2019 SPRING MEETING
OF
ABA BUSINESS LAW SECTION

2019 SUMMARY OF DELAWARE CASE LAW

RELATING TO

ALTERNATIVE ENTITIES[1]

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[1] Morris Nichols maintains a Cumulative Survey of Delaware case law relating to alternative entities which is updated annually, organized by subject area and includes most cases that address significant alternative entity issues. The entire Cumulative Survey and annual updates are available on the Morris Nichols website at www.mnat.com/practices/commercial under EPublications.

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1. *Inter-Marketing Group USA, Inc. v. Armstrong*, C.A. No. 2017-0030-TMR (Del. Ch. Jan. 31, 2019) (V.C. Montgomery-Reeves)

Plains All American Pipeline, L.P., a Delaware master limited partnership ("Plains"), owned pipelines in California that leaked, causing an oil spill (the "Spill") that resulted in high clean-up costs and a conviction in California for various felonies and misdemeanors and contributed at least in part to reputational loss and declining revenues and stock price. Plaintiff, a unitholder in Plains, brought a derivative action against Plains' general partner, the general partner's controlling entities, and individual directors, claiming breaches of fiduciary duty, waste, entitlement to contribution, breach of contract and breach of the implied covenant. Defendants moved to dismiss for failure to make a demand or plead demand futility and for failure to state a claim.

The court first addressed the motion to dismiss for failure to make a demand or plead demand futility, noting that well-established Delaware law requires a unitholder seeking to assert claims on behalf of an entity must make pre-suit demand or show demand futility. Plaintiff did not make pre-suit demand. Thus, the court turned to the Delaware Supreme Court cases that articulate the tests for demand futility—*Rales v. Blasband* and *Aronson v. Lewis*.

The parties agreed that *Rales* applied and the court stated that, under *Rales*, a plaintiff must allege particularized facts that create a reasonable doubt that the board could have properly exercised its independent and disinterested business judgment in responding to the demand. With respect to disinterestedness, under *Rales*, directors who face "a substantial likelihood of personal liability" are deemed to be interested in the transaction, but a plaintiff must show a sufficient connection between the corporate action and the board such that that at least half the directors faced such substantial likelihood of personal liability. Plaintiff advanced this theory, arguing that defendants were interested in the transaction because they faced a substantial likelihood of personal liability due to their breach of fiduciary duties. Defendants, however, argued that the partnership agreement eliminated fiduciary duties and, therefore, they faced no such likelihood of personal liability because no possibility of personal liability existed.

The court turned to the terms of the partnership agreement, which mirrored the language in the partnership agreement in *Norton v. K-Sea Transportation Partners L.P.* The Supreme Court held in *Norton* that the same language eliminated common law fiduciary duties and replaced them with a contractual fiduciary duty—specifically, that the general partner must reasonably believe that its actions were in the best interests of, or not inconsistent with, the best interests of the partnership. Because *Norton* was controlling, the same interpretation applied to Plains' partnership agreement. Thus, the court held that plaintiff could not demonstrate director interestedness because "directors cannot face a substantial likelihood of personal liability for breaching duties that they do not owe." Because the fiduciary duty claim failed, so did the waste claims (which derive from common law fiduciary duties) and the contribution claims (which depended on an underlying breach of fiduciary duty). The court also noted in a footnote that plaintiff failed to argue in a non-conclusory fashion that the director defendants faced personal liability for breach of contractual duties or the implied covenant.

Having found that plaintiff failed to adequately allege that defendants were interested in the transaction, the court then addressed whether plaintiff adequately alleged that a majority of directors were not independent. The board was comprised of ten members. Plaintiff made no arguments regarding the independence of three of the members. Three other members served on the audit committee of Plains, and plaintiff argued that this service meant that they could not be independent because the audit committee was responsible for monitoring Plains' compliance with legal and regulatory requirements, which Plains was found to have violated. The court stated, however, that, under well-settled Delaware law, membership on a committee that is responsible for the decisions that are being challenged does not call into question a director's impartiality. Thus, plaintiff failed to adequately allege that a majority of directors were not independent.

Having failed in its attempts to demonstrate the directors' were either interested in the transaction or lacked independence, plaintiff did not adequately plead demand futility and, as plaintiff did not make a pre-suit demand, the court dismissed plaintiff's claims. However, the court dismissed the claims without prejudice, as plaintiff argued that it could likely establish a "tighter nexus between the [board] and what happened" due to various felony and misdemeanor verdicts against defendants that have occurred since the complaint in this case was filed

2. *A&J Capital, Inc. v. Law Office of Krug*, C.A. No. 2018-0240-JRS (Del. Ch. July 18, 2018) and (Del. Ch. Jan. 29, 2019) (V.C. Slights)

Plaintiff, A&J Capital, Inc., a California corporation, was the manager of defendant company LA Metropolis Condo I, LLC, a Delaware limited liability company (the "Company"). Plaintiff was removed as manager of the Company by a majority of the Company's members for cause. After its removal, plaintiff filed an action for seeking a declaratory judgment that it was improperly removed as manager and moved for summary judgment.

The Company received capital from 200 foreign investors that became Class B Members of the Company. Plaintiff was named as the Class B Manager of the Company pursuant to the operating agreement of the Company (the "Operating Agreement") and the management agreement between, *inter alia*, the Company and plaintiff (the "Management Agreement"). The Operating Agreement had two provisions regarding the removal of managers, which stated "the Class B Members, by Majority Vote, shall have the sole and exclusive right to approve or disapprove the following . . . (f) Subject to 5.3, appointment, reappointment and removal, as applicable of any Manager" and "[t]he Class B Manager may be removed by Majority Vote of the Class B Members for gross negligence, intentional misconduct, fraud or deceit, all as more fully set forth in the Management Agreement." The Management Agreement stated "[t]he Class B Manager may be removed by Majority Vote (as defined in the Operating Agreement) of the Class B Members for gross negligence, intentional misconduct, fraud or deceit; provided that in any of such events as specified in this Section 12(b), without limiting any of their respective rights and remedies, the Members shall be entitled to exercise their respective powers under the Operating Agreement to appoint a new Class B Manager and to cause the Company to issue written notice of termination to the Class B Manager hereunder."

The court explained that these three provisions "comprise the universe of contractual provisions that govern the procedure for removal of the Class B Manager." In March of 2018, plaintiff was notified through a letter that a majority of the Class B Members had voted to remove it as manager and that the Law Office of Krug was appointed as the interim manager. The notice did not state a reason for plaintiff's removal and did not give any further details regarding the members' vote. Prior to the notice, plaintiff did not receive any notice of alleged default or the intent to hold a vote for its removal.

Plaintiff argued that the Operating Agreement and Management Agreement required the Class B Members to deliver plaintiff a notice of intent to remove it as manager and provide plaintiff an opportunity to be heard prior to removal. In addition, plaintiff argued that even if the agreements did not expressly provide it the right to notice and the opportunity to be heard, Delaware common law provides those rights and such common law should alter the Operating Agreement and Management Agreement. Defendants, on the other hand, argued that the provisions in the Operating Agreement and Management Agreement were clear and unambiguous and that the governance scheme, a product of the parties' contracts, could not be altered by common law.

The court held that the terms of the Operating Agreement and Management Agreement regarding the removal of a manager were clear and unambiguous and did not provide the right for plaintiff to receive notice prior to its removal or the opportunity to respond. The court clarified that the only "notice" required under the agreements was after-the-fact notice of termination. The fact that the Management Agreement expressly provided for notice of termination after the Class B Members vote, but was silent regarding prior notice and an opportunity to be heard, proved that the parties did not contract for pre-removal notice. Plaintiff maintained that even if the pre-removal rights were not expressly stated, the rights were embedded in the Operating Agreement and Management Agreement because the common meaning of being removed "for gross negligence, intentional misconduct, fraud or deceit" requires notice prior to removal. The court, however, explained that operating agreements for non-corporate business entities will normally provide for pre-removal protections if the parties intend for them to apply and if those provisions do not exist, the court will not infer them.

The court also held that common law regarding pre-removal notice in corporate law decisions did not alter the terms of the Operating Agreement or Management Agreement. Plaintiff contended that because certain corporate law cases in Delaware held that a director of a Delaware corporation must receive pre-removal notice and an opportunity to respond before such director can be removed for cause, the same rights and protections should exist for managers of a Delaware limited liability company. The court, however, explained that the Delaware LLC Act grants limited liability companies broad discretion in drafting their operating agreements and ensures that those agreements, with specific exceptions, will be respected. The court further explained that, unlike a Delaware corporation, "the scope, structure and very personality of [a limited liability company] is set almost exclusively by its operating agreement". In addition, plaintiff argued that Section 18-1104 of the LLC Act, which states "[i]n any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern," reflects the General Assembly's

belief that a purely contractarian view must give way to common law. The court held that plaintiff's interpretation of Section 18-1104 was incorrect, stating that "Delaware's pro-contractarian policy in the alternative entity space is alive and well."

The court further noted that in governance disputes among constituencies in a limited liability company, the court's role is to interpret the contract and effectuate the parties' intent, not to rewrite the contact. When operating agreements use corporate elements, the courts may view that as a signal that the parties intended to use a corporate structure for the alternative entity; however, the court is careful not to interpret the similarities too broadly or without close analysis because contractual flexibility is a key feature of the limited liability company structure. In this case, the court held that the facts were distinguishable from cases where the court borrowed from corporate law when construing governance rights under a limited liability company operating agreement. For the court to impose the requested additional procedures for "for cause" removal, the court would have to rewrite clearly written contracts that reflected the terms the parties bargained for. In addition, the Company was expressly "uncorporate" in its governance structure because it was managed by a single managing member and the Class B Members maintained the right to approve and disapprove several operational decisions. Because the parties did not intend to borrow from corporate law to alter or supplement the bargained for rights and obligations, the court held that common law did not rewrite the Operating Agreement and Management Agreement.

The court held that the terms of the Operating Agreement and the Management Agreement were clear and unambiguous and did not provide the manager pre-removal notice rights or the right to be heard before removal, and common law could not be used to rewrite the Operating Agreement and the Management Agreement because the governance structure of the Company was not analogous to that of a corporation. The court thus denied plaintiff's motion for summary judgment.

Following denial of the summary judgment motion, this case went to trial and the court delivered an opinion declaring that plaintiff's removal was improper because plaintiff had not violated the standards of conduct for removal set forth in the Operating Agreement and the Management Agreement. In reaching this conclusion, the court denied defendants' argument that defendants were not required to show that plaintiff's conduct harmed, or risked harm, the Company when proving that plaintiff violated the standards of conduct set forth in the Operating Agreement and Management Agreement. The court stated that the inclusion of those standards of conduct in the Operating Agreement and Management Agreement incorporated an appreciation that the proscribed conduct must be harmful, or risk harm, to the Company.

The court then moved to a discussion of whether plaintiff's conduct constituted just cause for removal. First, defendants argued that plaintiff's requests for prepayment fees were an "attempt to steal a substantial amount of money from the Members, under false pretenses." The court rejected Krug's argument, noting that plaintiff disclosed all of the reasons why plaintiff believed that it was deserving of the prepayment fee, and put the matter to a vote of the members, which did not amount to cause for removal.

The court also addressed Krug's argument that plaintiff caused the Company to make improper payments to Henry Global Consulting Group ("Henry Global"), the company responsible for securing investments in the Company. The court noted that the Operating Agreement stated that plaintiff could "enter into any agreement which the Managers may reasonably deem appropriate for any purpose beneficial to the Company." The record showed that the payments made to Henry Global were reasonable and plaintiff believed them to be reasonable. The court held that the payments to Henry Global were not unauthorized, excessive or improperly hidden and therefore, plaintiff could not have engaged in "gross negligence, intentional misconduct, fraud or deceit" when plaintiff made payments to Henry Global.

3. *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow (ERISA) Acquisition, LLC*, No. 536, 2018 (Del. Jan. 17, 2019) (J. Valihura)

On appeal to the Delaware Supreme Court, defendant below, Oxbow Carbon LLC (the "Company"), challenged the Court of Chancery's interpretation and application of provisions of the limited liability company agreement (the "LLC Agreement") governing the forced sale of the Company. When two minority members of the Company (the "Minority Members") made their initial investment, they were granted a liquidity right that provided them 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 Company rejected the Put, 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 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 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 of Chancery found the Minority Members 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 Members") retained over the Company and the Company's board of directors (the "Board"). On April 28, 2011, the Board, including the Minority Members' representatives, voted unanimously to issue Units to 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"). However, the Board failed to follow the requisite formalities specified in the LLC Agreement for the admission of the Small Holders, including failing to set the terms and rights that would apply to the Small Holders. Around the same time the Small Holders were admitted, the Minority Members exercised the Put Right, which the Majority Members rejected, and the Minority Members subsequently exercised the Exit Sale Right. Koch filed the suit below, primarily seeking a declaratory judgment that its interpretation of the LLC Agreement was correct and that the Small Holders could block the Exit Sale under the terms of the LLC Agreement.

The Court of Chancery first 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. Next, the Court of Chancery held the plain language of the LLC Agreement did not allow the Minority Members to force an Exit Sale unless the Small Holders would receive 1.5X their initial capital contributions in the transaction, taking into account any distributions received. However, the Court of Chancery found a gap existed in the LLC Agreement as to the terms on which the Small Holders became members. Relying on the implied covenant, the Court of Chancery "filled the gap" by holding the Exit Sale could proceed only if the Small Holders received additional funds to satisfy the 1.5X Clause, providing them with additional consideration that would not be given to any other member (the "Seller Top Off"). After resolving the application of the 1.5X Clause, the Court of Chancery held the Majority Members breached their obligations to use reasonable efforts to effect the sale under the Exit Sale provision. The Company appealed on the grounds that (i) the Court of Chancery improperly applied the implied covenant, (ii) there was no contractual gap in the LLC Agreement, (iii) the Company did not breach the LLC Agreement and (iv) the rulings on remedies were erroneous.

The Supreme Court first addressed whether a gap existed in the Company's LLC Agreement. The Supreme Court found the plain language of the LLC Agreement delegated responsibility to the Board to set the terms of admission, but did not require the Board to issue new units with different rights or classes. The record showed that the Board admitted the Small Holders without imposing a different set of rights, including a subscription letter and Board resolutions that addressed the price terms and number of units to be issued. Because the Board did not specify different rights, the Supreme Court found the unambiguous Exit Sale Right applied with equal force to the Small Holders. The Supreme Court held the Court of Chancery erred in holding a gap existed in the LLC Agreement under the reasoning that conferring discretion to the Board is a contractual choice to grant authority to the Board, not a gap. Further, the Supreme Court reasoned that the parties' sloppiness and failure to consider the implications of the Small Holders' investment did not equate to a contractual gap, as the Minority Members were highly sophisticated entities with three members on the Board.

The Supreme Court found the crucial problem with the Court of Chancery's reasoning was that it posited that a gap existed in the LLC Agreement because the parties did not give adequate attention to the effect the admission of the Small Holders would have on the Exit Sale Right provision of the LLC Agreement. Any mistakes the parties subjectively made about the implications of admitting new members to the Company should not operate to create contractual gaps. Accordingly, an Exit Sale could only be required by the Minority Members if all members, including the Small Holders, received at least 1.5X their initial capital contribution and distributions were *pro rata*.

Turning to the Court of Chancery's application of the implied covenant, the Supreme Court declined to apply the implied covenant because no gap existed concerning the admission of the Small Holders and because the admission of new members and their impact on the Exit Sale process could have been anticipated. The Supreme Court stated that the implied covenant does not apply when the contract addresses the conduct at issue and, even when the contract is silent, the covenant cannot be used to re-write the agreement between the parties and courts should be cautious about implying a contractual

protection when the contract could have easily been drafted to expressly provide for it. The Supreme Court held the Court of Chancery erred in finding a gap in the LLC Agreement and in using the implied covenant to imply a Seller Top Off Right. Finally, the Supreme Court agreed with the Koch parties that no Exit Sale was available under prevailing market conditions that could satisfy the LLC Agreement's express requirements. Thus, the Koch parties could not have breached the LLC Agreement's requirement that they use reasonable efforts to effectuate the Exit Sale and the Court of Chancery's remedies ruling on that issue constituted error.

