2021 VIRTUAL SPRING MEETING
OF
ABA BUSINESS LAW SECTION

2021 SUMMARY OF DELAWARE CASE LAW

RELATING TO

ALTERNATIVE ENTITIES[1]

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1. *Dieckman v. Regency GP LP*, C.A. No. 11130-CB (Del. Ch. Feb. 15, 2021) (Chancellor Bouchard)

A class of limited partners of Regency Energy Partners LP ("Regency") brought an action against its general partner for breach of Regency's limited partnership agreement (the "Regency LPA"). This litigation arose from a disputed unit-for-unit merger pursuant to which Energy Transfer Partners L.P. ("ETP") acquired Regency for approximately $10 billion in April 2015 (the "Merger"). Regency and ETP were both controlled by Energy Transfer Equity, L.P. ("ETE") at the time of the Merger.

The Regency LPA established several safe harbors for a potentially conflicted transaction that, if satisfied, would cause the transaction to be deemed to be approved by all of Regency's limited partners and not a breach of the LPA or a breach of any express or implied duty. One safe harbor would be satisfied if a potentially conflicted transaction were approved by a conflicts committee (the "Special Approval" safe harbor). Before trial, the court granted plaintiff's motion for partial summary judgment that the transaction failed to satisfy the Special Approval safe harbor because the conflicts committee was not validly constituted. The failure to satisfy the Special Approval safe harbor stemmed from the appointment of Richard Brannon ("Brannon") to the conflicts committee while he was serving on the board of another entity controlled by ETE, Sunoco LP. The court held that the Special Approval safe harbor contained an implicit requirement that the general partner of Regency would not undermine the protections afforded to unitholders in the safe harbor process (i.e., the general partner would not subvert the special approval process by appointing conflicted members to the conflicts committee). In other words, there was a breach of the implied covenant of good faith and fair dealing because the Special Approval safe harbor contained an implicit condition that the members of the conflicts committee would be genuinely unaffiliated and independent.

At trial, plaintiff contented that the general partner breached an express provision of the Regency LPA requiring that the Merger be fair and reasonable to the partnership. The court held that, notwithstanding the problems associated with Brannon's appointment to the conflicts committee, defendants satisfied their burden and demonstrated that the Merger was fair and reasonable to Regency and its unitholders. Plaintiff also failed to prove that the general partner acted in bad faith or engaged in willful misconduct or fraud so as to avoid a provision in the Regency LPA exculpating the general partner from monetary damages.

Under the terms of the Merger, Regency unit owners received 0.4124 ETP units in exchange for every one Regency unit that they held. Plaintiff's expert calculated one unit of Regency to be worth $29.06 based on a discounted cash flow analysis using a dividend discount model ("DDM"). Plaintiff's expert then calculated one unit of ETP to be worth $57.78 based on its closing stock price at the time of the Merger. According to plaintiff's expert, the difference between the "give" ($29.06) and the "get" ($23.83) of the Merger resulted in alleged per-unit damages of $5.23.

In this post-trial opinion, the court focused on plaintiff's failure to prove damages. The court ultimately denied plaintiff's bid for $1.6 billion in aggregate damages, even after

finding that the defendant general partner had breached the implied covenant of good faith and fair dealing. It summarily rejected the damages calculation made by plaintiff's expert, who failed to provide a valid reason for valuing the Merger consideration based on a DDM-to-market comparison. The court held: "The damages evidence presented at trial confirms the fairness of the Merger consideration. In analyzing the 'give-get' of the Merger, Plaintiff's expert could only demonstrate damages by relying on an illogical apples-to-oranges comparison of Regency's DDM value to the market price of ETP's units. Any comparison of DDM-to-DDM or market-to-market yielded no damages."

The use of apples-to-oranges comparisons (e.g., a DDM-to-market comparison) to justify damages in actions challenging the fairness of stock-for-stock mergers is illogical and at odds with well-established Delaware precedent rejecting similar attempts. In *Sterling v. Mayflower Hotel Corp.*, the Delaware Supreme Court rejected a damages analysis comparing "the market value of the parent stock issued to the stockholders of the subsidiary" to the "*liquidating* value of the subsidiary's stock." The court ruled that the analysis was "[o]n its face. . . unsound, since it attempt[ed] to equate two different standards of value" and that the plaintiffs' position was "wholly untenable." The Court of Chancery has followed *Sterling's* reasoning in several cases. For example, in *Citron v. E.I. DuPont de Nemours & Co.*, the court rejected a damages analysis of plaintiff's expert that was "akin to comparing apples to oranges." The court reasoned that a valuation of Remington that compared "Remington's *adjusted book value* to DuPont's stock *market price*, rather than valuing DuPont and Remington shares in the same manner and then comparing those values" had "no probative value." In *Emerald Partners v. Berlin*, the court explained that a damages analysis of plaintiff's expert that compared "an *undiscounted* going concern value as of one of one date, to a *discounted* going concern value as of a later date" was "flawed because it compare[d] apples to oranges." Based on *Sterling* and its progeny, the court held that the damages analysis of plaintiff's expert was "unreliable" and should be "accorded no weight" because it "attempt[ed] to equate two different standards of value." In sum, the apples-to-oranges analysis of plaintiff's valuation expert – comparing DDM-to-market – was unreliable and every DDM-to-DDM or market-to-market scenario yielded no damages.

2. *AG Resource Holdings v. Terral*, C.A. No. 2020-0850-JRS (Del. Ch. Feb 10, 2021) (V.C. Slights)

In this case, the Court of Chancery addressed claims for breach of contract stemming from the termination of an employee for violating an LLC agreement and employment agreement. Plaintiff AG Resource Holdings, LLC ("AG") is a Delaware limited liability company with operations in Louisiana. Defendant Thomas Terral filed a motion to dismiss for improper venue under Rule 12(b)(3) and failure to state a claim under Rule 12(b)(6). The court denied defendant's motion to dismiss but stayed the litigation pending outcome of the defendant's breach of contract claim in Louisiana.

Terral was a co-founder of AG and served as an executive in AG's Louisiana offices. AG terminated Terral for cause, alleging that he was secretly plotting to leave AG and steal its business opportunities in violation of both his employment agreement and AG's LLC agreements. AG's LLC agreement included a non-compete provision and a

provision requiring Terral to act in good faith. The LLC agreement also contained a Delaware choice of law provision and a Delaware choice of forum provision. Terral's employment agreement with the AG included a duplicative non-compete provision and other restrictive covenants, including a non-solicitation provision, a non-disparagement provision, a non-interference provision, and an agreement not to disclose confidential information. His employment agreement chose Delaware as the governing law but did not include a choice of forum provision.

Terral initiated litigation between the parties by filing suit in Louisiana, which has employee-friendly statutes regarding non-compete provisions. Terral sought a declaration that the non-compete provision in his employment agreement was unenforceable under Louisiana law and that the selection of Delaware law in the employment agreement was null and void. For relief, Terral sought an injunction that would prohibit AG from enforcing this non-compete provision. Shortly after Terral filed suit in Louisiana, AG filed suit against Terral in Delaware. AG sought damages for breach of contract and an order enjoining Terral from further competing with AG in violation of the employment agreement and LLC agreement.

The Louisiana court granted Terral's motion for a preliminary injunction, holding that the Delaware choice of law provision in the employment agreement was null and void under Louisiana law and that the non-compete was likely unenforceable.

Turning to Delaware, the Court of Chancery first considered the claims asserted under the employment agreement. The court focused on the fact that the Louisiana court had already ruled that the non-compete provision in the employment contract was likely unenforceable under Louisiana law. The court noted that the Louisiana court's decision on this point of law should be afforded deference in order to avoid disparate rulings in separate courts. The court then applied a choice of law analysis and determined that Louisiana had a compelling interest in enforcing the employment rights of its citizens who work in that state. AG had argued that high-level executives like Terral should be treated differently than lower-level employees because his conduct directly affected the internal affairs of a Delaware entity. As such, AG argued that Delaware courts have a strong interest in protecting the internal affairs of Delaware entities. The court opted not to "dwell" on this argument, nothing that this factor and other minor factors "do not push the needle toward either Louisiana or Delaware." For these reasons, the Delaware court determined that Louisiana was "best suited to address the claims under the Employment Agreement," and it stayed AG's claims stemming from breach of the employment agreement. However, the court clarified that AG's claims were merely stayed, meaning that AG parties could return to Delaware after fully litigating the matter in Louisiana.

Turning next to the claim for breach of the LLC agreement, the court recognized that AG's claims for breach of the LLC agreement differed from breach of the employment agreement The court explained that Terral's actions vis-à-vis the LLC agreement directly presented an issue of internal governance and fiduciary obligations owed to Delaware entities. Therefore, Louisiana law was wholly inapplicable to claims for breach of the LLC Agreement. AG thus had "every right to litigate those claims in its choice of

forum." The court found that the complaint sufficiently alleged that Terral had provided confidential company information to competitors of AG in a manner that subverted AG's business. The complaint also sufficiently alleged that Terral recruited company employees to engage in unauthorized acts and that Terral had intentionally interfered with AG's customer relationships. Thus, taking all the factual allegations in the complaint as true, Terral's actions allowed a reasonable inference that he violated LLC Agreement, and therefore the motion to dismiss on this count was dismissed.

3. *Mehra v. Teller*, No. CV 2019-0812-KSJM, 2021 WL 300352 (Del. Ch. Jan. 29, 2021) (V.C. McCormick)

Plaintiff Sanjiv Mehra ("Mehra") was hired by defendant Jonathan Teller ("Teller") as an executive for the companies managed by EOS Investor Holding Company, LLC ("Holdco"). Teller founded Holdco and controlled eighty-five percent of Holdco's equity while Mehra eventually controlled fifteen percent of Holdco's equity. The Holdco LLC Agreement (the "LLC Agreement") made Teller and Mehra the members of Holdco's two-person board of managers and required unanimity to effect board action. In the event of a deadlock on a board decision, the LLC Agreement required that Holdco be automatically dissolved. Upon a dissolution due to a deadlock, Holdco would distribute in kind its shares of its wholly owned subsidiary to Holdco members in proportion to their equity stakes, and the members would replicate their distribution rights from Holdco at the subsidiary level.

Holdco was successful for several years, but then faced a series of setbacks and financial difficulties, and Holdco's distributions eventually ceased. Teller subsequently sought to remove Mehra from his executive position and end the shared-control arrangement. Teller called a meeting of the Holdco board of managers and proposed a resolution to remove Mehra as the CEO of a Holdco subsidiary. Mehra refused to vote on the proposal and instead proposed to remove Teller from his positions. Teller then declared the board in deadlock and asserted that Holdco was automatically dissolved. Teller distributed to Mehra his proportionate equity in Holdco's subsidiary, but did not make provision to replicate Mehra's distribution rights at the subsidiary level. Mehra filed suit to invalidate the dissolution and restore the shared-control arrangement. The court bifurcated the case and considered the narrow issue of whether Holdco's dissolution was invalid.

The court found that, although Teller contrived the circumstances giving rise to the deadlock, Teller proved that the parties had an irreconcilable disagreement concerning Mehra's continued position as CEO of a Holdco subsidiary. The court also found that Teller breached his obligation to replicate Mehra's distributions right, but determined that was not a basis to invalidate the dissolution. The court noted that the LLC Agreement did not define when a deadlock occurred, and Mehra argued that his refusal to vote meant a deadlock did not exist. The court observed that LLC agreements are interpreted like other contracts, viewed in totality, with consideration objectively given to the language the parties used in the contract. As the LLC Agreement lacked direction on what constituted a deadlock, the court relied on statutory guidance and the court's precedent to define the term. The court determined that "deadlock" means a failure to meet a voting threshold, which – depending on the circumstances – could result from the presence of

negative votes or the lack of affirmative votes. The court also noted that a deadlock must be genuine for it to have legal effect, and that for a deadlock to justify dissolution, the decision at issue must be qualitatively significant. According to the court, serious managerial issues typically satisfy the qualitatively significant requirement, as was the case here. As the limited issue before the court was the validity of the dissolution, the court did not address remedies for Teller's failure to replicate the distribution arrangement at the Holdco subsidiary.

4. *In re Dissolution of Jeffco Mgmt., LLC,* No. CV 2018-0027-PAF, 2021 WL 282634 (Del. Ch. Jan. 28, 2021) (V.C. Fioravanti)

Jeffrey Miller ("Miller") and Jeffrey Tabak ("Tabak") (together, the "Members") were equal managing members in Jeffco Management, LLC ("Jeffco"). After disagreement and deadlock between the Members, the court in an earlier decision had granted a decree of judicial dissolution of Jeffco. The court then entered an order appointing an independent receiver (the "Receiver") to wind up Jeffco's affairs (the "Receivership Order").

The Receivership Order gave the Receiver "full authority over the business and affairs of Jeffco," and directed the Receiver to confer with the Members and submit a proposed plan of dissolution, subject to court approval, that would "provide for the prompt distribution of Jeffco's assets and the winding up of its affairs." The Receivership Order did not establish a standard of review for the Receiver's decisions.

The Receiver filed a Motion to Approve Plan of Distribution and Dissolution for Jeffco Management, LLC and for Related Relief (the "Plan of Distribution"). The Receiver determined Jeffco's assets were illiquid and that any distribution of Jeffco's assets to the Members should be in kind. The Receiver also determined that Miller's capital account was positive, while Tabak's capital account was negative. Thus, the Plan of Distribution proposed to distribute Jeffco's assets in kind to Miller. Tabak submitted objections to the Plan of Distribution.

One of the questions posed to the court was the standard of review to be applied to the Receiver's determinations. The court determined that each of the Receiver's challenged determinations should be analyzed independently, with some being subject to *de novo* review by the court and others to a deferential view. As the Receivership Order did not include the applicable standard of review, the court looked to the relevant statutes, rules, and case law for guidance. Delaware LLC Act Section 18-805 and the applicable Court of Chancery Rules do not provide a standard of review; however, the Court of Chancery Rules do indicate that the court should hold a hearing on exceptions to a receiver's determinations as to claims and accounts. The court noted that the court in *B.E. Capital Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 171 A.3d 140 (Del. Ch. 2017) stated that the Rules' references to a hearing suggest that *de novo* hearings are permissible. The court in *B.E. Capital* held that a receiver's decision to disallow a creditor's claim against a corporation pursuant to Section 296 of the Delaware General Corporation Law was subject to *de novo* review, noting *de novo* reviews were inherent in receivership actions at common law. However, the court in *B.E. Capital* acknowledged that a receiver may

perform other tasks to which a deferential standard, rather than *de novo*, may be appropriate, such as business decisions.

The court concluded that the Receiver's decision to deny Tabak's claim for advanced expenses and the Receiver's conclusion that Tabak had a negative capital account balance were subject to a *de novo* review while the Receiver's remaining decisions appeared to be discretionary business decisions permitted under the Jeffco LLC Agreement, and therefore were subject to a deferential standard of review.

5. *Morris v. Spectra Energy Partners (DE) GP, LP*, No. 489, 2019 (Del. Jan. 22, 2021) (Chief Justice Seitz)

In this case plaintiff, who was an owner of common units in Spectra Energy Partners, LP, a Delaware master limited partnership (the "MLP"), challenged a merger (the "Merger") between the MLP and Enbridge, Inc. ("Enbridge"), alleging that the general partner of the MLP agreed to the Merger in bad faith because it failed to receive any value for a derivative litigation asset. Plaintiff brought the action directly as a class action on behalf of all owners of public units of the MLP from May 17, 2018 through December 17, 2018 against defendant, Spectra Energy Partners (DE) GP, LP (the "GP"), a Delaware limited liability company and the general partner of the MLP. Enbridge was the ultimate parent of the MLP. Enbridge's predecessor-in-interest was Spectra Energy Corp (the "Sponsor"). Prior to the Merger, plaintiff had filed a derivative action (the "Derivative Claim") in connection with a reverse dropdown transaction in which the MLP sold pipeline interests to the Sponsor (the "Reverse Dropdown"). The Derivative Claim alleged that the GP breached its good faith obligation under the partnership agreement of the MLP because the MLP did not receive sufficient value under the Reverse Dropdown. In June 2017, the court declined to grant the GP's motion to dismiss, holding that plaintiff made adequate allegations showing that under reasonably conceivable circumstances a facially unreasonable gap in consideration existed sufficient to infer subjective bad faith.

Enbridge acquired the Sponsor in February 2017 in a stock-for-stock merger transaction. On May 17, 2018 Enbridge proposed the Merger, in which the public unitholders of the MLP would receive 1.0123 common shares of Enbridge in exchange for each publicly held common unit of the MLP. Upon the consummation of the Merger, plaintiff would lose standing in the Derivative Claim because he would no longer be a unitholder of the MLP. The GP's conflicts committee (the "2018 Committee") accepted an exchange ratio for the Merger of 1.111 Enbridge common share per MLP common unit and determined that the Merger was fair and reasonable to, and in the best interest of, the MLP and its public unitholders and the Merger was approved by the MLP's unitholders on December 13, 2018. After the Merger closed, the court granted defendant's motion to dismiss the Derivative Claim because plaintiff lost standing to continue a derivative suit when he ceased to be a unitholder of the MLP.

Plaintiff alleged that the GP allowed Enbridge to manufacture the Merger on terms that were unfair and unreasonable to the MLP and its public unitholders and that were not approved in good faith by the 2018 Committee or the GP's board of directors in breach of

the MLP's limited partnership agreement. Defendant filed a motion to dismiss and the Court of Chancery granted defendants' motion to dismiss for lack of standing (the "Prior Decision"). On appeal, in this decision, the Supreme Court reversed the Court of Chancery's judgment and held that plaintiff sufficiently pled a direct claim attacking the fairness of the Merger itself for the GP's failure to secure value

In the Prior Decision, the Court of Chancery applied the three-part test for claims challenging a merger because the equity owners were not being fairly compensated for the value of material derivative claims from its decision in *In re Primedia, Inc. Shareholders Litigation*. On appeal, the Supreme Court agreed that the *Primedia* framework provided a reasonable basis to conduct a pleadings-based analysis to evaluate standing on the motion to dismiss. Under the *Primedia* test, first, the underlying derivative claims had to be viable, meaning they would survive a motion to dismiss; second, the derivative claim recovery as pled must have been material in relation to the merger consideration; and third, the complaint must allege that the acquirer would not assert the underlying derivative claim and did not provide value for it in the merger. The parties agreed that the first and third prongs of the *Primedia* test were met. Plaintiff survived a motion to dismiss on the Derivative Claim in 2017, which was evidence that the underlying derivative claim was viable, and the record showed that the public unitholders, including plaintiff, did not receive value for the Derivative Claim and the acquirer would not assert the Derivative Claim. The Court of Chancery, however, held that the second prong was not met. The Prior Decision explained that although the Derivative Claim sought damages in the amount of $661 million, the total value was only $28,092,500, which represented less than 1% of the total value of the Merger. First, the Court of Chancery discounted the total to $112,370,000 to reflect only the minority unitholders' beneficial interest in the litigation recovery, which was only 17%. Second, the Court of Chancery discounted the value of the Derivative Claim to 25% percent of the already discounted total based on plaintiff's chance of success in the litigation of the Derivative Claim due to the difficulties that the that plaintiff would have faced in succeeding. The Court of Chancery held that 1% was not material and therefore plaintiff did not have standing to pursue his claims.

On appeal, plaintiff argued that the Court of Chancery should not have dismissed his complaint for lack of standing because he pled in detail a direct claim that satisfied the *Primedia* factors and if the Court of Chancery had accepted his well-pleaded factual allegations as true and drawn all reasonable inferences in his favor, it would not have discounted the potential value of the Derivative Claim such that it became immaterial to the merger value. Defendant argued that the Derivative Claim should have been discounted for litigation risk.

The Supreme Court explained that the question on appeal was whether the Court of Chancery followed the correct standard of review on the motion to dismiss and accepted as true all reasonable factual allegations in the complaint and considered whether it was reasonably conceivable that plaintiff asserted a direct claim that could lead to a $661 million recovery on the Derivative Claims. The Supreme Court noted that for purposes of a motion to dismiss, if it was reasonably conceivable that plaintiff could have

recovered the damages claimed in the complaint, the court had to accept that allegation as true. The Supreme Court held that the Court of Chancery erred in its motion to dismiss analysis in two different ways. First, it held that applying a further litigation risk discount to the Derivative Claim at the pleading stage was inconsistent with the court's standard of review on a motion to dismiss for lack of standing. The Derivative Claim survived a motion to dismiss prior to the Merger and, in its decision on the Derivative Claim, the Court of Chancery held that it was reasonably conceivable that the GP acted in subjective bad faith. Therefore, the Supreme Court explained, it was also reasonably conceivable that, had plaintiff succeeded in the Derivative Claim, the recovery would have been at least $660 million.

Second, the Supreme Court held that even if it was proper to discount the $661 million to $112 million in damages to reflect the public unitholders' interest in the Derivative Claim, the court should have compared the $112 million pro rata interest in the Derivative Claim recovery to the public unitholders' proportional interest in the merger consideration, which was valued at $3.3 billion. Therefore, the proportion of the value of the merger consideration that reflected the unitholders' interest was $561 million. The Supreme Court held that, under such calculation, the derivative claim was material at the motion to dismiss claim.

For the reasons explained above, the Supreme Court held that Plaintiff sufficiently pled a claim against defendants and reversed the Court of Chancery's judgment on the motion to dismiss and remanded for further proceedings.

6. *Int'l Rail Partners LLC v. Am. Rail Partners, LLC*, No. CV 2020-0177-PAF, 2020 WL 6882105 (Del. Ch. Nov. 24, 2020), cert. denied, (Del. Ch. 2020), and appeal refused, No. 436, 2020, 2021 WL 225823 (Del. Jan. 21, 2021) (V.C. Fioravanti)

Plaintiff International Rail Partners LLC ("IRP") and non-party Newco SBS Holdings, LLC ("SBS") were the two members of defendant American Rail Partners, LLC ("ARL"). Plaintiff Boca Equity Partners LLC ("BEP") owned 100% of IRP. Plaintiff Gary O. Marino ("Marino") controlled BEP and was IRP's Chief Executive Officer ("CEO"). ARL was governed by an Amended and Restated Limited Liability Company Agreement (the "LLC Agreement").

Following disagreements between IRL and SBS, the Management Agreement of ARL was terminated and ARL filed suit against plaintiffs in the Delaware Superior Court (the "Superior Court Action"). ARL alleged that IRP and Marino engaged in mismanagement and unjustly enriched Marino and his affiliates at the expense of ARL. Plaintiffs demanded advancement and indemnification to cover the claims asserted in the Superior Court Action and filed a verified complaint in the Court of Chancery for advancement pursuant to Section 18-108 of the Delaware Limited Liability Company Act (the "LLC Act").

The court concluded that the LLC Agreement unambiguously provided that ARL must advance the reasonable attorneys' fees and expenses incurred by plaintiffs in defending the claims asserted in the Superior Court Action. The cross motions turned on the

construction of the LLC Agreement. The court noted that Section 18-108 of the LLC Act gives limited liability companies authority to provide for indemnity and advancement, and is broadly enabling. The LLC Agreement contained a provision that provided for indemnification and advancement (the "Indemnification and Advancement Provision"), which unambiguously covered fees and expenses "*arising from any and all claims*." The provision used the precise language of the LLC Act.

Defendant argued that plaintiffs could not be indemnified for any of the claims in the Superior Court Action as the Indemnification and Advancement Provision did not cover "first-party claims" by ARL against plaintiffs. Defendant contended that such a provision may only cover first-party claims if it expressly said so, based on a line of decisions that established a presumption that a standard indemnification provision in a bilateral commercial contract would not be presumed to provide for fee-shifting. However, the court disagreed.

The court noted that the parties presented no cases that applied the first-party presumption to an indemnification or advancement provision in a company's operating agreement. The court stated that such provisions in LLC agreements are derived from clear statutory authority and apply much more broadly than typical commercial contracts. The court noted that the LLC Act allows a limited liability company to indemnify any person to the fullest extent possible by contract. The court also discussed the broad public policy of indemnification and advancement provisions, to encourage persons to serve in a company. Due to the statutory framework, the broad language of the Indemnification and Advancement Provision, and the strong public policy in favor of indemnification and advancement, the court refused to apply the interpretive presumption applied to commercial contracts to the LLC Agreement. The court further stated that the existence of a fee shifting provision in the LLC Agreement that expressly applied only to Members, did not negate the indemnification and advancement rights.

7. *Durham v. Grapetree, LLC,* C.A. No. 2020-0175-SG (Del. Ch. Jan. 11, 2021) (V.C. Glasscock)

Plaintiff, Andrew C. Durham, filed a claim for damages against defendant, Grapetree, LLC ("Grapetree"), a Delaware limited liability company the sole asset of which was a rental property in St. Lucia known as "Les Chaudieres," and Grapetree moved to dismiss. Plaintiff was one of five members of Grapetree. Plaintiff sought recover for two different actions against Grapetree. First, he sought recovery under theories of breach of fiduciary duty, breach of contract, and conversion because Grapetree had a policy to permit members to reserve two weeks for free at Les Chaudieres and when plaintiff requested two weeks that were, at the time, not being rented, Grapetree rejected plaintiff's request. Second, plaintiff sought recovery for reimbursement for expenses arising from a trip to St. Lucia in 2017 to sign a lease-purchase agreement on behalf of Grapetree. The court granted Grapetree's motion to dismiss with respect to each claim.

With regard to the first claim, the court explained that while Grapretree did have a policy that members could reserve up to two weeks of time at Les Chaudieres per year, presumably free, at a time of the member's choosing so long as the property had not been

rented for that time, that policy did not arise from the operating agreement of Grapetree (the "Operating Agreement"). Instead the policy was set out in a letter to plaintiff sent by the managers of Grapetree on May 31, 2019 (the "Letter"). For purposes of the Motion to Dismiss, the court assumed plaintiff requested the two weeks at Les Chaudieres prior to any rental contract for those two weeks and that the policy provided that plaintiff's request was effective at the time it was made. Plaintiff argued that the denial of the two-week request was actionable because it was a breach of the fiduciary duty of loyalty by Grapetree. The court, however, held that Grapetree did not owe common-law fiduciary duties to its members. Plaintiff further argued that Grapetree breached the implied covenant of good faith and fair dealing, but the court explained that plaintiff identified no "gap" in the writing on which he relied to which the covenant could apply. Further, plaintiff alleged "theft by conversion" but the court held that plaintiff had no present right of possession at the time of the alleged wrong, a requirement of "theft by conversion." Instead, plaintiff alleged he was denied a future (not present) right. Finally, plaintiff argued that Grapetree breached a contract with him by violating the policy set out in the Letter. The court held, however, that the Letter did not form a contract between plaintiff and Grapetree because there was no meeting of the minds over the terms and no consideration was exchanged.

In plaintiff's complaint, he contended that two of the managers manipulated the member reservation policy of Grapetree so as to deny him the benefit of his time at Les Chaudieres. The court explained that while plaintiff may have a claim of breach of fiduciary duty against such managers, he only sued Grapetree in this instance and he had no claim in contract or tort against Grapetree under the facts of the complaint.

With respect to plaintiff's claim for reimbursement for travel in 2017, plaintiff alleged that Grapetree breached a contract with him when it did not reimburse him for expenses when he flew to St. Lucia to sign a lease-purchase agreement for Grapetree. Plaintiff based this claim on a letter a manager of Grapetree sent requesting the members to use powers of attorney provided by Grapetree's St. Lucian attorney to sign such lease. The letter stated that a member could, instead of using powers of attorney, fly to St. Lucia to sign the lease. When plaintiff told the managers he would fly to St. Lucia, they told him Grapetree would not reimburse his costs. The court explained that under the Operating Agreement, managers are responsible for incurring and paying expenses of Grapetree, but there was no promise of reimbursement between plaintiff and any manager. Therefore, Grapetree did not breach a contract with plaintiff. For the reasons described above, Grapetree's motion to dismiss was granted with respect to both of plaintiff's claims for recovery.

8. *Roccia v. Mugica,* No. CV 2020-0641-MTZ, 2020 WL 6390038 (Del. Ch. Dec. 29, 2020) (V.C. Zurn)

Plaintiffs, Lorenzo Roccia ("Roccia") and Transatlantic Group Partners, LLC ("Transatlantic"), and defendants, Martin Mugica ("Mugica") and Ultiner LLC ("Ultiner"), along with nominal defendant Skyline Renewables, LLC ("Skyline") were parties in three nested entities. Transatlantic, Roccia's entity, and Ultiner, Mugica's entity, evenly split ownership of Transatlantic Ultiner LLC ("Managing Member"),

which in turn was the managing member of Transatlantic Power Holdings LLC ("Holdings"). Holdings owned 100% of the non-voting Class B shares and 0.5% of the Class A voting shares of nominal defendant Skyline, an investment company through which its owners invested in renewable energy ventures.

Managing Member, Holdings and Skyline were governed by a nested set of operating agreements (the "Skyline Operating Agreement," the "Holdings Operating Agreement," and the "Managing Member Operating Agreement," respectively). Managing Member was run by a two-member board of managers (the "Managing Member Board"), comprised of Roccia and Mugica. The Holdings Operating Agreement created a management structure comprised of the CEO and a four-member board of managers (the "Holdings Board") and delegated certain authority to Managing Member. Roccia and Mugica were both members of the Holdings Board. Additionally, Roccia served as the Chairman of Skyline Board and Mugica served as President and CEO of Skyline. The Skyline Operating Agreement established a management structure similar to that of Holdings, comprised of the CEO and a five-member board (the "Skyline Board). Two of the managers on Skyline's Board were appointed by Holdings and three were appointed by Skyline's other investor, Windpower I. Roccia and Mugica were the two managers appointed by Holdings to the Skyline Board. Identical to Holdings, Roccia served as the Chairman of Skyline Board and Mugica served as Skyline's President and CEO. The Skyline Operating Agreement also delegated certain authority to Holdings.

On May 11, 2020 Mugica attempted to remove Roccia from the Skyline Board. Mugica wrote a letter to Roccia, the Skyline Board members and the Holdings Board members (the "Removal Letter") purporting that his position as President and CEO of Holdings granted him the power to remove Roccia. On July 31, 2020, plaintiffs filed a complaint in the Court of Chancery under Section 18-110 of the Delaware LLC Act seeking an injunction to prevent Roccia's removal from the Skyline Board, a declaration that the purported removal was void *ab initio*, and attorney's fees pursuant to the Skyline Operating Agreement. The parties thereafter agreed to present the matter to the court through cross-motions for summary judgment.

The court considered two questions of contract interpretation. First, may Holdings remove Roccia from the Skyline Board under the relevant agreements? Second, if so, did Mugica have the authority to exercise that power by virtue of his position as Holding's President and CEO?

The court explained that, as Delaware LLCs are creatures of contract, the bargained-for operating agreement must be the start and end points to determine the parties' intent in a governance dispute. The court would thus look to the four corners of the agreements to determine the plain meaning of the agreements and give effect to all of their provisions. Upon review of the Holdings Operating Agreement and Mugica's employment contract, the court held that Mugica's attempt to oust Roccia from the Skyline Board was ineffective because Mugica did not have the authority on behalf of Holdings to do so. Based on the plain meaning of both the Holdings Operating Agreement and Mugica's employment contract, Mugica was not empowered by Holdings to act on Holdings'

behalf to remove a director of an affiliated entity. The court assumed that the Skyline Operating Agreement granted Holdings the power to remove Roccia from the Skyline Board but concluded that Holdings did not delegate that power to Mugica. Mugica was granted only limited authority under the Holdings Operating Agreement.

Under the Holdings Operating Agreement, the Holdings Board possessed the full power over Holdings' affairs, including the "full and complete" authority to act "on behalf of and in the name of the Company," while only a subset of that authority was delegated to Mugica. Mugica's employment agreement characterized his powers and duties as those of a chief executive, and emphasized Mugica's broad authority to supervise and control Holdings' "business and operations," stating that Mugica had "paramount and full responsibility and power for the general supervision, direction and control of the business and operations of [Holdings] and the officers and employees of [Holdings]". The Holdings Operating Agreement contained similar "paramount and full responsibility" language. The court thus found that Holdings delegated four branches of authority to Mugica: (1) management powers typically vested in the office of president of a corporation, (2) control of Holdings' business and operations, (3) control over Holdings' officers and employees, and (4) other duties as assigned by the Holdings Board. None of the four categories gave Mugica the authority to exercise Holdings' right to remove a director of an affiliated company.