Accordingly, the Supreme Court (1) affirmed the portion of the Court of Chancery's decision that found that the plain language of the LLC Agreement did not allow the Minority Members to force an Exit Sale unless the Small Holders would receive 1.5X their initial capital contributions in the transaction, taking into account any distributions received, (2) reversed the portion of the Court of Chancery's decision that found that a gap existed in the LLC Agreement and used the implied covenant to imply a Seller Top Off Right, and (3) vacated the Court of Chancery's remedies ruling.

4. *CHS Theatres, L.L.C. v. Nederlander of San Francisco Associates*, C.A. No. 9380-VCMR (Del. Ch. July 31, 2018) (V.C. Montgomery-Reeves); *Nederlander of San Francisco Associates v. CHS Theatres, LLC*, C.A. No. 2018-0701-TMR (Del. Ch. Nov. 30, 2018) (V.C. Montgomery-Reeves)

In the 1970s, two individuals formed a partnership to present Broadway-style shows in San Francisco. The families of those founders have operated that company, currently known as the Shorenstein Hays-Nederlander Theatres LLC, a Delaware limited liability company (the "Company"), for the past fifty years through their ultimate ownership of the two entities that are both fifty-percent members of the Company, CSH Theatres L.L.C. ("CSH"), which is controlled by the Shorenstein-Hays family (including Carole and Jeff Hays, referred to herein as "Carole" and "Jeff"), and NSF Associates ("NSF"), which is controlled by Robert Nederlander ("Robert"). Carole and Jeff also served as CSH-appointed managers of the Company.

The Company had been leasing the Curran Theatre to show some of the Company's Broadway-style productions. When the Curran came up for sale, the families could not agree on whether to buy it, so the Hays family purchased it with the consent of the Nederlander family. The parties, however, disputed the terms surrounding that consent. Those on the Nederlander family's side of the dispute alleged that Carole agreed to continue to rent the Curran to the Company. Those on the Hays family's side of the dispute disagreed. The relationship between the two families deteriorated, and the Hays family eventually cut ties with the Company and began operating the Curran itself. In this case, the parties asked the court to determine whether there was an enforceable promise by the Hays family to continue leasing the Curran to the Company, whether CSH and its controllers, Jeff and Carole, breached the LLC agreement's provisions on competing with the Company and whether Carole and Jeff breached fiduciary duties they owed to the Company as managers.

The court found that there was not an enforceable contract or promise to lease the Curran to the Company. NSF and Robert, counterclaim plaintiffs, advanced four legal theories to support their allegations that Carole promised to continue to lease the Curran to the Company after her purchase of the Curran—that there was an enforceable contract to renew the lease, that there was an enforceable oral lease renewal, that Carole's alleged promise to continue the Company's lease should be enforced under the doctrine of promissory estoppel and that Carole made an enforceable promise to negotiate in good faith the Company's renewal of the Curran lease. All four theories revolve around a discussion that Carole and Robert had when Carole was attempting to purchase the Curran. The only evidence of the substance of that discussion was oral testimony, and the court found that the evidence submitted by counterclaim plaintiffs failed to satisfy their burden to show that Carole made any promise to renew the Company's lease of the Curran. Thus, the court found that all four claims relating to the lease renewal failed.

The court also found that CSH, Jeff and Carole did not breach the LLC agreement's provision on competing with the Company by showing Broadway-style shows at the Curran through their venture and not through the Company. The court began its analysis by noting that CSH, Jeff and Carole (part of the "Shorenstein Entity" as defined in the LLC agreement) were bound by the LLC agreement's provisions on competing with the Company. These provisions included not only Section 7.02(a), which required the Shorenstein Entity to devote its efforts "to maximize the economic success of the Company", but also Section 7.06, which permitted Carole and Jeff to compete with the Company, subject to certain restrictions that prohibited staged productions that Carole and Jeff controlled within 100 miles of San Francisco unless that production already played at one of the Company's theaters, NSF's representatives turned down the production or the Company shared in the profits of the production (the "Control Exceptions"). Robert and NSF claimed that Carole violated these restrictions. However, while the evidence was clear that Carole staged a production she controlled within the geographic area specified in the LLC agreement, Robert and NSF provided no evidence regarding whether NSF turned down the production or whether the Company shared in the profits of the production. Further, Robert and NSF provided no evidence of damages. Thus, their breach of contract claim failed.

Finally, the court found that Jeff and Carole breached fiduciary duties they owed to the Company. Jeff and Carole, as managers of the LLC, owed common law fiduciary duties because the LLC agreement did not disclaim those duties. The court found that Carole breached her fiduciary duties by placing her interests above those of the Company. She played "hardball" with the Company during board meetings, used her fiduciary position to prevent the Company from pursuing opportunities that Carole wanted to pursue herself and instructed Company employees of the Company not to communicate with other employees and managers about Company business. The court found that Jeff breached his fiduciary duties by taking actions that were not in the best interests of the Company—notably, he shared confidential information with direct competitors of the Company and attempted to secure confidential information to hire away employees of the Company. Accordingly, the court granted Robert and NSF's requested declaratory relief that Carole and Jeff breached their fiduciary duties to the Company while serving as managers of the Company, awarded nominal damages for the breach of fiduciary duty, and enjoined

Carole and Jeff from using any confidential information gained while they were fiduciaries of the Company to compete with the Company.

In a subsequent decision, the court addressed claims that two new productions scheduled to play at the Curran would breach the limitations on competition in the LLC agreement. Nederlander sued, alleging that defendants breached the LLC agreement and their fiduciary duties by entering into contracts to stage the productions without complying with the LLC agreement's provisions on competing with the Company. In this action, plaintiff sought to enjoin defendants from staging those productions until final resolution of plaintiff's claims in the case. Plaintiff argued that it had a reasonable probability of success on the merits because CSH had the ability to determine where the two productions would play (at the Curran) and the terms of those engagements; thus, CSH had control of the productions under the LLC agreement and, because it did not meet any of the Control Exceptions, it violated the LLC agreement. Plaintiff also alleged that it would suffer irreparable harm if the productions proceeded, both because a contractual provision stated that breach constituted irreparable harm and because it would suffer reputational damage.

The court first addressed defendants' argument that the claims were barred by *res judicata* and held that *res judicata* did not apply, both because the facts surrounding the two new productions were unknown at the time of the prior litigation and the court did not rule on whether those productions by CSH constituted breaches of the LLC agreement. The court next addressed defendants' argument that the claims were barred by collateral estoppel. Defendants stated that plaintiff was attempting merely to re-litigate the meaning of control under the LLC agreement; the court disagreed. In its prior decision, the court held that ownership equaled control. Here, plaintiff alleged that staging a production equaled control. The court noted that while staging a play at a theater one owns "may be an important stick in the bundle of property rights we call ownership, it is not the only right in the bundle." Plaintiff raised a new argument in a dispute over new productions regarding what constituted control; thus, collateral estoppel did not apply.

The court then turned to plaintiff's request for preliminary injunction and, particularly, whether plaintiff showed reasonable probability of success on the merits of its claim that defendants breached the LLC agreement by staging productions that they controlled without meeting any of the Control Exceptions. The parties agreed that no Control Exceptions existed. Instead, the claims turned on whether defendants staged productions that they "controlled" within the meaning of the LLC agreement (i.e., whether they had the ability to determine where the productions played and the terms and conditions of the engagement). Plaintiff argued that any time defendants staged (or presented) a show directly, defendants controlled the show, regardless of whether the show could have chosen to play at another theater or whether the terms and conditions of the show were the product of negotiations that occurred simply because the show chose to play at the Curran and Carole owned the Curran and could negotiate terms she desired. The court disagreed with plaintiff's interpretation. The LLC agreement stated that "neither [party] will stage any Production that it controls" unless a Control Exception is met. Interpreting "staging" to mean "control" would create surplusage. Further, the drafting history

showed that the language "that it controls" was added, suggesting that the parties intended to prohibit only controlled staged productions, not all staged productions. The evidence also showed the parties engaged in open competition to show both productions. Unlike in the prior decision, defendants "had no independent right or authority to cause [the productions] to play at the Curran or to set the terms for either play." The court found that plaintiff's interpretation was not reasonable and created surplusage and, therefore, plaintiff failed to show a likelihood of success on the merits. Thus, it denied plaintiff's request for a preliminary injunction.

5. *Decco U.S. Post-Harvest, Inc. v. MirTech, Inc.*, C.A. No. 2018-0100-JTL (Del. Ch. Nov. 28, 2018) (V.C. Laster)

Plaintiff, Decco U.S. Post-Harvest, Inc. formed a Delaware limited liability company (the "Company") with defendant MirTech, Inc. as a vehicle for their joint venture to commercialize products based on the gas 1-Methycyclopropene ("1-MCP"). As part of the business arrangement, defendant granted the Company a license to use its intellectual property rights in 1-MCP. Defendant represented in the Company's operating agreement and the licensing agreement between Defendant and the Company that it was the sole owner of 1-MCP. The Company created and began selling its product, TruPick, which delivered 1-MCP gas to fruit.

After the Company began selling TruPick, AgroFresh Inc. brought suit in the United States District Court for the District of Delaware claiming it owned the patents used to develop TruPick. Defendant previously entered into a commercial agreement and consulting agreement with AgroFresh. Those agreements granted AgroFresh sole ownership over the parties' joint inventions. Defendant and AgroFresh entered into a settlement agreement, where defendant agreed that AgroFresh owned the intellectual property rights defendant had licensed to the Company. Plaintiff then brought this suit seeking to dissolve the Company because it was no longer reasonably practicable to carry on its business given that AgroFresh owned the intellectual property rights related to 1-MCP.

The Company's operating agreement had a purpose clause that stated the purpose of forming the Company was to conduct and coordinate all activities related to 1-MCP products. The clause additionally stated that plaintiff and defendant intended the Company be used for the development of other technologies not related to 1-MCP. The operating agreement granted plaintiff a right of first refusal over non-1-MCP products. Plaintiff had sixty days to determine whether it wanted to pursue commercialization of non-1-MCP products. If plaintiff exercised its option, plaintiff and defendant had 120 days to negotiate an agreement. If plaintiff did not exercise its option or the parties could not reach an agreement, defendant could contract with third parties to commercialize the non-1-MCP products.

The court granted plaintiff's motion to dissolve the Company under Section 18-802 of the Delaware LLC Act. The court looked to the Company's operating agreement to determine the purpose for which it was formed and found the record established the Company no longer had any 1-MCP Business and would never have any non-1-MCP

Business because the settlement agreement prevented the Company from continuing to sell TruPick, which was the Company's only product. The court rejected defendant's argument that it could rely on defendant's "know-how" and "trade secrets" to conduct a 1-MCP business because these were both assigned to AgroFresh. The court found it was not practicable for the Company to carry out the aspect of the business related to 1-MCP products.

The court also found it was not reasonable for the Company to carry out its second purpose, which was to act as a vehicle for non-1-MCP business. In order for a non-1-MCP business to exist, plaintiff must exercise its right of first refusal and partner with defendant to develop a new product. However, plaintiff stated at trial it would no longer do business with defendant. The court was satisfied the evidence established there was no viable non-1-MCP business. Accordingly, the court granted plaintiff's motion to dissolve the Company.

6. *Wenske v. Blue Bell Creameries, Inc*, C.A. No. 2017-0699-JRS (Del. Ch. July 6, 2018) and (Del. Ch. Nov. 13, 2018) (V.C. Slights)

Plaintiffs were limited partners of Blue Bell Creameries, L.P., a Delaware limited partnership ("Blue Bell"). Blue Bell was managed by its general partner, Blue Bell Creameries, Inc. ("BB GP"), a wholly owned subsidiary of Blue Bell Creameries USA, Inc. ("BB USA"). Blue Bell manufactured and sold ice cream products in the southern United States, and as of 2014, Blue Bell was the third largest ice cream manufacturer in the United States. In January 2015, South Carolina state health inspectors discovered Listeria monocytogenes bacteria ("Listeria") in a routine sampling of Blue Bell products, and shortly thereafter, the Food & Drug Administration and other state health agencies found Listeria contamination in other Blue Bell ice cream products. Further, it was determined that Blue Bell had discovered Listeria on its own in 2013, but had failed to conduct any analysis of the source of the bacteria. The discovery of Listeria had a devastating impact on Blue Bell's business.

Plaintiffs brought a derivative action on behalf of Blue Bell based on conduct relating to the Listeria disaster setting forth four counts: (1) against BB GP, for breach of Blue Bell's partnership agreement; (2) against BB USA, "as controller, principal, and joint venturer" of BB GP, and against certain directors and officers of BB GP and BB USA (the "Individual Defendants"), as "controllers" of BB GP, "for causing BB GP to breach the partnership agreement;" (3) against BB USA and the Individual Defendants, for aiding and abetting BB GP's breach of its "contractual fiduciary duties" under the partnership agreement; and (4) against BB USA and the Individual Defendants, "for breach of common law fiduciary duties" owed to Blue Bell. In response, defendants moved to dismiss the complaint for failure to state a claim and for failure to make a pre-suit demand on BB GP.

The court began its discussion with the claim that BB GP violated Section 6.01(e) of Blue Bells' limited partnership agreement (the "LPA"). The pertinent part of Section 6.01(e) of the LPA provided that BB GP shall use its "best efforts" to conduct Blue Bell's business "in accordance with sound business practices in the industry." The court found

that under Section 6.01(e)'s plain meaning, BB GP was required to endeavor diligently to conduct Blue Bell's business in accordance with practices that (1) were based on thorough knowledge of and experience with the dairy industry or (2) agreed with accepted views within the dairy industry. Defendants argued that the language of Section 6.11(d) modified or negated BB GP's obligation under Section 6.01(e). Section 6.11(d) provided that:

> any standard of care and duty imposed by this agreement or under DRULPA or any applicable law, rule or regulation shall be modified, waived or limited, to the extent permitted by law, as required to permit BB GP to act under this agreement or any other agreement contemplated by this Agreement and to make any decision under the authority prescribed in this agreement, so long as the action is reasonably believed by BB GP to be in, or not inconsistent with, Blue Bell's best interests.

The court noted that the Delaware Supreme Court has confirmed that language such as that contained in Section 6.11(d) of the LPA eliminates all common law standards of care and fiduciary duties, and replaces them with a contractual good faith standard of care. However, the court held that the contractual good faith standard did not modify the affirmative language in Section 6.01(e) because Section 6.01(e) created an express contractual obligation for BB GP to follow and the contractual good faith standard operated only in spaces of the LPA without express standards of care. Thus, the court denied defendants' motion to dismiss the first count because the court found that the express contractual language required BB GP to conduct Blue Bell's business in accordance with sound business practices in the dairy industry as set forth in Section 6.01(e).

The court then held that plaintiffs' veil piercing, agency and joint venturer liability claims against BB USA and is directors failed. The court stated that plaintiffs' veil piercing claim failed because the complaint did not allege or suggest that BB GP existed solely as a vehicle for fraud. Further, the court held that plaintiffs' attempt to hold BB USA liable for BB GP's alleged breach of the LPA under an agency theory failed because Delaware law does not recognize a theory under which a principal can be vicariously liable for its agent's non-tortious actions. Finally, the court stated that the terms of the LPA clearly stated that the arrangement was not a joint venture and there was no reasonable inference that the conduct of BB GP and BB USA amended the LPA to make the arrangement a joint venture. The court thus held that the plaintiffs' joint venturer theory failed.

The court also dismissed plaintiffs' aiding and abetting claims. The court stated that BB GP's obligations under the LPA were contractual and therefore plaintiffs' claim was for aiding and abetting a breach of contract. Because Delaware law does not recognize a claim for aiding and abetting a breach of contract, the court dismissed this count.

The court then addressed plaintiffs' breach of fiduciary duties claim against BB USA and the Individual Defendants. Plaintiffs claimed that BB USA and the Individual Defendants breached their common law fiduciary duties that were owed to Blue Bell

under the *In re USACafes, L.P. Litigation*, 600 A.2d 43 (Del. Ch. 1991) line of cases, which stand for the proposition that a corporate general partner's fiduciary duties to the limited partnership may extend to the general partner's controllers if such persons exercise control over the limited partnership's property. The court stated that this rule had limited, if any, application in this context because the LPA eliminated all common law fiduciary duties, and therefore neither BB USA nor the Individual Defendants owed any fiduciary duties directly to Blue Bell even if they exercised control over Blue Bell's property. Thus, the court dismissed these claims.

Finally, the court addressed whether demand on BB GP was excused for plaintiffs' derivative claims. The court stated that demand was futile in this case because there was reasonable doubt that BB GP could have properly exercised independent and disinterested business judgment in evaluating a demand to bring this derivative action. The court noted that the exculpatory language in the LPA did not provide a basis in this case for overcoming properly pled allegations supporting demand futility.

Following the dismissal of plaintiffs' claims against BB USA based on vicarious liability, veil-piercing and joint liability theories, plaintiffs filed a motion to reargue, stating that the Court of Chancery "misapprehended long-standing Delaware law regarding liability of a parent entity for its subsidiary's breach of contract." Plaintiffs sought reargument on six theories: (1) that BB USA was vicariously liable for BB GP's breach of contract; (2) that BB USA was directly liable for BB GP's breach of contract; (3) that the court should pierce the BB GP corporate veil because BB GP's corporate structure caused fraud; (4) that the court should pierce the BB GP corporate veil on a theory of domination and control; (5) that BB GP and BB USA formed a joint venture; and (6) that plaintiffs were not afforded an adequate opportunity to access pertinent information before their answering brief was due.

The court noted that it will deny a motion for reargument unless it overlooked a decision or principle of law that would have a controlling effect or misapprehended the law or the facts so that the outcome of the decision would be affected. The court found that its findings in its initial decision on these issues were consistent with Delaware law. The court therefore denied plaintiffs' motion for reargument.

7. *Composecure, L.L.C. v. Cardux, LLC f/k/a Affluent Card, LLC*, No. 177, 2018 (Del. Nov. 8, 2018) (J. Valihura), *on appeal from Composecure, L.L.C. v. Cardux, LLC f/k/a Affluent Card, LLC*, C.A. No. 2018-0631-TMR (Del. Ch. Oct. 5, 2018) (V.C. Montgomery-Reeves)

This case arose on appeal from the Court of Chancery by then-defendant Composecure, L.L.C. Plaintiff appealed on the grounds that the Court of Chancery erred in holding (i) that the Marketing Agreement was voidable, rather than void, under the LLC Agreement and (ii) that there was implicit ratification of the Marketing Agreement. Defendant argued that even if plaintiff were correct about the aforementioned errors of law in the Court of Chancery, the court should nonetheless enforce the Marketing Agreement based on a provision in the LLC Agreement that addressed reliance by third parties on certain company actions.

The court noted that the primary issue with the Court of Chancery ruling was that the lower court had failed to consider whether the Marketing Agreement was a "Restricted Activity" under the LLC Agreement, which, if so, would have rendered the Marketing Agreement void. If the Marketing Agreement was void, it would be incapable of ratification. Thus, a factual finding as to whether the Marketing Agreement was a "Restricted Activity" was determinative of the outcome of the case and the court remanded the issue to the Court of Chancery for determination. In doing so, the court dispensed with defendant's claim that plaintiff had waived the argument that the Marketing Agreement was void and should be unable to raise it on appeal. The court noted that, although defendant had only weakly raised the issue below and failed to fully flesh out the rationale behind such claim, defendant had nonetheless repeatedly asserted that the Marketing Agreement was "void". That distinction made by defendant that the Marketing Agreement was "void" rather than "voidable" was sufficient to preserve the argument on appeal.

The court found no other error in the Court of Chancery's legal analysis and affirmed its ruling that (i) New Jersey law governed the issue of implicit ratification of the Marketing Agreement, (ii) implicit ratification of the Marketing Agreement occurred and (iii) the third party reliance provision of the LLC Agreement could not save the Marketing Agreement even if it were a "Restricted Activity".

8. *Village Green Holding, LLC v. Holtzman*, C.A. No. 2018-0631-TMR (Del. Ch. Oct. 5, 2018) (V.C. Montgomery-Reeves)

This litigation arose out of a business dispute between plaintiffs Village Green Holding, LLC ("Village Green"), CCI Historic, Inc. and VG ECU Holdings, LLC and defendants Jonathon Holtzman ("Holtzman"), Village Green Residential Properties LLC ("VGRP") and VGM Clearing, LLC involving ownership of property management entities and a large apartment complex located in Pittsburgh (the "Property"). Through a waterfall of holding companies (the "Property Holdings Companies"), the parties owned interests in the Property. Pursuant to a redemption agreement (the "Redemption Agreement"), Holtzman indirectly held a right to purchase the interests of Village Green (and certain affiliated entities) in the Property Holding Companies. The Redemption Agreement further provided that if Holtzman failed to exercise his purchase right within a specified time period, Village Green and its affiliates would become entitled to purchase Holtzman's interest in the Property Holding Companies. A similar stand-alone provision establishing Holtzman's right to purchase Village Green's interest in the other Property Holding Companies was present in the operating agreement (the "Operating Agreement") of Morrow Park Holding, LLC ("MP Holding"), one of the Property Holding Companies. Holtzman sought to exercise the purchase right contained in the Operating Agreement.

After a disagreement arose regarding the appraisal procedures required under the Operating Agreement for Holtzman's exercise of the purchase right, Holtzman (through VGRP) filed suit in the Court of Chancery to resolve the appraisal issues. Because the appraisal dispute was delaying the sale, Holtzman realized that the purchase option may expire by the time the dispute was resolved. As a result, Holtzman sought an injunction to compel Village Green to close the deal. The injunction was not granted, but the Court

of Chancery did issue an order preventing, among other things, the parties from transferring their rights without the consent of the other party and preserving the parties' rights under the Operating Agreement from expiring during the pendency of the litigation.

While the Delaware litigation was ongoing, a third-party minority investor in one of the Property Holding Companies commencing an action in Pennsylvania that ultimately called for a court-ordered sale of the Property itself. The Pennsylvania sale order allowed both Village Green and Holtzman to bid on the Property, which Holtzman felt was unfair given his contractual purchase rights. Therefore, Holtzman filed a motion in Pennsylvania seeking a modification to the sale order that would give him a priority purchase right, in accordance with the priority right he had in the Operating Agreement. In response to Holtzman's motion, Village Green sought an injunction in the Court of Chancery to prevent Holtzman from further pursuing the modification to the sale order motion and from filing any additional actions in Pennsylvania. Village Green also sought an order directing Holtzman to withdraw his request for modification of the sale order.

The Operating Agreement contained a forum selection clause requiring any actions based in statute, tort, contract or otherwise arising out of or relating to the Operating Agreement to be brought exclusively in the Delaware federal district court or the Court of Chancery.

The court first set out the standard that must be met by the moving party for the granting of a preliminary injunction: (i) a reasonable probability of success on the merits, (ii) an imminent threat of irreparable injury and (iii) a balance of the equities in favor of injunction.

As to the first prong, Holtzman argued that, under *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36 (Del. 1995), a forum selection clause requiring litigation to be conducted in the Court of Chancery was unenforceable because a contract cannot confer exclusive jurisdiction over all disputes, including purely contractual ones, upon the Court of Chancery. The court here disagreed with Holtzman's comparison, noting that, unlike in *El Paso*, the forum selection clause in the Operating Agreement did not confer exclusive jurisdiction over all claims on the Court of Chancery because the Delaware federal district court was also an option. Furthermore, the forum selection provision in *El Paso* was contained in a run-of-the-mill contract, rather than an LLC agreement. Relevant to this point, plaintiffs also noted that Section 18-111 of the Delaware LLC Act grants an independent basis for subject matter jurisdiction on the Court of Chancery for all actions "to interpret, apply or enforce the provisions of a limited liability company agreement . . . ." Because the main issue of the case at hand was the purchase right contained in the Operating Agreement, the court determined that it clearly had jurisdiction pursuant to Section 18-111. Additionally, the court found that the Redemption Agreement, as an agreement among the members of Village Green, was similarly picked up as an agreement "contemplated by [the provisions] of the [Delaware LLC Act]," and was therefore within the court's subject matter jurisdiction. As to the second prong, the threat of imminent irreparable injury, the court noted that Delaware cases have consistently held that procession of an action in an unwarranted forum poses a threat of *per se* irreparable harm. The court found that the final prong, balancing of the

equities, also favored plaintiffs. The court noted that corporate formalities are respected in Delaware and that the Pennsylvania action and the Delaware action technically involved different entities -- the Pennsylvania action related to the sale of the Property by its owner while the Delaware action related to the sale of ownership interests in the Property Holding Companies. The court therefore granted plaintiffs' motion for the preliminary injunction.

9. *Miller v. HCP & Company*, C.A. No. 2017-0291-SG (Del. Ch. Feb. 1, 2018) (V.C. Glasscock); *Miller v. HCP & Company*, C.A. No. 107, 2018 (Del. Sep. 20, 2018) (ORDER)

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."

On appeal, the Supreme Court disagreed with the Chancery Court's finding that the operating agreement did not contain a gap as to how Trumpet could be marketed and sold, and held that the terms of Section 8.06(a) did not displace the implied covenant entirely. However, the Supreme Court affirmed the Chancery Court's decision because it agreed with the "essential holding that the implied covenant could not be used to imply *Revlon*-type sale requirements", particularly when the operating agreement expressly eliminated fiduciary duties.

10. *Trascent Management Consulting, LLC v. Bouri*, C.A. No. 10915-VCL (Del. Ch. Sep. 10, 2018) (V.C. Montgomery-Reeves)

In this case, defendant George Bouri ("Bouri") fraudulently induced Rakesh Kishan ("Kishan"), a management consultant looking for an investor or partner for his consulting firm, into forming Trascent Management Consulting, LLC ("Trascent") and making Bouri a manager and member of Trascent. Bouri was terminated without cause from his prior employment with Time Warner after an investigation was launched due to complaints about Bouri's management style. Some of the complaints alleged that Bouri was unreasonable, aggressive and disrespectful and that he made and engaged in inappropriate sexual comments and conduct in the workplace. After Bouri's termination, he struggled financially. When Kishan initiated negotiations with Bouri, Bouri explained he resigned from Time Warner because he was being micromanaged. Further, Bouri represented himself as a man of "substantial financial means," by talking in detail about his property and family wealth.

Bouri insisted he would only go into business with Kishan if the parties formed an entity that made Bouri an equity partner. In April 2013, Kishan formed UMS Advisory, LLC, which later changed its name to Trascent Management Consulting, LLC. Rather than contributing cash to Trascent, Bouri convinced Kishan to let him sign a promissory note. Trascent's operating agreement became effective January 1, 2014, and Bouri was made a manager and unitholder of Trascent. Bouri was in charge of finances and HR for Trascent, and he dug Trascent into a financial hole. He substantially increased overhead costs, refused to contribute any cash, requested several advancements on his paychecks and forged a letter from a client so he could submit a personal expense as a business expense. Kishan terminated Bouri's employment for cause after Bouri fabricated an HR investigation and involved a client in the matter. Trascent then sought rescission of Bouri's employment agreement procured by fraud, a declaration that the LLC agreement was unenforceable by Bouri and attorneys' fees and costs. The court granted all of

Trascent's requests, but opted to award some, not all, of the attorneys' fees and costs as a sanction for bad faith litigation conduct.

As for the fraudulent inducement claim, the court rejected Bouri's first argument that the claim must fail because the misrepresentations predated the LLC's existence. The court applied the two-part test outlined in *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504 (Del. Super. 1931): an entity can maintain a claim based on misstatements made before its formation when (1) the fraudulent statements were made to an innocent individual to induce him/her to form an entity and have that entity take certain actions, and (2) that individual forms the entity and causes it to take said action. The court found the *Nye* test to be satisfied because Bouri's statements regarding his prior employment with Time Warner induced Kishan to form an entity and to make Bouri a manager and unitholder. The court found that Trascent satisfied its burden of proving the elements of fraudulent inducement. The court reasoned that Bouri made misrepresentations he knew were false with the intent to induce action by Trascent and that Trascent justifiably relied on those statements. Further, the court deemed the misrepresentations to be material because a reasonable person would have considered it important to know that a potential member and manager to a new entity was struggling financially and was previously terminated from his last job after an investigation into his management style. Finally, Trascent was damaged by the justifiable reliance because the company entered into the employment agreement and LLC agreement.

The court also rejected Bouri's argument that legal rescission of the employment agreement would be improper because (1) Trascent would reap the benefits of his contributions while he would lose all the benefits and protections and (2) he abided by the eighteen-month post-termination non-compete provision. The court agreed Bouri contributed to Trascent's business but also found that he cost them a significant amount of money by increasing the size of the firm from ten to eighteen employees and not producing a profit for Trascent in 2014. The court found it was possible to return the parties to *status quo* because the benefits bestowed by Bouri and the expenses incurred by Trascent were comparable. Accordingly, the court rescinded the employment agreement.

Next, the court granted Trascent's motion to declare the LLC agreement unenforceable by Bouri. When there is fraud in the inducement, a contract is enforceable against at least one party and "voidable" at the option of the innocent party. The court rejected Bouri's argument that the LLC agreement was not procured by fraud holding that once Bouri gave an explanation for his departure from Time Warner, he had to give a full and open disclosure around those circumstances. Additionally, once Bouri volunteered information that gave Kishan a false impression about his financial status, Bouri had to correct that impression. The court found it inconceivable that Kishan would have made Bouri a member of Trascent had he known the truth about Bouri's financial status. Kishan was looking for members to invest cash in Trascent when necessary. Further, Kishan testified the only reason he accepted a promissory note in exchange for Bouri's equity was that he believed Bouri was a wealthy man. The court also found it hard to believe Kishan would have formed Trascent, made Bouri a member and offered him complete independence and decision-making had Bouri been truthful about why he

departed from Time Warner and the particular allegations against him. Thus, the court found that Bouri could not enforce the LLC agreement.

Finally, the court addressed Trascent's request for attorneys' fees and costs. First, the court denied Trascent's request for return of the attorneys' fees and costs advanced to Bouri because he was entitled to advancement under both the employment agreement and LLC agreement. The court explained Bouri was entitled to advancement until a final, non-appealable order was entered in the action. Second, the court denied Trascent's request for its own attorneys' fees and costs because Trascent did not argue that an exception to the American Rule applied. However, Trascent successfully sought sanctions against Bouri for repeatedly misrepresenting in discovery and before the court the nature of his departure from Time Warner. As a result, the court awarded Trascent its reasonable attorneys' fees and costs in bringing the Motion for Sanctions and two-fifths of its reasonable attorneys' fees and costs incurred in the litigation.

11. *Mesirov v. Enbridge Energy Company, Inc.*, C.A No. 11314-VCS (Del. Ch. Aug. 29, 2018) (V.C. Slights)

In March 2017, the Supreme Court reversed a decision of the Court of Chancery in which it had dismissed plaintiff's challenge to a conflicted dropdown transaction where the parent ("Enbridge") of the general partner (the "GP") of Enbridge Energy Partners L.P., a master limited partnership (the "MLP"), sold its interest in a pipeline joint venture, which it had acquired from the MLP six years earlier, back to the MLP at a higher price than it had originally paid the MLP (the earlier Chancery decision is referred to herein as "*Brinckerhoff IV*" and the Supreme Court's decision reversing the Chancery decision is referred to herein as "*Brinckerhoff V*"). In doing so, the Supreme Court "provided certain definitive constructions of the [MLP's] LPA, defined the boundaries of the contractual good faith standard imposed by that contract and remanded for further proceedings consistent with its guidance." After *Brinckerhoff V*, the Court of Chancery permitted Mesirov to be substituted as lead plaintiff and an amended complaint to be filed, which included the following defendants: the MLP; the GP; Enbridge Energy Manager, L.L.C., which managed the MLP and was owned in part by the GP ("Enbridge Management"); Enbridge; the individual directors of the GP and Enbridge Management, two of whom were the members of the Special Committee of the GP; and Piper Jaffray & Co., successor by merger to Simmons & Company International, which served as financial advisor to the Special Committee ("Simmons"). Plaintiff's amended complaint asserted breaches of the LPA and the implied covenant against the GP and Enbridge Management (plaintiff had dropped those same claims against Enbridge and the individual directors following *Brinckerhoff IV*), aiding and abetting and tortious interference with the GP's performance of the LPA against Enbridge, the individual directors, Enbridge Management and Simmons and breach of residual fiduciary duty against Enbridge and the individual directors, and sought reformation or rescission of the transaction. Defendants moved to dismiss the amended complaint for failure to make demand on the GP's board to prosecute the claims derivatively and for failure to state legally viable claims.