Regarding the first category, the court stated that Holdings, by giving Mugica the powers of a president of a corporation, gave Mugica only the authority to bind the company in the ordinary course of business. Removal of a director of an affiliated company does not fall under the usual or ordinary business of a company, but rather is an extraordinary event and constitutes an exercise of Holdings' membership rights under the Skyline Operating Agreement. The court then determined that the second branch of Mugica's authority granted Mugica the power to supervise Holdings' commercial enterprise and activities and was focused on operational matters of the company. Citing *Miramar Police Officers Retirement Plan v. Murdoch*, the court stated that "business" means the commercial enterprise of company and "operations" means the commercial activities of a company, which are distinguished from corporate governance matters. The court thus concluded that Mugica's "paramount and full responsibility and power" was only over the company's commercial enterprise and activities.

The third branch likewise did not grant Mugica the authority to remove Roccia from the Skyline Board. Holdings' designees on the Skyline Board were managers of the affiliate companies, not officers or employees of Holdings. As Roccia was a manager, the court found the authority in question did not reach him; thus Mugica did not have the power under the third branch to remove Roccia from the Skyline Board. Further, the court found no evidence under the fourth branch that the Holdings Board delegated any authority to Mugica by which he could exercise Holdings' removal power.

The court was not persuaded by Mugica's argument that he had absolute power at Holdings aside from ten restrictions enumerated in his employment agreement. Further, the court determined that the Holding Board's promise not to interfere in Mugica's

powers delegated under the employment agreement did not expand Mugica's powers to an area not contemplated by the agreements. Based on its findings, the court thus granted plaintiffs' Motion for Summary Judgment.

9. *Franco v. Avalon Freight Services*, C.A. No. 2020-0608-MTZ, order (Del. Ch. Dec. 8, 2020) (V.C. Zurn)

Plaintiff Franco filed an action under 6 *Del. C.* § 18-110 and 6 *Del. C.* § 18-111 that sought a declaration that a director on the Avalon Freight Services LLC ("Avalon") Board of Directors should be removed. Plaintiff argued that Avalon's LLC agreement provided that if the two groups indirectly in control of Avalon could not agree on the continued service of the director in question (the "Tie-Breaking Director"), then either group could remove the Tie-Breaking Director and plaintiff sought to exercise that right. The court disagreed with plaintiff's interpretation of the Avalon LLC agreement and held that plaintiff did not have the authority unilaterally to remove the Tie-Breaking Director from the Board.

Avalon was a Delaware limited liability company the sole member of which was GH Channel Holding LLC ("GH"). GH was equally owned and controlled by two groups, one controlled by plaintiff Franco and the other by defendant Bombard.

Section 3.1 of Avalon's LLC agreement provided that the company was managed by a five-member board of directors: two of the director positions were reserved for defendant and his nominee and two for plaintiff and his nominee. The LLC agreement provided that the fifth director, the Tie-Breaking Director "shall be mutually agreed upon and appointed by Bombard and Franco, who shall initially be Doug Houghton." Plaintiff's complaint did not identify the underlying dispute with defendant or Houghton, nor did it allege any misconduct on the part of Houghton.

The issue presented to the court was whether Section 3.1 of the LLC agreement, which did not address removal of any directors, required continuous, mutual agreement of plaintiff and defendant to keep Houghton as the Tie-Breaking Director.

Plaintiff argued that under the plain meaning of Section 3.1, if plaintiff and defendant ever failed to mutually agree on the Tie-Breaking Director, the director could be removed and replaced with a new Tie-Breaking Director "mutually agreed upon and appointed by Franco and Bombard." In interpreting Section 3.1, plaintiff argued that the use of "and" in the phrase "mutually agreed upon and appointed" showed that the parties must agree to the Tie-Breaking Director, otherwise the words "agreed upon and" would be rendered meaningless. Plaintiff further argued that Section 3.1 was designed to prevent one side or the other from unilaterally controlling the company to the detriment of the other. As such, if the Tie-Breaking Director became aligned with either side, either the plaintiff or the defendant could remove the Tie-Breaking Director and restore balance, thus protecting both factions from the Tie-Breaking Director aligning himself or herself with the opposite faction.

Defendant and Houghton argued that Section 3.1 did not permit unilateral removal of the Tie-Breaking Director. Defendant contended if the parties intended to give themselves unilateral removal power, they could have easily drafted a provision in the LLC agreement requiring periodic assessments of the Tie-Breaking Director's mutual acceptability.

The court agreed with the defendant that Section 3.1 did not empower Franco or Bombard to unilaterally remove Houghton from the Avalon Board. First the court noted that Section 3.1 only addressed appointing members of the Avalon Board, not removing them. Further, in interpreting the phrase "mutually agreed upon and appointed," the court noted that both "agreed" and "appointed" were in the past tense, indicating that Houghton's appointment, and the factions' agreement to that appointment, were one-time events Thus, because agreement and appointment only happened upon Houghton's initial ascension to the board, Houghton's continued service on the board was not dependent on the continued approval of either plaintiff or defendant. The court also noted the practical difficulty implied by Franco's interpretation of Section 3.1 as to maintaining the "balance of power between Franco and Bombard," explaining that protecting Houghton from removal protected the independence of the Tie-Breaking Director. Unilateral removal power, by contrast, would undermine neutrality and disincentivize cooperation. Consequently, the court denied plaintiff's motion for summary judgment motion and dismissed the action.

10. *Lipman v. GPB Capital Holdings LLC*, C.A. No. 2020-0054-SG (Del. Ch. Nov. 18, 2020) (V.C. Glasscock)

Plaintiffs Jeff Lipman and Carol Lipman were limited partners of both GPB Holdings II, LP ("Holdings II") and GPB Automotive Portfolio, LP ("Auto", and together with Holdings II, the "Partnerships"). Holdings II acquired and operated automotive retail, healthcare, and information technology companies. Auto acquired and operated automotive dealerships. Defendant GPB Capital Holdings, LLC ("GPB") was the general partner of both Holdings II and Auto. GPB operated a holding company and managed several investment funds in different industries. Defendant David Gentile ("Gentile") was the founder, sole member, and Chief Executive Officer of GPB. Defendant Jeffrey Lash ("Lash") managed the retail dealerships in which GPB had majority control. Finally, defendant Jeffry Schneider ("Schneider") was the founder of Ascendant Alternative Strategies, LLC, an investment firm that was the dealer manager of GPB's funds.

In July 2017, GPB sued Patrick DiBre ("DiBre"), one of its former automotive retail directors. GPB alleged that DiBre had failed to complete auto dealership sales valued at $40 million. DiBre then filed a counterclaim in March 2018 (the "DiBre Counterclaim"), asserting that "senior GPB executives had engaged in a pattern of self-dealing, effectively diverting Partnership assets to themselves without disclosing their self-interested transactions." Plaintiffs incorporated the allegations in the DiBre Counterclaim by reference. David Rosenberg ("Rosenberg"), the CEO of Prime Automotive Group, also filed a complaint against GPB (the "Rosenberg Complaint") because it failed to pay $5.9 million that was allegedly owed under a purchase agreement. The Rosenberg Complaint

maintained that GPB refused to pay Rosenberg and attempted to replace Rosenberg as CEO of Prime Automotive Group in retaliation for his reporting of alleged financial misconduct by GPB to the Partnerships' auditor. According to the Rosenberg Complaint, this financial misconduct included "Gentile and Lash engaging in fictitious transactions and other improper procedures to enrich themselves and inflate the Partnerships' financial results." Plaintiffs also incorporated the allegations in the Rosenberg Complaint by reference.

Plaintiffs alleged that this financial misconduct caused GPB to be unable to perform its obligations to the Partnerships. On December 31, 2018, GPB reported that the value of its portfolio had declined from $1.8 billion to $1.1 billion. GPB also disclosed that Holdings II had lost 25.4% of its fair market value and Auto had lost 39% of its fair market value. As of November 2020, the Partnerships were the subjects of multiple investigative proceedings in relation to the problems described above. Plaintiffs brought a derivative suit on behalf of the Partnerships alleging (i) breaches of fiduciary duty and (ii) aiding and abetting breaches of fiduciary duty. Defendants moved to dismiss plaintiffs' complaint.

Unless a plaintiff can demonstrate that demand should be excused as futile, a limited partner seeking to proceed derivatively on behalf of a partnership must first make a demand on the general partner to pursue the claim. In this litigation, plaintiffs made no demand on GPB. The court ultimately held that demand was excused based on futility grounds and plaintiffs could proceed derivatively. The court found that plaintiffs had "pled particularized facts raising a pleading-stage doubt about the independence" of GPB. The court explained that Gentile had a "disabling interest for pre-suit demand purposes" based on plaintiffs' allegations that he engaged in self-dealing conduct by wrongfully diverting partnership funds to himself and the other individual defendants. Because this litigation risked a substantial likelihood of liability or harm against GPB's controller (Gentile), the court reasoned that GPB would be unable to evaluate a demand using its business judgment.

The court concluded at the pleading stage that (i) Gentile owed fiduciary duties to the Partnerships and (ii) it was reasonably conceivable that he violated them. The court cited *Gotham Partners* for the proposition that "[u]nder settled precedent, directors of corporate general partners of limited partnerships have been held to be fiduciaries of the limited partners, and subject to liability for implementing unfair, self-dealing transactions." The court also referred to *USACafes*, which held 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." In this case, plaintiffs alleged that Gentile and Schneider wrongfully diverted more than $4 million from reinsurance funds and manufacturer rebates that should have gone to dealerships and ultimately to the Partnerships. Plaintiffs also alleged that Gentile engaged in other self-dealing transactions, such as transferring $201,706 to other entities under his control and diverting $2 million in revenue to entities under his control. Because those who effectively control a partnership – through exercising control of its assets – owe fiduciary duties to the partnership, the court determined that plaintiffs'

allegations (i.e., Gentile used his control over GPB to usurp assets belonging to the Partnerships) were sufficient to state a claim for breach of fiduciary duty against Gentile.

The court also concluded that plaintiffs had stated a claim for aiding and abetting a breach of fiduciary duty against Lash and Schneider. An aiding and abetting claim will survive a motion to dismiss if the complaint alleges facts demonstrating a reasonable conceivability of: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach." As a preliminary matter, the court ruled that elements (1), (2), and (4) were satisfied. The court therefore focused its analysis on the third element of "knowing participation". The court first explained that since plaintiffs must show scienter; those who "innocently deal with a faithless fiduciary" will not be exposed to liability. In this case, the court determined that the third element of aiding and abetting – knowing participation – was satisfied. The court ultimately held that based on Lash's employment by GPB and Schneider's involvement with GPB, it was reasonably conceivable that Lash and Schneider (i) knew Gentile was breaching fiduciary duties he owed to the Partnerships and (ii) participated in those breaches.

11. *Ferris v. Ferris Properties, Inc.*, C.A. No. 2018-0112-MTZ (Del. Ch. Nov. 12, 2020) (V.C. Zurn)

Plaintiff was a stockholder in the defendant Delaware corporation (the "Corporation") and a member of the defendant Delaware limited liability companies (collectively, the "LLCs" and, together with the Corporation, the "defendants"), and requested to see certain of the books and records held by the defendants in plaintiff's capacity as a stockholder or member, as applicable. The defendants agreed to provide plaintiff with access to the requested books and records but refused to produce the specific books and records responsive to plaintiff's request. Instead, defendants provided plaintiff with access to all of defendants' paper files, amongst which the documents responsive to plaintiff's books and records request could be found. After considering cross-motions for summary judgment, the Court of Chancery ordered defendants to produce for plaintiff the specific documents responsive to the plaintiff's request, rather than merely granting access to all documents held by the defendants.

Under 6 *Del. C.* § 18-305 ("Section 18-305"), the standards governing a members access to the books and records of a Delaware limited liability company may be set forth in the limited liability company agreement of such a company or "otherwise established" by the manager of such a company, or if no such manager exists, then by the members. The parties did not produce any limited liability company agreements of the LLCs (the "LLC Agreements") and provided no evidence that any standards governing the production of the LLCs books and records existed. In such cases where no standards are put forth, the language of Section 18-305 governs. When interpreting Section 18-305, Delaware courts will look to cases interpreting similar statutes concerning corporations, such as 8 *Del. C.* § 220 ("Section 220"). When, as was the case here, the parties do not distinguish between a party's rights as a stockholder of a corporation from the party's rights as a member of a limited liability company, Delaware courts will not distinguish between the party's rights to access books and records as a stockholder from its rights to access books

and records as a member. As such, the court considered plaintiffs rights under Section 18-305 and under Section 220 without distinguishing between them.

The court notes that plaintiff's rights under Section 18-305 and under Section 220 are rights of inspection and not rights of production. The scope of the inspection is, however, limited to those documents that are "necessary, essential, and sufficient" to a stockholder's or member's purpose. A court order granting inspection rights must be "carefully tailored" such that the order is not overbroad: inspection rights under Section 18-305 and Section 220 should not be confused with broader production orders in connection with discovery. The court also has the power, as put forth in Section 220(c), to "prescribe any limitations or conditions with reference to the inspection." Holding that defendants' proposal to provide plaintiff with access to all of defendants' books and records would negate the requirement that the inspection order be carefully tailored and that defendants' approach was "more akin to a comprehensive discovery order" than an inspection order, the court ordered the defendants to produce for plaintiff only those books and records responsive to plaintiff's inspection demand. The court concluded by noting that ruling in favor of the defendants would make plaintiff's exercise of its inspection rights "unduly burdensome."

12. *Focus Fin. Partners, LLC v. Holsopple,* No. CV 2020-0188-JTL, 2020 WL 6266915 (Del. Ch. Oct. 26, 2020) and (Del. Ch. Nov. 2, 2020) (V.C. Laster)

Plaintiff Focus Financial Partners, LLC ("Focus Financial"), LLC is a publicly traded Delaware limited liability company and the parent of non-party Focus Operating, LLC ("Focus Operating"), which has offices in New York and San Francisco. Defendant Scott Holsopple worked for Focus Operating from January 2015 to January 2020. After his resignation, Holsopple became employed by defendant Hightower Holdings, LLC ("Hightower"), a competitor of Focus Operating.

During his employment at Focus Operating, Holsopple received bonuses consisting largely of incentive units in Focus Financial and became a member of Focus Financial by virtue of being a unit holder. To receive these incentive units, Holsopple was required to execute a total of five agreements with Focus Financial (each, a "Unit Agreement"). The initial Unit Agreement included a Delaware choice-of-law provision as well as a non-competition provision, a non-solicitation provision, and a confidentiality provision restricting Holsopple's ability, as the unit holder, to share confidential information (together the "Employment-Related Provisions"). The subsequent Unit Agreements also contained the Employment-Related Provisions. Holsopple signed the initial Unit Agreement in Missouri and the four additional Unit Agreements in California. The third Unit Agreement ("the "Long-Term Agreement) and the fifth Unit Agreement (the "Omnibus Agreement") each specified Delaware as the exclusive forum for disputes surrounding the Unit Agreements. Additionally, Focus Financial's two most recent operating agreements, executed in 2017 and 2018, respectively, contained Delaware choice-of-forum provisions and the 2018 operating agreement also contained a Delaware choice-of-law provision. For the majority of Holsopple's employment with Focus Operating, he worked out of the company's San Francisco office, although he regularly traveled across the United States to meet with investment firms. Holsopple never worked

for Focus Operating in Delaware nor did any events giving rise to the matter take place in Delaware.

Before resigning from Focus Operating, Holsopple downloaded confidential information and trade secrets concerning the company's prospects. Holsopple also requested and received documents containing the financial terms that Focus Operating had discussed or agreed to with its new partners and prospective clients. The day he resigned Holsopple received spreadsheets containing confidential business development efforts and active negotiations. Holsopple then joined Hightower as the Chief Growth Officer on February 20, 2020, the responsibilities of which were comparable to his position with Focus Operating. Focus Financial subsequently sent letters to both Holsopple and Hightower flagging the restrictive covenants and confidentiality provision that Holsopple was bound by, to which neither party responded. Since Holsopple joined Hightower, Hightower invested in two investment firms that Focus Operating had pursued during Holsopple's employment at Focus Operating and Focus Operating believed Hightower was courting a third company that Focus Operating had been pursuing.

In March 2020, Focus Financial filed suit against Holsopple and Hightower in the Delaware Court of Chancery. Shortly thereafter, Holsopple and Hightower filed suit against Focus Financial in the Superior Court for the County of San Francisco seeking declarations that the restrictive covenants and the Delaware choice-of-law and choice-of-forum provisions were invalid and unenforceable under California law. Focus Financial then filed counterclaims in the California suit. Holsopple moved for dismissal of the Delaware action under Court of Chancery Rule 12(b)(2), believing that the court could not exercise jurisdiction over him. Holsopple cited Section 925 of the California Labor Code, which renders both choice-of-forum and choice-of-law provisions voidable at the request of the employee when those provisions appear in an agreement that the employee must sign as a condition of employment. Focus Financial did not offer any statute that would confer personal jurisdiction over Holsopple, instead relying exclusively on the Delaware choice-of-forum provisions.

The court found that the only grounds on which it could exercise personal jurisdiction over Holsopple were the Delaware choice-of-forum provisions. However, California law overrode Delaware law in governing those provisions, rendering them voidable, and rendering the court without basis to exercise personal jurisdiction over Holsopple. The court determined that under the *Restatement (Second) of Conflict of Laws § 187(b)*, Focus Financial could not rely on the Delaware choice-of-law provisions to validate the Delaware choice-of-forum provisions in the Unit Agreements. Delaware law could not govern the contracts with Delaware choice-of-forum provisions because doing so would be contrary to a fundamental public policy of California, which had a materially greater interest in the case. The court thus found that it lacked any basis to exercise personal jurisdiction over Holsopple and dismissed him from the case.

After Holsopple was dismissed from the action, Hightower then moved to dismiss the Delaware action under Rule 12(b)(3) on the grounds of improper venue, which was addressed in a subsequent decision by the Court of Chancery. The court found that the

doctrine of *forum non conveniens* called for dismissal of the case. The court considered factors from *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964) in its choice-of-law analysis and determined that Hightower would suffer overwhelming hardship under the doctrine if the company was forced to litigate in Delaware while the California action was proceeding. The court determined that the factors of *forum non conveniens* as a whole weighed heavily against litigating in Delaware and granted Hightower's motion to dismiss.

13. *Moscowitz v. Theory Entertainment LLC*, C.A. No. 2019-0780-MTZ (Oct. 28, 2020) (V.C. Zurn)

This case involved an equity grant to plaintiff Todd Moscowitz ("Moscowitz") in Theory Entertainment LLC (the "Company") and the effect of Moscowitz's purported resignation from the Company. Moscowitz's equity was granted pursuant to the Company's operating agreement, an issuance plan and a unit award agreement. Moscowitz, a founder of the Company, initially held common units and preferred units that comprised approximately 25% of the Company's equity. As new members were admitted, Moscowitz was diluted down to 11.9%. For tax reasons, Moscowitz needed to maintain a 12% stake in the Company. The Company granted Moscowitz incentive units equal to 0.1% of the equity of the Company, and Moscowitz executed an award agreement in connection with that small issuance. The award agreement permitted the Company to repurchase <u>all</u> of Moscowitz's equity upon certain departures from the Company, and the terms of that award agreement are the subject of the litigation in this case.

After the award agreement was effective, Moscowitz submitted a resignation letter stating that he resigned immediately. Resignation without notice triggered the Company's right to purchase all of Moscowitz's units at a low price (referred to herein as the "repurchase price"). However, Moscowitz drafted his resignation letter such that it purported to be conditioned on retaining his equity in the Company, either in contravention of or overriding the terms of the award agreement. The Company attempted to repurchase Moscowitz's equity at the repurchase price on the grounds that he resigned without notice and that the terms of the award agreement applied, regardless of whether Moscowitz purported to condition his resignation on retaining his equity. Moscowitz then sent a letter purporting to rescind his resignation and submitted a new resignation letter with terms that would not trigger the Company's repurchase right at such a low price. The Company sought to repurchase Moscowitz's unit nonetheless, and Moscowitz filed suit in Delaware challenging the Company's attempt to repurchase his units. The Company moved to dismiss.

The court reviewed the terms of the Company's operating agreement, the issuance plan and Moscowitz's unit award agreement and found that they "unambiguously grant[ed] the Company the right to repurchase plaintiff's equity and extinguish his status as a member." Moscowitz alleged that he provided no consideration for the award agreement. However, the court found that consideration existed to support the award agreement's terms, even if those terms were draconian. In so finding, the court recognized the contractarian nature of the Delaware law, noting that "parties have a right to enter into

good and bad contracts, the law enforces both." (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010)).

The court also addressed the contours of the Company's right to repurchase Moscowitz's units. In particular, the court analyzed Moscowitz's claims that he successfully rescinded his initial resignation notice and tendered a resignation that would not trigger the Company's repurchase right at the repurchase price. However, the court found that, even if Moscowitz resigned with requisite notice, the Company maintained a contractual call right to repurchase Moscowitz's units, albeit at a higher price than if he resigned with no notice (referred to herein as the "call price").

Moscowitz also raised an implied covenant claim, which the court rejected because the language of the applicable contracts specifically addressed the conduct at issue – mainly, a resignation by Moscowitz and the consequences thereof.

While the court found that the award agreement was binding on Moscowitz and that the Company was entitled to repurchase Moscowitz's units (at either the lower repurchase price or the higher call price), the court did not grant the Company's motion to dismiss in full. The court noted that issues remained that the parties did not brief fully – including the effect and validity of Moscowitz's first resignation notice, the Company's repurchase letter, Moscowitz's revocation letter and Moscowitz's second resignation notice, and whether the Company accepted Moscowitz's "conditional" resignation, which was not contemplated by the terms of the Company's operating agreement. Thus, the court refused to grant the Company's motion to dismiss regarding these claims.

14. *Durham v. Grapetree, LLC,* C.A. No. 2018-0174-SG (Del. Ch. Oct. 8, 2020) (V.C. Glasscock)

Plaintiff, Andrew C. Durham, filed a suit to compel books and records under Section 18-305 of the Delaware LLC Act against defendant, Grapetree, LLC ("Grapetree"), a Delaware limited liability company the sole asset of which was a rental property in St. Lucia known as "Les Chaudieres." A prior decision by the Court of Chancery Court on this books and records action was remanded from appeal to the Delaware Supreme Court because the decision only discussed two of the five demand letters attached to the complaint. The court explained that the remaining demands were overlooked but timely made. On remand, defendant provided no defense to the remaining demands and the court independently found a proper purpose for them. The court stated that the demands were to investigate Grapetree's value and the failure of its rental business. Therefore, the court held that all of the books and records demanded on March 6, 2018 were to be produced to the extent that they exist as books and records of Grapetree and any requests for "information" or "explanations" by plaintiff were to be treated as requests for books and records of Grapetree.

The court also revisited its fee-shifting decisions on June 4, 2019 and July 8, 2019 in which it granted fee-shifting in favor of defendant pursuant to the operating agreement of Grapetree (the "Operating Agreement"). The Operating Agreement stated that in the event "[plaintiff] does not obtain a judgment on the merits that substantially achieves, in

substance and amount, the full remedy sought, [plaintiff] shall be obligated to reimburse the Company . . . for all fees, costs, and expense of every kind and description." Because most of plaintiff's requests were granted on remand, the court held that the previous decisions on fee-shifting were withdrawn and each side was required to bear its own fees.

15. *Verdantus Advisors v. Parker Infrastructure Partners, LLC,* C.A. No. 2020-0194-KSJM (Del. Ch. Oct. 8, 2020) (V.C. McCormick)

Defendant Parker Infrastructure (the "Company") is a Delaware limited liability company managed by its managers, Jeffrey Parker, Carl Feinberg, Beverly Scott and Michael Phillips. Plaintiff Verdantus Advisors, LLC ("Verdantus"), defendant The Jeffrey A. Parker Trust (the "Parker Trust"), defendant The Carl P. Feinberg Revocable Trust (the "Feinberg Trust"), and non-party Beverly Scott and Associates, LLC are the four members of the Company. Michael Phillips is the sole owner of Verdantus. The dispute in this case stemmed from the Consultant Agreement between the Company and Verdantus whereby Verdantus agreed to provide consulting services to the Company in exchange for certain payments.

In early 2019, the managers adopted a budget that contemplated Verdantus deferring portions of its payments until March 12, 2020 and the Company pledged to pay 20% annual interest on those deferred amounts. In October 2019 (the "October Budget"), Parker prepared a budget and business plan that eliminated any payments to Verdantus in 2020 and did not recognize certain deferred payments but instead noted a debt for $30,000 in deferred compensation. Phillips asserted that Verdantus was entitled to $75,000 plus 20% interest. The managers never voted on the October Budget, but held a meeting over Verdantus' objection where they voted to remove Phillips as a manager without cause and terminate the Consulting Agreement. After Phillips was removed as manager, Phillips told Parker and Feinberg he would be content to hold Verdantus' ownership interest in the Company or have that interest purchased pursuant to a provision of the LLC Agreement. However, the provision referenced by Phillips did not establish a buy-out right but instead established a right of first offer and a right of first refusal under certain circumstances that were not triggered under the facts of this case. The Company continued to pay its employees, consultants, vendors and other members, but did not pay Verdantus and represented to it that the Company was insolvent.

Verdantus sued the Company for breach of the Consulting Agreement and the Company's LLC Agreement and for fraudulent transfers in violation of the Delaware Uniform Fraudulent Transfer Act and sued the other members and managers for breaches of their fiduciary duties and breach of the implied covenant of good faith and fair dealing. Defendants moved to dismiss all claims pursuant to Rule 12(b)(6) except for the claim alleging breach of the Consulting Agreement.

With respect to its fiduciary claim against the other members and managers, Verdantus asserted that the Parker Trust, the Feinberg Trust, Parker and Feinberg breached their fiduciary duties to Verdantus by taking a course of action meant to unduly pressure Verdantus into selling its interest in the Company and refusing to pay Verdantus the money that the Company contractually owed Verdantus as a creditor. During oral

argument, Verdantus' counsel conceded the Company did not invoke any purported right to buy out Verdantus' membership interest. The court dismissed this claim for a lack of factual predicate as it was not reasonably conceivable that defendants pressured Verdantus to sell its interest in the Company.

The court also dismissed Verdantus' claim that the other members and managers breached their fiduciary duties to Verdantus by embarking on a course of action intended to isolate and oppress Verdantus to force Phillips to accept less than Verdantus was owed and/or sell Verdantus' interest in the Company. The court stated that Verdantus' claim again lacked a factual predicate as there were no allegations sufficient to give rise to an inference that Verdantus was being forced to sell its membership interest.

The court also dismissed Verdantus' claim that the other members and managers acted in bad faith to force a buy-out of Verdantus' membership interest during the mediation process. Verdantus argued this conduct breached the implied covenant of good faith and fair dealing inherent in the LLC agreement and asked the court to imply a buy-out term that does not permit the parties to abuse a removed member by using bad faith actions to pressure it to sell its interest at an unfair price. The LLC Agreement expressly provides the Company and its members with an option, but not an obligation, to buy out a member's interests. Because the LLC agreement was not silent on the matter at hand, the implied covenant was inapplicable and the court declined to rewrite the LLC agreement to convert the buy-out provision into a mandatory obligation.

16. *In re National Collegiate Student Loan Trusts Litigation*, C.A. No. 12111-VCS (Del. Ch. Aug. 27, 2020) (VC Slights)

This case involved several related Delaware statutory trusts (the "Trusts") that were formed to acquire and service a large portfolio of student loans. The Trusts' purpose was implemented in three steps in a securitization transaction: *first*, the Trusts acquired a pool of student loans with proceeds from the issuances of notes; *second*, the Trusts signed an Indenture that granted all "right, title and interest in" the student loans to the Indenture Trustee for the benefit of the Noteholders; and *third*, the Trusts provided for the administration and servicing of the student loans through Administration and Servicing Agreements. The trust instruments (the "Trust Agreements") provided for one entity – the Owner Trustee – that had the right to act on behalf of the Trusts. Various constituencies of the Trusts could not agree on how those Trusts should be governed or operate, which "disabl[ed] the trusts from functioning". On one side of the dispute were holders of residual beneficial interest in the trusts ("Owners"), who argued that they could direct the Owner Trustee to take action on behalf of the Trusts. On the other side of the dispute were the Indenture Trustee, the Noteholders, and other indenture-related parties ("Indenture Parties"), who argued that the Indenture created an assignment of the Trusts' interest in the student loans for their benefit and, therefore, the Owners lack authority to control the Trusts.

Before the court were the parties' consolidated cross-motions for judgment on the pleadings, wherein the parties requested declaratory relief on many items. While a number of those requests related to the interpretation of a New York-law governed

Indenture, a few requests related directly to Delaware law and are discussed in further detail below.

The first Delaware law issued the court addressed was the interplay between the Trust Agreements and other trust-related agreements that created the securitization transaction, including the Indenture. The Owners sought a declaration that the Trust Agreements were the governing instruments of the Trusts under the Delaware Statutory Trust Act ("DSTA"). The court noted that the plain meaning of each Trust Agreement provided that such agreement "constituted the governing instrument of the Trust." Thus, the court found that each Trust Agreement was the governing instrument of the applicable Trust. However, the court noted that such a declaration did not "create the document hierarchy" sought by the Owners, who intended such a declaration to provide that the Trust Agreements somehow trumped the provisions of the other trust-related agreements, including the Indenture. The court disagreed, noting that such agreements were not subordinated merely because those agreements were not the "governing instrument" of the applicable Trusts. The court noted that, under Delaware law, a contract may incorporate by reference provisions contained in another contract. Here, the Trust Agreements made frequent reference to the other trust-related agreements, including the Indenture, and provided that a central purpose of the Trusts was to execute the Indenture. Further, the Trust Agreements prohibited the Owners from directing the Owner Trustee to violate the terms of the trust-related agreements, including the Indenture. Therefore, those matters that were incorporated into the Trust Agreements were "as much part" thereof "as if they had been set out in the contract verbatim."

The second Delaware law issue addressed by the court was who had authority to act for the Trusts. The court noted that Section 3806(a) of the DSTA provides the default rule that the trustees of a statutory trust are tasked with managing the trust unless otherwise provided in the governing instrument. Here, the Trust Agreements stated that the Owner Trustee would act on behalf of the Trusts. Thus, the Trust Agreements did not alter the DSTA's default rule, and the Owner Trustee was "the only entity authorized to act directly on behalf of" the Trusts.

The court also noted that the DSTA provides that trustees may delegate their authority to manage to other persons. Similarly, the Trust Agreements permitted the Owner Trustee to act directly or through agents or attorneys pursuant to agreements with such persons. The Owner Trustee entered into two such agreements: the Indenture and an Administration Agreement. The Indenture provided for a transfer by the Trusts of all their right, title and interest in the specified collateral to the Indenture Trustee. The Indenture was incorporated by reference into the Trust Agreements. The Trust Agreements provided that, if the Trusts transferred trust property, the Owner Trustee's and Owners' rights associated with the transferred property flowed automatically with the transferred property. Thus, the Indenture Trustee was authorized to act in the name of the Trusts with respect to the collateral. The Administration Agreement provided for a delegation of certain duties to the Administrator. Thus, the Administrator could act on behalf of the Trusts with respect to the matters covered by the Administration Agreement. The Owners retained rights under the Trust Agreements to direct the Owner Trustee in

certain specified circumstances. Such a direction right is expressly permitted under Section 3806(a) of the DSTA, which provides that a governing instrument may provide for any person, including a beneficial owner, to direct the trustees in the management of the statutory trust. However, such direction rights did not provide the Owners with the right to manage or direct the Trusts directly. Such direction rights were also properly provided to other persons in other trust-related agreements that were incorporated by reference into the Trust Agreements.

The third Delaware law issue that the court addressed was the fiduciary duties owed by the Owner Trustee and the Owners. The court, citing Section 3809 of the DSTA, noted that, unless the trust agreement otherwise provides, existing trust law, including the default fiduciary duties of loyalty, good faith and due care, apply. The court analyzed the provisions of the Trust Agreements and found (i) that the Owner Trustee owed limited contractual fiduciary duties that were satisfied through its delegation to the Administrator in the Administration Agreement, (ii) that the Owners, as the beneficial owners of the Trusts with rights to control certain of the Trusts' operations by virtue of certain direction rights over the Owner Trustee, owed fiduciary duties to the Trusts and (iii) that the Owners owed "direct but limited" fiduciary duties to the Noteholders.

First, the court found that the Trust Agreement "otherwise provided" for purposes of Section 3809 because they stated that the Owner Trustee had no duty to manage the Trusts except as expressly set forth in the applicable Trust Agreement. Each Trust Agreement required the Owner Trustee to administer the Trusts in the interest of the Owners, and that such duties were deemed to be discharge to the extent an administrator agreed to discharge those duties. Further, each Trust Agreement stated the no implied duties or obligations were to be read into the Trust Agreement against the Owner Trustee. Pursuant to the Administration Agreement, the Administrator agreed to perform all duties of obligations of the Owner Trustee. Thus, the Owner Trustee discharged its limited contractual fiduciary duties.