Plaintiff challenged the MLP's repurchase of an interest in the Alberta Clipper pipeline (the "AC Interest") from Enbridge for $1 billion. Plaintiff alleged that the Special Committee and Simmonds knew but ignored the fact that the MLP was overpaying for the AC Interest and provided three metrics to support its assertion. First, despite a decrease in EBIDTA in the AC Interest by almost 20% between Enbridge's purchase in 2009 and the MLP's repurchase in 2015 and the fact that the 2009 transaction included rights to expand the pipeline and the 2015 transaction did not, the EBITDA multiple associated with the MLP's repurchase price was higher than the EBITDA multiple associated with Enbridge's initial purchase price. Second, the "rate base" of the pipeline, which the court noted was a meaningful proxy for current market and fair value, implied a value of $674 to $707 million at the time of the repurchase. Third, the MLP paid an amount that was well above the GP management's own DCF equity value for the AC Interest. Additionally, plaintiff argued that the deal was not fair to the MLP because the GP was paid the equity portion of the deal in new Class E units that had a unique tax benefit that allocated over half of the gross income associated with the transaction away from the Class E unitholder to the other unitholders and a unique liquidation preference (the "Class E Attributes") and the Special Committee and Simmons allocated no value to those Class E Attributes.

The court first addressed defendants' motion to dismiss for plaintiff's failure to make a demand on the GP's board. The court noted that in *Brinckerhoff IV*, the court held that the complaint adequately pled demand futility, and the Supreme Court in *Brinckerhoff V* did not overrule that finding. Thus, demand futility was well-pled and the court refused to grant defendants' motion to dismiss for failure to make a demand.

The court next addressed plaintiff's direct and derivative breach of contract claims. Under *Tooley*, to determine whether a claim is direct or derivative, one must analyze who suffered the alleged harm and who would receive the benefit of any recovery. A claim could be "dual-natured" if there was an improper transfer of both economic value and voting power from minority equity holders to majority equity holders. Here, plaintiff's core theory was that the MLP was injured when it overpaid for the AC Interest. Further, the alleged breach was of Section 6.6(e) of the LPA, which required that GP and its affiliates to act in a manner that was "fair and reasonable *to the Partnership*." Finally, plaintiff did not allege any voting harm that could lead to a dual-natured claim. Thus, the court dismissed the direct breach of contract claims. It refused to dismiss the derivative breach of contract claims against the GP, noting that the Supreme Court held in *Brinckerhoff V* that plaintiff's allegations were sufficient to state a claim for breach of Section 6.6(e) and, therefore, that was the law of the case.

The court also held that in *Brinckerhoff IV*, it incorrectly dismissed the breach of contract claims against "Affiliates" and "Indemnitees" under the LPA on the grounds that such persons were not parties to the LPA. The Supreme Court in *Brinckerhoff V* had found that the transaction was expressly governed by Section 6.6(e) of the LPA, which stated that neither the GP nor its Affiliates (which term included Enbridge) could sell any property to or purchase any property from the MLP unless the transaction was fair and reasonable to the MLP. Further, under the LPA, Indemnitees (defined to include the GP, Affiliates of the GP such as Enbridge and Enbridge Management, and the individual

directors) were not liable for monetary damages for actions taken in good faith. The court addressed these LPA provisions in its first and third *Brinckerhoff* decisions, finding that plaintiff's claims could survive a motion to dismiss if it well-pled facts suggesting defendants acted in bad faith, and the Supreme Court did not overturn this holding in *Brinckerhoff V*. Thus, the court held that plaintiff could reinstate claims for breach of Section 6.6(e) against Enbridge, Enbridge Management and the individual directors in an amended complaint.

The court next addressed the breach of implied covenant claim, noting that its prior dismissal of this claim was undisturbed by *Brinckerhoff V*, which noted that the transaction was "expressly governed by Section 6.6(e)", leaving no room for the implied covenant to operate. Thus, the court granted defendants' motion to dismiss plaintiff's implied covenant claim.

The court then turned to the "secondary" claims, that is, if a party were not liable under a theory noted above, it would be liable as an aider and abettor, for tortious interference with a contract or for breach of residual fiduciary duties—and found that these claims failed as a matter of law. Under Delaware law, one generally cannot aid and abet a breach of contract. There is an exception for aiding and abetting breaches of "contractual fiduciary duties" that applies if the LPA does not expressly eliminate all fiduciary duties. Here, the court found that the LPA did not expressly eliminate all fiduciary duties. In so finding, it pointed to *Brinckerhoff V* and noted that the Supreme Court (1) interpreted the "fair and reasonable" standard in Section 6.6(e) to something akin to the entire fairness standard of review and (2) refused to "upset" the "settled interpretation" that a partnership agreement like the MLP's that provided that standards of care and duty imposed by the partnership agreement or applicable law were modified, waived or limited to permit a general partner to act "so long as such action is reasonably believed by the General Partner to be in the best interests of the Partnership" provided a contractual fiduciary duty standard. While an aiding and abetting claim theoretically could be brought under this LPA, the aiding and abetting claims were against Enbridge, Enbridge Management and the individual directors who, under the express terms of Section 6.6(e), owed duties directly to the MLP. Thus, they could not be liable for aiding and abetting. The same defendants also could not be liable for tortious interference because they were not strangers to the LPA or the transaction. Further, Enbridge and the individual directors could not be liable for breach of residual fiduciary duties. These defendants were bound by Section 6.6(e), which expressly governed the transaction and replaced common law duties with contractual fiduciary duties similar to entire fairness. The Supreme Court did not overturn the court's determination in its first and third *Brinckerhoff* decisions that claims against these persons would survive dismissal if plaintiff well-pled that such defendants acted in bad faith. Thus, Enbridge and the individual directors could not be liable for breach of residual fiduciary duties when they were bound by the terms of the Section 6.6(e), which supplanted common law fiduciary duties.

The remaining claims were against Simmons for aiding and abetting breach of contractual fiduciary duties and for tortious interference with the LPA. Neither claim had been brought previously; thus, *Brinckerhoff V* did not address them. The court held that

the aiding and abetting claim could not be dismissed, as plaintiff adequately pled that Simmons knowingly participated in the GP's and Enbridge Management's breaches of the LPA's contractual fiduciary duties. In so holding, the court pointed to, *inter alia*, plaintiff's allegations that Simmons created an "informational vacuum" by ignoring and failing to address the economic metrics outlined previously and the Class E Attributes and relied on the GP's management's "fully baked" EBIDTA projections in providing its fairness opinion. The court then addressed the tortious interference claim, noting that Delaware follows the Restatement (Second) of Torts and that, under the Restatement, (1) Simmons' "sole motive" must have been to interfere with the LPA, (2) Simmons was entitled to the "advisor's privilege" (which allows an advisor to provide advise without fear that its advice will give rise to a tortious interference claim), and (3) Simmons could only face tort liability if it counseled the GP and Enbridge in bad faith to breach the LPA. As plaintiff's complaint did not make these allegations, the court dismissed the tortious interference claim against Simmons.

Finally, the court addressed plaintiff's claims for rescission or reformation and refused to dismiss such claims on the grounds that the Supreme Court "made clear that the LPA does not 'limit equitable remedies'" even if the GP was found to have acted in good faith and therefore was not liable for monetary damages under the LPA.

12. *Matthew Godden, et al. v. Harley V. Franco*, C.A. No. 2018-0504-VCL (Del. Ch. Aug. 21, 2018) (V.C. Laster)

In this case, plaintiffs, who were two members of the Board of Managers (the "Board") of HMS Holdings 3, LLC ("Holdco 3"), acted by written consent to terminate defendant Harley Franco from his positions as President and CEO of Harley Marine Services, Inc., a Washington corporation ("HMS Inc."). In 2008, Franco sold a significant equity stake in HMS Inc. to Macquarie Capital, a private equity firm. In connection with Macquarie's investment in HMS Inc., the parties created a complex, multi-tiered ownership structure. At the time they took action by written consent, plaintiffs also comprised two of the four members of the board of managers of two additional Delaware limited liability companies: HMS Holdings 1, LLC ("Holdco 1") and HMS Holdings 2, LLC ("Holdco 2"). The three Holdco entities constituted a three-tiered holding company structure for HMS Inc. Holdco 1 owned 100% of the equity of HMS Inc., Holdco 2 owned a 76.64% member interest in Holdco 1, and Holdco 3 owned an 82.22% member interest in Holdco 2. Macquarie owned a 15.44% membership interest in Holdco 3 and HMS Partners, LLC, an entity controlled by Franco ("Franco Partners"), owned an 84.56% member interest in Holdco 3.

Each Holdco was a manager-managed LLC governed by a board of managers consisting of four managers and each LLC agreement specified that two managers were to be selected by Franco Partners (each, a "Franco Manager"), one manager was to be selected by Macquarie (the "Macquarie Manager") and one manager was to be independent of Macquarie and Franco Partners (the "Independent Manager"). Plaintiffs were the Macquarie Manager and Independent Manager. The Holdco 3 LLC agreement differed from the other Holdco LLC agreements in three key respects. First, Franco executed the Holdco 3 LLC agreement personally and became a party in his individual capacity for

purposes of the "Personal Commitment Provision." The Personal Commitment Provision required Franco to cause Franco Partners to perform all of its obligations under the Holdco 3 LLC agreement, to at all times maintain control of Franco Partners and to abide by the provisions set forth in each Holdco LLC agreement that applied to him in his personal capacity. Second, the Holdco 3 LLC agreement contained language authorizing the Board to select the officers of Holdco 3's subsidiaries. Third, the Holdco 3 LLC agreement contained language obligating the parties to that agreement to conform the governing boards of all of Holdco 3's subsidiaries to the composition of the Board.

After investigating allegations that Franco had misappropriated fund from HMS Inc., plaintiffs, in their capacities as the Independent Manager and Macquarie Manager of Holdco 3, purported to take action by written consent on behalf of the boards of managers of the Holdcos, the board of directors of HMS Inc. and the governing boards of each of HMS Inc.'s subsidiaries (the "Written Consent"). The Written Consent purported to terminate Franco's employment with HMS Inc. for cause pursuant the employment agreement between Franco and HMS Inc., and remove Franco as President, CEO and the Chairman of the Board of each Holdco, HMS Inc. and ten subsidiaries of HMS Inc.

The court first held that terminating Franco under the employment agreement constituted an "Interested Party Decision" under Section 1.10 of the Holdco 3 LLC agreement and that, as a result, the votes of the Independent Manager and the Macquarie Manager were the only votes required to terminate Franco under his employment agreement with HMS Inc. pursuant to the terms of the Holdco 3 LLC agreement. Plaintiffs next sought a declaration that the Independent Manager and the Macquarie Manager could act by written consent to make the decision to terminate Franco. Section 4.3(d) of the Holdco 3 LLC Agreement permitted the Board to take any action that could be taken at a meeting by written consent if the consent was signed by the number of Board members required to approve such action at a meeting held by the Board at which a quorum was present. The court found that the need for a quorum to meet and discuss the proposed action before valid action could be taken at a meeting did not apply to action taken by written consent. The court interpreted the quorum provision in Section 4.3(d) to mean that if the individuals who signed the consent could have approved the action at a hypothetical meeting of the Board at which a quorum was present, then the consent would be valid, and granted summary judgment for the plaintiffs on this issue.

Plaintiffs also sought a declaration that the Written Consent constituted valid and effective action to terminate Franco's employment at HMS Inc. and remove him from his positions as President and CEO of that entity. The court held that under the governance structure that the parties crafted, the parties to the Holdco 3 LLC agreement made contractual commitments to implement certain decisions at Holdco 3's various subsidiaries. The court rejected Franco's argument that the provisions in the Holdco 3 LLC agreement purporting to let the Board address the rights of other entities were a legal nullity. Franco argued that only the governing body of an entity can make decisions regarding that entity's rights, so therefore the Board could not address any rights other than the rights of Holdco 3. However, the court noted that the Holdco 3 LLC agreement's provisions that required that certain decisions made by the Board of Holdco 3's to be implemented by each of its subsidiaries were not unlike the voting agreements

that a corporation makes with its stockholders in a stockholder agreement, and that such contractual agreements are generally enforceable; so too with these Holdco 3 LLC agreement provisions. The court also noted that under Franco's argument, several provisions of the Holdco 3 LLC agreement, including the definition of an "Interested Party Decision" and the related mechanics for the Board to make Interested Party Decisions would be illusory. Additionally, the court found that the inclusion of the Personal Commitment Provision supported this structure—by binding Franco personally to the Holdco 3 LLC agreement, the parties ensured that Franco would have a contractual obligation to abide by the provisions of the Holdco 3 LLC agreement and to implement decisions made by the Board in accordance with those provisions. However, the court declined to address the question of whether a party to the Holdco 3 LLC agreement would be obligated to comply with a contractual obligation under that agreement notwithstanding competing obligations (like fiduciary duties to a subsidiary). The court noted that because HMS Inc. was a Washington corporation, Franco's compliance with a contractual obligation under the Holdco 3 LLC agreement could raise issues under Washington law, particularly if Franco were to assert that compliance would cause him to breach his fiduciary duties to HMS Inc.

The court rejected plaintiffs' argument that the action of the Board had a direct effect on Franco's status at HMS Inc. and automatically resulted in his termination as President and CEO of that entity. The court held that the contractual commitments contained in the Holdco 3 LLC agreement to implement certain decisions made by the Holdco 3 Board at Holdco 3's subsidiaries were not self-executing and required formal action at the relevant subsidiaries. The court noted that accepting plaintiffs' position would contravene the "bedrock principle of corporate separateness."

13. *Domain Associates, L.L.C. v. Shah*, C.A. No. 12921-VCL (Del. Ch. Aug. 13, 2018) (V.C. Laster)

Defendant, Nimesh S. Shah ("Shah"), was a member of a management company, Domain Associates, LLC (the "Company"), a venture capital firm. The other members of the Company (together with the Company, plaintiffs in this case) voted to force Shah to withdraw as member of the Company and, upon his withdrawal, paid Shah the value of his capital account. Plaintiffs sued, seeking a declaratory judgment that Article VII of the Company's Limited Liability Company Agreement (the "LLC Agreement") specified the payment Shah was entitled to receive, and Shah counterclaimed for breach of contract, arguing that Article VII did not specify the payment he was entitled to receive and that under the Delaware Limited Liability Company Act (the "Act"), he was owed the fair value of his membership interest.

Shah initially joined the venture capital firm as an employee, but in November 2014 he was invited to become a member of the Company. When Shah was admitted as a member in January 2015, he made a capital contribution of $25,000 to become an equity partner and he signed the LLC Agreement, knowing that it was not negotiable. By December 2015, and until Shah's withdrawal, Shah's membership interest in the Company was 12.1%. In January 2016, Shah was asked to leave the Company because his expertise was no longer needed. Shah and the other members of the Company tried to

negotiate a severance package for months following the members' decision to ask Shah to leave, but they could not come to an agreement. As a result, in April 2016 all of the members of the Company except Shah voted to require Shah to withdraw from the Company. The members believed that Shah was entitled to a payment equal to his capital account in return for his membership interest at the time of his forced withdrawal and sent Shah a check for that amount. Shah asserted that, instead, he was entitled to 12.1% (the percentage of his membership interest) of the Company's cash on hand at the time of his withdrawal.

Plaintiffs argued that under Article VII of the LLC Agreement Shah was entitled to receive the value of his capital account. Article VII provided, in part, as follows:

> Any Member may retire from the Company upon not less than 90 days' prior written notice to the other Members. Any Member may be required to withdraw from the Company for or without cause at any time upon written demand signed by all of the other Members except for any one other such Member, so long as such demand shall have been approved at a meeting of Members held for such purpose, to which all Members shall be given written notice in advance . . . If the remaining Members continue the business of the Company, the Company shall pay to any retiring Member, or to the legal representative of the deceased, insane or bankrupt Member, as the case may be, in exchange for his entire interest in the Company, an amount equal to (A) such Member's capital account, to be determined as of the date of a Member's death or retirement, or his withdrawal from the Company (such date of death or withdrawal being referred to herein as the "Withdrawal Date"), which capital account, for purposes of such determination, shall be computed on the cash and disbursements basis of accounting, shall take into account, without limitation, the aggregate amount of cash contributed to the capital of the Company by such Member, plus the aggregate amount of such Member's share, as in effect from time to time, of the net profits of the Company through the last day of the month next preceding the Withdrawal Date, less the aggregate amount of such Member's share, as in effect from time to time, of the net losses of the Company through the last day of the month next preceding the Withdrawal Date, less the aggregate amount of distributions to such Member through the Withdrawal Date in respect of the net profits or capital of the Company, or both; less (B) the aggregate amount, if any, of indebtedness of such Member to the Company at the Withdrawal Date.

The court held that Article VII was unambiguous and did not set forth the required payment for a member that is forced to withdraw. The court explained that while Article VII included forced withdrawal as a means by which a member's status as such could be terminated, Article VII was silent about payment following a forced withdrawal and the payment formula in Article VII only applied to a retiring member or the legal

representative of a deceased, insane or bankrupt member. The court also stated that even if Article VII was not plain and unambiguous, the court would not look to extrinsic evidence. Instead, because the LLC Agreement was drafted solely by one side and was presented on a "take-it-or-leave-it" basis, the doctrine of *contra proferentem* would apply and the LLC Agreement would be interpreted against the drafters. Plaintiffs argued that interpreting Article VII to say that a member that was forced to withdraw would receive a greater compensation than a member that withdrew for other reasons would lead to an irrational result. The court, however, disagreed, explaining that members may have been worried about disputes with other members and wanted protection from being forced out by other members. To protect themselves from being forced out, the court held that it was rational for forced-withdrawal to be excluded from the scenarios that are covered under Article VII's payout formula.

Because the LLC Agreement was silent on the payment Shah should have received when he was forced to withdraw, the default provisions of the Act controlled. Shah argued that he should be paid the fair value of his membership interest under Section 18-604 of the Act. The court held that Section 18-604 applied only to voluntary withdrawal and not to forced withdrawal. Because Section 18-604 did not apply, the court turned to the default principles of law under Section 18-1104 and held that "the rules of law and equity… shall govern." The court stated that this was a question of first impression under the Act, but relied on *Hillman v. Hillman*, 910 A.2d 262, 271-78 (Del. Ch. 2006), a case in which then-Vice Chancellor Strine interpreted Section 15-701 of the Delaware Revised Uniform Partnership Act (the "Partnership Act"), which states that an expelled partner is owed an amount "equal to the fair value of such partner's economic interest as of the date of dissociation based upon such partner's right to share in distributions from the partnership." The court held that the same analysis applied here and that, because the Company was member-managed, the governance structure resembled a partnership and, therefore, the application of the Partnership Act was especially appropriate. The court elaborated by giving the following guidance: (i) when a limited liability company is member-managed, then the parties should expect a court to draw on analogies to partnership law, (ii) when a limited liability company has a single managing member with other generally passive, non-managing members, then the parties should expect a court to draw on analogies to limited partnership law and (iii) when a limited liability company has a manager-managed entity, and it operating agreement created a board of directors and adopted other corporate features, then the parties should expect a court to draw on analogies to corporate law. In this case, the court applied partnership law because the Company was member-managed; therefore, the court found that Shah was owed the fair value of his membership interest. Because Shah was paid the value of his capital account instead of the fair value of his membership interest, the court held that plaintiffs breached the LLC Agreement and Shah was entitled to the difference between the fair value of his membership interest in the Company and the payment he received.

The court held that the individual members were jointly and severally liable for the damages awarded. The court explained that a party to a contract is liable when it breaches such contract and because the individual plaintiffs were members of the Company and parties to the LLC Agreement, they were liable for breaching the LLC Agreement. Plaintiffs argued that the individuals could not be held liable because

Section 18-303 of the Act said "no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company." The court, however, held that Section 18-303 was not applicable because (i) Section 18-303 only applies to liability to a third party and Shah was not a third party, (ii) the liability to Shah was not a liability of the Company because the LLC Agreement did not expressly create an obligation on the part of the Company to pay Shah and (iii) the members were not passive actors or so uninvolved in management of the Company that it would have been unfair to hold them liable.

In conclusion, the court held that, because plaintiffs failed to pay Shah the fair value of his membership interest in the Company after his forced withdrawal, they breached the LLC Agreement, Shah was entitled to damages based on the fair value of his membership interest and the remaining members of the Company were jointly and severally liable for such damages.

14. *Triple H Family Ltd. P'ship v. Neal*, C.A. No. 12294-VCMR (Del. Ch. July 31, 2018) (V.C. Montgomery-Reeves)

Plaintiff Triple H Family Limited Partnership was a holding company formed for investments made indirectly by Jeffrey Hoops ("Hoops"), a businessman in the coal mining industry. Defendant Jerry Neal ("Neal") was an insurance agent who owned an insurance company he formed. Neal and Hoops, who went to high school together, were reunited at their school's fortieth reunion. During that night, Hoops and Neal agreed to start Omni Insurance Group, LLC ("Omni"), an insurance agency, whereby Hoops would purchase insurance for his coal mining business and Neal would operate the company and source additional commissions, the profit of which would be split amongst the two. The relationship quickly soured when Neal failed to timely secure insurance coverage for the coal mining business, resulting in a brief lapse of coverage for Hoops. The lapse subjected Hoops and his coal company to an immense amount of liability and Hoops informed Neal that Omni would not be moving forward. The relationship having soured, the parties sued each other for claims of breach of contract, breach of fiduciary duties, fraud and judicial dissolution of Omni.

Omni never had a formal written operating agreement. Thus, the court primarily used email correspondence and trial testimony to glean information regarding the terms of the limited liability company relationship that was intended between the parties. As part of this process, the court noted that it placed heavy weight on the testimony of Hoops, who had proven to be a reliable and honest source of information, over the testimony of Neal, who, in the view of the court, would "say whatever he needs to, regardless of veracity . . . ." The court further stated that because the parties repeatedly relied on extrinsic evidence to support their arguments about the terms of the oral limited liability company agreement, all extrinsic evidence therefore became fair game for the court to review in order to divine the extent of the agreement.

Having established what it considered to be the terms of the Omni operating agreement through analysis of extrinsic evidence and email correspondence, the court turned to the

issue of breach of fiduciary duty. In order to determine whether a breach of fiduciary duty occurred, the court first needed to establish whether the parties owed such duties at all. Delaware case law has recognized that a person who is not named as a manager in a limited liability company's governing documents may nonetheless be deemed a de-facto manager and fiduciary of the company. In *WaveDivision Hldgs., LLC v. Millenium Digital Media Sys., L.L.C.*, 2010 WL 3706624 (Del. Ch. Sept. 17, 2010), a person who had "unfettered access" to information and took actions relating to a limited liability company's strategy was held to be a de-facto manager and fiduciary of the LLC. Relying on *WaveDivision*, the court held that both Neal and Hoops were de-facto managers and fiduciaries of Omni based upon the managerial roles that each took in developing Omni. Hoops disagreed, arguing that he was not a de-facto manager because Neal was designated as "President and CEO" of Omni and thus had to be the manager. The court countered this argument, noting that an LLC may have more than one manager and that, in any event, a person other than a named officer can also be a de-facto manager under *WaveDivision*.

Having determined the scope of Omni's operating agreement and the duties owed by each party, the court held that Neal breached the operating agreement and violated his duties of loyalty and care by (i) failing to obtain promised insurance coverage and misleading his only customer (Hoops) about a serious lapse of such insurance and (ii) failing to roll his own existing insurance business into Omni as previously agreed. The court further held that judicial dissolution of Omni was unnecessary because Hoops and Neal had already agreed to dissolve the company pursuant to email correspondence that amounted to a written consent to dissolve and instead ordered that Omni commence the winding up process.

15. *In re Bay Hills Emerging Partners I, L.P.*, C.A. No. 2018-0234-JRS (Del. Ch. July 2, 2018) (V.C. Slights)

Primary defendant Kentucky Retirement System ("KRS") was the sole limited partner in four Delaware limited partnerships. KRS exercised its right to remove the general partner of each limited partnership "for Cause" and gave notice of such exercise to the general partners (who collectively comprise the plaintiffs in this action). Plaintiffs filed suit in Delaware to obtain declarations that their removal was improper (the "Delaware Litigation"). Shortly thereafter, KRS filed an action in Kentucky seeking a declaration that removal was proper (the "Kentucky Litigation").

KRS moved to dismiss the Delaware Litigation on the grounds that the forum selection clause in the partnership agreement of each limited partnership required plaintiffs to litigate in Kentucky. The combined governing law and forum selection clause (the "Forum Clause") stated that "except as otherwise provided by the [DRULPA], this Agreement and the rights and obligations of the parties hereunder shall be governed by and interpreted, construed and enforced in accordance with the laws of the Commonwealth of Kentucky . . . . Each of the Partners hereby consents to the jurisdiction of the courts of the Commonwealth of Kentucky and further consents that venue shall lie in the Franklin Circuit Court located in Franklin County, Kentucky."

Plaintiffs countered that the Forum Clause was not an exclusive venue provision and that, in the alternative, even if the Forum Clause did require KRS to bring claims exclusively in Kentucky, it would be unenforceable because it violated DRULPA Section 17-109(d), which prohibits limited partners from waiving their right to litigate matters relating to the internal affairs of the limited partnership in Delaware.

The court began its analysis by noting that Delaware courts defer to forum selection clauses and grant motions to dismiss based on improper forum if the application of such a clause is relevant. However, given that each partnership agreement chose Kentucky law as the governing law, the court queried whether Kentucky courts treat forum selection clauses in the same way. Confirming that they did, the court declined to engage in a choice of law analysis given there was no conflict of laws. The court noted that all parties agreed to the application of Kentucky law to this dispute.

Having found no conflict of laws, the court turned to whether the Forum Clause was permissive or mandatory in regard to KRS's right to bring claims. The court noted that the Forum Clause stated that "each Partner hereby consents" to the jurisdiction of Kentucky courts. Such language did not expressly state or otherwise imply that Kentucky courts were the exclusive forum for the resolution of questions of internal affairs of the limited partnership. The court therefore denied defendants' motion to dismiss that was premised upon the enforcement of the Forum Clause.

Although a stay of proceedings was not requested by defendants, the court nonetheless imposed a stay *sua sponte* pending resolution of the Kentucky action. The court noted that, in situations where a Delaware action is filed first or simultaneously with action in another jurisdiction, Delaware courts will consider the same factors considered in a motion to dismiss for *forum non conveniens* to determine whether a stay is appropriate. The court also noted that, although a first-filed Delaware action typically weighs in favor of moving forward with Delaware litigation, in situations where the actions are filed relatively close in time, the factual scenario surrounding the filings should be taken into account. Applied here, the court noted that it may have been the case that the Delaware Litigation was filed in order to "scuttle or confound" the Kentucky Litigation that plaintiffs suspected KRS was preparing to file. Given that the partnership agreements chose to be governed by Kentucky law (and that substantive questions about the proper or improper removal would be questions of Kentucky law interpretation) and that both the Delaware Litigation and Kentucky Litigation were focused on the same issues, the court found the stay appropriate.

The court further rejected plaintiffs' argument that litigating the dispute outside of Delaware would violate Delaware public policy. The court stated that had the General Assembly intended for Section 17-109(d) to mandate litigation of internal affairs of limited partnerships in Delaware, it could have done so. KRS could have litigated in Delaware but chose not to and that choice was to be respected.

16. *Phillip M. Issac and James R. Freedman v. IFTHC, LLC et al.*, C.A. No. 2017-0821-TMR (Del. Ch. June 18, 2018) (V.C. Montgomery-Reeves)

Plaintiffs filed an action seeking approximately $470,000 from defendants for accrued salaries. Plaintiffs were managers of IF Technologies, Inc. ("IF Technologies") and its predecessor entities before IF Technologies sold substantially all of its assets in exchange for RemitDATA, Inc. ("RemitData") stock (the "Transaction"). In connection with the Transaction, IF Technologies dissolved and transferred its liabilities and the RemitDATA stock to defendant IFTHC, LLC ("IFTHC") and the stockholders of IF Technologies became unitholders of IFTHC. The board of directors of IF Technologies (the "IFT Board"), which was composed of the same persons who constituted the board of directors of IFTHC, approved an amendment to IFTHC's operating agreement (the "Operating Agreement") which stated that in the event of dissolution, all of the debts, liabilities and obligations of IFTHC must be paid. After the approval of the amendment and after speaking to plaintiffs, IFTHC's counsel added the following parenthetical to that provision: "(including without limitation, the compensation obligations owed to [plaintiffs] in the aggregate amount of $464,000 and all expenses incurred in liquidation)." The Board then distributed an information statement to the IF Technologies' stockholders seeking their approval of the Transaction and agreement to be bound by the Operating Agreement (which included the parenthetical). The stockholders approved the Transaction, the Transaction closed and plaintiffs requested payment for their accrued salaries. IFTHC refused to pay, and plaintiffs sued.

Plaintiffs moved for partial judgment on the pleadings as to their claim for breach of the Operating Agreement. Plaintiffs argued that the parenthetical in the amended Operating Agreement provided that plaintiffs must be paid immediately for their accrued salaries. Defendants argued that the parenthetical was unenforceable because the Board did not approve it and the stockholders did not know the Board did not approve it when they approved the amendment. As a result, defendants contended that there were "serious doubts concerning the validity and enforceability" of the parenthetical. The court explained that it would grant a motion for judgment on the pleadings when "there are no material issues of fact and movant is entitled to judgment as a matter of law." The court held that because defendant raised a question of fact as to whether the parenthetical was operative, plaintiffs did not establish as a matter of law that there was a contractual obligation for defendants to pay plaintiffs' accrued salaries. Plaintiffs also argued that even if the parenthetical was not operative, the Operating Agreement provided that the plaintiffs should be paid their accrued salaries. They argued that the requirement for IFTHC to pay all debts, liabilities and obligations of IFTHC included the accrued salaries. Defendants argued, on the other hand, that a 2011 purchase agreement, which stated that accrued salaries were to be paid from future profits with approval by the IFT Board, was not altered by the amendment to the Operating Agreement. Therefore, defendants argued that they did not owe plaintiffs payment for the accrued salaries because IF Technologies was not profitable. The court held that there were factual disputes as to whether plaintiffs' accrued salaries were debts and liabilities under the Operating Agreement. Because there were factual disputes, the court denied partial judgment on the pleadings.

17. *Obeid v. Gemini Real Estate Advisors, LLC,* C.A. No. 2017-0510-JTL (Del. Ch. June 5, 2018) (V.C. Laster)

Obeid was a member and manager of Gemini Real Estate Advisors, LLC (the "Company") and, following disputes arising with other managers of the Company, sought books and records of the Company relating to distributions to investors, management fees and operating subsidiary accounts (the "Information") pursuant to the Company's LLC Agreement and Section 18-305 of the Delaware Limited Liability Company Act (the "LLC Act").