Second, the court, in analyzing the DSTA's and the Trust Agreements' language that permitted the Owners to "direct the trustees or other person in the management of" the Trusts, turned to the principles established in *Gargill v. JWH Special Circumstances LLC*, which provided that beneficial owners owed fiduciary duties to their trusts when they exercised control over the trusts or their assets to benefit themselves at the expense of the trust. The Trust Agreements did not waive or modify the Owners' fiduciary duties to the Trusts. Thus, fiduciary duties were owed by the Owners to the Trusts. However, the court noted that this holding had limited significance given that, under Section 3816(b) of the DSTA, derivative claims could only be brought by beneficial owners of the Trusts (e.g., the Owners that owed the fiduciary duties to the Trusts).

Third, the court found that the Owners owed direct fiduciary duties to the Noteholders to the extent the Owners exercised control over the collateral—an issue of first impression under Delaware law. The court began its analysis of this issue by noting that, in the Indenture, the Trusts granted all their interest in the collateral to the Indenture Trustee, for the benefit of the Noteholders. The Trusts retained solely bare legal title to the

Collateral in order to collect the student loans. The court found that, at common law, a split in ownership between legal and equitable title to property in an assignment for collection "gives rise to a fiduciary relationship between the assignor and the assignee." Thus, the Trusts owed fiduciary duties to the Noteholders, as beneficial owners of the collateral. The court made clear that "this fiduciary duty arises because of the Noteholders . . . relationship to the *Collateral*, rather than their relationship to the *Trusts*." The court then turned to the effect on the Owners. The court applied the principals in *Cargill* and *In re USACafes L.P. Litigation* to find that the Owners owed fiduciary duties to the Noteholders "to the extent the Owners cause the Trusts to exercise control over the Collateral in relation to the Trusts' fulfillment of their obligations". Again, the court noted that the Trust Agreements could have waived these fiduciary duties but did not. Therefore, the court held that the Owners owed direct fiduciary duties to the Noteholders in the limited circumstances described above.

17. *Brick v. The Retrofit Source, LLC*, C.A. No. 2020-0254-KSJM (Del. Ch. Aug. 18, 2020) (V.C. McCormick)

This case involved a demand for advancement by plaintiff Nathan Brick ("Brick") from defendant TRS Holdco, LLC, a Delaware limited liability company ("Holdco"). Defendant The Retrofit Source, LLC, a Delaware limited liability company ("Opco" and, together with Holdco, the "Companies"), imported and sold high-end headlamps and other lighting products for automobiles. Holdco was the manager of Opco and owned all of the membership interests in Opco. Brick was the Chief Operating Officer ("COO") of Opco from March 25, 2018 to January 28, 2020. In this role, Brick headed supply chain management and order fulfillment for Opco. His responsibilities included liaising with Customs brokers as required by U.S. Customers and Border Protection ("CBP") and overseeing the payment of all Customs duties to the U.S. government. During the same period, Brick also served as a member of Holdco's Board of Managers (the "Holdco Board").

In March 2018, Kian Capital Partners, LLC ("Kian") acquired a majority stake in Opco. Shortly thereafter, the United States Trade Representative imposed special duties on Chinese imports. Despite importing a significant portion of its products from China, Opco's profitability was relatively unharmed by these new duties. Kian noticed this outperformance compared to other companies within its portfolio. It directed Victor Jimenez ("Jimenez"), Opco's Vice President of Finance, and a consultant to investigate Opco's accounting with respect to the increased duties. Jimenez determined that (1) Opco was engaging in a "double-invoicing scheme" that caused it to underpay its Customs duties for years and (2) Brick played a role in the double-invoicing practices. Kian and Opco voluntarily disclosed these findings to CBP.

The Holdco Board decided to terminate Brick's employment with Opco and presented him with a separation agreement that included a release of claims (the "Separation Agreement"). The Separation Agreement provided that, in exchange for Brick's execution of the document, Opco would not pursue repayment of certain payments exceeding $400,000 (the "Earnings Payments") made to Brick based upon incorrect

earnings data. Brick refused to sign the Separation Agreement and instead resigned from his positions with Opco and Holdco on January 28, 2020.

Brick obtained legal counsel to advise him in connection with any potential civil or criminal liability stemming from the Earnings Payment claim and the CBP proceeding. On March 27, 2020, Brick sent a letter to the Companies demanding advancement under Holdco's Second Amended and Restated Limited Liability Company Agreement (the "Holdco LLC Agreement") for his legal fees and expenses. Section 11.3 of the Holdco LLC Agreement granted indemnification and advancement rights to "Covered Persons," including Holdco and Opco officers. Nevertheless, the Holdco Board retained the "sole discretion" to "limit or deny" such rights to all Covered Persons except Holdco Board members. On April 16, 2020, the Holdco Board passed a resolution formally denying Brick's demand for advancement of expenses. Brick filed this action for advancement. The parties then cross-moved for summary judgment with regard to Brick's entitlement to advancement.

The court first considered whether Brick was entitled to advancement as an Opco officer. Defendants maintained that the Holdco Board had exercised its discretionary authority to deny advancement rights to Brick as an officer. Brick asserted that his right to advancement had vested as of the date of his demand and, therefore, Holdco lacked the authority to revoke it. While Brick supported his position by relying on the court's decision in *Branin v. Stein Roe Investment Counsel, LLC*, the court found that case to be distinguishable. In *Branin*, the defendant LLC amended a mandatory indemnification provision in an attempt to preclude the plaintiff's indemnification claim. In this case, however, the Holdco Board exercised its discretionary right to deny Brick advancement in his capacity as an officer of Opco—a power supported by the plain, unambiguous language of the Holdco LLC Agreement. The court concluded that (1) the right at issue was not "vested" and "revoked" and (2) Brick was not entitled to advancement in his capacity as COO.

The court then considered whether the proceedings for which Brick demanded advancement involved actions he took in a covered capacity (i.e., as a Holdco Board member). Defendants asserted that Brick's claims for advancement solely involved Brick's conduct in his capacity as COO and not as a Holdco Board member. The court explained that the Holdco LLC Agreement incorporated the "by reason of the fact" standard from Section 145 of the Delaware General Corporation Law. In *Homestore, Inc. v. Tafeen*, the Delaware Supreme Court stated that this standard is satisfied when "there is a nexus or causal connection between any of the underlying proceedings . . . and one's official corporate capacity." Defendants submitted compelling evidence—in the form of three affidavits—that Brick's actions implicated only his capacity as COO of Opco. In his briefing, Brick conceded that the Earnings Payments claim "[was] a claim made by reason of the fact that he was COO" and that any liability resulting from the CBP proceeding would arise "by reason of the fact he was COO of [Opco]." In his affidavit, Brick also conceded that the relevant conduct occurred in his capacity as an employee, rather than as a member of the Holdco Board. This aligned with Brick's narrative that Matthew Kossof ("Kossof"), Opco's Chief Executive Officer, was responsible for

developing Opco's Customs policies for Chinese imports and he "merely executed upon the terms Kossof had set." The court concluded that there was no issue of disputed material fact: Brick's actions for which he claimed advancement were taken in his capacity as COO and lacked a sufficient nexus to his position as a Holdco Board member. Based on the foregoing, the court denied Brick's cross-motion for summary judgment and granted defendants' cross-motion for summary judgment.

18. *Menacker v. Overture, L.L.C.*, C.A. No. 2019-0762-JTL (Del. Ch. Aug. 4, 2020) (V.C. Laster)

In this opinion, the court considered the defendants' motions to dismiss plaintiff's claims for either lack of subject matter jurisdiction, arguing that some claims were subject to a valid arbitration clause, or for failure to state a claim. The court granted defendants' motions in their entirety. Plaintiff Terry Menacker was one of three members of Overture, L.L.C. ("Overture"). The other two members were entities, each wholly controlled by a business partner of Menacker. These business partners were John Fawthorp and John Iwanicki, and both the court's opinion and this summary refer to the business partners and Overture as the defendant parties, although Overture and the wholly-controlled entities were the named defendants.

Menacker, Fawthorp and Iwanicki founded Overture together. Menacker was Overture's Chief Executive Manager and ran the business's day-to-day operations. Fawthorp and Iwanicki provided the initial capital and were not involved in Overture's operations. After nearly twenty-five years with Menacker as the Chief Executive Manager, Fawthorp and Iwanicki terminated Menacker, and Menacker then signed a document memorializing his withdrawal from Overture. After a dispute over the price at which Fawthorp and Iwanicki were to buy out Menacker's interest in Overture, Menacker filed this action (1) seeking to recover (a) the buyout payment and (b) other amounts he claims he should have received as compensation and (2) claiming that Fawthorp and Iwanicki breached their fiduciary duties to Overture.

Menacker argued that Article 10 of Overture's LLC agreement (the "LLC Agreement") entitled him to a payment of $892,563 plus interest in exchange for his membership interest. Fawthorp and Iwanicki argued that a subsequent amendment to the LLC Agreement (the "Buy-Sell Amendment") governed all transfers of membership interests and that, under the Buy-Sell Amendment, Menacker was actually required to pay Overture $105,977 in exchange for the membership interest. Fawthorp and Iwanicki also argued that Menacker's claim for the buyout payment should be dismissed, as the Buy-Sell Amendment contained an arbitration clause. The court found that the Buy-Sell Amendment, and not Article 10 of the LLC Agreement, governed the buyout of Menacker's interest because, by its terms, the Buy-Sell Amendment governed all transfers of membership interests owned by the members and superseded any provision of the LLC Agreement that conflicted with the Buy-Sell Amendment.

The court then considered the arbitration provision in the Buy-Sell Amendment (the "Arbitration Provision"). The court first considered whether the Arbitration Provision required an arbitrator to decide whether the Arbitration Provision required the parties to

submit the question of whether the claims governed by the Buy-Sell Amendment would be subject to arbitration to an arbitrator, *i.e.*, the question of substantive arbitrability. Generally, the courts decide whether a claim is subject to arbitration, but where there is "clear and unmistakable evidence" that the parties to an agreement agreed to submit the question of substantive arbitrability to an arbitrator, Delaware courts will enforce such an agreement. In *James & Jackson, LLC v. Willie Gary, LLC*, the Delaware Supreme Court held that an arbitration provision that references rules of an arbitral association that contemplate having an arbitrator decide questions of substantive arbitrability provides clear and unmistakable evidence of the parties agreement to submit such questions to an arbitrator only if the arbitration provision refers "all controversies to arbitration." In *Willie Gary*, the Delaware Supreme Court found that the arbitration provision did not refer all controversies to arbitration, as the provision expressly authorized parties to obtain injunctive relief and specific performance from the courts, and therefore, that the arbitration provision did not provide clear and unmistakable evidence that the parties agreed to submit the question of substantive arbitrability to an arbitrator. The question, instead, fell to the courts. As the arbitration provision in *Willie Gary* was "identical . . . in all relevant respects" to the Arbitration Provision, the court held that it was required to answer the question of substantive arbitrability, rather than submit the question to an arbitrator.

Regarding whether to refer Menacker's claims under the Buy-Sell Amendment to arbitration, the court held that the parties' disagreement over whether Article 10 or the Buy-Sell Amendment governed the buyout payment for Menacker's membership interest was a "controversy, claim or dispute arising out of or relating to the Buy-Sell Amendment." As the Arbitration Provision required that all such controversies, claims and disputes be submitted to arbitration, the court agreed to dismiss the Menacker's claims for a buyout payment and require an arbitrator to decide such claims.

Menacker's claim for a buyout payment also contained a plea for a mandatory injunction requiring Fawthorp and Iwanicki to pay Menacker the buyout payment. While the claim for an injunction was outside the scope of the Arbitration Provision, the court dismissed the claim because "[a] mandatory injunction is not available to compel the payment of money."

Menacker also sought to recover certain payments he claimed he was owed under the LLC Agreement. Specifically, Menacker sought to recover his "Guaranteed Salary," "Profit Sharing" and certain distributions that he claimed Overture had not made. The court dismissed the claims for all three, as none were reasonably conceivable. The court also held that the claim for guaranteed salary was barred by laches. The LLC Agreement provided that Menacker would receive a guaranteed salary and provided a method for calculating this salary (the "Guaranteed Salary Provisions"). The court noted, however, that the LLC Agreement was ambiguous as to whether the "Guaranteed Salary" was a payment to Menacker distinct from Menacker's interest in Overture as a member (the "Guaranteed Payment Theory") or whether the "Guaranteed Salary" was a guaranteed advance on Menacker's share of Overture's net profits (the "Draw Theory"). While the initial LLC Agreement was ambiguous on this point, subsequent amendments to the LLC

Agreement were inconsistent with the Guaranteed Payment Theory and consistent with the Draw Theory. The court therefore held that the LLC Agreement, when read as a whole, was not ambiguous and did not guarantee to Menacker payments apart from his net profits as a member. Menacker therefore had no claim to a guaranteed salary in addition to the value of his membership interest, the transfer and valuation of which is subject to arbitration. The court went on to say that, even if Menacker's interpretation of the provisions providing for a guaranteed salary were reasonable, the claim would be barred by laches, as the presumptive limitation period for laches "[f]or claims arising out of contractual or fiduciary relations . . . is three years," and Menacker did not file this claim until five years after he was aware of the divergent interpretations of the Guaranteed Salary Provisions. The court also dismissed the claims for profit sharing and distributions as the record, interpreted in the light most favorable to Menacker, showed that Menacker received payments from Overture that could not reasonably be attributed to anything other than profit sharing and that the making of such payments to Menacker as a member of Overture constituted distributions.

Menacker's final argument was that Fawthorp and Iwanicki breached their fiduciary duties to Overture by overcharging Overture for services provided by other companies in the control of Fawthorp and Iwanicki. The court noted that this was a derivative claim, as the benefit of any recovery would flow to Overture, rather than Menacker, and any damages suffered by Menacker on account of the breach were in proportion to his interest as a member of Overture. Menacker, however, did not have standing to bring a derivative claim on behalf of Overture: only a member of an LLC can bring a derivative action on behalf of the LLC and Menacker withdrew as a member of Overture two years prior to filing this action pursuant to an agreement with Fawthorp and Iwanicki to withdraw as a member (the "Withdrawal Agreement"). The court noted that Menacker's initial complaint could be charitably construed to argue that Menacker's entry into the Withdrawal Agreement was fraudulently induced by Fawthorp and Iwanicki, which, if true, would bring into question whether Menacker did, in fact, withdraw from Overture. However, Menacker did not further brief this issue and this failure to brief the issue waived the claim. Because Menacker waived the claim that his entry into the Withdrawal Agreement was fraudulently induced and did not otherwise challenge the validity of the Withdrawal Agreement, the court upheld the Withdrawal Agreement and found that Menacker had withdrawn as a member of Overture pursuant to the clear language of the Withdrawal Agreement.

19. *Lynch v. Gonzalez*, C.A. No. 2019-0356-MTZ (Del. Ch. July 31, 2020) (V.C. Zurn)

This case arose from a dispute regarding the ownership and management of plaintiff Grupo Belleville Holdings ("GBH"), a Delaware LLC that operated as a media company in Argentina. GBH. Plaintiff Carlos Eduardo Lorefice Lynch ("Lynch") filed suit against defendants Remigio Angel Gonzalez ("Gonzalez"), Televideo Services, Inc. ("Televideo"), Juan Pablo Alviz ("Alviz") and Fernando Guido Contreras Lopez ("Lopez") seeking a declaratory judgment that (i) Lynch held 65% of the membership interests of GBH, (ii) Gonzalez held 5% of the membership interests of GBH, (iii) Televideo held 30% of GBH, (iv) Lynch was GBH's sole manager and (v) all contrary actions taken by Gonzalez and Televideo were null and void. Defendants filed an answer

and asserted affirmative defenses along with counterclaims seeking a declaratory judgment that (i) Gonzalez held 5% of the membership interests of GBH, (ii) Televideo held 95% of the membership interests of GBH, (iii) Gonzalez was GBH's sole manager and (iv) any actions taken by Lynch on behalf of GBH were null and void. Defendants also asserted counterclaims for conversion, fraud in the inducement and fraudulent misrepresentation.

Plaintiffs and defendants presented a stark contrast as to the parties' understanding of the membership and management of GBH. Lynch claimed that he and Gonzalez agreed that Lynch would purchase 65% of the membership interests of GBH as was documented by multiple purchase agreements and public filings signed by Gonzalez and identifying Lynch as the 65% owner of GBH. However, defendants contended that Lynch had induced Gonzalez to execute a series of documents to create a paper trail presenting Lynch as GBH's 65% majority owner, in name only, for the purpose of satisfying Argentine regulations. Defendants argued that once Lynch had completed the paper trail, he then wrongfully claimed control of GBH.

In 2007, Lynch began working as GBH's attorney and Gonzalez's personal attorney. In late 2008, Lynch advised Gonzalez of a new law requiring Televideo to transfer its majority interest in GBH to an Argentine citizen. Lynch proposed that he would fill this role as an Argentine citizen and that the parties create a paper trail fabricating Lynch's 65% membership interest in GBH in order to satisfy this Argentine law. Lynch also proposed that the parties sign a secret contract (the "Counterdocument") providing that Lynch would hold the interest in name only and that Televideo would remain the true owner of the 65% majority interest in GBH. To effectuate this, Lynch drafted backdated purchase agreements to fabricate a 5% transfer in September 2007 and a 60% transfer in January 2008, among other documents. Lynch also prepared and presented to Gonzalez the Counterdocument providing that Televideo beneficially owned the 65% interest and that Lynch would return the interest to Televideo upon Gonzalez's request. Gonzalez executed these documents, including the Counterdocument, while Lynch assured Gonzalez that he would also execute the Counterdocument. The Counterdocument was the only document that the parties objectively intended to have any binding effect or otherwise evidence a legitimate agreement. However, Lynch never intended to execute the Counterdocument or return the majority interest in GBH. Lynch did not sign the Counterdocument and ultimately concealed or destroyed the copy that Gonzalez signed.

Lynch, however, argued that he had negotiated for and purchased the interest outright between September 2007 and January 2008 pursuant to two verbal agreements. Lynch contended that Gonzalez had agreed to transfer 5% of Televideo's interest in GBH in September 2007 and 60% of Televideo's interest in GBH in January 2008 to Lynch in exchange for his efforts in another of Gonzalez's business ventures. The court did not find Lynch's account credible and found that there were no contemporaneous documents that supported Lynch's testimony; rather, Lynch only pointed to a series of either inconsistently timed or backdated documents.

For the first step in Lynch's attempt to subvert Televideo's 65% interest in GBH, Lynch induced Gonzalez to execute an amendment to GBH's certificate of formation that was filed with the Delaware Secretary of State on October 18, 2007 which stated that Gonzalez owned 5% of GBH, Televideo owned 30% and Lynch owned 65%. Lynch's next step in the paper trail to transfer the interests in GBH from Televideo to himself was an affidavit that Lynch signed and filed in his capacity as GBH's legal representative on November 26, 2007 with an Argentine regulatory authority, which was not signed by Gonzalez. This affidavit, which was filed one month after the certificate of amendment was filed with the Delaware Secretary of State, represented that Lynch only owned 5% of GBH, rather than the 65% indicated in the certificate of amendment.

The parties eventually decided that they needed to create several additional documents evidencing the transfer of the GBH interests to Lynch in the event that Argentine regulators requested them. In order to further evidence the fake transfer of the 65% interest in GBH, Lynch prepared a series of eight documents that were emailed to Gonzalez for his execution on October 22, 2009. The attached documents were: (1) a purchase agreement for 5% of GBH, dated September 2007 (the "First Purchase Agreement"); (2) a notification letter to GBH of the 5% transfer; (3) a purchase agreement for 60% of GBH, dated January 2008 (the "Second Purchase Agreement" and together with the First Purchase Agreement, the "Purchase Agreements"); (4) a notification letter to GBH of the 60% transfer; (5) a debt assumption agreement for $16 million of Televideo's debt; (6) a dation-in-payment; (7) a blank transfer notice and (8) the Counterdocument. Lynch advised Gonzalez that these documents were necessary to comply with Argentine law, and that they documented the transfer for public record purposes only, such that Gonzalez and Televideo would remain the actual and beneficial owners of all membership interests in GBH.

The Purchase Agreement provided that the total purchase price for 65% of GBH was $16 million and required Lynch to pay interest annually, but Lynch was not required to pay principal until January 8, 2013. Lynch's principal payments were divided into ten equal installments totaling $16 million. Eventually, the parties delivered an addendum reflecting the consideration for the transfer as a debt assumption by Lynch. However, the parties never performed under the Purchase Agreements because the transfer of 65% of the GBH interests was a sham and therefore Lynch did not make the required payments thereunder. As a result, the paper record reflected that Lynch was in arrears and threatened the apparent authenticity of the transfer. Beginning in 2010, Lynch drafted a series of instruments restructuring the debt he purportedly assumed and advised Gonzalez to execute them, including a Restructuring Agreement that the parties executed on September 15, 2010. While Lynch appeared to make payments required under the Restructuring Agreement, the funds for those payments were actually provided by Gonzalez and eventually the payments stopped being made. The remainder of Lynch's purported debt went unpaid for years and in 2017, Lynch and Gonzalez agreed that they again needed to address Lynch's default to maintain the transfer's apparent legitimacy. Therefore, Lynch advised Gonzalez to execute a series of additional debt restructuring agreements, with each backdated to May 2016. Lynch used one of these restructuring agreements to legitimize the Counterdocument's destruction by including a provision

providing that the Counterdocument or any other agreement evidencing the actual intended ownership of the 65% membership interest in GBH shall be null and void. Lynch justified the inclusion of this provision to Gonzalez as being a mechanism to falsely evidence that the Counterdocument did not govern GBH's ownership structure in the event that the Argentine regulators came close to uncovering their scheme.

After Lynch felt secure that his plan had worked, he delivered a message to one of Gonzalez's advisors stating that GBH would no longer answer to Gonzalez and would be handled as an independent operation. Lynch subsequently agreed to a meeting with Gonzalez's advisor and demanded that Gonzalez do the following before he would agree to return the record ownership in GBH: (1) transfer between $15 to $25 million to Lynch to cover potential tax liability for the return; (2) provide a golden parachute of approximately $12 million for Lynch's friends and confidants; (3) set up a bank account in the United States funded with $10 million that Lynch could draw upon as a legal defense fund in the event he was sued for any of the transaction he implemented for Gonzalez; and (4) issue a severance payment to Lynch of approximately $20 million. Gonzalez refused Lynch's demands.

After Gonzalez refused to meet Lynch's demands, Lynch drafted an LLC Agreement for GBH, which was the first LLC Agreement for GBH that had been adopted, and named Lynch as GBH's sole manager. The LLC Agreement was signed solely by Lynch. Additionally, on April 11, 2019, Gonzalez filed a certificate of amendment to the certificate of formation of GBH with the Delaware Secretary of State which reflected Televideo owning 95% of the membership interests in GBH, Gonzalez owning 5% and named Alviz as GBH's president and manager. Lynch responded by filing a certificate of correction with the Delaware Secretary of State stating that GBH's membership interests were held 5% by Gonzalez, 30% by Televideo and 65% by Lynch and naming Lynch as GBH's sole manager and legal representative. Gonzalez subsequently filed another certificate of correction with the Delaware Secretary of State that included the same items as his April 11, 2019 certificate of amendment and Lynch subsequently filed another certificate of correction with the Delaware Secretary of State again stating his 65% membership interest.

The court held that defendants were entitled to a declaratory judgment that (1) Televideo owned 95% of GBH, (2) Gonzalez owned 5% of GBH, (3) Gonzalez and Alviz were GBH's co-managers, and (4) Lynch owned no membership interest in GBH and was not a member or manager of GBH. The court found that the documents showing Lynch held a 65% membership interest in GBH did not reflect a genuine contract between Lynch and Gonzalez. The court began by noting that under Delaware law, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration" and that a valid contract exists only if "the parties have manifested mutual assent to be bound by that bargain." The court additionally noted that a party's subjective intent to eschew the objective terms of the agreement does not prevent formation of a contract but may render the contract voidable. The court found that the parties objectively agreed to a sham transfer in which Lynch held the 65%

interest in GBH in name only for Televideo's benefit and that Gonzalez was not bound by the documents naming Lynch as the owner of the 65% interest in GBH.

The court further held in dicta that, even if Gonzalez were bound by the terms of the documents naming Lynch as the owner of the 65% interest in GBH, then defendants' affirmative defenses of fraudulent inducement and promissory estoppel would bar plaintiffs' claims as to the ownership of GBH. The court specifically noted that, in the context of a statutory claim under Section 18-110 of the Delaware LLC Act addressing disputed management, the action of a director or manager "will be deemed invalid if obtained through trickery or misrepresentation," even where the counterparty had an opportunity to "simply read" the relevant document to discover an alleged misrepresentation. The court stated that to prevail on a fraudulent inducement defense, the asserting party must prove, among other things, reasonable reliance on a false representation. The court specifically noted that Delaware law finds it "unreasonable to rely on oral representations when they are expressly contradicted by the parties' written agreement and that fraudulent inducement is "not available as a defense when one had the opportunity to read the contract and by doing so could have discovered the misrepresentation." With respect to promissory estoppel, the court stated that the asserting party must prove by clear and convincing evidence the "(1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promise; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) such promise is binding because injunctive avoided only by enforcement of the promise."

The court held that both defenses allowed Gonzalez to be released from the terms of the documents naming Lynch as GBH's 65% owner. The court specifically identified several misrepresentations made by Lynch upon which Gonzalez relied, including that Gonzalez needed to execute the Purchase Agreements and the other sham documents to comply with Argentine law, that Lynch would hold the 65% interest in GBH in trust for Televideo and that Lynch intended to sign and perform under the Counterdocument. Further, the court found that the second element of promissory estoppel and the third element of fraudulent inducement – the intention or reasonable expectation of inducing the counterparty to act – were met. The court noted that Lynch knew Gonzalez trusted him and would follow Lynch's proposal to sign the sham documents despite his plan to strip Televideo of the 65% interest in GBH. In particular, the court noted that Lynch knew that without his promise to execute the Counterdocument, Gonzalez would not have executed the Purchase Agreements or the other sham documents.

With respect to the claim as to GBH's management pursuant to Section 18-110 of the Delaware LLC Act, the court found that plaintiffs did not address Lynch's purported status as GBH's sole manager in their post-trial briefing, nor did they refute defendants' claim that Gonzalez was GBH's sole manager. As a result, plaintiffs waived that claim and any argument that Lynch was GBH's manager pursuant to Section 18-110. Considering defendants' Section 18-110 counterclaim, the court found that the preponderance of the evidence presented demonstrated that both Gonzalez and Alviz were GBH's managers. The court found that Gonzalez was GBH's manager because of

his material participation in GBH's management and that Alviz was also a manager of GBH pursuant to the certificate of amendment filed by Gonzalez in April 2019 that named Alviz as a manager of GBH. With respect to Gonzalez, the court specifically noted that he formally served as GBH's President, solely controlled GBH's management and business, made the ultimate decisions for GBH and that employees of GBH and its subsidiaries understood that Gonzalez was in charge, even when he delegated tasks to others. With respect to Alviz, the court found that although defendants did not seek a declaration that Alviz was a manager of GBH, the representation in the April 2019 certificate of amendment filed with the Delaware Secretary of State demonstrated that Alviz was a manager and president of GBH and that was sufficient to find that Alviz was a manger of GBH under Section 18-110.

20. *SolarReserve CSP Holdings, LLC v. Tonopah Solar Energy, LLC,* C.A. No. 2019-0791-JRS (Del. Ch. Mar. 18, 2020) (V.C. Slights); *SolarReserve CSP Holdings, LLC v. Tonopah Solar Energy, LLC,* C.A. No. 2020-0064-JRS (Del. Ch. July 24, 2020) (V.C. Slights)

Plaintiff SolarReserve CSP Holdings, LLC ("SolarReserve"), which was the sole owner of Tonopah Solar Energy, LLC (the "Company") at the time of its formation, petitioned the court to dissolve the Company as a matter of equity on the grounds it was no longer reasonably practicable to carry on the Company's business. SolarReserve lacked standing to seek statutory judicial dissolution because it was not a member or manager of the Company, but urged the court to invoke its equitable powers to order the Company's dissolution.

The Company was formed in 2008 to develop, own and operate a power plant in Nevada. SolarReserve holds an indirect equity interest in the Company through several intermediary entities. Specifically, SolarReserve holds a 50% interest in Tonopah Solar Investments, LLC ("TSI"), which has an interest in Tonopah Solar Energy Holdings I, LLC, which, in turn, has an interest in Tonopah Solar Energy Holdings II, LLC ("Holdings"). The Company's limited liability company agreement (the "LLC Agreement") made clear SolarReserve was the "Original Member," but Holdings was the sole member at the time the complaint was filed.

In order to fund the power plant project, the Company proceeded in three steps. First, the Company entered into a Loan Guarantee Agreement (the "LGA") with United States Department of Energy (the "DOE"). The DOE agreed to guarantee a $700 million loan to the Company, but required the Company to find a buyer for the energy from the power plant before the Company could begin construction. Second, the Company hired Cobra Thermosolar Plants, Inc. ("Cobra") to design and build the power plant. SolarReserve and Cobra became 50/50 co-venturers by SolarReserve allowing Cobra to become a 50% investor in TSI. Third, the Company entered into a Power Purchase Agreement (the "PPA") with Nevada Power Company whereby Nevada Power Company agreed to purchase the Company's power plant energy for 25 years if the Company's plant was up and running by late 2014.

When the Company missed key deadlines under the PPA, Nevada Power Company was relieved from its power purchase obligations under the PPA. The DOE then declared an event of default under the LGA, which allowed it to exercise certain remedies, including (i) a right to replace SolarReserve's nominees on the Company's Board of Managers (the "Board") with its own nominees and (ii) the right to place Holdings' Company units with a collateral agent until the event of default was cured. Holdings was prohibited from exercising powers of ownership pertaining to its unit until the default was cured.

In order for a petitioner to seek equitable dissolution, such petitioner must "explain" in a "convincing manner" why the court should "invoke equitable principles to override the plain language" of the Delaware LLC Act and the relevant limited liability company agreement. SolarReserve relied on *In re Carlisle Etcetera LLC* to support its petition. The court rejected SolarReserve's reliance on *Carlisle*, explaining that SolarReserve's relationship to the Company was that of an indirect investor, not a member. In addition, Holdings had pledged all of its membership interests in the Company to a collateral agent to secure to the DOE Loan, and the court stated that SolarReserve could not rely on equity to recoup the rights it knowingly bargained away now that the DOE had foreclosed under the LGA. Finally, the court rejected SolarReserve's argument that the LLC Agreement granted SolarReserve rights commonly held by members, such as the right to inspect the books and records of the Company, which reflected the intent to confer member status on SolarReserve. The court explained that the LLC Agreement unambiguously provided that Holdings was the sole member of the Company and SolarReserve could not rely on equity to impose its preferences for the Company's future when it bargained away that status. Accordingly, the court granted the Company's motion to dismiss.

Subsequently, SolarReserve brought a breach of contract claim against the Company to enforce its contractual right to inspect certain books and records in compliance with the inspection rights provided in the Company's LLC Agreement. The Company rejected SolarReserve's demand to inspect various documents and communications on the grounds SolarReserve no longer possessed inspection rights under the LLC Agreement because it was not associated with the Company to a degree that would allow it to demand inspection.

The Company was formed to develop, own and operate a power plant in Nevada. While the precise ownership structure was unclear, the record showed that SolarReserve, Inc. ("SolarReserve Parent") sat atop a complex set of entities, including SolarReserve, and was engaged in developing solar power plants. SolarReserve was the Company's sole owner at the time of the Company's formation, but in the process of raising capital for the Company it ceded its member status through various transactions. As a result, SolarReserve held only an indirect interest in the Company.

In connection with SolarReserve's withdrawal as the sole member, the Company inserted a provision into the LLC Agreement that provided a mechanism for SolarReserve to request access to the Company's books and records as a "Sponsor Entity." The LLC Agreement defined a "Sponsor Entity" as "any of Santander Sponsor, Cobra Sponsor, or

SolarReserve Sponsor." SolarReserve Sponsor was defined as "SolarReserve CSP Holdings, LLC, excluding any unaffiliated successor." "Santander Sponsor" was defined differently to include the identified entity as well as that entity's "assignees, transferees and successors."