The court found that Obeid was entitled to the Information in his capacity as a manager of the Company under Sections 18-305(a) and (b) of the LLC Act, which provide managers with the right to examine information regarding the status of the business and financial condition of an LLC for a purpose reasonably related to the position of manager. The court noted that this language was "tantamount" to that used in Section 220 of the Delaware General Corporations Law and that the cases interpreting Section 220 were an analogue to Section 18-305 inspection rights. The court stated that it presumes that sitting directors are entitled to "unfettered access" to company books and records. Obeid was a manager of the Company, so he made a *prima facie* case for access to the Information. It was then up to defendants to carry the "rather substantial burden" of proving that Obeid was not motivated by a proper purpose, which could be shown by "concrete evidence" that Obeid would use the Information to harm the Company in violation of his fiduciary duties. Defendants pointed to one prior act by Obeid (he filed noticed of pendency against the Company's properties during the course of active litigation) and asserted that Obeid was using this books and records action to make an end-run around the discovery process in a separate litigation proceeding in a North Carolina court. The court found that neither of these reasons was sufficient to warrant denying Obeid's access to the Company's books and records, particularly since Obeid agreed to a confidentiality order that prohibited him from using the Information in the North Carolina litigation absent Delaware and North Carolina court approval. Thus, defendants were unsuccessful in their claims of improper purpose against Obeid. Defendants further argued that they provided Obeid with the information he needed to discharge his fiduciary duties to the Company. The court found that this was not a valid defense, noting again that directors' and managers' access to company information is "essentially unfettered" absent valid contractual restrictions.

The court also found that Obeid was entitled to the Information under Section 8.6.1 of the Company's LLC Agreement as a member of the Company. Section 8.6.1 of the Company's LLC Agreement provided that "[a]ll of the records and books of account of the Company . . . shall be open to the inspection and examination of the Members or their representatives during reasonable business hours." Defendants tried again to argue that Obeid had an improper purpose in seeking the Information as a member. The court noted that the implied covenant of good faith and fair dealing would permit defendants to raise an improper purpose defense absent express language in the LLC Agreement to the contrary. To successfully assert this defense, defendants would have to show that Obeid was seeking the Information for a personal purpose that was also adverse to the interests of the Company. Defendants failed to satisfy this burden.

Specifically with respect to the information requested relating to operating subsidiary accounts, the court noted that the Company used its records database to maintain books and records of its operating subsidiaries. These operating subsidiaries did not have their own employees and relied on the Company to carry out their management functions and maintain responsibility over their funds and assets, and the court found that such "unity of control and management composition is sufficient to subject operating subsidiary information to a proper request by a parent Manager in accordance with Section 18-305(b)" (quoting *RED Capital Inv. L.P. v. RED Parent LLC*, 2016 WL 612772, at *5 (Del. Ch. Feb. 11, 2016)). Thus, the court held that Obeid was entitled to the Information.

18. *Eagle Force Holdings, LLC v. Campbell*, No. CV 10803-VCMR (Del. Ch. Sept. 1, 2017) (V.C. Montgomery-Reeves), *rev'd en banc*, No. 399, 2017 (Del. May 24, 2018)

Plaintiff, Richard Kay ("Kay"), and defendant, Stanley Campbell ("Campbell"), sought to form a business venture to market certain medical diagnosis and prescription technology that Campbell had developed. Under the principal terms of the business venture that were outlined in two letter agreements, Campbell would contribute to the venture stock in his wholly-owned subsidiaries and certain intellectual property, and Kay would contribute cash. For nearly a year, the parties negotiated the terms of a contribution agreement (the "Contribution Agreement") and operating agreement of Eagle Force Holdings LLC (the "Operating Agreement," and together with the Contribution Agreement, the "Transaction Documents"), each of which contained a forum selection clause pursuant to which the parties consented to personal jurisdiction in the Delaware courts. Kay and Campbell eventually signed the Transaction Documents, but the parties dispute whether such signed documents represent binding contracts. Following the execution of the Transaction Documents, Kay and Campbell were unable to resolve the remaining open items regarding the Transaction Documents, and Campbell sought to move on from his business venture with Kay. Consequently, Kay caused Eagle Force Holdings LLC to file suit against Campbell for breach of contract and fiduciary duty and sought specific performance of Campbell's obligations under the Transaction Documents. Campbell argued that the Court of Chancery could not assert personal jurisdiction over him because the only basis to support personal jurisdiction over him was the forum selection clause in each of the Transaction Documents. However, according to Campbell, the signing of those documents did not create binding contracts. A full trial was held to determine whether Campbell was bound by the Transaction Documents and therefore subject to the court's personal jurisdiction. The court found that the Transaction Documents did not include agreement on material terms such as the intellectual property to be contributed, and contracts to be assigned to Eagle Force Holdings LLC and the equity interests in Eagle Force Holdings LLC to be issued to each party. Therefore, the court agreed with Campbell that the parties did not form binding contracts because essential terms of the Transaction Documents were missing. Consequently, the court held that it could not assert personal jurisdiction over Campbell, and plaintiff's complaint was dismissed.

On appeal, the Supreme Court reversed and remanded the case back to the Court of Chancery, noting that the Court of Chancery must analyze whether the Transaction

Documents were valid, binding contracts under the *Osborn* test. In *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010), the court held that "a valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration." With respect to the Contribution Agreement, the Supreme Court provided guidance to the Court of Chancery on the first prong of the *Osborn* test, noting that a signature on a document generally indicates assent absent fraud, duress, mutual mistake or unconscionability. However, there was also evidence that suggested that the parties may not have intended to be bound by the Contribution Agreement, including blank schedules and "DRAFT" on the top of the Contribution Agreement.

With respect to the second prong of *Osborn*, whether the contract's material terms are sufficiently definite, the court stated that this was a question of law. The court adopted the test from the *Restatement (Second) of Contracts* § 33(2), which states that terms are sufficiently definite if they "provide a basis for determining the existence of a breach and for giving an appropriate remedy." While the Court of Chancery determined that the parties failed to agree on the precise scope of consideration of the Contribution Agreement, the Supreme Court disagreed, reasoning that the terms of the Contribution Agreement allowed the court to ascertain the consideration, the remedies if the consideration was not provided and the manner to enforce the agreement. Notably, the court stated that the Contribution Agreement recitals articulated the consideration, which was also reiterated in the body of the agreement. Additionally, the court noted that the Contribution Agreement provided that Campbell must contribute all right, title and interest in and to, any and all "Intellectual Property", which was defined as the "Transferred IP", and all "Targeted Companies Securities". As these terms were defined in the Contribution Agreement and the Contribution Agreement specified that *all* "Intellectual Property" and "Targeted Companies Securities" must be contributed by Campbell, the court held that the Contribution Agreement consideration was sufficiently definite. Additionally, the court noted that the negotiations between the parties did not create ambiguity as the language regarding the consideration was definitive. In addition, the court found that Kay had recourse if Campbell did not contribute the required assets through actions for breaches of the warranty or indemnification provisions. Thus, the court held that the second prong of *Osborn* was satisfied. With respect to the third prong of *Osborn*, the court noted that the parties did not dispute that legal consideration exists and therefore the third prong of *Osborn* was satisfied.

In regards to the Operating Agreement, similar to the Contribution Agreement analysis, the Supreme Court noted that, as in the Contribution Agreement, the parties signed the Operating Agreement, which provides evidence that the parties did intend to be bound by the Operating Agreement. Additionally, the Operating Agreement provided that each member intended to be bound by the document. On remand, the Supreme Court stated that the Court of Chancery should consider the policy of the Delaware Limited Liability Company Act to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements. With respect to the second and third prongs of *Osborn*, the court held that because the parties did not contest these prongs, the two prongs were satisfied.

19. *In re Energy Transfer Equity L.P. Unitholder Litigation,* C.A. No. 12197-VCG (May 17, 2018) (V.C. Glasscock)

This litigation arose out of the private placement issuance of convertible units to some of the unitholders, most of whom were insiders, in Energy Transfer Equity, L.P., a Delaware limited partnership ("ETE"), in return for which the unitholders gave up their rights to certain distributions for a time on their common units (the "Issuance"). Defendants asserted that the Issuance was a necessary device used to prevent a downgrade by credit rating agencies without cutting distributions on ETE's units. Plaintiffs asserted that the issuance was a hedge designed to protect insiders from possible bad effects of ETE's planned merger with The Williams Companies, Inc. ("Williams Co.") and a downturn in the energy sector. In making this assertion, plaintiffs advanced two theories of liability. First, they argued that the Issuance was a "distribution" under ETE's partnership agreement (the "LPA"), that the LPA required that distributions be made *pro rata* to unitholders and that the Issuance violated this provision because the securities were not issued *pro rata* to unitholders. Second, plaintiffs argued that the Issuance violated the provisions of the LPA applicable to conflicted transactions because defendants did not comply with the "safe harbor" provisions of the LPA and the Issuance was not "fair and reasonable" to ETE.

In two prior decisions in this matter in 2017, the court denied the parties' cross-motions for summary judgment, finding that a more developed factual record was needed to determine whether the "special approval" safe harbor for a conflicted transaction in the LPA had been met and whether the Issuance was a "distribution" under the LPA. Trial on those and related issues commenced in February 2018, during which additional facts were revealed. The relevant facts that emerged in depositions and at trial follow.

ETE was managed by its general partner, LE GP, LLC (the "General Partner"), which was in turn managed by a board of directors (the "Board"), which appointed ETE's executive officers. Many of the individual defendants were members of the Board or officers of ETE and current or former directors or officers of other companies in the ETE family. Plaintiffs were an individual and an entity that held ETE common units at all relevant times. In September 2015, ETE entered into an agreement to merge with Williams Co., wherein Williams Co. would receive cash financed by ETE through new debt. Once the merger was consummated, ETE's consolidated debt would increase by over $30 billion. After the merger was announced, the energy market took a nosedive, the credit market for energy companies experienced significant stress and energy companies' access to credit was reduced. This was bad for ETE, which distributed all of its available cash every quarter to its unitholders and depended heavily on capital markets access to fund its growth. The credit rating agencies expected ETE's debt-to-EBITDA ratio ("D/E") not to exceed 4.0x. ETE's CFO informed the rating agencies that an equity issuance would be on the table if this occurred. However, if the Williams Co. merger closed, ETE's D/E would likely reach 4.7x. Thus, ETE was facing a credit rating downgrade that would significantly harm ETE's competitiveness and commercial reputation and significantly increase its interest expense. ETE explored deleveraging options like issuing equity, renegotiating the Williams Co. merger to require less cash up front, selling assets and cutting distributions. Some of the options (like asset sales) were

not feasible given market conditions. ETE also tried and failed to renegotiate the merger with Williams Co., and the merger agreement contained conduct-of-business restrictions that took other deleveraging options off the table. ETE's management did not want to cut distributions, calling it a "nuclear option". This left one option—issuing equity.

In February 2016, the Board considered a public offering of securities that guaranteed $0.11 in cash or accrual if common unit distributions were less than $0.11; if common unit distributions were above $0.11, participating unitholders would receive $0.11 in cash and an accrual, redeemable for common units, for the amount exceeding $0.11 (the "Initial Terms"). On February 13, Williams Co.'s CFO informed ETE's CFO that the public offering required Williams Co.'s consent, which he did not think would be provided, and that he would not permit Williams Co.'s auditors to release the financial statements needed to file the S-3, which was required for the public offering. Email correspondence from that same day shows that ETE's general counsel and its president were aware of Williams Co.'s CFO's position. On February 15, Latham & Watkins, ETE's counsel, sent ETE updated documents for the public offering. Notably, these revised documents increased the quarterly accrual for units from $0.11 to $0.285 (the "Revised Terms"), a "massive hedge" for participating unitholders if ETE cut distributions that ETE's financial adviser described as "a 'wealth transfer' to subscribers in case distribution *[sic]* were cancelled." That same day, the Board held a telephonic meeting. The unredacted portion of the minutes did not include any discussion of the Revised Terms. The resolutions included Board approval of the public issuance on "substantially the terms set forth in the term sheet previously provided to the Board," which were the Revised Terms that the Board was informed of on the date of the meeting. ETE's CFO testified that he provided the Board with a report on his conversation with Williams Co.'s CFO at the Board meeting. Thus, evidence showed that the Board knew on February 15 that Williams Co. likely would not consent to the public offering. Indeed, on February 18, Williams Co.'s CFO informed ETE's CFO that the Williams Co. board, acting unanimously, refused to consent to the public offering. ETE's Board members testified that they were "floored" and "very disappointed" by this; the court found that testimony not credible given that the Board already knew of Williams Co.'s position.

On February 22, the Board met and agreed to pursue a private offering of securities, which would not require Williams Co.'s consent. The terms of the private offering largely mimicked the Revised Terms for the public offering. The Board approved the private offering on February 28.

At the February 22 Board meeting, the Board established a conflicts committee consisting of three individuals (Williams, Turner and Collins). Williams was an engineer that had never served on a conflicts committee. As was later discovered, Turner and Collins were directors of affiliates of the General Partner and thus, under the terms of the LPA, were ineligible to serve on the conflicts committee. After the meeting, Turner told another Board member, who told ETE's general counsel, that he (Turner) was ill and could not serve on the conflicts committee. On February 24, ETE's general counsel told their investment bank that Collins and Williams were on a two-person conflicts committee, despite the fact that the Board never designated a two-person committee.

Latham discovered Collins' and Turner's ineligibility to serve on the conflicts committee on February 26, the date of the first conflicts committee meeting. It also realized that a separate committee—audit and conflicts ("A&C")—needed to approve the Issuance. A&C was a standing committee also consisting of Williams, Turner and Collins. Latham and Akin Gump decided to create "revised resolutions" for the February 22 meeting that purportedly would reflect the Board's decision to appoint Williams as a one-man conflicts committee and for Williams and Collins to serve as the members of the A&C committee. However, the minutes of the February 22 meeting did not match those resolutions and there was no evidence that the Board ever adopted those "revised" resolutions. Further, the Board never met to reconstitute or approve the constitution of the conflicts committee as a one-man committee consisting of Williams.

The conflicts committee purported to meet on February 26, when Williams and an attorney from Akin Gump met telephonically. Phone records and testimony do not match regarding the length of this meeting, which could have lasted anywhere from twenty-seven seconds (per the phone records) to twenty minutes (per the testimony). On the morning of this meeting, Collins, who was ineligible to serve on the conflicts committee, signed an engagement letter with a financial adviser for the conflicts committee; apparently Collins was not informed that he was not a member of the conflicts committee until February 27, though it does not appear that Collins attended the February 26 meeting. On February 27, the conflicts and A&C committees held a joint telephonic meeting, attended by Williams, Collins, the financial adviser and Akin Gump, and met again that afternoon for a presentation on the proposed issuance by the financial adviser. The committees met a final time on February 28. The financial adviser gave one last presentation, notably devoid of any explanation of how the specific terms of the private offering were desirable as compared to any other terms. The record contains no evidence that either committee considered whether the terms were fair to ETE. Williams' testimony made clear that he did not understand key aspects of the transaction he was approving. Both committees voted to approve the Issuance. Later that same day, the Board met to discuss the Issuance. At this meeting, an Akin Gump attorney told the Board that Williams, Turner and Collins had acted as a "special committee" of the Board. However, there was no evidence that ETE ever formed a "special committee" or that such a committee was involved in the Issuance. The Board approved the Issuance and documents relating thereto. Notably, while the Board resolutions from the meeting contained "whereas" clauses referencing the Board's purported prior formation of a one-man conflicts committee, no actual resolutions ratified the decision to use such a committee.

The private placement was offered to individuals—at least 70% of whom were affiliated with ETE or related to an individual with an ETE affiliation—and 3 of the 400 institutional investors that ETE had at the time. One institutional investor decided to participate. The rating agencies reacted positively to the Issuance. ETE announced that it was going to cut distributions. However, ETE terminated the merger agreement with Williams Co. on June 29, 2016 and subsequently did not cut distributions. In fact, ETE increased quarterly distributions twice during the Issuance plan period. The plan period expired on May 18, 2018, at which time the securities would convert into common units in accordance with their terms.

The court first addressed plaintiffs' argument that the private issuance was a "distribution" under the LPA and, as such, was required to be made *pro rata* to all unitholders. The court noted that Section 5.8 of the LPA provided the General Partner with the discretion to issue securities on terms the General Partner found appropriate. Further, the court found that the term "distribution" was not ambiguous and the term referred "to something *transferred* to the unitholders, as, for instance, a payment; rather than something that is *offered* to the unitholders for sale, which they may accept or reject." Such a definition comported with the LPA as a whole, especially in light of Section 5.8. Therefore, the court found that the Issuance did not constitute a distribution and thus was not prohibited under the provisions of the LPA that required distributions to be made *pro rata*.