The Company maintained its documents on a server located at SolarReserve Parent's headquarters, but that arrangement came to an end when SolarReserve Parent experienced financial difficulties and had to wind down its business through liquidation. The liquidation of SolarReserve Parent caused two critical changes. First, SolarReserve assigned all of its "right title and interest in and to all actions, claims, choses in action, and lawsuits of any nature whatsoever . . . against" the Company to CMB Infrastructure Investment Group IX, L.P. ("CMB"), a lender of SolarReserve (the "Assignment of Claims"). As a result, CMB had the right to prosecute SolarReserve's claims against the Company and CMB alone was entitled to the proceeds of such claims. Second, CMB installed a CEO at SolarReserve whose sole job was to help CMB maximize its recovery, which left no one else with an interest separate from CMB in SolarReserve.

Chancery Court Rule 17(a) provides where there has been a complete assignment of claims, the plaintiff should be the assignee. The court found that it was clear on the record that CMB was the sole party in interest in the wake of the absolute assignment to CMB of SolarReserve's interest in all claims and lawsuits. The court rejected SolarReserve's attempt to rely upon provisions in the Assignment of Claims where SolarReserve authorized CMB to act in the name of SolarReserve as its "attorney-in-fact." SolarReserve argued that by virtue of the power of attorney, CMB was causing SolarReserve to exercise SolarReserve's rights under the LLC Agreement. The court stated that the premise of the real party in interest rule is that, as an assignee under a complete assignment, the right to maintain the lawsuit belongs only to CMB. The court explained that a power of attorney from SolarReserve in favor of CMB is irrelevant to the real party in interest inquiry. Accordingly, the court found SolarReserve was an improper plaintiff under Rule 17 because it had no interest in the proceeding.

In an effort order to avoid the application of Chancery Court Rule 17, SolarReserve argued that CMB could be joined as a substitute plaintiff under Chancery Court Rule 25(c). Rule 25(c) provides that "in case of any transfer of interest, the action may be continued by or against the original party, unless the Court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Rule 25(c) only applies where there has been a transfer of interest during the pendency of the action, and because SolarReserve executed the Assignment of Claims well before this suit, it could not rely on this rule. The court stated that even if it could look past the procedural defects, the LLC Agreement granted SolarReserve alone a personal right to inspect the Company's records and CMB's status as an assignee did not make it the same as SolarReserve. Further, the drafters of the LLC Agreement knew how to include a Sponsor Entity's assignees because they did so within the definition of "Santander Sponsor." Under the plain meaning of the LLC Agreement, the court found that CMB had no information rights because it was not SolarReserve and the definition of SolarReserve Sponsor did not include SolarReserve's assignees.

21. *Hindlin v. Gottwald*, C.A. No. 2019-0586-JRS (Del. Ch. July 22, 2020) (V.C. Slights)

Plaintiff Jacob Hindlin ("Hindlin") first invested in Core Nutrition LLC ("Core") in February 2015. In connection with this investment, Hindlin signed a joinder binding him to Core's LLC agreement (the "LLC Agreement"). Hindlin acquired additional Core units in early 2017. In November 2018, Keurig Dr. Pepper Inc. acquired Core for an aggregate transaction value of $449,462,907 (the "KDP Acquisition"). Hindlin maintained that based on his 0.613% ownership stake in Core as of the end of 2017, he should have received $2,755,207 for his units following the KDP Acquisition. In stark contrast, Core believed that he was entitled to $393,583.

Hindlin brought an action against three former members of Core's Board of Managers (the "Board"). Hindlin maintained that the discrepancy between what he was owed and what he was offered resulted from defendants Lukasz Gottwald, Lawrence Spielman, and Renee Karalian improperly diluting Core's minority unitholders. The complaint offered three bases to infer improper dilution: (1) Core issued incentive units prior to the KDP Acquisition; (2) the change in Core's 2017 capital accounts; and (3) the shift in the proportion of Hindlin's membership interest to a capital interest. Count I of the complaint alleged a breach of the implied covenant of good faith and fair dealing. Count II of the complaint alleged a breach of fiduciary duty. Defendants moved to dismiss Hindlin's complaint for failure to state a claim, failure to plead demand futility, and lack of standing.

The court first explained that plaintiff's complaint was "frustratingly vague" and determined that it lacked sufficient pled facts to put defendants on notice of the claims against them. While the standard for notice pleading has a "low bar," Hindlin's complaint failed to clear it. The court noted that dilution is not per se wrongful. Therefore, Hindlin had to plead not only that he was diluted, "but also that the defendants did something wrongful that caused him to be improperly diluted" in order to survive dismissal. The court held that Hindlin's complaint fell short on this front and merely contained conclusory allegations. In other words, it was devoid of well-pled factual allegations that any defendants did anything actionably wrong in violation of the implied covenant of good faith and fair dealing or in breach of their fiduciary duties. The court believed that Hindlin was attempting to invoke a form of res ipsa loquitur that would allow the court to draw an inference of wrongdoing within the context of claims against corporate fiduciaries. The court explained that a res ipsa-like inference of wrongdoing was not reasonable and conflicted with Delaware's business judgment rule, which presumes that corporate fiduciaries have acted with due care and in good faith.

For purposes of its analysis, the court assumed that Hindlin pled sufficient facts to put defendants on notice of the claim for breach of the implied covenant of good faith and fair dealing. The court nevertheless held that plaintiff failed to state a claim for breach of the implied covenant as a matter of law. The court explained that the court in *Oxbow Carbon & Minerals Hldgs.* emphasized that the implied covenant (1) may only be invoked "when the contract is truly silent concerning the matter at hand" and (2) should be viewed as providing "a limited and extraordinary legal remedy." Even though the

implied covenant attaches to every contract, Hindlin did not adequately allege the existence of a "gap" in the LLC Agreement that the implied covenant could be invoked to fill.

The LLC Agreement contained contractual language that addressed the issuance of potentially dilutive units. Section 5.1(b) of the LLC Agreement authorized Core's Board to "cause the Company to offer to the Members or other Persons additional Units or other securities of the Company on such terms and at prices as the Board of Managers shall determine in its discretion." Section 5.1(c)(iii) of the LLC Agreement authorized Core's Board to issue incentive units under the company's equity incentive plan. The court stated that Hindlin could have attempted to negotiate for anti-dilution protection and did not have to invest in Core in the absence of such protection. The court ultimately refused to employ the implied covenant to impose new contract terms that Hindlin failed to bargain for and, therefore, dismissed Count I of the complaint.

For purposes of its analysis, the court also assumed that Hindlin pled sufficient facts to put defendants on notice of the claim for breach of fiduciary duty. Defendants argued that Hindlin lacked standing to prosecute the dilution claim upon completion of the KDP Acquisition because it was purely derivative in nature. Hindlin countered that he asserted a "dual-natured claim" as described in *Gentile v. Rossette* and, therefore, his direct claim survived the KDP Acquisition. The court explained that under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, it applies a two-part test in order to determine whether a claim is derivative or direct. The court must examine (1) whether a stockholder's claimed direct injury is independent of any alleged injury to the company and (2) whether a stockholder would receive the benefit of any remedy. Although dilution claims are traditionally characterized as derivative in nature, the court stated that there is a narrow exception to this general rule.

Under *Gentile*, a shareholder dilution claim is both derivative and direct when: (1) a stockholder having majority or effective control causes the corporation to issue excessive shares of its stock in exchange for assets of the controlling stockholder that have lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public minority shareholders. *El Paso Pipeline GP Co.* further clarified *Gentile's* holding by ruling that dilution claims are only dual-natured if there is an expropriation of control, in addition to economic value, from minority stockholders. In the instant case, Hindlin did not well-plead the existence of a controller or control group and thus failed to allege an expropriation of control. The court therefore characterized the dilution-based breach of fiduciary duty claim as "classically derivative," rather than dual-natured under *Gentile*, and noted that Hindlin was no longer a Core unitholder. The court ultimately dismissed Count II of the complaint because Hindlin lacked standing to prosecute his claim upon consummation of the KDP Acquisition.

22. *Murfey v. WHC Ventures, LLC*, No. 294, 2019 (Del. July 13, 2020) (J. Valihura, for the majority)

On appeal to the Supreme Court was a dispute between two limited partners and certain partnerships over those limited partners' access to Schedule K-1s of other limited partners that were attached to the partnership's tax returns. The Court of Chancery, C.A. No. 2018-0652 (Del. Ch. June 21, 2019), denied plaintiffs' request for the K-1s, finding that although plaintiffs had stated a proper purpose, they had not shown that the K-1s were reasonably related to their stated purpose. In so finding, the Court of Chancery applied the "necessary and essential" condition and concluded that the K-1s were not necessary and essential to satisfying the stated valuation purpose. The "necessary and essential" condition had initially been developed in cases applying Section 220 of the DGCL, and it had been carried over by the Court of Chancery to cases applying Section 17-305 of DRULPA, based on the common usage of the term "purpose reasonably related" to the person's interest as a stockholder or limited partner. The Court of Chancery applied the "necessary and essential" standard to the partnership agreement provision that provided plaintiffs with access to certain books and records of the limited partnerships because the partnership agreement provision was based on Section 17-305. The Supreme Court reversed, finding that it was inappropriate to imply the "necessary and essential" condition to the provision in the partnership agreement.

In its decision, the Supreme Court agreed with the Court of Chancery on several point. First, that the plaintiffs' stated purpose—valuing their interests in the partnerships—was proper. Second, it was undisputed that the K-1s constituted a part of the partnership's tax returns to which the limited partners were entitled for a purpose reasonably related to their interest as limited partners. Third, while the general partner had the authority under the partnership agreements to establish reasonable standards for determining whether the purpose for the request was reasonably related to the limited partner's interest as a limited partner, the general partner did not exercise that authority. Finally, the language in the partnership agreements that provided inspection rights—specifically, the provision that stated that limited partners could "obtain from the General Partner **for the purposes reasonably related to** the Limited Partner's Interest as a Limited Partner the information set forth above in Section 12.1" (emphasis added)—performed a limiting function; that is, that the limited partner must show a proper purpose and also must connect that proper purpose to the information sought.

However, the Supreme Court disagreed with the Court of Chancery over whether the plaintiffs needed to show that the information sought was "necessary and essential" to their proper purpose. The Supreme Court held that the phrase "necessary and essential" performed a greater limiting role than the "for the purpose reasonably related to" language and, therefore, "necessary and essential" was not the proper test. In addition, where the Court of Chancery found that the K-1s would provide no type of information that would help the plaintiffs value their interests, the Supreme Court found that the K-1s were part of the partnership's tax returns, which can "provide important information for Plaintiffs' valuation purpose."

Two Justices dissented from the majority opinion on the basis that the effect of the majority opinion's interpretation of the contractual language "is to recognize a broader reach in the contractual language that we would permit under the statute from which that language was listed", which the dissenting Justices found to be "contrary to the intentions of the parties as well as Plaintiffs' contentions on appeal."

23. *DG BF, LLC v. Ray*, C.A. No. 2020-0459-MTZ (Del. Ch. July 9, 2020) (V.C. Zurn)

Defendant American General Resources LLC ("AGR") was a multi-million-dollar cannabis and CBD business. Defendant Michael Ray was a manager and member of AGR. Plaintiff DG BF, LLC ("DG BF") was a signatory to AGR's Sixth Amended and Restated Limited Liability Agreement (the "Operating Agreement") and Series D Unit Purchase Agreement (the "Purchase Agreement"). Finally, plaintiff Jeff A. Menashe ("Menashe") was a managing member of DG BF and, as stated in the Purchase Agreement, a member and the Series D manager of AGR.

Plaintiffs sought a declaratory judgment in order to confirm their interpretation of the Operating Agreement. They asserted that Menashe – pursuant to his role as the Series D manager – had to consent to amending the Operating Agreement for defendants to issue Series E financing that would give a liquidation preference to Series E unitholders over Series D unitholders. The court had previously granted a temporary restraining order that enjoined the closing, but not the shopping, of the Series E financing. This action was pending a decision as to what the Operating Agreement required for approving Series E financing with a liquidation preference above Series D unitholders.

The court first explained that limited liability companies are "creatures of contract." Their operating agreements are governed by the objective theory of contracts and related principles of contract interpretation. The court then commenced its analysis with Section 5.3(c)(vi) of the Operating Agreement, which enumerated thirteen actions that required the board of managers' prior written consent or majority vote. In particular, Section 5.3(c)(vi)(C) permitted the creation and authorization of an issuance of units senior to the Series D units with the board of managers' approval. The court noted, however, that Section 5.3(c)(vi)(C) did not do so "in a vacuum" and AGR was subject to other constraints in the Operating Agreement. Because issuing senior units under Section 5.3(c)(vi)(C) required amending the Operating Agreement "in a manner that adversely affected the powers, preferences, rights or interests" of the Series D unitholders, the court had to consider whether the Series D manager's consent rights, as set forth in Section 14.2(b)(ii), were triggered by the planned Series E issuance.

The Series D manager's consent rights only applied to the removal of rights expressly granted to the Series D unitholders. In this instance, the court concluded that the Series D unitholders did not have an express right to liquidation priority in perpetuity. While Section 13.2 expressly granted the Series D unitholders the right to be above all other units within the current equity structure, it did not expressly grant that position in perpetuity or in all future equity issuances. The absence of clear language granting Series D the permanent right to be the senior series led to the conclusion that no such right was expressly granted. Such a finding was further supported by reading the Operating

Agreement as a whole. Specifically, Section 5.3(c)(vi) contemplated a senior issuance and the Operating Agreement expressly granted other rights to the Series D unitholders (e.g., the right to appoint the Series D manager).

In sum, the court determined that Section 14.2(b)(ii) did not require AGR to seek the Series D manager's consent in order to amend the Operating Agreement and issue Series E financing with a liquidation preference over Series D unitholders. This is because the plain language of the Operating Agreement required triggering Series D rights to be "expressly granted." The court therefore denied plaintiffs' argument for a right to perpetual priority, reasoning that the language of the Operating Agreement was clear and unambiguous. In order to give effect to the parties' shared intent, the court refused to imply contractual protections into the Operating Agreement that plaintiffs had failed to secure for themselves at the negotiating table. The court ultimately denied plaintiffs' request for a declaratory judgment, terminated the temporary restraining order, and allowed defendants to move forward in closing the Series E financing.

24. *Eagle Force Holdings, LLC v. Campbell*, No. 405, 2019 (Del. July 8, 2020) (J. Valihura) (en banc)

In this opinion, the Delaware Supreme Court considered an opinion issued by the Court of Chancery, which was itself an opinion issued in reconsideration of a case on remand from the Delaware Supreme Court. 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. For nearly a year, the parties negotiated the terms of a contribution agreement (the "Contribution Agreement") and LLC agreement of Eagle Force Holdings LLC (the "LLC 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 disputed whether such signed documents were 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 defended against Kay's claims by arguing that the court lacked personal jurisdiction because the Transaction Documents were not enforceable and that he was not, therefore, subject to the forum selection clauses in the Transaction Documents. The Court of Chancery found: (1) that the Contribution Agreement lacked material terms and was therefore unenforceable; (2) that the LLC Agreement was contemplated as part of the same contract as the Contribution Agreement, and because the Contribution Agreement was unenforceable, the LLC Agreement was as well; and (3) there was no independent basis for personal jurisdiction. On appeal, the Supreme Court found that the Transaction Documents contained all material terms and that those terms were sufficiently definite. The Supreme Court then remanded the case to the Court of Chancery with instructions to reconsider each Transaction Document in turn

to determine whether it was an enforceable contract. As the parties did not dispute that the contracts were supported by legal consideration, the only remaining question confronting the Court of Chancery regarding the enforceability of the Transaction Documents was whether the parties intended to be bound by them. The Court of Chancery held that Campbell did not intend to be bound by the Transaction Documents and executed the Transaction Documents only to acknowledge receipt. Because Campbell did not intend to be bound by the Transaction Documents, the Transaction Documents were not enforceable agreements and the forum selection clause subjecting Campbell to personal jurisdiction in Delaware was ineffective. With no personal jurisdiction under the forum selection clause and no other sufficient basis for personal jurisdiction, the Court of Chancery dismissed the case for lack of personal jurisdiction.

Kay first argued that the Court of Chancery erred by "focusing on Campbell's subjective thoughts" as opposed to following the Court's instruction that "overt manifestation of assent – not subjective intent – controls the formation of a contract." Specifically, Kay argued that the Court of Chancery "should have focused on whether a reasonable person in Kay's position would have understood from Campbell's overt actions . . . that Campbell intended to be bound." The Court, however, held that the Court of Chancery engaged in a thorough analysis of the factual record and sufficiently focused on objective events.

Kay next argued that, if the subjective evidence of Campbell's intent to be bound was disregarded, Campbell's overt acts demonstrated an intent to be bound. Specifically, Kay pointed to the fact that Campbell executed the Transaction Documents and other facts surrounding the signing to bolster this claim that Campbell's overt acts demonstrated an intent to be bound. The Court recognized that there were several facts that could be interpreted to demonstrate an intent to be bound, but refused to "re-weigh the evidence" that was "appropriately weighed" by the Court of Chancery. Disagreements about how to weigh the evidence did "not constitute reversible error."

Kay also argued that the Court of Chancery failed to properly weigh evidence from a witness to the execution of the Transaction Documents, but the Court did not credit this argument because it amounted to a call to reweigh the evidence, which the Court had already refused to do. In connection with this same witness, Kay argued that the Court of Chancery made judgments related to Campbell's credibility that were contradicted by testimony offered by the witness. Kay called on the Court to "make [its] own credibility determinations", which the Court refused to do: "only when the findings below are clearly wrong" will the Court make contradictory findings of fact, and the Court did not find that to be the case in this instance.

Next, Kay argued that the Court of Chancery improperly considered whether the Transaction Documents were in a form that "a reasonable person [would] expect[] to be a final version." The Court noted that certain language in the Court of Chancery's opinion could be interpreted to suggest that the Court of Chancery did consider this factor when deciding whether Campbell evidenced an intent to be bound, but held that, in the context of the surrounding language, the Court of Chancery did not consider this factor in an

improper manner and, in any case, did not rely on this factor when making its decision. The Court therefore held that "the fairest reading" of the Court of Chancery's opinion was that the Court of Chancery did not improperly consider this factor.

Finally, Kay argued that the Court of Chancery did not sufficiently consider whether Campbell consented to personal jurisdiction based upon Campbell's "actual consent contained in the LLC Agreement" or based upon Campbell's implied consent pursuant to LLC Act Section 18-109, which governs service of process on managers of LLCs. The Court held that the Court of Chancery properly considered these questions and found "no reversible error in [the Court of Chancery's] conclusions."

For all the reasons above, the Court denied Kay's appeal and upheld the decision of the Court of Chancery.

25. *HUMC Holdco, LLC v. MPT of Hoboken TRS, LLC*, C.A. No. 2019-0972-KSJM (Del. Ch. July 2, 2020) (V.C. McCormick)

The parties to this case owned, operated, and leased real estate to three acute care facilities: (1) Hoboken Hospital, (2) Christ Hospital and (3) Bayonne Medical Center in Hudson County, New Jersey. Each of the three acute care facilities was owned and operated by a corresponding entity: (1) HUMC Opco, LLC ("Hoboken Opco"), (2) Hudson Hospital Opco, LLC ("Christ Opco"), and (3) IJKG Opco, LLC ("Bayonne Opco" and, together with Hoboken Opco and Christ Opco, the "Opcos"). Each of the three acute care facilities leased real estate from a corresponding entity: (1) MPT of Hoboken Real Estate, LLC ("Hoboken Propco"), (2) Hudson Hospital Propco, LLC ("Christ Propco"), and (3) MPT of Bayonne, LLC ("Bayonne Propco" and, together with Hoboken Propco and Christ Propco, the "Propcos"). Plaintiffs owned "founders' interests" in the Opcos and Propcos. As relevant to this decision, plaintiff HUMC Holdco, LLC ("Hoboken HUMC") owned the founders' interest in Hoboken Opco and defendant MPT of Hoboken TRS, LLC ("Hoboken MPT") owned a membership interest in Hoboken Opco.

Hoboken HUMC and Hoboken MPT were members of Hoboken Opco and parties to Hoboken Opco's LLC Agreement (the "LLC Agreement"). Section 10.5 of the LLC Agreement granted a right of first refusal to each member in the event that any other member sought to transfer its interests in Hoboken Opco. Alaris Health ("Alaris") offered to acquire Hoboken MPT's membership interest in Hoboken Opco. The first version of the offer cross-conditioned the sale of the membership interest on the sale of real estate owned by two other defendants—Hoboken Propco and Bayonne Propco. Alaris and Hoboken MPT entered into an Equity Purchase Agreement dated October 27, 2019 (the "First EPA"), which listed a purchase price of $8,275,000 for the membership interest sale and purchase prices of $50 million and $58 million for the real estate sales. After the real estate sales closed on November 5, 2019, Alaris and Hoboken MPT entered into a second agreement for the sale of only the membership interest, the Equity Purchase Agreement dated December 11, 2019 (the "Second EPA"), which listed a purchase price of $8,275,000 for the membership interest. The plaintiffs then filed this action, seeking, *inter alia*, an order temporarily restraining Alaris and Hoboken MPT from closing the

membership interest sale. This decision served to resolve defendants' motion for judgment on the pleadings with respect to a single count asserted by Hoboken HUMC against Hoboken MPT for breach of the LLC Agreement. The parties disagreed over whether the scope of Hoboken HUMC's first-refusal right extended to the real estate sales. The parties also disagreed over what constituted a qualifying offer and whether Hoboken MPT could withdraw its first notice to Hoboken HUMC after Alaris modified its offer.

The court first considered whether the scope of the first-refusal right, as informed by the phrase "the same terms and conditions," included the real estate sales. In order to resolve this scope issue, the court explained that it would apply the objective theory of contracts and the whole-text canon. Under this principle, the specific provisions of a contract will be read in light of the whole contract. In *USA Cable v. World Wrestling Federation Entertainment, Inc.*, the Court of Chancery applied the whole-text canon to formulate a rule for determining the scope of a first refusal right. In that case, plaintiff agreed to televise four of defendant's narrative wrestling series (the "Series"). The parties' contract contained a first-refusal right that enabled plaintiff to match the terms offered by a third party. Defendant received an offer from a third party, which not only covered televising the Series, but also additional specials, a new drama series, XFL football coverage, a multi-million dollar advertising campaign, radio syndication, pay-per-view events, print publishing, and theme park events. Plaintiff claimed to have matched the offer by accepting certain elements and striking others—a claim that defendant rejected. Plaintiff argued for a narrow interpretation of the first-refusal right and asserted that its scope only extended to the subject matter of the existing contract. In other words, plaintiff maintained that it only had to match those provisions of the qualifying offer that were related to the Series. On the other hand, defendant argued for a broad interpretation and asserted that plaintiff had to match every provision of the qualifying offer. The Court of Chancery ultimately agreed with plaintiff's interpretation, holding that "[t]he scope of the right [was] limited to the subject matter of the Agreement in which the right exist[ed]." The Delaware Supreme Court later affirmed the trial court's decision, concluding that the scope of the first-refusal right was limited to the membership interest sale.

In this case, Hoboken MPT contended that the scope of the first-refusal right was limited to the membership interest sale. Hoboken HUMC argued that it was entitled to acquire the membership interest on the same terms and conditions as the qualifying offer and, therefore, could also purchase the real estate on the same terms and conditions as the qualifying offer. The court followed the rule from *USA Cable*: unless the parties expressly agree otherwise, the scope of a first-refusal right will be limited to the subject matter of the agreement containing the right. The court therefore concluded that Hoboken MPT's narrow interpretation was the only reasonable one. Nevertheless, the court held that there were sufficient questions of fact concerning the terms and conditions of the membership interest sale to foreclose judgment on the pleadings in favor of Hoboken MPT. This was because of the nature of the package deal, *i.e.*, the sale of the membership interest in the First EPA being conditioned on and a condition for the sale of the sale of the real estate. The court held that it could not isolate the terms and conditions

in the First EPA that were unique to the membership interest sale without a more developed factual record.

The court then considered whether a qualifying offer could be withdrawn, such that the Second EPA effectively replaced the First EPA. Defendants argued that the Second EPA—which included the membership interest sale and excluded the real estate sales—constituted the operative offer. This was because the First EPA had been abandoned and Hoboken MPT withdrew its first notice. Plaintiffs argued that Hoboken MPT's first notice served to create an option contract that could not be withdrawn for the duration of the exercise period.

Generally speaking, an offeror may withdraw its offer before acceptance. Option contracts, however, constitute an exception to the general rule. The court noted that jurisdictions disagree over whether a first-refusal right, once triggered by a qualifying offer, gives rise to a revocable offer or creates an irrevocable option during the exercise period. According to defendants, it was unclear under Delaware law whether a first-refusal right, once triggered by a qualifying offer, gave rise to a revocable offer or created an irrevocable option during the exercise period. Defendants therefore asked the court to follow *Lin Broadcasting v. Metromedia, Inc.*, in which a New York court held that first-refusal provisions permitted revocable offers and did not fall under the option contract exception. In *Lin Broadcasting*, the court explained that the purpose of a first-refusal provision is not served by treating the right as an option contract. This is because the purpose of a first-refusal right is to prohibit the transfer of property absent compliance with the provision, rather than to compel the owner to sell. The Court of Chancery ultimately concluded, however, that it could not decide this issue without a more developed factual record: even if the court were to follow *Lin Broadcasting*, there was a question of fact as to whether the qualifying offer had been withdrawn and the Second EPA reflected the terms and conditions of the membership interest sale.

The court then had to decide whether any letter of intent or preliminary term sheet issued prior to the First EPA was in fact the qualifying offer. Plaintiffs argued that neither the First EPA nor the Second EPA qualified as an offer because they were final, memorialized contracts. In other words, it was possible that Hoboken MPT had received a qualifying offer before the First EPA and breached its first-refusal obligations by failing to provide timely notice of that offer. The court determined that there were questions of fact preventing judgment on the pleadings as to what constituted the operative qualifying offer. First, it was reasonably conceivable that the First EPA was actually a final, executed agreement and not a bona fide offer. Second, it was reasonably conceivable that some written document—short of a binding agreement but nevertheless reflecting sufficiently definite terms and conditions—constituted a qualifying offer and preceded the First EPA.

Finally, the court addressed a second claim that Hoboken MPT breached Section 10.1 of the LLC Agreement. Section 10.1 restricted the transfer of any governance or financial rights of a membership interest in Hoboken Opco to any third party, except as permitted under the LLC Agreement. At issue, the First EPA contained a provision that prohibited

Hoboken MPT from approving an amendment to the LLC Agreement unless it obtained Alaris' prior written consent. Hoboken HUMC argued that Hoboken MPT—by providing Alaris consent rights—had impermissibly transferred governance rights in breach of the LLC Agreement. Questions of law (i.e., whether the transfer of consent rights of this nature constituted a transfer of governance rights) and fact (*i.e.*, whether the First EPA was actually withdrawn and replaced by the Second EPA) were sufficient to foreclose judgment on the pleadings in favor of Hoboken MPT.

26. *Iacono v. Capano*, C.A. No. 11841-VCL (Del. Ch. June 29, 2020) (V.C. Laster)

Plaintiff Leonard Iacono ("Iacono") and defendant Joseph Capano ("Capano") were seasoned real estate developers and close friends who had talked about developing real estate together for years. Iacono owned and operated a property management company – plaintiff Sovereign Property Management, LLC ("Sovereign"). Capano worked on many real estate projects, including phases 1 and 2 of a master plan for the development of 1,100 acres in Middletown, Delaware (the "Westown Master Plan"). Iacono had bid on phases 1 and 2, but Capano was ultimately successful in securing and completing the projects. Capano leaned about an opportunity to bid on the third phase of the Westown Master Plan ("Phase 3"), which entailed the purchase and development of roughly twenty-two acres next to phases 1 and 2. Shortly thereafter, Capano invited Iacono to play golf at Kings Creek Country Club and discuss bidding on Phase 3 together. Iacono later testified that he and Capano agreed that "we were going to acquire [Phase 3] and that we were going to be 50/50." Capano then utilized one of his real estate companies, defendant JMC Acquisitions, Inc. ("JMC Acquisitions"), to submit a letter of intent for Phase 3. Iacono relied on his agreement with Capano and did not bid to acquire Phase 3.

Capano and Iacono agreed that an entity would be formed to own the property. Capano sent Iacono a draft of an LLC Agreement (the "First Draft"), which described a 50/50 ownership structure. The First Draft designated Capano as the "Class A Member" and Iacono as the "Class B Member," each with a 50% member interest. While the Class A Member had the authority to manage the business and affairs of the LLC, the Class B Member did not have the power to do so. By allocating all management authority to the Class A Member, the First Draft gave Capano control over all stages of Phase 3: (1) the planning and design stage; (2) the construction stage; and (3) the post-construction and stabilization stage. Iacono rejected the First Draft, believing that the two should be treated equally with respect to both control and economics. Iacono stated, "If we are 50/50 partners then we should be on a level playing field." Capano then told Iacono, "Go ahead and change whatever you want and send it back[.] We should be equal in all respects." Iacono had an attorney prepare a new LLC agreement (the "Second Draft"). Similar to the First Draft, the Second Draft explained that Capano and Iacono would each own a 50% member interest in the LLC. In contrast to the First Draft – which established a member-managed structure and vested management rights only in the Class A Member – the Second Draft used a manager-managed structure in which joint approval of both managers (Capano and Iacono) would be required for the LLC to act. In sum, the Second Draft was a 50/50 venture that treated Capano and Iacono equally in all respects.

Capano then unexpectedly died. His widow became the executrix of his estate, took over the management of his businesses, and continued to pursue Phase 3 with Iacono. The Capano team then caused JMC Acquisitions to execute a formal agreement for the purchase of Phase 3 and sent a markup of the Second Draft to Iacono (the "Third Draft"). The Third Draft retained the 50/50 manager-managed structure from the Second Draft. The Third Draft also explained that the parties would "select a mutually acceptable management company" to serve as property manager; thus giving Sovereign the opportunity to bid for the property management work. Finally, the Third Draft contained a new provision that required any member to give the LLC a right of first offer on any adjoining property before developing the property on its own (the "Right of First Offer"). Iacono pushed back on the Right of First Offer: he wanted to be included in phases 1 and 2 in exchange for giving the LLC the Right of First Offer (the "Adjacent Property Management Right"). The parties then met in an attempt to finalize the LLC Agreement. The Capano team asked Iacono if he would contribute 75% of the required capital instead of 50%. Iacono replied that he would, but only if (1) Sovereign was named the property manager for Phase 3 and (2) Capano's estate repaid an unrelated loan in the amount of $800,000. The Capano team then sent another version of the LLC Agreement to Iacono (the "Fourth Draft"), which followed the Second Draft with respect to the ownership and management structure. The Fourth Draft retained the Right of First Offer without granting Iacono the Adjacent Property Management Right. The Fourth Draft listed Sovereign as the initial property manager, but did not address the repayment of the $800,000 loan and provided that Iacono would contribute 75% of the capital and receive only a 50% membership interest. Iacono rejected the Fourth Draft and Capano's widow terminated the discussions shortly thereafter. Iacono then attempted to acquire Phase 3, but the Capano team successfully closed on Phase 3.

Plaintiffs sued to enforce an oral contract to form a joint venture that would acquire and develop Phase 3. Under Delaware law, the elements of a breach of contract claim are (1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) a resulting damage to the plaintiffs. A valid contract exists when (1) the parties intended that the agreement would bind them, demonstrated at least in part by its inclusion of all material terms; (2) these terms are sufficiently definite; and (3) the agreement is supported by legal consideration. Defendants moved for summary judgment, arguing that an oral agreement could not have existed. The court ultimately denied defendants' motion for summary judgment because the evidence – viewed in the light most favorable to the non-movants – could have supported a finding that an enforceable oral agreement existed.

Defendants argued that the alleged contract was unenforceable because Capano and Iacono did not reach an agreement on all material terms. The court explained that determining which terms are material depends "on the subject matter of the agreement and on the contemporaneous evidence of what terms the parties considered essential." This involves a case-by-case analysis of the surrounding circumstances, including "the course and substance of the negotiations, prior dealings between the parties, customary practices in the trade or business involved, and the formality and completeness of the document (if there is a document) that is asserted as culminating and concluding the

negotiations." Construed in the light most favorable to Iacono as the non-moving party for purposes of defendants' motion for summary judgment, the court held that the evidentiary record could support the existence of an oral contract with the two material terms being shared ownership and control. The court reached this determination based upon Iacono's testimony and email correspondence indicating that Capano agreed to Iacono's position that they should be "equal in all respects," including on management. The parties' relationship, their history of dealing with each other, and the nature of the agreement also supported this finding. In sum, the type of informal agreement that Capano and Iacono possibly reached would constitute an "oral or implied" agreement as described under the Delaware LLC Act. Alternatively, even if Iacono and Capano had not agreed on all material terms, the court held that the evidentiary record could support the existence of an enforceable agreement to negotiate in good faith over the terms of the LLC's operating agreement.