The court next determined whether the Issuance was "fair and reasonable" to ETE as required under Section 7.6(f) of the LPA for transactions with affiliates, which the Issuance was. The LPA provided that the General Partner could conclusively establish that a transaction was fair and reasonable if it complied with one of the safe harbor provisions in the LPA. One safe harbor was to receive "Special Approval" (i.e., approval of a properly constituted conflicts committee). Unfortunately, as outlined in the summary of the facts above, a conflicts committee was never properly constituted. The conflicts committee that the Board established and approved included two individuals who were not, under the terms of the LPA, eligible to serve. The Board never reconstituted that committee, nor did not ratify the purported establishment of a one-man conflicts committee consisting of Williams. The court noted that the actions of then-counsel for ETE's committees created "a record which is at best misleading . . . . Suffice it to say that these actions are not helpful to the Defendants, at all."

The court then turned to a second safe harbor, which provided that an affiliate transaction was deemed fair and reasonable to ETE if the terms of the transaction were no less favorable to ETE than those generally being provided to unrelated third parties. Defendants argued that the private placement was offered to three institutional investors; therefore, it was conclusively fair and reasonable. The court disagreed. However, the court agreed with ETE's position that one could satisfy the safe harbor by comparing the challenged transaction to similar arms-length transactions. However, that option was not available here, as defendants created a "unique and complex security" offered to selected parties simultaneously. There were neither "generally" similar transactions with which to compare the terms of the Issuance nor similar securities being offered in the market. Because defendants did not satisfy any safe harbor, the court turned to analyzing whether the Issuance was fair and reasonable to ETE.

The court found that the contractual "fair and reasonable" standard invoked a review similar to that of entire fairness. Thus, the Issuance must evidence a fair process and be undertaken at a fair price. The court found that defendants failed to show that the Issuance was entirely fair to ETE. In so determining, the court found that the Initial Terms would have provided significant benefit to ETE while providing a benefit that likely would induce investors to subscribe, and that the Initial Terms were fair to ETE. However, the Initial Terms were replaced with the Revised Terms, which neither the Board nor the committees discussed in relation to the Initial Terms. The Revised Terms

were introduced at a time when the Board knew that Williams Co. likely would not consent to a public offering. Further, defendants were unable to explain how the Revised Terms originated or were placed before the Board or how they determined that the Revised Terms were necessary for the success of the public offering. The court adopted a "reasonable supposition" that ETE's CFO informed insiders that, based on the likelihood that Williams Co. would not consent to the public offering, a private offering would be an alternative and that distribution cuts loomed, and insiders seized the opportunity to hedge against these cuts. The Revised Terms were "not fair in terms of process, and nothing in the Board's actions indicated that it was fair as to price." Thus, the securities, to the extent transferred to the General Partner or its affiliates, breached the LPA and defendant Directors caused the General Partner to breach the LPA by issuing those securities.

The court then turned to the remedy for that contractual breach. Plaintiffs sought only equitable relief in the form of cancellation of the securities. The court found that equitable relief was not warranted. The terms of the Issuance that the court found to be unfair—the Revised Terms—would have resulted in harm to ETE and value to the Issuance's subscribers only if ETE reduced distributions during the plan period of the Issuance. This did not occur; ETE increased distributions during that time. Therefore, the unfair terms caused ETE no damages, and the court found that rescission of the securities would be disproportional to the "loss" (which was nothing).

20. *MHS Capital LLC v. Goggin*, C.A. No. 2017-0449-SG (Del. Ch. May 10, 2018) (V.C. Glasscock)

Primary defendant Keith Goggin ("Goggin") was sole manager of East Coast Miner LLC (the "Company"), an entity formed for the purpose of purchasing a senior debt note from U.S. Coal ("US Coal"). Pursuant to the note purchase, the Company obtained the right to credit bid the value of the note for the assets of Licking River, a division of US Coal, in the event US Coal entered bankruptcy. Plaintiff MHS Capital LLC held a 23.75% interest in the Company and was told repeatedly by Goggin that it would receive a majority stake in Licking River's assets in the event the credit bid was exercised.

In May of 2014, US Coal entered bankruptcy. However, instead of having the Company exercise the credit bid, Goggin formed two additional entities and had one of those entities exercise the credit bid. As a result, the proceeds of the Licking River assets were shared between the newly formed entities and the Company, ultimately resulting in a dilution of the interest plaintiff expected to receive. The credit bid was approved by the United States Bankruptcy Court for the Eastern District of Kentucky.

In the weeks leading up to the credit bid, efforts were made by plaintiff to ascertain information regarding its investment in the Company and the rationale behind the decision to exercise the credit bid. These efforts were either rebuffed or ignored by the Company and Goggin. A consent package was circulated less than twenty-four hours before the required Company vote on the exercise of the credit bid but did not include any financial information relevant to evaluating the bid. The consent package also requested that all members of the Company ratify all prior acts of Goggin, though it did not detail what exactly those actions were.

Plaintiff sued defendants for monetary damages and requested equitable relief based on a variety of theories including breach of contract, breach of fiduciary duty, fraud, breach of the implied covenant, tortious interference with contract and unjust enrichment. Defendants moved for dismissal, claiming among other things that Goggin, as manager of the Company, was exculpated from liability for monetary damages for breach of duties owed under the Company operating agreement.

With respect to defendants' motion to dismiss the breach of contract claim, the Company's operating agreement replaced traditional fiduciary duties with a contractual standard providing that: "[Goggin] shall discharge his . . . duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner [Goggin] reasonable believes to be in the best interests of the Company." The operating agreement also exculpated Goggin from liability to the Company or any member for monetary damages for breach of any duty as manager, except otherwise required under the Delaware LLC Act. Given that defendants did not argue that plaintiff failed to state a claim for breach of contract, the court was permitted to assume that the complaint properly stated such claim and thus denied defendants' motion to dismiss.

However, the court did grant defendants' motion to dismiss for the breach of fiduciary duty claim based on the fact that the claim was duplicative of the breach of contract claim. The court noted that when a dispute arises based on obligations that are expressly addressed by a contract, a breach of fiduciary duty claim is superfluous. Here, the court held that any conduct that would conceivably give rise to a fiduciary duty claim would be covered by the duties expressly set forth in the operating agreement.

Plaintiff's implied covenant claim was premised on the fact that Goggin usurped corporate opportunities from the Company when he shared the profits of the credit bid. Defendants argued that the operating agreement expressly required Goggin to act in good faith, which would obviously prevent the usurpation of corporate opportunities. The court agreed and dismissed the implied covenant claim, stating that the contract directly addressed the issue and left no gap to fill.

With respect to plaintiff's books and records claim, the court dismissed this claim without prejudice on the grounds that such a claim should be litigated in

21. *Eames v. Quantlab Grp. GP, LLC,* No. CV 2017-0792-JRS (Del. Ch. May 1, 2018) (V.C. Slights)

This case concerned a voting trustee's, acting on behalf of 96% of the voting limited partnership interests of Quantlab Group, LP (the "Partnership"), purported action to remove Quantlab Group GP, LLC ("Quantlab GP") as general partner of the Partnership and add Quantlab Group GP II, LLC ("Quantlab GP II") as general partner of the Partnership. Simultaneously with this action, Plaintiff Bruce Eames ("Eames"), in his capacity as a manager of Quantlab GP, consented to Quantlab GP II's addition as general partner of the Partnership. Under the Partnership's limited partnership agreement (the "Partnership Agreement"), the general partner could be removed without cause only if

there was one other general partner and the new general partner's admission was consented to by the removed general partner. Under the limited liability company agreement of Quantlab GP (the "Quantlab GP Agreement"), the managers could act unilaterally to transact business on behalf of and for the benefit of Quantlab GP. This was restricted by the requirement that managers of Quantlab GP could not take any action that would make it impossible to carry on the ordinary business of Quantlab GP or change the nature of Quantlab GP's business, which was to act as the general partner of the Partnership. On the same day as the purported removal and admission, plaintiffs filed this complaint under 6 *Del. C.* § 17–110 to confirm that Quantlab GP was removed as general partner of the Partnership and Quantlab II GP was admitted as general partner of the Partnership. Plaintiffs argued that Quantlab GP II was the sole general partner of the Partnership.

Defendant Quantlab GP, in its motion for partial summary judgement, argued that these actions were invalid under the terms of the Partnership's limited partnership agreement (the "Partnership Agreement") and thus Quantlab GP was still the sole general partner of the Partnership. The court agreed. The court held that the clear and unambiguous terms of the Partnership Agreement did not allow for a simultaneous removal and replacement of the general partner, reasoning that the Partnership Agreement required that a second general partner must be admitted before Quantlab GP could be removed as general partner. Additionally, the court held that Eames did not have authority to unilaterally consent on behalf of Quantlab GP to Quantlab GP II being added as a general partner. Plaintiffs argued that Eames could take action to add Quantlab GP II as general partner because he was acting for the benefit of Quantlab GP and the action did not change the business of Quantlab GP. The court disagreed, reasoning that Eames did not have the unilateral authority to take this action under the Quantlab GP Agreement because he could not take any action that would make it impossible to carry on the ordinary business of Quantlab GP or change the nature of Quantlab GP's business. The court stated that the sole purpose of Quantlab GP was to act as *the* general partner of the Partnership; therefore, by adding Quantlab GP II as a general partner of the Partnership, Eames changed the business from acting as *the* general partner of the Partnership to acting as *a* general partner of the Partnership. Additionally, the court held that his action was not for the benefit of the Quantlab GP, which was required for unilateral action by a manager. Therefore, the court granted defendant's motion for partial summary judgement.

22. *Capone v. LDH Management Holdings LLC*, C.A. No. 111687-VCG (Del. Ch. Apr. 25, 2018) (V.C. Glasscock)

In this case, the court addressed the requirements of Section 18-804(b) of the Delaware Limited Liability Company Act (the "LLC Act"), which requires an LLC that has been dissolved to, among other things, pay or make reasonable provision to pay claims known to the LLC. Plaintiffs were unitholders in an LLC that held a fifteen percent profits interest in another LLC (referred to herein as "LDH"). Plaintiffs' employment was terminated, triggering a call right held by the LLC. The LLC agreement included several relevant provisions that applied to the exercise of the call right. First, the call right was required to be exercised at the "Fair Market Value" as of the last day of the last fiscal year preceding the fiscal year in which the call notice was given. The notice was given

and the units were redeemed in early 2011; thus, the relevant "as of" date for determining Fair Market Value was December 31, 2010. Second, "Fair Market Value" was defined as the amount that would be distributed if all of the assets of LDH and its subsidiaries had been sold at their "Gross Asset Value" (adjusted immediately prior to such deemed sale by the LLC's board in good faith in consultation with LDH's board), the proceeds had been distributed to the members of LDH (including the LLC) and the amount of the LLC's distribution had been distributed to its members in accordance with its LLC agreement. Third, the determination of Gross Asset Value was to be made promptly following the relevant date and based on the LLC's financial statements for the fiscal quarter ending on the relevant date or during which the relevant date occurred, unless otherwise determined by the board.

LDH had two divisions: a midstream asset division and a merchant trading business. LDH retained bankers to explore a sale of its midstream assets in November 2010. In December 2010, LDH sent an information memorandum to potential bidders. Prior to sending out the memorandum, Energy Transfer Partners ("ETP") expressed to LDH its interest in buying LDH's midstream assets and asked whether LDH would entertain an exclusive deal with ETP. Plaintiffs testified that they learned in December 2010 that ETP was interested in buying the midstream assets for around $2 billion and that they shared these rumors with members of LDH's management. In the meantime, management was valuing LDH's business as a whole for purposes of determine the price to be paid for plaintiffs' units in connection with the LLC's exercise of its call right. The valuation was finalized on December 23, 2010 and the board approved it—LDH as a whole was valued at $1.744 billion and its midstream assets were valued at $1.43 billion, all as of December 31, 2010. LDH continued to pursue a sale of its midstream assets. Twenty-three bids were submitted on January 14, 2011. The median bid was $1.8 billion and all but one were higher than the $1.43 billion valuation approved by the board. About a week later, one of the plaintiffs told LDH's CEO and certain members of management that he thought it was legal error not to take account of the bids in valuing the midstream assets for purposes of the call right valuation. On February 4, 2011, the other plaintiff wrote a letter to LDH's CEO questioning the call right valuation and noting that if the midstream assets were significantly undervalued in that valuation, it would be "devastating" to the repurchase of his units and "something I would need to review and perhaps formally question." On March 22, 2011, LDH sold its midstream assets for $1.925 billion. On April 12, 2011, defendants redeemed plaintiffs' units in the LLC using the $1.744 billion valuation of LDH (including the $1.43 billion valuation of its midstream assets). The two plaintiffs continued to reach out to management to question the valuation and seek information as to how the call right valuation was determined. On December 31, 2012, LDH was acquired by third-party investors. The same day, the LLC and its managing member (another LLC) were cancelled, purportedly as part of the restructuring necessary to consummate the LDH acquisition. Defendants did not notify plaintiffs of the cancellations and did not reserve any funds in connection with plaintiffs' claims.

On May 21, 2015, plaintiffs sued the LLC, its managing member and some members of management in New York for breach of contract, alleging, among other things, that defendants failed to determine in good faith the fair market value of LDH and plaintiffs' units in the LLC. Plaintiffs also commenced a Delaware action asserting various claims

and seeking an order nullifying the certificates of cancellation of the LLC and its managing member so that plaintiffs could pursue their breach of contract claims in New York. The parties cross-moved for summary judgment on the nullification issue, and the New York court stayed the breach of contract claim before it pending a ruling from the Delaware Court of Chancery on the nullification claim. Plaintiffs argued that the defendants violated Section 18-804(b) of the LLC Act by cancelling the LLC and its managing member without setting aside any reserve to cover plaintiffs' breach of contract claims. Plaintiffs contended that, at the time of the cancellations, defendants knew of those claims or were aware of facts that made those claims likely to arise. Defendants argued that the dissolutions were accomplished in accordance with the LLC Act, but they did not argue that, should the court find their actions violated the LLC Act, nullification would be improper.

The court first provided an overview of the relevant provisions of the LLC Act and common law. It noted that Sections 18-804(b)(1) and (b)(3) require an LLC to "pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited liability company" and "make such provision as will be reasonably likely to be sufficient to provide compensation for claims that . . . are likely to arise or to become known to the limited liability company within 10 years after the date of dissolution." Further, the court stated that Delaware case law permits a court to nullify the certificate of cancellation of an LLC that is not wound up in accordance with the LLC Act. The court emphasized that a dissolved LLC must provide for all claims (even contingent or unmatured) irrespective of the likelihood that such claims will vest, and that the term "claims" includes contract, tort or statutory claims whether or not reduced to a judgment. The court also noted that the LLC Act provides flexibility for those making provision for such claims by prescribing a reasonableness standard. Whether the provision made was reasonable depends on several factors, including the potential amount of a claim and the likelihood of a claim actually becoming a liability for which the company must answer. The court explained that the minimal likelihood of a given claim actually arising or vesting could justify making no or minimal provision for the payment of such a claim. However, the court noted that standard must also be applied in the context of the purpose of Section 18-804 of the LLC Act, which is to provide "mandatory protection to creditors" of an LLC when the LLC dissolves and winds up.

The court reviewed plaintiffs' claims and the evidence relating to those claims. Plaintiffs alleged that defendants breached the LLC's operating agreement by redeeming plaintiffs' units based on a bad-faith estimate of LDH's value as of December 31, 2010. Plaintiffs put forward evidence that the valuation was done on December 23, 2010, prior to the valuation date of December 31, 2010, when the LLC's operating agreement required the valuation to be performed "promptly following" the valuation date. Further, plaintiffs argued that between December 23, 2010 valuation of LDH and the April 2011 redemption of their units, "highly probative evidence" (in the form of the multiple bids for the midstream assets) emerged that showed that the midstream assets were worth almost $500 million more than the call right valuation suggested. Further, the record contained no evidence that the midstream assets increased in value during that timeframe.

Finally, evidence existed showing that plaintiffs made their concerns about the valuation known to LDH management prior to the dissolution of the LLC.