Defendants cited two cases in their attempt to persuade the court to grant their motion for summary judgment: *Leeds v. First Allied Connecticut Corp.* and *Ramone v. Lang*. The court determined, however, that neither case compelled the granting of summary judgment: there were significant differences between (1) *Leeds* and *Ramone* and (2) this case. First, the procedural postures were different. Neither *Leeds* nor *Ramone* granted a motion for summary judgment as both decisions were post-trial opinions. Second, *Leeds* and *Ramone* involved "more complex business ventures with more moving parts" than a 50/50 joint venture. Third, the parties in *Leeds* and *Ramone* were not close friends with a history of prior dealings. Instead, the court cited *Grunstein v. Silva* as a more instructive precedent for this case that supported the denial of defendants' motion for summary judgment. *Grunstein* also involved a motion for summary judgment. In *Grunstein*, the joint venture and third-party transaction were far more complex and the parties did not share a longstanding, trusting friendship. Despite these facts – which seem more likely to have supported a ruling that no agreement existed as a matter of law – the court in *Grunstein* denied defendants' motion for summary judgment and the case proceeded to trial.

In this case, the court recognized that defendants might ultimately be successful after a trial on the full evidentiary record. Defendants could prove that (1) the parties did not reach agreement on all material terms for a 50/50 joint venture or (2) the parties contemplated a "to be formed" LLC with a written operating agreement that would involve further negotiation (i.e., they had not reached a definitive oral agreement to form a joint venture). Nevertheless, the court concluded that it could not grant judgment as a matter of law at this stage.

27. *Stone & Paper Investors, LLC v. Blanch*, C.A. No. 2018-0394-PAF (Del. Ch. June 29, 2020) (V.C. Fioravanti)

In 2013, Clovis Holdings LLC ("Clovis"), was formed in order to produce and sell stone-based paper products. Stone & Paper Investors, LLC ("Stone & Paper") was Clovis' non-managing member. Stone & Paper alleged that Clovis' two managers – Richard Blanch ("Blanch"), affiliated with member Red Bridge & Stone, LLC ("Red Bridge" and together with Clovis and Blanch, the "Counterclaim Plaintiffs"), and Brian Skinner,

affiliated with member Skinner Capital, LLC – breached both their fiduciary duties and Clovis' LLC Agreement by misappropriating the company's capital. The court denied defendants' motion to dismiss the complaint. The defendants subsequently filed counterclaims and third-party claims alleging that Stone & Paper and certain of its affiliates had misappropriated Clovis' assets and (i) breached the LLC Agreement, (ii) committed fraud, (iii) converted Clovis' funds, (iv) were unjustly enriched and (v) aided and abetted breaches of fiduciary duty. This decision addressed a motion to dismiss the counterclaims and third-party claims.

Stone & Paper had contributed $3,500,000 to Clovis, which represented the sole capital investment in Clovis. Counterclaim Plaintiffs alleged that Stone & Paper's capital contribution was in name only and that Stone & Paper treated the assets of Clovis like a "private slush fund" for itself and certain affiliates. Clovis did not directly pay all of its expenses but rather charged expenses to a credit card managed by third-party defendant Albert Carter ("Carter") and held by third party defendant Diamond Carter Trading, LLC ("DCT"). Expenses for Carter, DCT, and additional third-party defendants John Diamond ("Diamond"), Kanokpan Khumpoo ("Khumpoo") and JAD Trading, LLC ("JAD") were commingled on the same credit card and when DCT or JAD were low on funds, Clovis paid the charges made by those entities on the credit card. Counterclaim Plaintiffs also alleged that Clovis's funds were used to make payments for Diamond's investment newsletter, an Amazon server used by DCT and JAD, Diamond and Khumpoo's personal internet and cable service, charitable event sponsorships and event tickets amounting to more than $1,250,000 of credit card charges that were wholly unrelated to Clovis. The counterclaims also alleged that Stone & Paper directly paid itself $10,000 per month for a total of $110,000 from Clovis's bank account despite providing no services or other consideration to Clovis in return.

The movants first argued that the court lacked personal jurisdiction over third-party defendants DCT and Khumpoo Pursuant to one provision of Delaware's long-arm statute, the court may exercise personal jurisdiction over any nonresident who "in person or through an agent . . . [t]ransacts any business or performs any character of work or service in the State[.]" 10 Del. C. § 3104(c)(1). To establish personal jurisdiction under Section 3104(c)(1), a plaintiff must demonstrate that (i) the nonresident transacted some sort of business in the state, and (ii) the claim being asserted arose out of that specific transaction. Furthermore, some act must have actually occurred in Delaware. Counterclaim Plaintiffs asserted that DCT – a New York limited liability company with its principal place of business in New York – was subject to personal jurisdiction in Delaware because it engaged in transactions with Clovis, a Delaware entity. The court ruled, however, that it could not exercise personal jurisdiction over DCT because Counterclaim Plaintiffs failed to allege that any of these acts actually occurred in Delaware. Counterclaim Plaintiffs asserted that Khumpoo, a non-Delaware resident, was subject to personal jurisdiction in Delaware because she held a membership interest in JAD, a Delaware limited liability company with its principal place of business in Florida. However, Counterclaim Plaintiffs did not allege that Khumpoo had personally engaged in any act in Delaware or that JAD had committed any acts in Delaware and the court therefore concluded that Khumpoo's mere membership interest in JAD was insufficient

to confer personal jurisdiction. The court therefore dismissed the counterclaims alleged against DCT and Khumpoo for lack of personal jurisdiction.

Count I alleged that Stone & Paper engaged in self-interested transactions that misappropriated Clovis' assets in breach of the LLC Agreement. In order to survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must demonstrate: (i) the existence of the contract, whether express or implied; (ii) the breach of the obligation imposed by that contract; and (iii) the resultant damage to the plaintiff. The court found that counterclaim plaintiffs sufficiently alleged that Stone & Paper engaged in a series of self-interested transactions that removed a portion of its initial capital contribution from Clovis without the necessary approval under – and therefore in violation of – Section 9.6 of the LLC Agreement and held that counterclaim plaintiffs had stated a claim for breach of the LLC Agreement.

Counts II and III alleged claims for fraud and fraudulent inducement against Stone & Paper, Diamond and Carter. In order to survive a motion to dismiss, a plaintiff asserting a fraud-based claim must sufficiently plead: (i) that defendant made a false representation, usually one of fact; (ii) with the knowledge or belief that the representation was false, or with reckless indifference to the truth; (iii) with an intent to induce the plaintiff to act or refrain from acting; (iv) that plaintiff's action or inaction was taken in justifiable reliance upon the representation; and (v) damage to the plaintiff as a result of his reliance on the representation. In alleging fraud, a party must state with particularity the circumstances constituting the fraud. A claimant may satisfy this standard by alleging: (i) the time, place and contents of the false representation; (ii) the identity of the person making the representation; and (iii) what the person intended to gain by making the representation. Counterclaim Plaintiffs alleged that Stone & Paper, Diamond and Carter had made material misrepresentations regarding the intent of Stone & Paper's $3,500,000 capital contribution to Clovis and the intended management of Clovis under the LLC Agreement. The court, however, determined that Counterclaim Plaintiffs had made conclusory allegations and failed to plead the time, place, and contents of any allegedly false representations. This lack of particularity ultimately proved "fatal to the fraud counterclaim as a matter of law." Further, with respect to the claim that Stone & Paper never intended to permit Skinner and Blanch to serve as the managers of Clovis, the court found that the LLC Agreement expressly named Blanch and Skinner as the managers of Clovis and that the counterclaims alleged that Skinner and Blanch served as managers of Clovis at all times. Therefore, the court held that the representation that Skinner and Blanch would be the managers of Clovis was not false and therefore could not be the basis of a claim for fraud. Counts II and III also failed because Counterclaim Plaintiffs impermissibly attempted to "bootstrap" a claim of breach of contract into a claim of fraud "merely by alleging that a contracting party never intended to perform its obligations."

Count V alleged a claim for unjust enrichment against the movants. Counterclaim Plaintiffs alleged that the movants obtained benefits to which they were not entitled, including excessive compensation and diversion of Clovis' assets to themselves. Under Delaware law, the elements of a claim for unjust enrichment are: (i) an enrichment; (ii) an

impoverishment; (iii) a relation between the enrichment and impoverishment; (iv) the absence of justification; and (v) the absence of a remedy provided by law. The court explained that unjust enrichment is a "flexible doctrine" that can be deployed in order to avoid injustice and may enable recovery in the absence of a formal contract. The unjust enrichment claim failed with respect to Blanch and Red Bridge because Count V only alleged that Clovis had been impoverished by the enrichment of the movants. The movants also argued that the unjust enrichment claims with respect to Clovis should be dismissed because the parties' relationship was governed by the LLC Agreement. The court explained that a claim of unjust enrichment will be denied if a contract comprehensively governs the parties' relationship and provides the measure of plaintiff's rights. The court concluded that, with the exception of Stone & Paper paying itself a total of $110,000 from Clovis' bank account without rendering services or providing other consideration, Counterclaim Plaintiffs had failed to identify a factual basis for the unjust enrichment claim independent of the allegations supporting the breach of contract claim. Other than the unjust enrichment claim as to the $110,000 in compensation to Stone & Paper, the court dismissed Count V as to all other movants.

Count VI alleged that third-party defendants had aided and abetted Stone & Paper's breaches of fiduciary duty to Clovis. Under Delaware law, the elements of a claim for aiding and abetting a breach of fiduciary duty are: (i) the existence of a fiduciary relationship; (ii) a breach of the fiduciary's duty; (iii) knowing participation in that breach by the defendants; and (iv) damages proximately caused by the breach. The court explained that Stone & Paper – a non-managing member that did not exercise control over Clovis – did not owe fiduciary duties to Clovis. Therefore, because Counterclaim Plaintiffs had failed to demonstrate an underlying breach of fiduciary duty, the aiding and abetting claim failed as a matter of law.

28. *AM General Holdings LLC v. The Renco Group, Inc.*, C.A. No 7639-VCS; *The Renco Group, Inc. v. MacAndrews AMG Holdings LLC*, C.A. No. 7668-VCS (Del. Ch. June 26, 2020) (V.C. Slights)

The parties that were the subject of this decision were engaged in a dispute for almost ten years, resulting in numerous written opinions, related to the interpretation of the limited liability company agreement (the "Holdco Agreement") of AM General Holdings LLC ("Holdco"). MacAndrews AMG Holdings LLC ("MacAndrews AMG") asked the court for an order declaring that the Holdco Agreement did not give Renco Group Inc. ("Renco") a right to consent to a sale of the capital stock of Holdco's primary asset, AM General LLC ("AM General"), and moved for judgment on the pleading with respect to such declaration.

Under the Holdco Agreement, MacAndrews AMG was the managing member of Holdco and Section 6.2 of the Holdco Agreement stated that the managing member has "the right, power and authority, in the management of the business and affairs of [Holdco], to do or cause to be done any and all acts . . . deemed by the Managing Member to be necessary or appropriate to effectuate the business, purposes and objectives of Holdco." MacAndrews AMG's discretion was only limited by specific provisions in Section 6.4 of the Holdco Agreement. Specifically, Section 6.4(a) required Renco's consent for "any

voluntary sale . . . of [Holdco] (including the Capital Stock of any of its Subsidiaries (other than GEP)) not in the Ordinary Course of Business . . . ." and Section 6.4(c) required Renco's consent for any "AM General Major Decision." The definition of "AM General Major Decision" included an "AM General Extraordinary Event," which, in turn, was defined to include "the sale to a Person(s) that is neither (x) a Member nor (y) an Affiliate of AM General . . . of a majority of the Capital Stock of AM General . . . ." However, the Holdco Agreement stated that an AM General Extraordinary Event was not an AM General Major Decision, and therefore would not require Renco's consent, if it occurred at any time after December 31, 2013 on terms that were no less favorable to Renco than to MacAndrews AMG.

MacAndrews AMG argued that the proposed sale of all of the capital stock of AM General was an AM General Extraordinary Event and governed by Section 6.4(c) of the Holdco Agreement. The sale, however, would not be an AM General Major Decision under MacAndrews AMG's interpretation because the sale would occur after December 31, 2013, on terms no less favorable to Renco than to MacAndrews AMG. Renco argued that the sale of AMG General was governed by Section 6.4(a) or Section 6.4(f) of the Holdco Agreement. Renco explained that 6.4(a) should have governed because the proposed sale involved the sale of the capital stock of a Holdco subsidiary and Section 6.4(a) specifically carved-out a sale of the stock of AM General's engine manufacturing subsidiary from the consent requirement, but contained no such carve out for AM General. Renco further explained that Section 6.4(f) should have governed, which requires Renco's consent to liquidate Holdco, because the sale of AM General would result in such liquidation. In the alternative, Renco argued that if Section 6.4(c) governed, in order to assess whether the sale was on terms no less favorable to Renco than to MacAndrews AMG, Section 6.4(c) provided Renco with an implied right to receive information regarding the sale before closing.

The court explained that with regard to the Motion for Judgment on the Pleadings, Court of Chancery Rule 12(c) requires that the court grant judgment on the pleadings in favor of the moving party if the contract meaning is unambiguous and further explained that contracts are ambiguous only when the provisions at issue are reasonably or fairly susceptible to different interpretations or may have two or more different meanings. The court held that the relevant language of the Holdco Agreement was unambiguous and relied on two well-settled canons of contract interpretation for such holding. First, specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one. The court explained that Section 6.4(a) of the Holdco Agreement provided Renco with a consent right for a broad range of transactions and Section 6.4(c) specifically carved-out from such consent rights the sale of the majority of the capital stock of AM General after December 31, 2013, as long as the sale was on terms no less favorable to Renco. Following the canon of contractual construction, the court held that the specific provision, Section 6.4(c), applied and the general provision, Section 6.4(a), to the extent it might apply, must give way to the more specific provision. Additionally, contracts must be interpreted as a whole, to give each provision and term effect, so as not to render any part of the contract mere surplusage or any provisions or terms meaningless

or illusory. The court explained that if Section 6.4(a) governed all sales of AM General then the qualifiers in the definition of AM General Major Decision would have no purpose and render the provision meaningless or illusory, in clear violation of that canon of contract construction. With regard to Renco's argument that 6.4(f) governed, the court explained that while Renco's consent would be required to liquidate Holdco, the sale of AM General's capital stock would not automatically trigger Holdco's liquidation.

Renco also argued that AM General's interpretation was at odds with what reasonable parties would have bargained for and were attempting to achieve. The court noted that while it should consider the Holdco Agreement's overall scheme or purpose when construing it, it could not rewrite clear contract terms. In this case, the court noted that the MacAndrew AMG's interpretation that it had the power to negotiate and consummate a sale of AMG General after a certain date was not, on its face, nonsensical. Further, the court explained that the Holdco Agreement unambiguously provided for the different treatment of sales under Sections 6.4(a) and 6.4(c) of the Holdco Agreement and even if it was a "bad deal" for Renco, Delaware law enforces "good" and "bad" contracts.

Finally, the court held that the Holdco Agreement did not create an implied information right. The court explained that MacAndrews AMG had the managerial power to determine the terms of the sale. The AM General Major Decision carve-out in the Holdco Agreement did not specify who had the power to determine if a proposed sale was fair to Renco. Therefore, the court explained that it turned to the broader allocation of authority under the Holdco Agreement. Section 6.2 provided MacAndrews AMG with broad managerial power as the managing member, which power was limited by the specific provisions enumerated in Section 6.4. Because Section 6.4 did not provide Renco with consent rights of the sale, MacAndrews AMG had the power to determine the terms of the sale. The court noted that if Renco believed MacAndrews AMG did not exercised such power in good faith, or was otherwise troubled by the terms of the sale, it could pursue its remedies as available.

For the reasons explained above, MacAndrews AMG's Motion for Judgment on the Pleadings was granted.

29. *In Re Morrow Park Holding LLC*, C.A. No. 2017-0036-PAF (Del. Ch. June 22, 2020) (V.C. Fioravanti)

This litigation arose out of a business dispute between real estate developers in the process of dividing jointly owned businesses as part of a "business divorce." Morrow Park City Apartments (the "Property") was one of the businesses being divided. In order the accomplish the division, the parties formed LLCs with operating agreements governing the development and financing of the Property. The LLC agreements contemplated that one of the developers would purchase the Property from the other after they were substantially completed and occupied and established the process for determining the purchase price. In 2016, Village Green Residential Properties, L.L.C. ("VGRP"), one of the developers, sought to exercise its rights to acquire the Property by purchasing the interests of two of the defendants, but the court entered an injunction essentially maintaining status quo until a final judgment as to the purchase price. The

disputes have continued to grow and there has been related litigation in this court and elsewhere. Most notably, one of the defendants purchased the Property pursuant to an order entered by a Pennsylvania court (the "Pennsylvania Action").

Plaintiffs' side of this dispute was composed of Jonathon Holtzman ("Holtzman") and affiliated companies: VGRP, VGM Clearing, LLC ("VGM Clearing") and counterclaim defendant City Club Apartments, Inc. ("CCA" and together with Holtzman, VGRP and VGM Clearing, the "Holtzman Parties"). Defendants' side of the dispute was composed of VG ECU Holdings, LLC ("VG ECU"), Compatriot Capital, Inc. ("Compatriot"), Village Green Holding, LLC ("Village Green Holding"), Village Green Management Company, LLC ("Village Green Management"), and counterclaim plaintiff CCI Historic, Inc. ("CCI" and together with VG ECU, Compatriot, Village Green Holding and Village Green Management, the "Compatriot Parties").

In 2016, when the relationship between the parties deteriorated, Village Green Holding, VGM Clearing, VGRP, CCI, VG ECU, and Holtzman entered into a redemption agreement (the "Redemption Agreement") to effectuate their separation. The Redemption Agreement included provisions for the development and ownership of the Property, including the formation of Morrow Park Holding, LLC ("MP Holding") to own the Property. As a result, MP Holding became the parent entity of a chain of entities that held the Property. The entities were structured as follows: MP Holding was co-managed by VGRP and CCI. VGRP, CCI and VG ECU were the three members of MP Holding. MP Holding was the majority owner and manager of VG Morrow Park Capital LLC ("MP Managing") and Compatriot, the 100% owner of CCI, was the minority owner of MP Managing. MP Managing was the majority owner and manager of Morrow Park City Apartments, LLC ("MP Operating"). MP Operating owned the Property until CCI purchased it through the Pennsylvania Action.

The Holtzman Parties and Compatriot Parties each filed cross-motions for partial summary judgements centered on the parties' contractual rights under the operating agreements of MP Holding (the "MP Holding Agreement") and MP Managing (the "MP Managing Agreement"). The three contractual claims related to: (1) VGRP's right to purchase CCI's membership interest in MP Holding and Compatriot's membership interest in MP Managing (the "VGRP Purchase Right"); (2) the refusal to consent to a permanent mortgage for the Property, and (3) the Compatriot Parties' entitlement to preferred returns on their membership interests in MP Holding, MP Managing and MP Operating.

The court first addressed the VGRP Purchase Right claim. The MP Holding Agreement provided VGRP with the right to purchase CCI's membership interest in MP Holding and Compatriot's membership interest in MP Managing once the Property was substantially completed and occupied ("Stabilization"). The MP Holding Agreement also provided CCI a secondary right to purchase VGRP's membership interest in MP Holding if VGRP determined not to exercise its purchase right or failed to provide timely written notice as provided in the MP Holding Agreement. Upon on the exercise of either purchase right, the purchaser was to pay an appraised value of the Property. The MP Holding

Agreement prescribed the process for determining such value (the "Appraisal Schedule"). The Appraisal Schedule required a three-appraiser process to establish the appraised values if the parties could not reach an agreement.

On September 23, 2016, VGRP provided a Notice of Stabilization to CCI stating the Project had reached Stabilization, and the parties began negotiating over the appraisal value. The parties could not agree on a value, so in accordance with the Appraisal Schedule, they were to proceed with the three-appraiser process. The parties exchanged emails identifying their respective appraiser, but they did not select a third appraiser within ten days of their designation as contemplated by the Appraisal Schedule. In their correspondence, the parties discussed using the mortgage loan appraisal from the permanent mortgage for the Property that the parties were currently trying to obtain from Freddie Mac. The Compatriot Parties contended these emails amended the Appraisal Schedule to require the use of the mortgage appraisal as the third appraisal.

The parties exchanged appraisals and were unable to reach an agreement on the fair value of the Project. A dispute then arose regarding whether a third appraiser needed to be selected, or whether the parties had previously agreed to use the mortgage appraisal as the third appraisal. With the closing deadline for the VGRP Purchase Right approaching, VGRP filed an action seeking a temporary restraining order requiring CCI and Compatriot to sell their interests pursuant to the VGRP Purchase Right. The court issued a status quo order, which provided that the parties could not transfer their interests until thirty days after a non-appealable judgment as to the appraised value of the Project.

The court first rejected Compatriot's motion for summary judgment asserting that VGRP could not rely on its selected appraisal because the appraiser only held a temporary practice permit. The Appraisal Schedule did not require an appraiser to hold any particular permit, certification or license, but the parties did agree on specific qualifications for the appraisers. The court determined there was a genuine issue of material fact as to whether VGRP's appraiser was qualified under the contract.

The Compatriot Parties also argued they were entitled to a partial summary judgment declaring the parties amended the Appraisal Schedule to the MP Holding Agreement by agreeing to use the Freddie Mac mortgage appraisal. The court found there was some evidence to suggest the parties validly amended the Appraisal Schedule, but other evidence indicating the parties did not mutually assent to use the mortgage appraisal. Accordingly, the Compatriot Parties were not entitled to summary judgment on this claim.

Finally, the Compatriot Parties argued even if the Appraisal Schedule was not amended, a third appraiser was not selected within ten days and thus there was no valid third appraisal for the VGRP Purchase Right. The court rejected this assertion on the grounds that the argument assumed that the Compatriot Parties did not breach any contract by causing the failure of the appraisal process. Further, the court explained the record could support a finding that VGRP and CCI agreed through their course of conduct that that the missing the ten-day window would not restrict the nomination of the third appraiser.

The court then turned to the second area of dispute concerning the financing of the Project. The day after VGRP initiated this action, Holtzman executed a mortgage loan commitment as the borrower for a Freddie Mac loan on behalf of MP Operating. The Compatriot Parties refused to consent to the financing. The Holtzman Parties and the Compatriot Parties sought summary judgment on the Holtzman Parties' claim that the Compatriot Parties breached the MP Managing Operating Agreement by obstructing the Freddie Mac financing. The Holtzman Parties argued that the MP Managing Agreement unambiguously required the Compatriot Parties to approve financing for the Project by a permanent mortgage.

The court found that neither side established CCI's and Compatriot's contractual obligations to approve permanent mortgage financing. The MP Managing Agreement incorporated a business plan, which had been approved by Compatriot and required Compatriot's consent to revise, but the business plan did not unambiguously state that Compatriot or CCI was obligated to approve a permanent mortgage. Although a section of the business plan contained a table that illustrated a permanent mortgage upon Stabilization, it did not contain language expressly obligating any party to approve the mortgage described therein. Further, the court stated that the MP Managing Agreement did not unambiguously require Compatriot or CCI to approve a permanent mortgage, and therefor the Holtzman Parties did not establish as a matter of law that any of the Compatriot Parties were obligated to accept the Freddie Mac financing.

The Compatriot Parties argued that the business plan did not impose any obligations on Compatriot or CCI. While the court agreed this was a reasonable construction of the contract, it also found that the business plan could be interpreted to obligate the parties to act consistently with the business plan. The parties raised numerous factual and legal issues concerning the interpretation of the business plan and the interrelationship between the business plan, the MP Managing Agreement, the MP Holding Agreement and the factual circumstances surrounding the Freddie Mac loan. Accordingly, the court found there were genuine issues of material fact that required the denial of summary judgment.

Finally, the operating agreements of MP Holding, MP Managing, and MP Operating each provided their investors, including certain of the Compatriot Parties, rights to preferred returns on their investments. The Compatriot Parties sought summary judgement declaring that the preferred returns accrued until the termination of the respective agreements, but they also acknowledged that if the Compatriot Parties were liable for breach of contract or breach of the implied covenant of good faith and fair dealing by refusing to approve the Freddie Mac financing, it was possible their rights to preferred returns could have terminated. Because the court denied the summary judgement as to the Holtzman Parties' breach of contract claims, the Compatriot Parties were also not entitled to a declaration at the summary judgment stage as to the preferred return claims.

The court also rejected motions for summary judgement on the Holtzman Parties' implied covenant of good faith and fair dealing claim because further development of the factual record was necessary for the implied covenant analysis. The court stated it was possible

that CCI breached the implied covenant by failing to comply with obligations implied by the parties' agreed-upon three-appraiser process. The court also denied the Compatriot Parties' motion as to whether refusal to approval a permanent mortgage breached the implied covenant because the MP Managing Agreement was ambiguous as to what obligations the business plan imposed on the Compatriot Parties. If at trial neither party prevailed in establishing whether the MP Managing Agreement imposed obligations on the Compatriot Parties, the court reasoned it was possible that the business plan implied an obligation that the parties would enter into a permanent mortgage on terms consistent with those set forth in the business plan.

30. *Sustainability Partners, LLC v. Jacobs*, C.A. No. 2019-0742-SG (Del. Ch. June 11, 2020) (V.C. Glasscock)

Plaintiff Sustainability Partners, LLC (the "Company") was a Delaware limited liability company with its principal place of business in Arizona. Defendant Joel Jacobs ("Jacobs") was a former employee of the Company and a resident of California. After his employment with the Company was terminated, Jacobs contended that he had a contractual right to a 15% equity interest in the Company by way of an oral agreement with CEO Thomas Cain (the "Oral Agreement"). The Company sought a declaration from the court that it had no contractual obligation to issue equity to Jacobs and, accordingly, Jacobs had no claim for damages. In other words, the Company desired to forestall Jacobs from bringing a breach of contract action based on the Oral Agreement. Jacobs moved to dismiss the Company's claim due to lack of personal jurisdiction.

The Company maintained that personal jurisdiction over Jacobs was valid through the forum selection clause in its Operating Agreement, which conferred exclusive jurisdiction in the state or federal courts of the State of Delaware. Plaintiff argued that if Jacobs had an enforceable right to receive equity, he would be subject to the Operating Agreement's forum selection clause as an equity holder; thus, Jacobs should be deemed to have consented to Delaware jurisdiction. The Company relied on the principle of equitable estoppel and stated that, as the party to a prior equity agreement – which never vested – Jacobs was a signatory to a prior version of the Operating Agreement, and had knowledge of its forum selection clause. Jacobs countered that he was entitled to equity in the Company, but never received it and, therefore, was not an equity holder subject to the Operating Agreement. Jacobs asserted that he only sought damages for breach of the Oral Agreement and had not submitted to Delaware jurisdiction.

The court first stated that this case involved an "unusual issue" of personal jurisdiction. The court then described the three-step analysis in *Capital Group Cos. v. Armour* that governs whether a non-signatory may be bound to a forum selection clause in a contract. For a non-signatory to be bound by a contract's forum selection clause, the answer to all three of the following questions must be in the affirmative: First, is the forum selection clause valid? Second, are the defendants third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the agreement? Because the parties did not dispute the validity of the forum selection clause, the court focused its inquiry on the second part of the analysis (i.e., whether the defendant was a third-party beneficiary of, or closely related to, the contract). The Company did not

argue that Jacobs was a third-party beneficiary; only that he was closely related to the Operating Agreement. While the "closely-related" concept serves to expand the availability of equitable estoppel under Delaware law, the court explained that it would apply that doctrine only if: (1) the party received a direct benefit from the agreement; or (2) it was foreseeable that the party would be bound by the agreement.

Non-signatories have to actually receive a direct benefit to be bound by forum selection clauses. Both pecuniary and non-pecuniary benefits are sufficient under the closely-related test. The mere contemplation of a benefit, however, does not constitute the receipt of a benefit for purposes of equitable estoppel. In this case, the court determined that Jacobs had not received a direct benefit from the Operating Agreement. Any benefits the Operating Agreement could bestow on Jacobs were, at most, contemplated benefits that could result upon the vesting of equity under the Oral Agreement.

The court then cited *Neurvana Medical, LLC v. Balt USA, LLC* for the proposition that even though the direct-benefit and foreseeability inquiries have been articulated as disjunctive, many Delaware cases have relegated the foreseeability inquiry to a subordinate role. In terms of finding a party "closely related to a contract," foreseeability had been applied on a standalone basis only in two contexts: (1) when non-signatory defendants sought to enforce a forum selection clause, and the signatory plaintiffs sought to avoid it by arguing the non-signatory defendants lacked standing under the contract; and (2) when a controlled entity was subject to a forum selection clause agreed to by its controller and the controlled entity bore a clear and significant connection to the subject matter of the agreement. The court found that Jacobs satisfied neither of these categories. The court then distinguished a federal case, *Ninespot, Inc. v. Jupai Holdings Ltd.*, which found that a non-signatory defendant was "closely related" to a contract based on foreseeability outside of the two scenarios described above. In *Ninespot*, the defendant was the chief negotiator of the contract and completion of the contract depended on the defendant's funding. The court determined that even if it were to apply *Ninespot's* active-involvement theory to this case, it could not support a finding that Jacobs was "closely related" to the Operating Agreement containing the forum selection clause. This is because Jacobs was not involved in either the creation or negotiation of the Operating Agreement.

According to the court, plaintiffs' argument (i.e., the consequence of the Oral Agreement—the existence of which the Company denied—was that Jacobs had consented to Delaware jurisdiction) contained "more of metaphysics than jurisprudence." The court ultimately held that Jacobs was not a closely related party to the Operating Agreement, as necessary to find a non-signatory bound by a forum selection clause. Because of this ruling, the court did not address the third prong of the analysis (i.e., whether the claim arose from the defendant's standing relating to the agreement). The Company only argued that personal jurisdiction was grounded in consent to the forum selection clause in the Operating Agreement. The Court therefore found that the forum selection clause did not bind Jacobs and subsequently granted Jacob's motion to dismiss for lack of personal jurisdiction.

31. *Martinez v. GPB Capital Holdings, LLC,* C.A. No. 2019-1005-SG (Del. Ch. June 9, 2020) (V.C. Glasscock)

Defendant GPB Capital, LLC ("GPB") is a Delaware limited liability company and the general partner of four limited partnerships: GPB Automotive Portfolio, LP ("Automotive"); GPB Holdings I, LP, ("Holdings I"); GPB Holdings II, LP ("Holdings II"); and GPB/Armada Waste Management, LP ("Waste" and together with Automotive, Holdings I, and Holdings II, the "GPB Funds"). Plaintiff, Alfredo J. Martinez, a limited partner of Holdings II, and other plaintiff, HighTower Advisors, LLC ("HighTower"), brought this action to inspect the books and records from GPB under Section 17-305 of the Delaware Revised Uniform Limited Partnership Act and the Agreement of Limited Partnership of each GPB Fund (the "GPB Fund Agreements").

HighTower was the investment advisor to various clients who purchased limited partnership interests in the GPB Funds. HighTower sent a demand to GPB for information regarding GPB's failure to file financial information, failure to respond to certain data requests, and investor communications relating to underperformance, impairment recognition, and distribution charges (the "First Demand"). HighTower sent the First Demand "on behalf of its clients who beneficially own shares" of the GPB Funds and to whom HighTower served as an investment advisor, but HighTower did not identify the names of the clients or provide any description of their ownership interests. GPB provided some information but failed to provide significant categories of information requested by the First Demand.

HighTower reiterated and supplemented its requests from the First Demand and made a demand pursuant to Section 17-305 for inspection of books and records seeking to investigate potential breaches of fiduciary duty (the "Second Demand"). The Second Demand also did not identify HighTower's clients or their membership interests in the GPB Funds. GPB rejected the Second Demand on the grounds it was improper because it was not sent by the limited partners themselves and because it was brought for the improper purpose of aiding HighTower's defense in pending FINRA arbitrations. HighTower responded to GPB's rejection via letter by asserting the demand was proper under Delaware law because its clients who own partnership interests in the GPB Funds authorized HighTower to make the demand as an agent on their behalf. HighTower attached four affidavits to the letter, which included one affidavit from an investor from each of Automotive, Holdings I, Holdings II, and Waste authorizing Hightower to act as their agent in seeking information pursuant to Section 17-305. The affidavits stated the authorizations were retroactive to the date of the Second Demand. Plaintiff Martinez submitted one of the four affidavits stating he beneficially owned shares in Holdings II. GPB refused to comply with the Second Demand, reiterating the form and content deficiencies and improper purpose.

The plaintiffs asserted a statutory right to obtain such books and records under Section 17-305 and a contractual right under each GPB Fund Agreement. Section 9.4 of each GPB Fund Agreement provided each limited partner, or a designee thereof, certain inspection rights. Plaintiffs argued that Martinez was entitled to inspect GPB's books

and records as a limited partner and HighTower was entitled to inspect as the designee of multiple limited partners.

Standing is a threshold issue that the court must determine before substantive consideration of a claim. The inspection rights under Section 17-305 belonged to current limited partners, and such limited partners may exercise their inspection rights in person or by attorney or other agent. The court found HighTower lacked standing to pursue inspection rights under Section 17-305 because it was not a limited partner of any of the GPB Funds. As for HighTower's contractual claims, because plaintiffs did not argue HighTower was party to any of the GPB Fund Agreements, plaintiffs had to demonstrate that HighTower had standing to enforce the GPB Fund Agreements as a third-party beneficiary. HighTower argued that, as a designee, the language in Section 9.4 provided it with inspection rights. However, the court stated because plaintiffs failed to plead any of the elements required to demonstrate third-party beneficiary status, HighTower lacked standing to enforce the GPB Fund Agreements. Moreover, the court explained that the right of a limited partner to nominate a designee to examine and audit the books and records or request additional information was not equivalent to conferring upon the designee a right to specifically enforce the contract.

Turning to Martinez, the court determined he had standing to pursue the statutory and contractual books and records claims for Holdings II, the only entity in which he held a limited partnership interest. GPB challenged whether Martinez's affidavit, authorizing and purportedly retroactively allowing HighTower to act as his agent in seeking the information described in the Second Demand, comported with Section 17-305(d)'s mandate that where an attorney or other agent seeks the right to obtain information, the demand should be accompanied by a power of attorney or other writing authorizing the attorney or agent to act on the behalf of the limited partner. GPB's motion required the court to interpret the words "accompanied by" in Section 17-305 in light of the rule of strict adherence. The court found *Central Laborers Person Fund v. News Corp.* to be controlling. In that case, the Supreme Court of Delaware considered the documentary requirement of Section 220 of the DGCL that required a demand be accompanied by documentary evidence of beneficial ownership of the stock. In *Central Laborers*, the documentary evidence was not included with the demand due to a clerical error, but an account statement purporting to show the evidence of beneficial ownership was submitted with the plaintiff's brief. The Court held that a subsequent filing would comply with the statute "only if it was submitted with either a new or amended demand." Accordingly, the court found Martinez did not demonstrate strict adherence with Section 17-305's form and manner requirements because there was no dispute that Martinez's writing authorizing HighTower to act on his behalf was not submitted until a month after the Second Demand was submitted. The court stated that the statute foreclosed the possibility of applying the affidavit retroactively.

Finally, the court addressed GPB's argument to dismiss Martinez's contractual claim. GPB cited to a provision the GPB Fund Agreements that permitted GPB to withhold production of documents from Martinez if GPB in good faith believed the disclosure of such information was not in the best interest of Holdings II. The court found GPB was

not entitled to judgment on the pleadings because material issues of fact existed as to whether GPB had such a good faith belief.

32. *HOMF II Investment Corp. v. Altenberg*, C.A. No. 2017-0293-VCL (Del. Ch. May 19, 2020) (V.C. Laster)

In this case, the court addressed claims for breach of fiduciary duty brought by investors in Vert Solar Fund I, LLC (the "Fund"), a Delaware LLC and newly created investment fund, against the individual controller of the Fund's managing member. Defendant Joaquin Altenberg managed the Fund through VERT Solar Finance, LLC ("Finance"), a now-bankrupt entity that he controlled. Plaintiff's also brought claims for fraudulent inducement, fraud during the operation of the Fund and breach of contract.

The Fund was formed for the purpose of acquiring middle-market solar projects, owning them through special purpose vehicles, and providing the equity capital necessary to bring them to commercial operation. Altenberg represented to plaintiffs that once a project achieved commercial operation it could be refinanced with long-term debt, which would enable the Fund to recover its equity investment in the project, plus a return. It was intended that the Fund would own the project and thus would also have a right to ongoing cash flows. Altenberg represented to plaintiffs that he could take a project from acquisition to refinancing in as little as three to six months, which would enable him to revolve the Fund's equity through multiple projects and generate significant gains. Despite Altenberg's representations, the Fund performed disastrously and plaintiffs lost all of their almost $7 million in capital contributions to the Fund. However, Finance received $2.37 million in fees from the Fund, which amounted to 35% of plaintiffs' capital contributions.

The court first analyzed plaintiffs' claim that Altenberg had fraudulently induced them to execute the Fund's LLC Agreement and commit to invest in the Fund. The court began by setting forth the five elements of common law fraud under Delaware law: 1) a false representation, usually one of fact, made by defendant; 2) defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or refrain from acting; 4) plaintiff's action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance. The court held that plaintiffs proved that Altenberg made three false representations to induce them to invest in the Fund. First, Altenberg misrepresented that the Fund's first project would be a specifically identified project in California ("Project Cali"), which plaintiffs understood Altenberg would use to demonstrate the Fund's business model worked. In fact, Altenberg testified that Project Cali was simply an illustration and not an actual project for the Fund. Second, Altenberg misrepresented that the Fund would acquire projects that could be completed within three to six months so that he could recycle the Fund's capital and generate outsized returns. Third, he misrepresented that a broker-dealer firm that he controlled would be a dedicated source of financing for the Fund.

While the court found that the evidence supported plaintiffs' claim for fraudulent inducement, judgment was entered in favor of Altenberg on the procedural ground that

this claim was never validly introduced into the case. The court explained that the claim was never validly introduced because plaintiffs did not put Altenberg on notice before trial that they were pursuing a claim for fraudulent inducement, Altenberg objected at trial to the introduction of evidence in relation to that claim, and plaintiffs never sought to conform the pleadings to the evidence under Rule 15(b). Additionally, the court rejected Altenberg's argument that the integration clause contained in Section 9.10 of the Fund's LLC Agreement barred plaintiffs' fraud claim. Section 9.10 was a standard integration clause that stated "This Agreement constitutes the entire agreement among the parties. This Agreement supersedes any prior agreement or understanding among the parties and may not be modified or amended in any manner other than as set forth herein or therein." The court held that this provision should not be construed as an anti-reliance provision and that it did not bar reliance on extra-contractual representations and did not foreclose a claim of fraud based on extra-contractual representations.

Turning to plaintiffs' breach of fiduciary duty claim, the court held that Altenberg breached the duty of loyalty that he owed to the Fund and its members in his capacity as the human controller of the manager of the Fund by engaging in self-interested transactions that he did not prove were entirely fair. The court began by noting that the Fund's LLC Agreement did not eliminate or modify default fiduciary duties and therefore, under *In re USA Cafes, L.P. Litig.*, 600 A.2d 43 (Del Ch. 1991), Altenberg owed a duty of loyalty to the Fund and the Investment Members as the human controller of Finance. Accordingly, because no independent decision maker was involved in the challenged actions, the standard of review for plaintiffs' claims was entire fairness.

The court analyzed five claims in which plaintiffs contended that Altenberg breached his duty of loyalty: 1) causing the Fund to pay excessive management fees to Finance; 2) holding Fund assets in Finance's name; 3) causing the Fund to pay for project-related fees for projects held in Finance's name; 4) causing the Fund to pay for various legal expenses; and 5) advancing himself expenses to defend this litigation.

With respect to the first claim, the court initially noted that Delaware law applies the entire fairness standard of review to compensation arrangements, consulting agreements, services agreements, and similar arrangements between a controlled entity and its controller or an affiliate. Additionally, the court noted that Altenberg extracted 35% of the Investment Members' capital through management fees paid to Finance, which was well beyond the well-known "2-and-20" standard fee structure for fund managers. While Altenberg charged a management fee of $10,000 per megawatt per month, regardless of the state or stage of the project, the court found that the record established that industry practice was to pay fees based on the achievement of project milestones. To defend the disputed fees, Altenberg pointed to a provision in the Fund LLC Agreement that authorized Finance to receive a management fee of up to $170,000 per megawatt. However, the court held that this provision did not insulate Altenberg's self-interested conduct from fiduciary review but rather confirmed that Finance had the power to receive compensation from the Fund, which addressed the first step in Adolf Berle's "twice-tested" framework. However, this provision did not address the second step, which asks whether the fiduciary properly exercised his or her power. The court explained that the

provision in the LLC Agreement was analogous to a board of directors that had been authorized to grant itself compensation under a stockholder-approved plan that allows directors to retain discretion to make such awards under general parameters. In that setting, the directors would still need to prove their self-interested transactions were entirely fair to the company. The court held that Altenberg failed to carry his burden of proving that it was entirely fair for Finance to extract the disputed management fees from the Fund. The court noted that he failed to introduce any evidence of fair dealing, admitted that he determined the amount of the fees unilaterally and failed to prove that the fees he charged the Fund reflected a fair price.

The court also held that Altenberg did not demonstrate that holding the Fund's assets in Finance's name was entirely fair. The Fund's LLC Agreement contemplated that each project would be owned by a special purpose vehicle and wholly owned subsidiary of the Fund. However, Altenberg breached this requirement and, according to the court, did so in a self-interested manner that implicated his fiduciary duties by causing Finance to own the projects and therefore conferring benefits on Finance at the expense of the Fund. With respect to plaintiffs' third claim, the court held that Altenberg did not breach his duty of loyalty by causing the Fund to pay project-related fees for projects that were held in Finance's name. The court explained that because they had held that Altenberg breached his duty of loyalty by holding the projects in Finance's name, the Fund was the equitable owner of these projects and therefore it was not a fiduciary wrong for Altenberg to spend money from the Fund developing the projects.

Turning to plaintiffs' fourth and fifth claims for breach of the duty of loyalty, the court initially noted that unless the Fund was contractually obligated to pay for Finance's legal fees under the indemnification provision in the Fund's LLC Agreement, then causing the Fund to pay for Finance's legal fees would be an interested transaction and Altenberg would be obligated to prove that having the Fund pay Finance's legal fees was entirely fair. However, the court found that plaintiffs had not made the necessary threshold showing of whether Altenberg was entitled to indemnification or not for the proceedings at issue. With respect to the amount that Altenberg advanced to himself to defend this litigation, the court held that under the Fund's LLC Agreement, Altenberg was not entitled to mandatory advancement of legal expenses, only indemnification. Therefore, this decision was a self-interested transaction that was subject to entire fairness review. The court found that Altenberg did not make any effort to prove that the advancements that he paid to himself were entirely fair to the Fund and to the Investment Members and therefore breached his fiduciary duties by causing the Fund to advance these amounts to him.

33. *GMF ELCM Fund L.P. v. ELCM HCRF GP LLC,* C.A. No. 2018-0840-SG (Del. Ch. May 18, 2020) (V.C. Glasscock)

The court previously entered judgments exceeding $350,000 against defendant Andrew White ("White"), which remained unpaid. The bulk of the judgments were for sanctions for White's actions in this matter, and a portion was being collected by plaintiffs to compensate the former receiver (the "First Interim Receiver") for outstanding fees incurred due to White's misconduct in his dealings with the First Interim Receiver.

Plaintiff owned a 100% interest in EL FW Leasing LLC ("FW Leasing") and EL FW Intermediary I LLC ("FW Intermediary" and together with FW Leasing, the "FW Entities"). FW Intermediary entered into a lease (the "Master Lease") for two properties and received payments from a sublease of such properties. Plaintiffs sought to subject the subsequent distribution of such funds to White, as the sole member, to a charging order and filed a motion for a temporary restraining order ("TRO") and interim charging order (the "Interim Charging Order") to provide interim relief until the resolution of plaintiffs' request for a permanent charging order. The court granted the motion for the TRO and Interim Charging Order.

The court explained that in evaluating the TRO, it considered (i) whether plaintiffs stated a colorable claim; (ii) whether plaintiffs faced irreparable harm in the absence of a TRO; and (iii) whether a balancing of the equities favored plaintiffs. In a previous ruling, the court found that plaintiffs stated a colorable claim because they had outstanding judgments, arising as sanctions for White's misconduct, which he claimed to be unable to satisfy, and that plaintiffs faced irreparable harm because there was a likelihood that in the absence of injunctive relief White would act to make the assets unavailable to plaintiffs. In this decision, the court decided that the third prong was also met and a balancing of the equities favored plaintiffs.

White argued that a charging order on his membership interest under Section 18-703 of the LLC Act would cause FW Intermediary to default on the Master Lease because (i) it would create a prohibited lien and (ii) it would constitute a prohibited transfer or assignment of interest, including a prohibited change in control. Under the Master Lease, FW Intermediary could not "create . . . any lien, encumbrance, attachment, title retention agreement or claim upon any portion of the Property caused by [FW Intermediary] or its Agents or on [FW Intermediary's] Accounts." The Master Lease defined "Property" as "the Facilities and all rights related to the use and operation of the Facilities. . ." and "Accounts" as including "cash and accounts receivable . . . and other rights to payment arising from the Facilities now existing or hereafter arising." The court explained that the charging order is a lien solely on White's right to distributions from FW Intermediary, not a lien on any interest of FW Intermediary under the Master Lease, therefore, a charging order does not constitute a lien on "Property" or "Accounts". As a result, the court held that a charging order under Section 18-703 of the LLC Act did not constitute a prohibited lien under the Master Lease.

In addition, under the Master Lease, any prohibited transfers or assignments would result in a default. Prohibited transfers under the Master lease included "an assignment of [sic] delegation (whether by operation of law, transfers of interests in [FW Intermediary], Subtenant or otherwise) of [FW Intermediary's] or Subtenant's rights under the [Master Lease]" or "a Change in Control." The Master Lease defined "Change in Control" as "a transfer, assignment, or other event that results in [FW Intermediary] no longer being directly or indirectly Controlled by Andrew White . . ." and "Control," as "the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such entity . . . including the right to act as managing member." The court explained that under Section 18-703(e) of the LLC Act, the

charging order would only give plaintiffs the right to receive distributions, it would not affect White's ability to control FW Intermediary or grant plaintiffs any interest in FW Intermediary's rights under the Master Lease. As result, the court held that a charging order would not cause a default of the Master Lease through a prohibited transfer or assignment, including a change of control. Because a charging order would not cause a default under the Master Lease, the court held that the balance of equities favored plaintiffs and granted plaintiffs' motion for the TRO and Interim Charging order.

34. *Riker v. Teucrium Trading, LLC*, C.A. No. 2019-0314-AGB (Del. Ch. May 12, 2020) (C. Bouchard)

In this post-trial opinion, the Court of Chancery ruled that the plaintiff, Dale Riker ("Riker"), was not entitled to the bulk of the books and records he sought from the defendant, Teucrium Trading, LLC ("Teucrium"). The court did, however, rule in favor of Riker as to a few specific documents. The court also considered Riker's claim for attorneys' fees and held that there were no extraordinary circumstances to entitle Riker to attorneys' fees.

Riker was the CEO and a member of Teucrium, holding a 25% equity interest. Teucrium was the sponsor of a trust that held five exchange-traded funds (collectively, the "Funds"). Upon a vote of the members, Riker was removed as CEO of Teucrium. He then made a demand under LLC Act Section 18-305 to see fifteen categories of books and records held by Teucrium. Teucrium produced some, but not all, of the documents demanded. During negotiations between Riker and Teucrium regarding the production of the remaining documents, a dispute arose as to whether Riker was terminated as CEO with or without cause. Riker then filed a complaint asserting claims for the production of the remaining documents under Teucrium's LLC Agreement and under Section 18-305. After the court denied cross-motions for summary judgment, the parties entered mediation. As a result, Teucrium agreed to produce certain documents and Riker agreed to drop his demand for other documents. The parties proceeded to trial on the remaining nine categories of documents.

The nine categories of documents corresponded to three purposes for which Riker sought the documents. First, Riker sought documents to value his membership interest in Teucrium (the "Valuation Purpose"). Second, Riker sought documents "[t]o investigate improprieties in corporate governance" (the "Governance Purpose"). Third, Riker sought documents related to mismanagement resulting in the loss of, and continuing decline in, value of equity in Teucrium (the "Financial Performance Purpose"). Because Riker did not address the Financial Performance Purpose in his post-trial briefing, the court held that Riker abandoned his claims for documents relating to this purpose. Riker also failed to address in his post-trial briefing his demand for documents under Teucrium's LLC Agreement, and the court held that these claims were abandoned as well. The court then proceeded to consider whether, under Section 18-305, Riker was entitled to the remaining six categories of documents related to the Valuation Purpose and the Governance Purpose.

Before considering the merits of Riker's demands for the six categories of documents, the court first laid out the legal standards governing its ruling. Under Section 18-305, Riker would be entitled to any documents for which he could establish a "proper purpose" for inspection by a preponderance of the evidence. A proper purpose is one "reasonably related" to his interest as a member of Teucrium. If Riker could establish a proper purpose, then he would be entitled to only those documents that were "necessary and essential" to accomplish the proper purpose. To demonstrate that the documents were necessary and essential, Riker was required to specifically identify the documents he sought.

The court first ruled on the documents demanded for the Valuation Purpose. Noting that seeking documents in order to value a member's interest in an LLC was well established as a proper purpose, the court found that the parties disputed whether the documents Riker sought were necessary and essential to value his interest in Teucrium. From the two categories of documents that related to the Valuation Purpose, Riker sought five pieces of information that he claimed were necessary and essential for him to properly value his interest in Teucrium. First, Riker sought information relating to the allocation of expenses between Teucrium and the Funds. More specifically, in his post-trial briefing, Riker sought Teucrium's allocation model, which contained granular details updated on a continuous basis illustrating the allocation of expenses between Teucrium and the Funds. Teucrium argued that sufficient information regarding the allocation of expenses was contained in its audited financial statements, which it had already agreed to supply to Riker. The court agreed, noting that Riker did not specifically request the allocation model until post-trial briefing and that the level of detail in the allocation model exceeded what Riker would require to value his interest in Teucrium. Second, Riker sought information regarding Teucrium's contingent assets and liabilities as found in Teucrium's prepaid memoranda. Teucrium argued that sufficient information regarding its contingent assets and liabilities could be found in its audited financial statements and that the prepaid memoranda primarily contained information that would not be of use when valuing Riker's interest. Teucrium also noted that the value of its contingent assets and liabilities was minimal. The court found Teucrium's arguments persuasive and held that Riker was not entitled to the prepaid memoranda. Third, Riker sought information related to Teucrium's net operating loss carryforward. More specifically, Riker sought "Item L" from Teucrium's most recent tax return. Teucrium agreed to provide this information in post-trial argument, so the court found this issue moot. Fourth, Riker sought information in Teucrium's budget or business plan relating to Teucrium's "plans or projections, if any, for expanding the outstanding shares of its funds, increasing [Teucrium's] assets under management, and/or restoring [Teucrium] to profitability." The court found that this information was necessary and essential to an accurate valuation of Riker's interest and ordered that Teucrium turn over any part of its budget or business plan addressing these issues. Fifth, Riker sought information concerning whether Teucrium's internal finance team and its outside auditors considered Teucrium a going concern. Because the audited financial statements contained a going-concern analysis, and because Riker had not produced any evidence at trial to suggest there were other documents that might be relevant for this analysis, the court did not order Teucrium to produce any documents beyond its audited financial statements.

The court next turned to the Governance Purpose. In order to receive documents to investigate mismanagement, Riker was required to demonstrate a "credible basis" for believing Teucrium's management had engaged in wrongdoing. The court notes that this is the lowest burden of proof, but it still requires "*some* evidence" (emphasis in original). Riker put forth a number of claims of mismanagement. The first claim related to whether he was terminated as CEO for cause or without cause. Teucrium had already produced a number of documents related to this claim, but Riker sought additional documents he believed to exist. The court credited testimony on behalf of Teucrium that no non-privileged documents responsive to Riker's demand existed. As there were no additional documents responsive to Riker's demand, the court did not require Teucrium to produce additional documents related to this claim. As to the rest of the claims Riker put forth relating to mismanagement, the court held that Riker had not produced any evidence to suggest that Teucrium's management had engaged in mismanagement, and therefore did not order Teucrium to produce documents related to Riker's Governance Purpose.

Finally, the court considered Riker's claim for attorneys' fees. While noting that "both sides fought hard in this litigation," the court found there to be nothing extraordinary about the tactics used by Teucrium that might entitle Riker to recover attorneys' fees. Specifically, the court cited to Teucrium's willingness to produce documents in response to the initial demand and during the course of mediation.

35. *Acela Investments LLC v. Raymond DiFalco,* C.A. No. 2018-0558-AGB (Del. Ch. April 27, 2020) (C. Bouchard)

Raymond DiFalco ("DiFalco"), Manish Shah ("Shah") and Stefan Aigner ("Aigner") formed and were managers of Inspirion Delivery Sciences, Inc., a Delaware limited liability company ("IDS"), to manufacture and sell drugs that deter the abuse of opioids and other drugs. Since the parties formed IDS, their relationship deteriorated and they became deadlocked on significant issues regarding the business, with DiFalco and Shah on one side and Aigner on the other. In May 2019, the Chancery Court held that it was not reasonably practicable to carry on the business of IDS in conformity with its LLC agreement and ordered IDS to be dissolved and ordered that a liquidating trustee be appointed under Section 18-803 of the LLC Act to wind up the affairs of IDS. The court entered into an order (the "Sale Order") appointing the liquidating trustee (the "Liquidating Trustee) and on April 3, 2020 the Liquidating Trustee filed a motion requesting court approval to sell substantially all of the IDS's assets to OHEMO LIFE SCIENCES INC. ("OHEMO"). DiFalco and Shah objected to the motion.

The Sale Order granted the Liquidating Trustee full control and dominion over the dissolution and liquidation of IDS. Further, the Sale Older specifically authorized the Liquidating Trustee to dispose of the assets of IDS in a transaction that could be structured in whatever form he determined to be in the best interest of IDS, including selling the Company as a going concern or selling its assets individually or collectively. To assist with the liquidation of IDS, the Liquidating Trustee retained Locust Walk Partners LLC and Locust Walk Securities (together, "Locust Walk") in July 2019 and filed a motion describing the steps of a proposed sale process that would conclude on

December 31, 2019. After filing such motion, Locust walk contacted several entities that were potential buyers and received non-binding indications of interest from five potential buyers. Despite the entities expressing interest, the Liquidating Trustee was unable to reach definitive terms for a transaction with anyone before the contemplated December 31, 2019 deadline. In 2020, IDS suffered a critical loss of revenues and the Liquidating Trustee furthered his efforts to finalize a transaction, frequently urging stakeholders to make concrete bids. The Liquidating Trustee also explained to the stakeholders that following execution of an acceptable bid and receipt of a deposit, he would shop such bid to the others for 48 hours and then seek the court's approval of such bid. On March 31, 2020, IDS entered an asset purchase agreement with OHEMO (the "OHEMO Agreement") and received a $750,000 deposit from OHEMO. The OHEMO Agreement provided that OHEMO could terminate the OHEMO Agreement if IDS did not file the transaction for court approval by 6p.m. on April 3, 2020 and provided that IDS could not accept a competing bid if the other party did not make a deposit of at least $750,000 on the date of execution of such party's purchase agreement. After the OHEMO Agreement was executed, the Liquidating Trustee sent an executed copy to the other stakeholders, including DiFalco, and instructions for submitting a topping bid. The instructions stated that interested parties must "(1) submit a signed APA that represents a higher and better offer, as interpreted by the Liquidating Trustee, to the company; and (2) transfer the greater of $750K or 10% of the bid deposit to an Inspirion-designated escrow account by close of business on Thursday, April 2nd."

At 4:55p.m. on April 2, 2020, DiFalco and Shah's counsel sent the Liquidating Trustee a copy of an asset purchase agreement (the "Cerovene APA") between IDS and Cerovene, Inc. ("Cerovene"),which is co-owned by DiFalco and Shah. The Cerovene APA that was sent on April 2 was not executed and Cerovene did not send a deposit on April 2 with the Cerovene APA. On April 3, DiFalco and Shah's counsel sent the signature page to the Cerovene Agreement to the Liquidating Trustee and $2.3 million to his firm's trust account "to be used to back up [his clients'] bid." Also on April 3, the Liquidating Trustee filed the motion seeking the courts approval of the OHEMO Agreement. DiFalco and Shao objected to the Liquidating Trustee's motion, arguing that (i) the Liquidating Trustee's rejection of their bid for failing to comply with the bidding requirements was unwarranted and (ii) Cerovene's offer provides more value to IDS's stakeholders than the OHEMO Agreement. The court explained that it applied an abuse of discretion standard when reviewing the objections. Specifically, the court stated that the decision of the Liquidating Trustee would only be overturned as an abuse of discretion if it was arbitrary or capricious or exceeded the bounds of reason in light of the circumstances.

The court held that the Liquidating Trustee did not abuse his discretion in rejecting the Cerovene bid for failing to comply with the bidding requirements. DiFalco and Shah knew that there would be a 48-hour deadline for submitting a topping bid and Cerovene failed to provide an executed agreement and the required deposit prior to such deadline. DiFalco and Shah argued that it was unreasonable for the Liquidating Trustee to insist on compliance with such requirements because the signature page and deposit were sent the day after the deadline. The court, however, explained that DiFalco and Shah had months to submit a bid and instead chose to disengage from the sale process and wait until the

very last minute. Further, the OHEMO Agreement required the Liquidating Trustee to seek court approval of the transaction by April 3rd and to only accept a competing bid that was accompanied by a deposit of at least $750,000. These requirements were a heavily negotiated and material part of the transaction with OHEMO and, therefore, not "arbitrary technicalities". The court noted that because the sales process failed to yield any bidders for six months and IDS was losing revenues, OHEMO had substantial leverage to demand tight restrictions on having its bid shopped. Further, Locust Walk advised the Liquidating Trustee not to extend the 48-hour deadline because of the risk of losing the OHEMO transaction and the Liquidating Trustee was concerned about the lack of deposit because Cerovene previously stated that it lacked the funds necessary to continue operating its business. For the reasons described above, the court held that the Liquidating Trustee's decision was not arbitrary or capricious.

The court also held that the Liquidating Trustee did not abuse his discretion in determining that OHEMO's bid was the better offer. The only differences between the OHEMO Agreement and the Cerovene APA were (i) the nature and amount of the payment due at closing and (ii) the cap on potential future royalties. Under the OHEMO Agreement, OHEMO would pay $4 million to in cash to IDS at closing and under the Cerovene APA, Cerovene would pay $2.5 million in cash to IDS at closing and credit $1.85 million to be used to discharge the debt IDS owed to Cerovene. The Liquidating Trustee argued that Cerovene's proposal was worth less than $4 million because the $1.85 million attributable to the credit bid may not have been paid in full to Cerovene at closing based on of IDS's liquidity and anticipated claims and wind down costs at closing. The court held that it was reasonable for the Liquidating Trustee to conclude that OHEMO's all-cash offer was superior by discounting the credit bid component of Cerovene's bid. Regarding the royalty payments, the only difference between the OHEMO and Cerovene bid was that under the OHEMO Agreement, the royalty cap was $10 million and under the Cerovene APA the royalty cap was $15 million. The court explained that even though the caps differ by $5 million, valuing the royalty component of the two proposals was inherently speculative and the Liquidating Trustee determined it was possible that no future royalty stream would be paid by OHEMO or Cerovene. Each Locust Walk and the Liquidating Trustee had reservations about Cerovene's ability to successfully create any future downstream royalty payments to IDS. The court held that the Liquidating Trustee's conclusions regarding the value of the potential royalty payments was not was arbitrary or capricious and did not exceed the bounds of reason. As a result, the court held that there was no basis under the applicable standard of review for the court to second guess the Liquidating Trustee's determination that the OHEMO Agreement provided more value to IDS than the Cerovene APA. The court granted the Liquidating Trustee's motion and approved the sale of substantially all of the IDS's assets to OHEMO.

36. *Zachman v. Real Time Cloud Services, LLC*, C.A. No. 9729-VCG (Mar. 31, 2020) (V.C. Glasscock)

In this case, the court addressed claims for breach of fiduciary duty brought by James Zachman ("Zachman"), a former managing member of Real Time Data Services, LLC ("Real Time Data"), against Sangeeta Chhabra ("Chhabra"), the remaining manager of

Real Time Data, for failure to pay Zachman the fair value of his economic interest in Real Time Data after he was removed as a manager and his economic interest was extinguished pursuant to a merger.

Zachman and Chhabra founded and co-managed Real Time Data, with Zachman as a managing member and Chhabra as a manager. Zachman and CBS Accounting, a company wholly owned by Chhabra, each owned half of the membership interests in Real Time Data. During the lifetime of the company, Zachman and Chhabra had grievances relating to the other's behavior regarding the company's accounting practices, including Zachman's failure as "Tax Matters Member" to file the company's tax returns. In addition, unbeknownst to Chhabra, Zachman filed for personal bankruptcy in 2010. In 2012, the business disputes between Zachman and Chhabra came to a head when Zachman unilaterally opened a new bank account for Real Time Data and began to deposit the company's revenues into that account and then transfer a portion of those revenues to Real Time Data's other bank account, to which Chhabra and Zachman had access. Chhabra became aware of this second account and alleged that Zachman wrongfully retained funds in that account. In May 2012, Chhabra removed Zachman as a manager of Real Time Data due to his personal bankruptcy, failure to file company tax returns, and mismanagement of company funds. In October 2012, Chhabra, acting as the sole remaining manager of Real Time Data, eliminated Zachman's economic interest in Real Tim Data through a merger. Chhabra assigned the same value to Zachman's interest that Zachman assigned to his interest in his 2010 bankruptcy petition (approximately $3,500). She then applied what he allegedly owed the company to offset that amount and paid Zachman nothing for his interest. Chhabra admitted at trial that "these choices did not comport with the fair value owed to Zachman under Delaware law for his interest in the company."

The parties each retained a valuation expert to provide a valuation for Zachman's extinguished interest. Unsurprisingly, the expert's valuations varied widely—Chhabra's expert valued Zachman's interest at the closest month-end to the date of the merger and, using an income capitalization approach, valued the interest at $132,500. Zachman's expert valued the interest as of May 2012 (the date Zachman was removed as a manager) and, using a discounted cash flow model, valued the interest at $1,682,000.

In addressing Zachman's claim for breach of fiduciary duty against Chhabra, the court analyzed two questions: first, how much Real Time Data was worth when Chhabra merged Zachman out in 2012; and second, whether that value must be offset by Real Time Data's counterclaims against Zachman.

In addressing the first question, the court noted that, under Section 18-304 of the Delaware LLC Act, Zachman ceased to be a member of Real Time Data, and lost his manager status, in 2010 when he filed for personal bankruptcy. However, applying the precedent set in *Milford Power Co., LLC, v. PDC Milford Power, LLC*, the court found that Zachman became an assignee with economic rights but not membership rights. The court found that Chhabra's assignment of value to Zachman's interest was "a pretextual opportunity to avoid paying Zachman anything for his interest in the company he had co-

founded" and, therefore, Chhabra breached her fiduciary duties as a manager of Real Time Data and controller of Real Time Data's other member. The court found that the proper way to remedy such breach was to determine the fair value of Zachman's interest and award him damages. In reviewing the experts' valuations, the court found that the proper valuation date was October 2012 (the time the merger occurred) for two reasons: (1) that is when Zachman's economic interest was eliminated and (2) it would be inequitable to value the interest at an earlier date when, after Zachman was terminated as manager in 2012, he tried to prevent Real Time Data from operating in the United States and formed a competing company that solicited Real Time Data's customers. Such actions, the court noted "eroded the value of Real Time Data in the six months leading up to the Merger" and, therefore, Zachman could not argue that a "Court of equity should ignore the downturn in [the company's] financial performance" in valuing his interest in the company. The court found Chhabra's expert to be more reliable and, using that expert's valuation with some adjustments, arrived at a value of $173,000 for Zachman's interest.

In addressing the second question, the court found that Real Time Data failed to establish an entitlement to damages and an offset against the amount owed to Zachman for his extinguished interest. Real Time Data alleged that Zachman converted company funds and tortiously interfered with the company's contracts following his termination from the company. However, the court found that the company failed to carry its burden of proof on both of these claims and, therefore, its counterclaims could not support an offset against the amounts owed to Zachman for his interest.