The court then applied the LLC Act and common law to plaintiffs' claims and related evidence. The court found that plaintiffs' breach of contract claims were "known to the limited liability company" for purposes of Section 18-804(b)(1) of the LLC Act when the LLC and its managing member were dissolved, pointing to the communications between plaintiffs and high-ranking officers of LDH and other management in which plaintiffs accused defendants of acting "in bad faith under the contract" and "with malice" in breaching the LLC's operating agreement and asserted that it was legal error not to consider the midstream asset bids when undertaking the valuation for the call right. The court also found that defendants did not "make reasonable provision to pay" for those known claims as required under Section 18-804(b)(1) of the LLC Act because they did not set aside any funds for those claims. Such a zero-dollar reserve was not reasonable because the court found that plaintiffs' claims were not meritless, despite defendants' arguments to the contrary.

Because defendants violated the requirement of Section 18-804(b)(1) of the LLC Act to create a reasonable reserve to address known claims, the court granted plaintiffs the relief they sought and nullified the LLC's and its managing member's certificates of cancellation, enabling plaintiffs to pursue their breach of contract claims in the New York action.

23. *Leaf Invenergy Company v. Invenergy Wind LLC*, C.A. No. 11830-VCL (Del. Ch. Apr. 19, 2018) (V.C. Laster)

In this case, defendant, Invenergy Wind LLC ("Invenergy") exercised a right under Invenergy's limited liability company agreement (the "LLC Agreement") to call the membership interests of Leaf Invenergy Company ("Leaf"). Under the LLC Agreement, Invenergy could not engage in an asset sale of a specified magnitude (the "Material Partial Sale") unless Invenergy either obtained Leaf's consent or paid Leaf an amount sufficient for Leaf to achieve an agreed upon rate of return (the "Target Multiple"). The court referred to the requirement that Invenergy obtain Leaf's consent as the "Series B Consent Right." The court had previously granted Leaf's motion for judgment on the pleadings on the question of whether Invenergy had breached the LLC Agreement by engaging in a Material Partial Sale without obtaining Leaf's consent or paying Leaf its Target Multiple.

The court's decision in this case concerned the proper damages award to Leaf as a result of Invenergy's breach of the Series B Consent Right. Leaf sought to recover its Target Multiple as a remedy for Invenergy's breach of the Series B Consent Right despite the fact that the LLC Agreement did not include a liquidated damages provision or specify a remedy for breach of the Series B Consent Right. Leaf had argued that the parties' subjective beliefs were that Invenergy would be required to pay the Target Multiple in the event of a breach of the Series B Consent Right. Although the court found that both Leaf and Invenergy did subjectively believe that Invenergy would be required to pay the Target Multiple if it engaged in a Material Partial Sale without obtaining Leaf's consent,

the court held that these subjective beliefs were not controlling unless they were implemented in a remedial provision in an agreement, such as a liquidated damages clause.

The court noted that Leaf must show that it suffered actual harm from the breach of the Series B Consent Right in order to recover damages. The court set forth two ways that Leaf could prove actual damages. Leaf could prove that the Material Partial Sale itself harmed their interests, or, in the alternative, Leaf could prove that if Invenergy had respected the Series B Consent Right, then Leaf could have bargained for consideration in exchange for granting its consent. In order to prove that the Material Partial Sale itself harmed Leaf's interests, Leaf would need to show that it was worse off than it would have been had the Material Partial Sale not taken place. The court held that Leaf failed to show that it suffered actual harm as a result of the breach of the Series B Consent Right, and in fact actually benefitted from the transaction and awarded Leaf one dollar in nominal damages.

As to whether Leaf could have bargained for consideration in exchange for granting its consent, Leaf conceded that any steps taken to withhold their consent would not have been to protect Leaf from an economic downside or threatened harm, but rather to act as "leverage to ask for something in return." The court observed that under its prior decision in *Fletcher International, Ltd. v. Ion Geophysical Corporation*, 2013 WL 6327997, at *18 (Del. Ch. Dec. 4, 2013), a consent right does not give the holder the "opportunity to coerce value" from a counterparty "in circumstances where [the holder of the consent right] believed that the transaction it was being asked to consent to was highly beneficial." However, the court noted that Leaf could still demonstrate actual damages under *Fletcher* by showing that it could have negotiated for consideration for waiving its consent if given the opportunity. The court held that Leaf would not have been able to extract any payment in return for its consent and therefore did not suffer any actual damages as a result of Invenergy's breach of the Series B Consent Right. Specifically, the court noted that Invenergy had various alternative options to the transaction that triggered the Series B Consent Right, was not facing any financial pressure and therefore would have had significant leverage in any negotiations with Leaf. Additionally, Leaf would have had no real ability to block the deal since Invenergy needed to obtain other investor consents in order for the transaction to close and testimony had shown that Leaf had no intention of delaying or jeopardizing the transaction.

Invenergy also sought a declaratory judgment that Leaf had breached certain put-call provisions of the LLC Agreement that required the parties to "negotiate in good faith" to determine the price at which Invenergy would purchase Leaf's interests by making an aggressive opening demand for the exercise price. Invenergy pointed to Leaf's opening bid of $214 million as evidence of bad faith since this figure was between three and five times as high as the figure offered by certain independent appraisal firms. However, the court found that this figure was supportable and not outside the realm of reason, and held that Leaf's aggressive opening bid alone was not enough to establish bad faith.

Additionally, the court dismissed Invenergy's alternative claim that Leaf breached the implied covenant of good faith and fair dealing by not conducting the appraisal "in good faith." The court first noted that Invenergy did not engage in a methodical analysis of the implied covenant and did not expressly identify the gap it sought to fill, or the terms with which it sought to fill the alleged gap. Invenergy claimed that Leaf breached an implied term to conduct the appraisal in good faith by instructing an independent appraisal firm to determine "Fair Market Value" as the "highest" price that anyone would pay for the company. However, the contractual definition of "Fair Market Value" in the LLC Agreement when Leaf originally invested specifically contemplated that "Fair Market Value" would be determined as the highest price that Invenergy could obtain for the company. The definition of "Fair Market Value" in the LLC Agreement subsequently dropped the "highest price" component. However, the court found that given the history of this provision, it was not unreasonable for Leaf to instruct the independent appraisal firm to determine "Fair Market Value" as the highest price that could be obtained by Invenergy.

24. *Czarninski Baier v. Upper New York Investment Company LLC,* C.A. No. 6896-VCS (Del. Ch. Apr. 16, 2018) (V.C. Slights)

Plaintiff brought an action against, among others, his brother, Johny, and three Delaware LLCs formed by Johny, alleging that defendants engaged in a fraudulent scheme and conspiracy to deprive plaintiff of his inheritance from his parents' estate. The court granted defendants' motion to dismiss based on a number of factors, including, in relevant part, due to lack of personal jurisdiction over Johny.

Plaintiff's father built El Rosado Group (the "Group"), one of the largest commercial groups in Ecuador, and structured the Group as a web of companies owned directly and indirectly by himself, his wife, and his three children that were parties to this action. Plaintiff's father died intestate in Ecuador in 2003 and his mother died in intestate in 2013. Plaintiff brought this action in Delaware because he alleged that Johny wrongfully transferred Group stock that should have been part of the inheritance to British Virgin Island entities and then redomesticated the British Virgin Island entities into the defendant Delaware LLCs.

The court held that it lacked personal jurisdiction over Johny. Plaintiff argued that the court had personal jurisdiction over Johny under 10 *Del C.* § 3104, Delaware's long-arm statute, because Johny "formed his Delaware LLCs in Delaware in furtherance of a fraudulent scheme and the formation of Johny's Delaware LLCs is an integral part of the actions giving rise to Danny's claims." The court explained that under 10 *Del C.* § 3104(c)(1), Johny would have to have transacted business in Delaware and that act of transacting business needed to be an integral component of the transaction to which the cause of action relates. Even though Johny formed the defendant LLCs in Delaware, plaintiff would need to prove that the formation was integral to the alleged fraudulent scheme. The court explained, however, that the formation of the Delaware LLCs was not an integral part of the scheme because the scheme was completed when the Group stock was transferred to British Virgin Island entities, before the Delaware entities were

created. In addition, the LLCs had no offices or employees and did not conduct business in Delaware and therefore had not transacted business in Delaware after their formation.

The court also lacked personal jurisdiction over Johny under Delaware LLC Act Section 18-109, the implied consent statute for non-resident managers of Delaware LLCs. In order to exercise personal jurisdiction under Section 18-109, "the Court must find that: (1) the claims at issue focus on the manager's 'rights, duties, and obligations'; (2) the resolution of the matter is 'inextricably bound up in Delaware law'; and (3) Delaware has a strong interest in providing a forum for the resolution of the type of dispute at issue". The court held that in this action, none of those factors were met. First, as stated above, the alleged fraud was committed outside of Delaware and was not based on Johny's rights, duties or obligations as manager of the Delaware LLCs. Second, the alleged fraud commenced in Ecuador, was completed in the British Virgin Islands and the wrongful removal claims are matters of Israeli or Ecuadorian law, and therefore, was not inextricably linked to Delaware law. Finally, under principles of comity Delaware was not the proper forum when a foreign court already made a substantive ruling relating to the controversy and it is a dispute over foreign assets governed by foreign law.

25. *Meyers v. Quiz-DIA LLC*, C.A. No. 9878-VCL (Del. Ch. Mar. 16, 2018) (V.C. Laster)

In an earlier proceeding, plaintiffs Greg MacDonald and Dennis Smythe had been granted summary judgment (the "Entitlement Decision") entitling them to indemnification from defendants Quizmark LLC and QCE Gift Card LLC arising from losses incurred defending claims filed in Colorado (the "Colorado Action"). The Entitlement Decision did not quantify the indemnification award, instead instructing plaintiffs and defendants to attempt to negotiate an agreement on the amount. The parties could not reach an agreement and an application was filed for a determination under Court of Chancery Rule 88. Consumer Capital Partners LLC ("Consumer Capital"), the entity that had paid all of plaintiffs' legal expenses to date, was a movant in the application and asserted its right of subrogation against defendants.

The court agreed with defendants' initial argument that plaintiffs could not recover any amounts in their own right because they themselves did not pay for any expenses out of pocket. Plaintiffs therefore lacked standing to assert any indemnification claim. To recover the legal fees, Consumer Capital, as the payor, would have to seek subrogation. A claim for subrogation requires a showing that (i) defendant is primarily obligated for the loss, (ii) that the subrogee is secondarily responsible for the loss and (iii) that by paying the loss, the subrogee satisfied defendant's liability for the loss.

Defendants' first argument related to prong (ii) above, that Consumer Capital was not secondarily responsible for the loss. Defendants pointed to the fact that one of the ancillary indemnity agreements entered into between Consumer Capital and Dennis Smythe (the "Smythe Agreement") did not contain explicit language otherwise found in a sister agreement entered into between Consumer Capital and Greg MacDonald (the "MacDonald Agreement"). The MacDonald Agreement stated that the rights provided therein were "supplemental and secondary" to the rights the indemnitee had against the primary indemnitor. Defendants argued that the inclusion of the language in the

MacDonald Agreement and the exclusion of the language in the Smythe Agreement had to be given meaning. This meaning, defendants asserted, was that the Smythe Agreement did not make Consumer Capital's indemnification obligation secondary. The court disagreed, stating that despite the lack of the explicit "secondary language," the Smythe Agreement nonetheless evidenced clear intent to establish a secondary subrogation relationship rather than a primary indemnification relationship. As the court stated, "the language in MacDonald's agreement [was] thus a better version, but the language in Smythe's agreement [did] the trick."

Defendants next argued that Consumer Capital acted as a volunteer when it paid plaintiffs' legal expenses before entering into the above-referenced agreements, making it ineligible for subrogation. Although the court hesitated to apply the volunteer exception, it noted that to the extent the exception did apply, Consumer Capital did not act as a volunteer because Consumer Capital had an existing relationship with the indemnitees and made payment to preserve and further that relationship.

Defendants further claimed that expenses incurred by plaintiffs in connection with a bankruptcy proceeding were unrelated and not subject to indemnification. The court disagreed, noting that plaintiffs were forced to intervene in the bankruptcy action in order to protect their rights in the proceedings to which indemnification directly applied.

Defendants next argued that a fee-sharing arrangement entered into between plaintiffs and the other eight defendants in the Colorado Action (whereby plaintiffs would be responsible for 20% of the legal fees) applied in such a way that defendants' indemnification obligation was similarly limited to 20% of the total amount of that litigation. The court agreed, noting that an allocation agreement cannot be "recut . . . so as to impose a greater burden on the third party than they would have borne themselves."

Consumer Capital also sought to recover certain fees-on-fees in its capacity as subrogee of plaintiffs. The court noted that under Delaware law, successful enforcement of indemnification rights entitles plaintiffs to fees-on-fees and Consumer Capital's status as subrogee was sufficient to entitle it to similar recovery. Consumer Capital sought roughly 39% of the total expenses incurred by plaintiffs when pursuing the claims as fees-on-fees. Fees-on-fees awards must be reasonably proportionate to the level of success achieved. Applying this standard, the court first halved the total expenses of plaintiffs based on the fact that one group of claims failed and the other group of claims succeeded. That halved amount was further reduced by the court to reflect the fact that roughly 20% of the total amount of expenses sought by plaintiffs in the current action was actually awarded. The court then multiplied 20% (representing the amount awarded) by 50% (representing the total expenses minus the failed claims) to reach 10%, which the court held was the proper percentage of fees-on-fees to be awarded from the total expenses and represented a reasonable amount given the degree of success achieved by plaintiffs.

Finally, the court granted pre-judgment interest only from the date at which plaintiffs asserted their rights under the relevant operating agreements. Plaintiffs claimed that such interest should accrue from the time they initially made demand for reimbursement.

Defendants posited, and the court agreed, that pre-judgment interest should not be awarded from the date of a demand for reimbursement when such demand does not specify the source of promise to pay underlying the demand.

26. *REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, No. CV 2017-0708-JRS (Del. Ch. Feb. 28, 2018) (V.C. Slights)

Plaintiff REJV5 AWH Orlando, LLC's predecessor-in-interest and defendant AWH Orlando Member, LLC entered into an LLC Agreement (the "LLC Agreement") for the purpose of pursuing a hotel redevelopment project (the "Project"). Plaintiff and defendant's dispute centered on plaintiff's ability to unconditionally remove defendant as manager of the Project if the Project was not completed by a deadline described in the LLC Agreement. Defendant argued that plaintiff could not remove defendant as manager when it was plaintiff's conduct that caused the failure to complete the Project on time. In an oral ruling on February 1, 2018 (the "Ruling), the court held that plaintiff was entitled to remove defendant as manager based on the express terms of the LLC Agreement. In response, defendant filed an application for certification of an interlocutory appeal or, alternatively, for entry of partial final judgment.

Delaware Supreme Court Rule 42(b)(i) provides that "[n]o interlocutory appeal will be certified by the trial court or accepted by [the Delaware Supreme] Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment." Defendant presented seven different appeal issues to the court in its application. First, defendant argued that the court improperly applied the "prevention doctrine." The court denied the application on this issue, holding that it only applied the prevention doctrine to the facts at hand in the Ruling and did not extend or restrict the doctrine as would be required to grant the application. Plaintiff's second argument was that the court erroneously held that defendant was required to plead a culpable mental state for purposes of pleading bad faith in the implied covenant defense context. The court denied the application on this issue because defendant mischaracterized the Ruling. The court held that the Ruling correctly acknowledged the pleading standard for the implied covenant in Delaware, which requires that facts that support a reasonable inference that a party failed to act in a manner reasonably believed to be in the best interests of the LLC. The third, fourth, fifth and sixth appeal issues were related to the court's interpretation of the LLC Agreement. The court denied plaintiff's application on these issues, stating that issues of contract interpretation are not worthy of interlocutory appeal. The seventh appeal issue was in regards to the court's refusal to find that plaintiff waived arguments that were not properly argued by plaintiff in the briefs. The court held that as this was matter within the court's discretion, it was not an issue for interlocutory appeal. Thus, the court denied defendant's application for certification of an interlocutory appeal. The court also denied defendant's motion for entry of partial final judgment because there were outstanding claims and issues that needed to be resolved before entering final judgement.

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