37. *FP UC Holdings, LLC v. Hamilton,* C.A. No. 2019-1029-JRS (Del. Ch. Mar. 27, 2020) (V.C. Slights)

This case arose from the alleged breaches by a former employee of a Delaware LLC of non-competition, non-solicitation and confidentiality covenants contained in an employment agreement, unit grant agreement and LLC agreement. Plaintiffs, FP UC Holdings, LLC ("Holdings"), FPMCM, LLC ("FPMCM") and Fast Pace Medical Clinic, PLLC ("Clinic" and collectively with Holdings and FPMCM, the "Company"), ran urgent care clinics across the southeast United States. Defendant, James W. Hamilton, was an employee of the Company until 2019 working in a clinic in Tennessee. Plaintiffs alleged that Defendant breached the relevant agreements when he left the Company to start a competing urgent medical care business in Alabama and filed a Motion for Preliminary Injunction which sought to close Defendant's competing business pending a trial on the merits.

Defendant entered into an employment agreement with Clinic in 2012 (the "Employment Agreement") which contained a non-competition covenant whereby defendant agreed to refrain from "engag[ing] in the management or operation of an urgent care/walk-in clinic business for a period of two years within 60 miles of any significant place of business of the [Clinic]." In 2016, a private equity firm acquired the Company and at that time certain employees, including defendant, were offered Holdings membership units in exchange for an agreement to be bound by broader restrictive covenants than those contained in the Employment Agreement. When defendant received his Holdings

membership units, he signed two Class P-1 Unit Grant Agreements (collectively, the "Grant Agreement").

The Grant Agreement contained a non-compete that was more restrictive than the Employment Agreement and prohibited defendant from being employed by a business that "engages" in the same business as the Company "anywhere in the United States" where the Company operates or "proposes" to operate. The Grant Agreement also prohibited post-employment solicitation of Company employees and disclosure of Company information. Additionally, pursuant to the Grant Agreement, both defendant and his wife became bound to Holdings' Second Amended and Restated Limited Liability Company Agreement (the "LLC Agreement"). The LLC Agreement restricted members from pursuing certain business opportunities outside of the Company. On July 9, 2019, defendant notified the Company that he intended to terminate his employment with the Company. Shortly thereafter, defendant began operating an urgent care clinic in Alabama ("Thrive") located within 26 miles from one of the Company's clinics.

The court began its analysis by explaining that, to obtain a preliminary injunction, plaintiffs must demonstrate: (1) a reasonable probability of success on the merits, (2) that absent preliminary injunctive relief, they face imminent and irreparable injury and (3) that such harm outweighs the harm that may result from the injunction, should it prove to have been improvidently granted. The court first turned to plaintiffs' claim that defendant breached the Grant Agreement's covenant not to compete. As a threshold issue, the court first analyzed the choice of law issue implicated by the Grant Agreement and its Delaware choice of law provision. The court began by noting that in determining which states law applies to a contract, Delaware generally follows the Restatement (Second) of Conflict of Laws. The court explained that the choice of law analysis in circumstances where the parties have contracted for choice of law involves three questions: (1) whether "absent the contractual agreement of the parties to import Delaware law, [Alabama] law would apply[,]" (2) "whether the enforcement of the covenant would conflict with a 'fundamental policy' of [Alabama's] law" and (3) "whether [Alabama] has a materially greater interest in the issues – enforcement (or not) of the contract at hand – than Delaware."

With respect to the first question, the court looked to Section 188 of the Restatement, which provides that "an issue in contract is determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." The court explained that the factors a court may consider in determining which state has the most significant relationship to the transaction and the parties include: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. The court found that many of these factors, such as the place of performance, subject matter of the contract and domicile of the parties weighed in favor of Alabama law.

The court explained that when engaging in the most significant relationship analysis, Delaware courts also consider the factors laid out in Section 6 of the Restatement: (1) the

needs of the interstate and international systems, (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability and uniformity of result and (7) ease in the determination and application of the law to be applied. Applying these factors, the court noted Alabama's strong statutory public policy of not enforcing non-compete clauses, which is set forth in *Ala. Code* §8-1-190, pointed to the application of Alabama law. Additionally, the court explained that the comments to Section 188 further elaborate that "the state where performance is to occur has an *obvious interest* in the question whether this performance would be illegal" and that the Company was effectively asking defendant to "perform" the non-compete in Alabama. Although the court noted that place of performance can bear little weight in the choice of law analysis when at the time of contracting it is either uncertain or unknown, the Grant Agreement's plain language made clear that the parties anticipated defendant would "perform" in every state within the United States where the Company operates or proposes to operate, including Alabama. Also, defendant's domicile at the time in Alabama further supported an inference that the parties anticipated his performance would occur there. Despite the fact that Holdings was a Delaware LLC with its principal place of business in Tennessee and that defendant worked for the Company in Tennessee, the factors probably weighed in favor of the application of Alabama law absent the Delaware choice of law provision.

Turning to the second question under the Restatement analysis, the court found that enforcement of the non-compete likely would conflict with a "fundamental policy" of Alabama given that it is well-settled that Alabama law "frowns on restrictive covenants" and that Alabama public policy would be offended if the court enforced a non-compete to shut down an urgent medical care facility within Alabama's borders. The court also found that Alabama's interest against the enforcement of non-competes materially outweighed Delaware's general interest in freedom of contract. The court specifically emphasized that the Alabama legislature had addressed this issue and noted that under similar circumstances, the Court of Chancery had held that California's clear public policy prohibiting non-competes outweighed Delaware's interest in freedom of contract.

Plaintiffs also alleged that defendant was obligated under the LLC Agreement to ask the Company whether it wanted to open an Alabama urgent care clinic before defendant opened Thrive. Section 15.5 of the LLC Agreement established a contractual restriction commensurate with a common law corporate opportunity restriction that required members of Holdings to bring opportunities "he or she *believes* would qualify as an investment or business opportunity [for the Company]" to the Company's board of managers. The court noted that according to the language of Section 15.5, the obligation to present opportunities to the Company hinged on the members' *subjective* perception of whether the opportunity would be a corporate opportunity for the Company. In determining whether Thrive constituted a "business opportunity" of the Company, the court explained that under Delaware law, a corporate opportunity is a business prospect "presented to a corporate officer" that the company (i) "is financially able to undertake," (ii) within the company's "line of business," (iii) in which the company has "an interest

or expectancy" and (iv) that, by taking, a fiduciary "will be laced in a position inimical to his duties to the corporation." The court held that it was unlikely plaintiffs would succeed on their corporate opportunity claim because it did not appear that Thrive was ever "presented" to defendant while he was employed at the Company. Rather, it appeared that Thrive was an idea that defendant hatched on his own likely while working for the Company, and then left the Company and pursued the idea after his employment with the Company terminated.

Plaintiffs also alleged that defendant's scheme to open Thrive breached his fiduciary duty of loyalty while working at the Company. The court held that it was not reasonably probable that plaintiffs would be able to demonstrate that defendant actually owed fiduciary duties. Holdings was a manager-managed LLC and, although defendant did work for Holdings, he was not one of its managers. The court explained that defendant's status as an employee, or even as a member of Holdings, could not give rise to fiduciary duties in a manager-managed LLC unless defendant exercised *actual control* over Holdings.

38. *Walsh v. White House Post Productions, LLC*, C.A. No. 2019-0419-KSJM (Del. Ch. Mar. 25, 2020) (V.C. McCormick)

In April 2009, plaintiffs Kieran Walsh and Francis Devlin, and defendant White House Post Productions, LLC ("White House") founded defendant Carbon Visual Effects, LLC (the "Company"). Plaintiffs were employees and members of the Company and White House was the Company's majority unitholder. The parties' dispute revolved around Section 9.2(e) (the "Buyout Provision") of the Company's Amended and Restated Limited Liability Operating Agreement dated January 28, 2014 (the "LLC Agreement"). The Buyout Provision stated: "In the event a Member ceases to be employed by the Company for any reason, the Company shall have the right to purchase such Member's Units, and such Member shall be obligated to sell such Units to the Company." The Buyout Provision established an appraisal process for determining the units' fair market value in the event that the Company invoked its buyout right. Under the price-setting process, the Company would obtain the first appraisal. The departing member was entitled to dispute the findings of the first appraisal and obtain a second appraisal. If the results of the second appraisal were more than 10 percent greater than the first appraisal, the two appraisers would jointly select a third appraiser. The third appraiser's valuation would then be binding on the parties.

In November 2018, the Company decided not to renew plaintiffs' employment and gave notice of its intent to purchase plaintiffs' units. In anticipation of plaintiffs' departure, the Company began the price-setting process by obtaining the first appraisal and submitting the results to plaintiffs on December 13, 2018 (the "December Notice"). On February 7, 2019, plaintiffs informed the Company that they would be obtaining a second appraisal as contemplated under the Buyout Provision. On March 29, 2019, the Company reversed course and told plaintiffs that it had ultimately decided not to purchase plaintiffs' units. Plaintiffs nevertheless continued with the price-setting process and obtained a second appraisal that exceeded the first appraisal by more than 10 percent. Plaintiffs commenced this litigation after the Company failed to respond to their demand

for the appointment of a third appraiser. Plaintiffs asserted three claims against the Company and White House for (1) breach of the LLC Agreement, (2) breach of the implied covenant of good faith and fair dealing, and (3) specific performance of the Buyout Provision. Defendants filed a motion to dismiss each of the three counts for failure to state a claim. Because the Buyout Provision did not expressly prohibit the Company from withdrawing from the price-setting process before the third appraisal, the court addressed whether either the common law or the implied covenant imposed such a restriction.

The court held that the Buyout Provision constituted a call option and, therefore, the Company could not withdraw from the price-setting process after it had exercised the option. The court explained that option contracts represent an exception to the general common law rule that an offeror may revoke its offer before acceptance. An option contract contains two elements: (1) the underlying offer concerning the sale or purchase of the property and (2) the collateral promise to hold that offer open. As applied to these facts, the underlying agreement was the Company's "right to purchase" a member's units "[i]n the event [that] [m]ember ceases to be employed by the Company." The collateral promise in this case was plaintiffs' promise to keep that offer open: "such [m]ember shall be obligated to sell" his units to the Company. Once the Company exercised its option to purchase plaintiffs' units, the underlying agreement became a valid and enforceable bilateral contract. In other words, the notice of acceptance (i.e., the Company's exercise of the call option) served to bind the option holder (i.e., the Company) irrevocably. Thus, the Company could not withdraw from the price-setting process once it exercised the call option by delivering its appraisal for the units.

According to the court, it was reasonably conceivable that the Company exercised the option by expressing its intent in the December Notice to purchase plaintiffs' units. The Buyout Provision did not describe the specific method by which the Company had to exercise its power of acceptance. Under Delaware law, however, acceptance "may be made in words or other symbols of assent, or it may be implied from conduct." With respect to a call option, acceptance is a party's exercise of the option. In this scenario, it was objectively reasonable to infer the Company's acceptance and intent to be bound based on the Company's conduct (i.e., initiating the price-setting process by delivering notice, conducting the first appraisal, and providing its results to plaintiffs). Because the December Notice constituted an exercise of the Company's power of acceptance, the plain language of the Buyout Provision—through use of the word "shall"—mandated that the Company adhere to the appraisal process. The court therefore held that plaintiffs had stated a claim for breach of the Buyout Provision and specific performance, at least as to the Company. This is because plaintiffs had established that (1) a valid contract existed, (2) they were ready, willing, and able to perform, and (3) the balance of the equities weighed in favor of specific performance. The court ruled, however, that plaintiffs had failed to state a claim against White House—the majority member. This is because White House was a party to the LLC Agreement, but had no contractual right or obligation under the Buyout Provision to purchase plaintiffs' units.

The court then turned to plaintiffs' claim that the Company had breached the implied covenant of good faith and fair dealing by withdrawing from the price-setting process. The court acknowledged that the implied covenant may prohibit a party to a contractual appraisal process from exerting pressure on the process in order to coerce a more favorable valuation. It explained, however, that the implied covenant "does not apply when the contract addresses the conduct at issue" but only "when the contract is truly silent concerning the matter at hand." In this case, plaintiffs failed to identify any unanticipated development or contractual gap in the LLC Agreement. This is because the LLC Agreement expressly covered the conduct at issue: the call-option nature of the Buyout Provision directly addressed the Company's ability to withdraw from the price-setting process. There was no gap for the implied covenant to fill and the court refused to rewrite the parties' bargain. The court therefore dismissed plaintiffs' claim for breach of the implied covenant of good faith and fair dealing.

39. *United States v. Sanofi-Aventis U.S. LLC*, C.A. No. 18-2472 (Del. Mar. 17, 2020) (J. Valihura) (*en banc*)

The United States Court of Appeals for the Third Circuit (the "Third Circuit Court") certified three questions of law to the Delaware Supreme Court (the "Court") in connection with the prosecution of a *qui tam* action under the False Claims Act (the "FCA"). To successfully prosecute a *qui tam* action under the FCA, a party must satisfy a number of procedural requirements. In this case, two procedural requirements were of particular relevance: (1) the party bringing the action must be an "original source" of knowledge of the facts upon which the allegations are based (the "Original Source Requirement"); and (2) once a *qui tam* action has been filed, no other party may intervene or bring a related action based on the facts underlying the pending action (the "First to File Requirement").

In this case, Jeffery Stahl ("Partner A"), John Venditto ("Partner B") and Kelly Wood ("Partner C" and, together with Partner A and Partner B, the "Initial Partners") formed a limited liability partnership, JKJ Partnership 2011 LLP (the "Partnership" and, with Partner A, Partner B and Partner C as the only partners of the Partnership, the "Old Partnership"), for the sole purpose of prosecuting the *qui tam* action. In order to comply with the Original Source Requirement, the partnership agreement of the Partnership (the "Partnership Agreement") contained a provision stating that the "Partnership shall not be a separate legal entity distinct from its Partners." The statement of qualification of the Partnership (the "Statement of Qualification") contained language to the same effect. This provision was important because if it was not included and the Partnership was instead treated as a separate legal entity rather than an aggregate of its partners, the Partnership could not have been an original source of knowledge because it was formed after the alleged fraud occurred and thus would not have been eligible to bring the *qui tam* action. With the provision, the Partnership could satisfy the Original Knowledge Requirement because the Partners satisfied the Original Knowledge Requirement and the Partnership was not distinct from its partners. The Partnership filed an initial complaint in the *qui tam* action (the "Initial Complaint") and was the first party to do so, satisfying the First to File Requirement. After the Initial Complaint was filed, Partner B withdrew from the Partnership and Dr. Paul A. Gurbel ("Partner G") was admitted to the

Partnership in his stead. The Partnership, with Partner A, Partner C and Partner G (the "Substitute Partners" and the Partnership with such partners, the "New Partnership"), then filed a second amended complaint (the "SAC"). Because the Partnership was not a legal entity distinct from its partners and the partners of the Partnership when the SAC was filed were different partners than when the Partnership filed the Initial Complaint, the trial court raised, *sua sponte*, the issue of whether the Partnership that filed the SAC was the same party that filed the Initial Complaint, and, on this basis, questioned whether the Partnership continued to satisfy the First to File Requirement. After considering the parties' briefs, the trial court found that the Partnership that filed the SAC was distinct from the Partnership that filed the Initial Complaint and, therefore, did not satisfy the First to File Requirement.

On appeal, the Third Circuit Court certified the following three questions to the Court. First, when the partnership agreement of a limited liability partnership organized under the Delaware Revised Uniform Partnership Act ("DRUPA") contains a provision stating that the partnership is not a legal entity distinct from its partners and that the withdrawal of a partner will not be an event of dissolution, will the substitution of a new partner for a withdrawing partner dissolve the old partnership and create a new partnership? Second, if a new partnership was formed, would the new partnership be the party that filed the SAC, or would the old partnership continue long enough to file the SAC as part of the winding-up process? Third, if the change in the constituent partners dissolved the old partnership, may the partners of the old partnership continue to prosecute the *qui tam* action as part of the winding-up process?

To answer the first question, the Court discussed the history of two theories of partnerships: the aggregate theory and the entity theory. The aggregate theory holds that a partnership is not a distinct legal entity and that it is merely an aggregate of individuals. The entity theory provides that a partnership is a legal entity of its own, separate and distinct from the individual partners. As set forth in DRUPA Section 15-210, DRUPA follows the entity theory, providing that a partnership is a legally distinct entity from its partners. However, Section 15-201 allows parties to a partnership agreement to opt out of entity treatment if they so "provide[] in a statement of partnership existence or a statement of qualification and in a partnership agreement." In this case, the Initial Partners to the Partnership so provided in the Partnership Agreement and the Statement of Qualification, which both stated that the Partnership was not legally distinct from its partners. Because the Partnership was not an entity distinct from its partners, a different set of partners resulted in a different Partnership. Therefore, the withdrawal of Partner B and the addition of Partner G dissolved the Old Partnership and effectively created the New Partnership.

The Court held that, in this case, a provision in the Partnership Agreement providing that partners may withdraw from the Partnership without causing the Partnership to dissolve (the "Dissolution Provision") did not change this result. Insofar as the Dissolution Provision could be interpreted to allow the withdrawal of partners without dissolving the Partnership, the provision was in conflict with the provision that stated the Partnership was not a legal entity distinct from its Partners (the "Aggregate Provision"). Because, in

this case, the Aggregate Provision contained language that made it controlling over the other provisions of the Partnership Agreement, the withdrawal of a partner from the Partnership was an act of dissolution notwithstanding the Dissolution Provision.

The second question asked whether the Old Partnership terminated immediately, such that the New Partnership filed the SAC, or whether the Old Partnership continued to prosecute the *qui tam* action. The Court noted that it was an undisputed fact of the case that Partner A, Partner C and Partner G continued to prosecute the case after filing the SAC, and that the SAC alleged the Partnership had three partners: Partner A, Partner C and Partner G. Based on these undisputed facts, the Court held that the New Partnership filed the SAC. The Court questioned whether the New Partnership had ownership of the claim that gave rise to the *qui tam* action, but held this was a fact-based questioned beyond the purview of its opinion regarding the certified questions of law.

The third question asked whether the Old Partnership would be able to prosecute the *qui tam* action as part of its winding-up process. The Court, following the question as certified by the Third Circuit Court, assumed that the winding-up process had not been completed. The Court held that even if the winding-up process of the Old Partnership was ongoing, the Old Partnership could not prosecute the *qui tam* action as part of that process. The provision of the Partnership Agreement that governed the winding-up process (the "Winding-up Provision") provided that the Partners would determine what Partnership property was to be distributed in kind and what property was to be liquidated, and that the liquidation of Partnership property was to be "carried out as promptly as is consistent with obtaining the fair value thereof." The Court held that continuing to prosecute the *qui tam* action was inconsistent with the concept of liquidation as provided in the Winding-up Provision. Furthermore, the prosecution of the *qui tam* action was the sole purpose of the Partnership. While the Court noted that litigation is sometimes a part of the winding-up process in both partnership and corporate contexts, such litigation is generally ancillary to the main business of the entity winding-up. Here, where the litigation was the sole purpose of the Partnership, and the litigation was only in its beginning stages, the litigation could not be continued as part of the winding-up process. The Court expressly limited this holding to the facts of this case because of "the dearth of case law in this area."

40. *Joseph C. Bamford v. Penfold, L.P.,* C.A. No. 2019-0005-JTL (Del. Ch. Feb. 28, 2020) (V.C. Laster)

Defendant Joseph Manheim and plaintiff Young Min Ban co-founded Delaware Valley Regional Center, LLC ("DVRC"), a Delaware limited liability company that facilitated investments by foreign nationals in infrastructure projects in the United States. At Manheim's request, plaintiff Joseph Bamford invested in DVRC and in 2015, Manheim, Ban and Bamford each held a 30% membership interest in DVRC. Defendant West 36th, Inc. ("WestCo") held the remaining 10% interest in DVRC and served as its manager. Manheim, Ban, and Bamford comprised WestCo's board of directors (the "WestCo Board"), but Manheim controlled WestCo and had the power to name the members of the WestCo Board. A portion of Bamford's investment in DVRC, however, took the form of a loan to WestCo that was convertible into a majority stake of WestCo (the "Conversion

Feature"). In 2016, Manheim began to take steps to solidify his control over DVRC. In order to gain full control, Manheim convinced Ban and Bamford to enter into a contribution agreement (the "Contribution Agreement") to contribute their interests, along with Manheim's 30% interest, in DVRC to defendant Penfold, L.P. ("Penfold"), a newly created Delaware limited partnership and holding company of DVRC (the "Restructuring"). Manheim told Ban and Bamford that the Restructuring was advisable from a tax standpoint. Further, Manheim told Bamford, a British citizen, that imminent federal legislation (that did not actually exist) would restrict the ability of a foreign national to exercise control over an enterprise like DVRC and that by implementing the Reorganization and waiving the Conversion Feature, they could avoid any adverse consequences from such legislation. After the Reorganization, despite Manheim's assurances to Ban and Bamford that they would carry equal economic and governance rights and that all three would co-own the general partnership interests in Penfold, only Manheim and defendant Reath & Co., LLC ("ReathCo"), which was controlled by Manheim, were general partners of Penfold. Further, after the Restructuring and Bamford's waiver of the Conversion Feature, Manheim added his brother and a friend to the WestCo Board, creating a majority. As a result, once the Restructuring was completed, Manheim had complete control over the governance of Penfold, DVRC and WestCo. After the Reorganization, and once Manheim had control over Penfold, DVRC and WestCo, Manheim engaged in interested transactions, including causing DVRC to pay lucrative management fees. After Ban and Bamford became suspicious of Manheim and started asking questions and for books and records for DVRC, Manheim removed them from the WestCo Board. Plaintiffs believe the insider transactions led to Manheim misappropriating $5.9 million.

Plaintiff filed a complaint containing the following thirteen claims: a derivative claim on behalf of Penfold for breach of fiduciary duty against Manheim and ReathCo. ("Count I"); a derivative claim on behalf of DVRC for breach of fiduciary duty against Manheim and WestCo. ("Count II); a derivative claim on behalf of Penfold for fraud against Manheim and ReathCo.; a derivative claim on behalf of Penfold for breach of contract against Manheim and ReathCo. ("Count IV"); a derivative claim on behalf of DVRC for fraud against Manheim, WestCo, and ReathCo. ("Count V"); personal claims by each plaintiff for conversion against Manheim ("Count VI"); a personal claim by Bamford for breach of fiduciary duty against Manheim ("Count VII"); a personal claim by Bamford for common law fraud against Manheim ("Count VIII"); a personal claim by Ban for common law fraud against Manheim ("Count IX"); direct claims by each plaintiff on their own behalf and a derivative claim on Penfold's behalf for unjust enrichment against Manheim ("Count X"); a personal claim by Bamford for negligent misrepresentation against Manheim ("Count XI"); a personal claim by Ban for negligent misrepresentation against Manheim ("Count XII"); a claim seek a declaration that Penfold's limited partnership agreement is void ("Count XIII"). Defendants moved to dismiss Counts II through XII for failing to state a claim on which relief can be granted.

Beginning with the counts that the plaintiffs asserted in their personal capacity, the court denied defendants' motion to dismiss Count VII, Count VIII, Count IX, Count XI, Count XII in part and Count VI. With regards to Count VII, Bamford contends that because of

Manheim's status as his personal fiduciary, Manheim was obligated to act loyally by pursuing Bamford's personal best interests throughout the events giving rise to this litigation, regardless of what other formal roles Bamford and Manheim might have occupied at the time. The court noted that to bring a claim for breach of fiduciary duty, a plaintiff must establish (1) that a fiduciary duty existed and (2) that the defendant breached that duty. The only question at issue in this decision was whether Manheim owed fiduciary duty to Bamford and the court held that Bamford pleaded a reasonable inference that Manheim was Bamford's fiduciary. The court explained that whether someone is a fiduciary is a question of fact and arises "where one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person in another to protect the interests of another." In this case, Manheim was Bamford's financial advisor and held himself out as such, he controlled and managed Bamford's property, he had deep familiarity with Bamford's personal affairs and confidential information, and had superior knowledge and expertise, all of which the courts said were factors for considering Manheim a fiduciary. Further, the court noted that Manheim and Bamford had a lengthy friendship that reached a level of familial intimacy and such relationships can take on a fiduciary character. Manheim argued that he was not a fiduciary because there was a clause in the Contribution Agreement that Bamford signed stating "[Bamford] has knowledge and experience in financial, tax and business matters to enable [Bamford] to evaluate the merits and risks of the contribution in Penfold and to make an informed decision about the contribution." The court explained that one statement in one agreement, that Bamford signed after being persuaded to by Manheim, was not enough to infer that there was not a fiduciary relationship between Manheim and Bamford.

With regards to Count VII and Count IX, each plaintiff asserted a claim against Manheim for common law fraud to challenge the Reorganization and Ban asserted a claim against Manheim for common law fraud because Manheim characterized Ban's compensation as a loan. The court explained that to state a claim for common law fraud, a complaint must plead the following elements: (1) a false representation, usually one of fact, made by the defendants; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance. The court held that at the pleadings stage, each element is satisfied. Manheim argued that plaintiffs could not plead reasonable reliance because the Contribution Agreement contained certain acknowledgements, including a provision that "no oral representations have been made or oral information furnished to Parties or Parties' representatives in connection with Parties' contribution in Penfold." The court explained that while sophisticated parties bargaining at arms' length could agree to limit the information on which they have relied to the written representations in the contract, and such a provision would be enforced, it is reasonable to infer that such provision may not be given effect in this case. The court noted that in order for such provision to be enforced, there must be a clear anti-reliance clause in the contract. In this case, the Contribution Agreement only contained a standard integration clause and the provision described above, which the court stated would likely be interpreted as an inadequate combination instead of a clear,

detailed, and sufficient combination of provisions. Further, the court stated that it is reasonable to infer that the provisions were not negotiated at arm's length by sophisticated parties where both sides were fully aware of the implications of agreeing to the contractual limitations on the scope of the information that plaintiffs had received. As discussed, Manheim acted as Bamford's fiduciary and Ban trusted Manheim because of their status as long-time business partners and co-founders of DVRC. Further, the court explained that the facts suggest that the parties did not approach the Reorganization as a negotiated transaction in which they were bargaining at arms' length, instead Manheim pitched the Reorganization as a mere reshuffling of ownership interests and the Contribution Agreement reflected the informal nature of such transaction. Finally, the court noted that to rely on certain acknowledgments regarding the sophistication of the parties in the Contribution Agreement conclusively at the pleading stage would be to permit Manheim to insulate himself from claims for fraud brought by less sophisticated individuals in a scenario where it is reasonable to infer that the provisions themselves were the product of fraud.

Plaintiffs also pled that the recital that "each of Parties is the record and beneficial owners of 1/3 of all of the share capital, securities, shares or other equity interests of any kind (collectively, Parties own 100% of Penfold) of Penfold" (the "Ownership Recital") in the Contribution Agreement misled them into believing they would jointly control Penfold with Manheim. The court held that the Ownership Recital represented that Ban, Bamford, and Manheim would share ownership of all of the equity interests of any kind in Penfold equally. The court explained that equity interests were partnership interests generally and that partnership interests were divided among limited partners and general partners. As a result, the court stated that for the Ownership Recital to be correct, Bamford, Ban, and Manheim would have to each own one-third of the general partnership interest in addition to each owning one-third of the limited partnership interest. Defendant argued that equity interests only referred to economic rights, not management or government rights, but the court explained that equity interests are comprised of both economic and governance rights. As a result, the court held that the complaint supported a reasonable inference that the Ownership Recital was false and could provide the basis for a claim of common law fraud.

Plaintiffs also claimed that Manheim failed to disclose material facts that he was under a legal obligation to disclose with regards to the Reorganization. Specifically, plaintiffs argued that Manheim failed to disclose that (i) the real purpose behind the Contribution Agreement was to ensure that Manheim would have full control over the DVRC entities, (ii) if Ban and Bamford entered into the Contribution Agreement and related documents, their economic, voting, and other rights would be harmed, (iii) Manheim unilaterally created the structure for his own benefit, and (iv) Manheim had previously set up Penfold and made himself and ReathCo the only general partners. The court explained that a duty to disclose arises when there is a fiduciary relationship between parties and, at the time of the Reorganization, Manheim owed fiduciary duties to Bamford and Ban in multiple capacities. As described above, Manheim was a fiduciary for Bamford personally. In addition, as a director of WestCo., Manheim owed a duty to provide full information to Bamford and Ban in their capacities as fellow members of the WestCo Board. Further, as

an officer of DVRC, Manheim owed a duty to provide full information to Bamford and Ban in their capacities as members of the WestCo Board. Finally, as the party that controlled WestCo, the managing member of DVRC, Manheim owed a fiduciary duty to Bamford and Ban as members of DVRC. Plaintiffs argued that the Reorganization was analogous to "a request for stockholder action" in the corporate context, therefore, there was a duty to disclose all facts that were material to Bamford and Ban's consideration of the Reorganization. Manheim argued that the reorganization was analogous to a situation in which "a corporate fiduciary buys shares directly from or sells shares directly to an existing outside stockholder," therefore, Manheim only has a duty to disclose information that he possessed special knowledge of and would deliberately mislead Ban and Bamford. The court held that of the two arguments, the Reorganization was most analogous to a request for stockholder action because asking plaintiffs to exchange their equity interests in DVRC for equity interests in Penfold was comparable to an exchange offer. The court explained that it was reasonable to infer that the governance structure of Penfold was material information. Manheim also argued that disclosures about his control over Penfold were unnecessary because Penfold's certificate of limited partnership was filed publicly with the Delaware Secretary of State on March 18, 2016 and the certificate listed ReathCo as Penfold's sole general partner. The court held that the certificate did not put plaintiffs on notice because they could have assumed that the certificate would be amended to provide for different and/or additional general partners, and therefore, the certificate did not pre-emptively satisfy Manheim's duty to disclose.

With regards to Count XI and Count XII, plaintiffs restated their claims for common law fraud as claims for negligent misrepresentation. The court explained that a claim for negligent misrepresentation must satisfy all of the elements of a claim for common law fraud, except that it substitutes negligence for scienter, therefore, the analysis was the same as above for the claims related to the Reorganization. With regards to Ban's claim against Manheim based on his compensation, the court explained that Ban did not articulate any reason to think that Manheim was acting as a fiduciary for Ban when convincing him to treat his compensation as a loan and a special equitable remedy (as opposed to damages) was not required to make Ban whole. Therefore, the court held that Count XII was dismissed only to the extent it addressed Ban's compensation.

With regards to Count VI, plaintiffs claimed that Manheim wrongfully converted the plaintiffs' membership interests in DVRC. The court denied defendants' motion to dismiss because it held that intangible property, including membership interests, could be converted and plaintiffs alleged that Manheim obtained the membership interests in DVRC through fraud.

After reviewing the claims that the plaintiffs asserted in their personal capacity, the court decided on the derivative claims. The court denied the motions to dismiss Count II and Count IV and dismissed Count III, Count V and Count X. With regards to Count II, plaintiffs sought to recover on behalf of DVRC from Manheim and WestCo, arguing that Manheim and WestCo breached their fiduciary duties by engaging in interested transactions and otherwise harming DVRC. Defendants argued that plaintiffs did not have standing to assert a derivative claim on DVRC's behalf. Looking first at conduct

that occurred before the Reorganization, the court held that even though Bamford and Ban are no longer members of DVRC, they had double-derivative standing to assert their claims. The court, citing LLC Act Section 18-1002, explained that Penfold had standing to assert claims derivatively on behalf of DVRC because Penfold was a member of DVRC at the time of the action. However, LLC Act Section 18-1002 requires the member to be a member at the time of bringing the action and to have been a member at the time of the transaction or "the plaintiff's status as a member or an assignee of a limited liability company interest had devolved upon the plaintiff by operation of law or pursuant to the terms of the limited liability company agreement from a person who was a member or an assignee of a limited liability company interest at the time of the transaction." The court explained that although Penfold was not a member at the time of the conduct, Penfold met the second prong of LLC Act Section 18-10002 because Penfold became a member of DVRC after Bamford, Ban and Manheim contributed their membership interests pursuant to the Contribution Agreement and the terms of DVRC's limited liability company agreement. The court further held that, as limited partners of Penfold, Ban and Bamford could sue derivatively on behalf of Penfold. The court explained that under DRULPA Section 17-1002, for a plaintiff to sue derivatively on behalf of a limited partnership, the plaintiff must be a partner at the time of bringing the action and "[a]t the time of the transaction of which the plaintiff complains; or [t]he plaintiff's status as a partner or an assignee of a partnership interest had devolved upon the plaintiff by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner or an assignee of a partnership interest at the time of the transaction." The court explained that under *Lambrecht v. O'Neal*, the Delaware Supreme Court held a stockholder could assert a double-derivative claim to cause the parent entity to assert its subsidiary's claim, even though the contemporaneous ownership requirement was not met, reasoning that "[o]therwise there would be no procedural vehicle to remedy the claimed wrongdoing in cases where the parent company board's decision not to enforce the subsidiary's claim is unprotected by the business judgment rule." The court held that this same concept applied in this case. In this case, Manheim would not have sued himself and would not have caused ReathCo to bring suit; therefore, if Bamford and Ban lacked standing to sue, there would have been no procedural vehicle to remedy the claimed wrong. The court held that under the statutory provisions of the DRULPA and the principles articulated in *Lambrecht v. O'Neal*, Ban and Bamford had standing to sue derivatively on behalf of Penfold to cause Penfold to assert the claims that it could bring derivatively on behalf of DVRC for actions that preceded the Reorganization. The court held, despite defendants arguments to the contrary, that Delaware law recognizes double-derivative actions in the alternative entity space. Further, the court held that the common law continuous ownership requirement did not affect plaintiffs' standing because the exceptions to the rule applied. The first exception applies when the transaction that otherwise would deprive the plaintiffs of standing is essentially a reorganization that does not affect such plaintiff's relative ownership in the post-merger enterprise. The court explained that the Reorganization was only a reshuffling of ownership interests, which falls directly into the first exception. The second exception is when plaintiff loses standing based on a merger that itself was the subject of a claim of fraud, being perpetrated merely to deprive shareholders of their standing to bring or maintain a derivative action. The court held this exception applies

when the principle purpose of the transaction was to eliminate a party's standing to assert a derivative claim, and in this case it was reasonable to infer at the pleading stage that interfering with the plaintiffs' ability to bring derivative claims was a principal reason for Manheim's pursuit of the Reorganization.

The court held that plaintiffs also had double-derivative standing to assert claims on behalf of DVRC for conduct that occurred after the Reorganization. As discussed, Penfold was a member of DVRC at the time of bringing the action, and Penfold was a member at the time of the post- Reorganization conduct. Further, Bamford and Ban were limited partners of Penfold at the time of bringing the action and at the time of the post-Reorganization conduct. As a result, the court held that plaintiffs had double-derivative standing to sue on behalf of DVRC for both conduct that occurred prior to and conduct that occurred after the Reorganization.

With regards to Count III and Count V, plaintiffs asserted a derivative claim on behalf of Penfold and DVRC contending that Manheim and ReathCo defrauded Penfold by engaging in self-dealing transactions. The court explained that plaintiffs was using fraud to recover for self-dealing and such claims were the functional equivalent of claims the that Penfold's and DVRC's fiduciaries breached their duties by engaging in self-interested transactions. As a result, the court held that Count III and Count V were duplicative and subsumed within the derivative claims for breach of fiduciary duties asserted in Count I and Count II. The court, therefore, dismissed Counts III and Count V.

With regards to Count IV, plaintiffs asserted a derivative claim on behalf of Penfold for breach of contract. Plaintiff argued that under the limited partnership agreement of Penfold, Manheim and ReathCo had an obligation to, and did not, indemnify Penfold and its limited partners for any harm they caused due to fraud or willful misconduct. The provision in question said "the General Partner must indemnify Penfold and the limited partners for any loss, damage or liability, including reasonable attorneys' fees, due to or arising out of the General Partner's fraud or willful malfeasance." Defendants argued that the claim was not ripe because there was no finding of fraud or malfeasance. The court held that although it was likely the provision would require a finding of fraud or willful misconduct before a claim for indemnification was ripe, the court had to rely on and accept the allegation in the complaint at the pleadings stage because a copy of the partnership agreement was not submitted to the court. As a result, the motion to dismiss Count IV was denied.

Finally, the court granted defendants' motion to dismiss Count X. Plaintiffs asserted a derivative claim for unjust enrichment on behalf of Penfold against Manheim to recover the compensation and other benefits that Manheim extracted. The court explained that a claim for unjust enrichment could provide a means of holding a defendant accountable when a plaintiff proves a primary claim against one defendant, but another defendant is not primarily liable and yet reaped the benefits of the wrongdoing. In this case, both defendants are primarily liable, and therefore the claim for unjust enrichment was duplicative and unnecessary.

41. *Neurvana Medical, LLC v. Balt USA, LLC,* C.A. No. 2019-0034-KSJM (Del. Ch. Feb. 27, 2020) (V.C. McCormick)

Plaintiff, Neurvana Medical, LLC, a Delaware limited liability company ("Neurvana"), sold a medical device that required regulatory approval and commercialization to defendant Balt USA, LLC, also a Delaware limited liability company ("Balt"). Defendant David Ferrera ("Ferrera") was a member of Neurvana and also served as the Chairman of Neurvana's board of managers (the "Board") at the time the sale was negotiated. At the same time, Ferrera served as the COO and President of Balt, and co-defendant Pascal Girin ("Girin") served as Balt's CEO. Under the terms of the asset purchase agreement, Balt would pay additional post-closing consideration upon the achievement of certain milestone events such as regulatory approval. When Balt failed to achieve the regulatory approval condition to the first milestone payment, plaintiff brought suit asserting various contract and tort claims, including a claim against Ferrera for a breach of his duty of loyalty and a claim against Girin for aiding and abetting Ferrera's breach. Both Ferrera and Girin moved to dismiss the claims against them for lack of personal jurisdiction.

Over the summer of 2017, Balt and Neurvana negotiated the sale of one of Neurvana's medical products. Despite his dual roles as both Neurvana's Chairman and Balt's COO and President, Ferrera was involved in the negotiations on behalf of Neurvana and during the negotiations retained his own "long-time corporate counsel" to represent Neurvana. On August 1, 2017, Neurvana and Balt entered into a letter agreement (the "Letter Agreement") that attached a non-binding term sheet (the "Term Sheet") and stated that it was the "intent of the parties that their discussion initially proceed based on the term sheet."

Over the course of the negotiations leading to the Letter Agreement and Term Sheet, the Board became increasingly concerned with Ferrara's involvement. Specifically, the Board worried that the attorney Ferrera retained to represent Neurvana "had been soft on multiple elements of the negotiation" and that during this period, Ferrera allegedly "became abusive" toward Neurvana's CEO, called for his removal, sent abusive emails and texts, made culturally derogatory statements and repeatedly butted heads with Board members. After the Letter Agreement was executed, the Board removed Ferrera's chosen corporate counsel and Ferrera ultimately resigned from his position as Chairman of the Board. Following his resignation, Ferrera and Neurvana entered into a consulting agreement (the "Consulting Agreement") pursuant to which Ferrera agreed not to divulge Neurvana's confidential information or make disparaging statements about Neurvana.

Plaintiff argued that the court had jurisdiction over Ferrera under the Delaware LLC Act's implied consent provision in Section 18-109 and over Girin because he aided and abetted Ferrera's breach of fiduciary duty. Defendants conceded that because Ferrera served as Chairman of the Board until November 10, 2017, Ferrera was subject to the court's jurisdiction under Section 18-109 for any breach of fiduciary duty allegedly committed while in that role. However, the court focused on the issue of whether it may exercise ancillary jurisdiction on certain other counts against Ferrera that allegedly occurred after his resignation from the Board. The court initial noted that once a

fiduciary is properly subject to jurisdiction for a claim of breach of fiduciary duty, "the trial court may also subject that fiduciary to personal jurisdiction for claims that are 'sufficiently related' or '[not] distantly related' to the breach of fiduciary duty claim." The court further explained that whether the non-fiduciary duty claims are "sufficiently related" to the fiduciary duty claim "depends on whether the claims arise out of the 'same nucleus of operative facts.'"

Ferrera argued that the non-fiduciary claims against him were not sufficiently related to the fiduciary duty claim because they addressed conduct that occurred after he had resigned from his fiduciary position. The court noted that while generally, "former directors owe no fiduciary duties," Delaware law recognizes limited exceptions to this rule, such as if a former director engages in transactions that had their inception before the termination of the fiduciary relationship or were founded on information acquired during the fiduciary relationship. Plaintiff argued that Ferrera's conduct fit this exception and alleged that Ferrera breached his fiduciary duties by using confidential information and knowledge that he acquired before his resignation to harm Neurvana. The court held that plaintiff's claims against Ferrera for breach of the Consulting Agreement and for tortious interference with prospective economic advantage were sufficiently related to this claim for breach of fiduciary duty such that ancillary jurisdiction was appropriate. The court noted that the Consulting Agreement was a byproduct of Ferrera's resignation from the Board, and it prohibited Ferrera from using any confidential information he acquired during the fiduciary relationship. Ferrera's alleged breach of this confidentiality obligation formed one of the bases for plaintiff's breach of fiduciary duty claim. With respect to the claim for tortious interference with prospective economic advantage, the court noted that the complaint alleged that Ferrera's ouster from the Board prompted Ferrera to take nefarious actions designed in part to intentionally interfere with Neurvana's development of other medical devices and that such alleged actions included using confidential information that he acquired in his capacity as a manager of Neurvana to "undermine Neurvana's product development" and demand repayment of a substantial debt "in an attempt to further cripple Neurvana using knowledge of Neurvana's financial vulnerability," which he also acquired in his capacity as manager.

The court next turned to whether it had jurisdiction over Girin for plaintiff's claim that he aided and abetted Ferrera's alleged breach of fiduciary duty. The court relied on the conspiracy theory of jurisdiction, including the elements set forth in the *Instituto Bancario* test, and granted Girin's motion to dismiss for lack of personal jurisdiction. The court noted that the threshold questions under the *Instituto Bancario* test were (a) whether plaintiff sufficiently pled a claim for breach of fiduciary duty against Ferrera, and if so, (b) whether plaintiff sufficiently pled a claim for aiding abetting such breach of fiduciary duty against Girin. Turning to the first question, the court analyzed plaintiff's allegation that Ferrera breached his fiduciary duty to Neurvana. The court initially noted that while the LLC Agreement did not eliminate fiduciary duties, it did exculpate managers from liability for breaches of the duty of care. The court explained that the practical effect of this exculpation provision was that to state a claim for breach of fiduciary duty, plaintiff must plead a reasonably conceivable basis for the court to infer that Ferrera breached his duty of loyalty or otherwise acted in bad faith.

The court held that plaintiff had adequately alleged that Ferrera breached his duty of loyalty and acted in bad faith while serving as Chairman of the Board but failed to state a claim for the same concerning Ferrera's post-resignation conduct. Specifically, the court noted that despite Ferrera's dual roles as Chairman of Neurvana and as President and COO of Balt, Ferrera "inserted himself" into negotiations with Balt over the Term Sheet and Letter Agreement on behalf of Neurvana rather than distancing himself from the process, including going so far as to "push for his long-time counsel to work on the deal during initial negotiations over the deal term sheet." These allegations, along with the fact that members of the Board were concerned that Ferrera failed to negotiate in Neurvana's best interests and believed that Ferrera's lawyer was soft on multiple terms of the Term Sheet and Letter Agreement, made it reasonably conceivable that Ferrera was acting for a purpose "other than that of advancing the best interests of the corporation" and therefore breached his duty of loyalty and good faith.

The court next analyzed the allegation that Ferrera breached his fiduciary duties to Neurvana after he resigned from the Board by using Neurvana's confidential information to harm Neurvana. The court found that plaintiff did not allege that Ferrera engaged in a transaction that had its inception before his resignation, but rather just alleged in a conclusory fashion that Ferrera used "his knowledge of Neurvana's financial vulnerability" in engaging in those activities but did not plead facts to support this assertion. The court noted that it was not reasonable to infer that any knowledge of Neurvana's vulnerability was only attained by Ferrera in his fiduciary capacity.

Turning to the second threshold question under the *Instituto Bancario* test, the court held that plaintiff had failed to state a claim for aiding and abetting breach of fiduciary duty against Girin. The court initially noted that a party is liable for aiding and abetting when he knowingly participates in any fiduciary breach and that an aider and abettor knowingly participates in a breach when he acts "with the knowledge that the conduct advocated or assisted constitutes such a breach." The court further explained that this standard requires well-pleaded facts that the aider and abettor acted with "scienter," or "knowingly, intentionally or with reckless indifference." The court found that there were no facts alleged by plaintiff that allowed for the rational inference that Girin knowingly participated in Ferrera's breach since the complaint did not allege that Girin was involved in the negotiations of the Letter Agreement and Term Sheet or that Girin and Ferrera ever communicated during that period.

Additionally, plaintiff alleged that Balt breached the implied covenant of good faith and fair dealing. Plaintiff argued that the implied covenant applied because the asset purchase agreement was silent about certain protocols relating to the medical device needed to achieve the relevant regulatory approvals and that Balt acted in bad faith when it exercised its discretion to pursue one course of a sterilization protocol instead of another for the device. However, the court found that this argument was inconsistent with the plain language of the asset purchase agreement, which vested Balt with "authority over all matters relating to [the device] after the Closing, including, but not limited to, any research, development, manufacturing, Commercialization, clinical trial

design, site selection, regulatory, quality standards," and other decisions. Therefore, Neurvana affirmatively agreed to vest Balt with the discretionary authority to proceed with any and all regulatory, commercial, and other decisions related to the device post-closing and thus there was no gap in the contract for the implied covenant to fill.

42. *Skye Mineral Investors, LLC v. DXS Capital (U.S.) Limited*, C.A. No. 2018-005-JRS (Feb. 24, 2020) (V.C. Slights)

Plaintiffs alleged that the minority members of Skye Mineral Partners, LLC (the "Company") carried out a scheme to divest the Company of its sole asset, a wholly owned operating subsidiary named CS Mining, LLC ("CSM"). According to plaintiffs, the minority members used certain blocking rights granted to them in the Company's operating agreement to drive CSM into bankruptcy, then caused their affiliate to buy CSM out of bankruptcy at a rock-bottom price. Plaintiffs brought multiple counts against the minority members and the other defendants (a group that included CSM's lender and individuals and entities that sat atop the minority members), including claims for breach of contract, breach of fiduciary duty and breach of the implied covenant. Defendants moved to dismiss on grounds that claims belonging to CSM were discharged in the bankruptcy, for lack of proper service and personal jurisdiction over certain defendants, and for failure to state viable claims. The court dismissed the claims against CSM's lender and for claims brought directly against the individuals and entities that owned or controlled the minority members based on "strained agency theories". The court also dismiss claims for fraud because plaintiffs did not meet the heightened standard required to adequately plead fraud. However, the court refused to dismiss claims against the minority members for breach of contract and breach of fiduciary duties and against the individuals and entities that owned or controlled the minority members for aiding and abetting the minority members' alleged breach of fiduciary duties. These claims are summarized in greater detail below.

Certain provisions of the Company's operating agreement were particularly important to this dispute, and these are summarized here. The Company was managed by a three-person board appointed by the Company's members. The minority members were entitled to appoint one board member, and the majority members appointed the other two. The Company's operating agreement did not eliminate the fiduciary duties of managers; instead, it confirmed that the managers owed the same fiduciary duties owed by directors of a Delaware corporation, provided for exculpation analogous to Section 102(b)(7) of the DGCL, and waived application of the corporate opportunity doctrine. The operating agreement eliminated fiduciary obligations of members solely "insofar as making other investment opportunities available to the Company or to the other Members" and provided that any member's consent or approval could be given, withheld, conditioned or delayed in their sole and absolute discretion. Further, the operating agreement included certain "major decision" items that required the approval of holders of 75% of the Company's class A units. The minority members held more than 25% of the class A units; thus, their approval was required for specified major decisions, including granting security interests and liens, issuing new units and entering into a merger or sale of substantially all of the Company's assets (the "Blocking Rights"). The minority

members also negotiated for the right to approve the Company's annual budget and the Company's incurrence of material debt.

CSM owned valuable mineral assets; however, to extract these assets, the Company needed to expand its processing facility. To facilitate the expansion, the Company initiated a capital project. During the capital raise, the board member appointed by the minority members, Mr. Cooper ("Cooper"), discovered the full value of CSM's mineral deposits (approximately $600 million) while acting in his capacity as a manager of the Company. He shared this information with the minority members but not the majority members. In 2014, CSM entered into a $30 million loan arrangement with Noble to provide some of the capital required to expand CSM's processing facilities. The loan was atypically structured in that Noble did not extend credit to CSM but rather negotiated to be the sole purchase of CSM's copper. Noble was restricted from selling the loan to certain Company insiders (known as the "Lippo Group", which included the minority members and Cooper) to prevent one of the Company's members from benefitting from a loan default by CSM.

Plaintiffs allege that defendants' scheme began in 2014 when the minority members began to block reasonable financing proposals that were needed to expand CSM's processing facilities, including a pro rata equity round proposed by the majority members. The scheme allegedly continued in 2015 (while CSM was "withering on the vine"), when Cooper suggested in an email to Noble representatives that, notwithstanding the inside sale prohibition, Noble could offload its loan to the Lippo Group at a discount, which would allow Lippo to wait for CSM to declare bankruptcy, then use its position as senior creditor to buy CSM's assets at a steep discount. Because CSM was in financial straits, Noble notified the Company and its members that it was interested in selling the loan. Noble did not, however, disclose its discussions with the Lippo Group or that it would be willing to sell the loan at a substantial discount. Plaintiffs allege that Noble was motivated to keep these discussions hidden because Noble and Lippo Group has significant commercial relationships outside their dealings with the Company and CSM. After Noble declared default, CSM and Noble agreed to amend the loan agreement to forestall acceleration of the debt. The amendment also removed the insider sale prohibition. Around this time, Cooper lied to the Company's other board members when he proffered that he was not involved in any discussions to purchase the Noble loan. Plaintiffs, however, were aware of these discussions. Nonetheless, aware of Cooper's misrepresentations and the absence of the insider sale prohibition, the majority members infused more capital into the Company to keep CSM afloat. Shortly thereafter, they became aware that Lippo was on the verge of acquiring the loan. Plaintiffs unsuccessfully attempted to stop the sale. Cooper allegedly engaged in certain unauthorized actions, including giving directions to the Company's management on how to spend Company funds to advance Lippo's interest and to ramp up borrowing under the loan. These actions improved Lippo's position in the looming bankruptcy and, in 2016, CSM entered bankruptcy. A Lippo-affiliated buyer purchased CSM's assets out of bankruptcy for $40 million.

First, the court addressed the motion to dismiss by certain non-Delaware residents for lack of jurisdiction. The court, relying on the long-arm statute and the conspiracy theory of jurisdiction (including the factors set forth in the *Instituto Bancario* test), found sufficient grounds for jurisdiction and denied the motion to dismiss.

Second, the court analyzed defendants' motion to dismiss under Rule 12(b)(6). Defendants sought to dismiss on grounds of *res judicata*, by arguing that the *en rem* protections of the bankruptcy sale barred the claims and by asserting that the claims, which were derivative on behalf of CSM, were sold to the buyer in the bankruptcy. The court was unpersuaded by these arguments. The bankruptcy court did not consider the allegations that the Lippo Group executed a plan to divest the Company of its ownership interest in CSM in a wrongful manner, so *res judicata* did not bar the claims. Further, the *en rem* protections were for the benefit of the buyer of CSM's assets; as the buyer was not party to this case, the claims were not barred. Finally, the claims as pled belonged to the Company, not CSM, and thus were not sold in the bankruptcy sale.

Third, the court analyzed plaintiffs' breach of contract claims. The court found it reasonable to infer that Cooper breached his confidentiality obligations under the Company's operating agreement and refused to dismiss those claims. The court dismissed certain claims relating to breach of the New York-law governed loan agreement because the Company was not a party to that agreement nor did the agreement confer third-party beneficiary status on the Company.

Fourth, the court addressed plaintiffs' breach of fiduciary duty claims (i) against Cooper as a manager of the Company, (ii) against the minority members, and (iii) against certain alleged controlling persons of Cooper the minority members as ultimate controllers of the Company. With respect to Cooper's alleged breach of fiduciary duty, defendants seized on the agreement's waiver of the corporate opportunity doctrine to argue that the Noble loan was a corporate opportunity that need not be presented to the Company. Plaintiffs, on the other hand, relied on the agreement's incorporation of corporate fiduciary duties. The court found that the agreement unambiguously provided for default fiduciary duties, with a waiver of the corporate opportunity doctrine. In light thereof, the court found it reasonable to infer that Cooper used his status as a fiduciary of the Company to gain valuable information about the Company and used that information to harm the Company and benefit members of the Lippo Group, with which he was affiliated. It was thus reasonably conceivable that Cooper breached his duty of loyalty and exceeded the scope of behavior permitted by a waiver of the corporate opportunity doctrine. Cooper may well not have been obligated to share the Noble loan opportunity with the Company, but that did not mean that he could harm the Company by, in his own words, intentionally "sit[ting] back" while CSM collapsed, or otherwise make decisions that would drive CSM into bankruptcy.

With respect to the minority members' alleged breach of fiduciary duty, the parties pointed to two operative provisions of the operating agreement—the agreement removed members' fiduciary obligations with respect to making other investment opportunities available to the Company (essentially a waiver of the corporate opportunity doctrine for

members) and it permitted members to provide or withhold approval in their sole and absolute discretion. Plaintiffs alleged that the minority members acted to affirmatively harm the Company for personal advantage, a classic duty of loyalty claim, "which the sole discretion language cannot coyly eliminate." The court noted that an agreement must make "painstakingly clear" the intent to eliminate liability for acts of bad faith and found that this agreement did not. The court then turned to analyze whether the minority members were conflicted controlling members who would thus owe fiduciary duties to the Company and its members. Under Delaware law, a stockholder generally owes no fiduciary duties to fellow stockholders unless they are controlling stockholders because they own more than 50% of the company's voting power or, if they own less, exercise control over the company. Plaintiffs must plead facts showing a reasonable inference that the minority members "exercise[d] such formidable voting and managerial power that, as a practical matter, [they were] no differently situated than if [they] had majority voting control." The court found this reasonably conceivable in this case, given the Blocking Rights and consent rights of the minority members, in the context of the Noble loan. The court viewed those rights as a "self-destruct button" that permitted the minority members to drive the Company "into the ground if it suited their interests." Defendants argued that, under *Basho Technologies v. Georgetown Basho Investors*, blocking rights alone are very unlikely to support a finding or inference of control. The court agreed but found that the Blocking Rights and other consent right allowed the minority members to block all efforts by the Company to finance any ongoing operations with debt or equity. The rights gave the minority members the power to channel the Company into a particular outcome—shutting down the Company's operations—which contributed to an inference of control.

The court dismissed the claims against the persons and entities that allegedly controlled the minority members and Cooper because they held no contractual blocking rights, appointed no board members, owned no units in the Company, and, in certain cases, were unable to actually control Cooper in his decision-making.

Sixth, the court addressed plaintiffs' aiding and abetting claims, and permitted the claims against the minority members' principals under the agency theory pursuant to which the agent's knowledge is imputed to the principal. The court dismissed these claims against individuals as to which no plausible agency relationship was pled and against Noble because it was not reasonably conceivable that Noble itself knowingly attempted to encourage or create conflicts of interest at the Company level.

Finally, the court denied claims for civil conspiracy and fraud, but refused to deny tortious interference claims against the principals of the minority members.

43. *In re CVR Refining, LP Unitholder Litigation*, C.A. No. 2019-0062-KSM (Jan. 31, 2020) (V.C. McCormick)

Plaintiffs, former common unitholders in CVR Refining, L.P. (the "Partnership"), alleged that entities controlled by Carl Icahn ("Icahn") engaged in a scheme inspired by the events that unfolded in *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP* (the "Partnership") to enable an Icahn-affiliated entity to buy out the minority unitholders

at an unfair price. Plaintiffs alleged breach of the Partnership's amended and restated partnership agreement (the "LPA"), breach of the implied covenant, and tortious interference with the LPA. Defendants moved to dismiss, which motion was addressed by the court in this decision.

CVR Refining GP, LLC (the "General Partner"), the general partner of the Partnership, was managed by a board of directors comprised of persons closely affiliated with Icahn. The indirect parent of the General Partner, CVR Energy, Inc. ("CVR Energy") was controlled by Icahn Enterprises, L.P. The Partnership's LPA eliminated traditional fiduciary duties and imposed two contractual standards. Relevant here, when the General Partner acted in its official capacity, it could not act in "Bad Faith", defined as the belief that the act was adverse to the interests of the Partnership. The LPA had no separate standards of conduct for conflicted transaction; however, it contained optional safe harbors for such transactions, none of which is the subject of this decision.

The LPA contained a call right that granted the General Partner or its designated affiliates the right to purchase all of the minority holders' common units if the General Partner and its affiliates satisfied certain ownership thresholds. The call right included two price-setting mechanisms: a 90-day provision that mandated the call price not fall below the price the General Partner or an affiliate thereof paid to purchase any units within the 90 days preceding the exercise of the call right, and a 20-day provision that set the price as the average of the closing prices for the units on the 20 trading days preceding the exercise date.

CVR Energy decided to increase its equity stake in the Partnership by launching a partial exchange offer. The General Partner's board met to discuss the partial exchange offer and determined to "express no opinion" with respect thereto. The General Partner caused the Partnership to disclose its "no recommendation" position in its public filings with the SEC. The exchange offer launched, and analysts reacted skeptically, noting their view that Icahn could be using the exchange offer as the starting point to exercise a call right in a *Boardwalk*-like manner that would be communicated and timed to depress the value of the common units. The SEC also expressed this skepticism and inquired of CVR Energy as to whether it intended to exercise the call right, and it denied any present intent to do so to the SEC and in its public filings. After the exchange offer closed, the Icahn entities satisfied the ownership threshold required to exercise the call right. Approximately 120 days later, Icahn Enterprises and CVR Energy filed with the SEC to disclose that CVR Energy "now contemplated" exercising the call right. Unsurprisingly, the unit price plummeted. About a month and a half later, the unit price was slightly more than one-third of the exchange offer price and CVR Energy announced that the General Partner assigned it the call right and it would exercise that right. However, in the 90-day period prior to the exercise, a vice president of CVR Energy and the General Partner purchased units at a price in excess of the price set by the 20-day mechanism. Plaintiffs alleged that she was an affiliate and, therefore, the price could not be lower than the price she paid.

Plaintiffs alleged breach of the LPA in connection with the Exchange Offer and by setting the call price lower than the price the vice president paid. The court found that both counts stated a claim on which relief could be granted.

First, because the General Partner's board met to discuss the offer, the General Partner decided to make no recommendation with respect thereto, and the General Partner caused the Partnership to so disclose, it was reasonably conceivable the General Partner breached the LPA's requirement that the General Partner, when acting in its official capacity, not act in "Bad Faith". The court found it reasonably conceivable that the board believed that the exchange offer was adverse to the interests of the limited partners with no offsetting benefits, particularly in light of the negative market reaction to the Boardwalk transaction, of which the board members as sophisticated players in the marketplace would have been aware, and, therefore, was adverse to the Partnership as a whole. The court also found it reasonably conceivable that the exchange offer was detrimental to the Partnership as a whole because the trading price of units dropped, increasing the Partnership's cost of equity and thus its cost of capital. It was reasonable to infer that the board knew all of this when it made and disclosed the Partnership's "no recommendation" determination. Second, the court found it reasonably conceivable that the vice president was an "Affiliate" as defined in the LPA such that the call price could not be lower than the price she paid.

Plaintiffs alleged that defendants undermined the price-setting mechanisms contained in the call right provisions of the LPA and, therefore, breached the implied covenant of good faith and fair dealing. The court, relying on *Dieckman*, determined that plaintiffs stated a claim on which relief could be granted. The court looked to the language in *Dieckman* in which the Delaware Supreme Court stated that terms like "the General Partner will not mislead unitholders [when seeking their approval] . . . or . . . subvert the Special Approval process by appointing conflicted members to the Conflicts Committee" were "easily implied" because they would have been too obvious to include when drafting the agreement. The court, citing to *Boardwalk*, noted that a similar provision could be implied (i.e., the call right would not be implemented in a way to manipulate the pricing mechanisms), and found that it was "reasonably conceivable that the General Partner worked with CVR Energy to frustrate the Call Right's price-protection mechanisms", particular in light of the fact that each Board member "had strong ties to Icahn and Icahn Enterprises, the ultimate controller of CVR Energy."

Defendants attempted to invoke the "stranger rule", which states that only strangers to a contract can tortiously interfere with that contract, to support dismissal of the tortious interference claims. However, Delaware courts have moved away from applying the stranger rule and, instead, focus on whether the interference was improper or unjustified. Defendants offered no arguments as to why the alleged interference was justified. However, the court did dismiss this count with respect to the individual directors of the Board because plaintiffs failed to allege that they exceeded the scope of their agency as directors.

44. *Ogus v. SportTechie, Inc.*, C.A. No. 2018-0869-AGB (Del. Ch. Jan. 31, 2020) (Chancellor Bouchard)

Plaintiff Simon Ogus ("Ogus") alleged that defendants engaged in a conspiracy to remove him from SportTechie, Inc., a Delaware corporation ("SportTechie" or the "Company"), eliminate his 44.5% ownership interest in the Company through a multi-step fraudulent scheme, and transfer control of the Company to Oak View Group, LLC ("Oak View")—a large venture capital firm. Ogus was a founder of SportTechie and served as its Chief Operating Officer until March 8, 2017. Defendant Taylor Bloom ("Bloom") was a founder, a director, and the Chief Executive Officer of SportTechie. Defendant Daniel Kaufman ("Kaufman") was an officer of—and the sole in-house attorney at— SportTechie. Defendant Oak View was a controlling investor in SportTechie and had invested $675,000 in the Company through a secured convertible note. Defendant Francesca Bodie ("Bodie") was the President of Business Development for Oak View, and served as a director of SportTechie as a designee of Oak View.

SportTechie had been a District of Columbia limited liability company and was converted to a Delaware limited liability company in October 2015. In 2016, Bloom and Ogus amended SportTechie's Operating Agreement (the "2016 Operating Agreement") and renegotiated the ownership structure of the Company such that Bloom received 55.5% of the units and Ogus received 44.5% of the units of SportTechie. Pursuant to the 2016 Operating Agreement, Ogus was the sole manager of SportTechie and held a right as a member to block "Major Decisions" by the Company (the "Veto Right"), which required unanimous approval by the members. The 2016 Operating Agreement also stated that a member could only be expelled from the Company if a court determined that such member had engaged in certain instances of serious misconduct.

In October 2016, Bloom, Bodie, and Kaufman began a campaign to (1) convert SportTechie from a Delaware limited liability company to a Delaware corporation and (2) establish a board of directors (the "Board") with Bloom and Bodie constituting a majority of the Board. The conversion required Ogus' approval because he held a Veto Right under the 2016 Operating Agreement. On December 31, 2016, Ogus signed the conversion documents and SportTechie became a Delaware corporation. Ogus also signed a written consent of stockholders establishing the Board and appointing Bloom as the first director. On February 1, 2017, Ogus signed a written consent of stockholders appointing Bodie and Kai Sato—a friend of Bloom and the founder of Vintage Capital—to the Board; thus expanding the Board to three members.

On January 31, 2017, Bloom and Ogus executed a Shareholders Agreement, which gave SportTechie an option to purchase Ogus' shares within ninety days after the termination of his employment—"for any reason or for no reason"—at a purchase price "equal to the fair market value (as determined in good faith by the Board) of the Shares sold." On March 8, 2017, Bloom and Bodie, acting by written consent on behalf of the Board, removed Ogus from his position as Chief Operating Officer of the Company and terminated his employment without cause. The termination letter was accompanied by an agreement to purchase Ogus' stock and indicated that the value of SportTechie was $2.2 million. On May 9, 2017, SportTechie claimed to have repurchased Ogus' shares for a

total of $819,951.35. Ogus believed that the price was unfair, however, and refused to accept any payment for his shares. Ogus brought multiple claims against defendants, including fraud, breach of fiduciary duty, aiding and abetting and civil conspiracy.

Ogus asserted a claim for fraud in the inducement against Bloom and Kaufman for inducing Ogus to "(1) agree to converting SportTechie from an LLC to a corporation, (2) agree to a five-person Board, initially comprised of Bloom, Sato, and Bodie, and (3) execute the Shareholders Agreement." The court analyzed Ogus' fraud claim by evaluating the three actions separately: (1) converting the Company from a limited liability company to a corporation—which eliminated Ogus' Veto Right and provided the Board with the authority to terminate officers and employees, (2) creating and expanding the Board—which excluded Ogus, and (3) executing and implementing the Shareholders Agreement. The court held that the complaint stated a reasonably conceivable claim of fraud against Bloom and Kaufman with respect to the first two actions described above. Ogus pled specific facts showing that Bloom and Kaufman had induced Ogus to approve SportTechie's conversion by falsely promising him that he would retain both his managerial role and the Veto Right under the 2016 Operating Agreement. Ogus also pled specific facts showing that Bloom and Kaufman had provided false assurances to Ogus that he would be added to the Board of SportTechie shortly after the conversion. The court held, however, that Ogus could not complain that he was fraudulently induced to enter into the Shareholders Agreement. This is because the plain terms of the Shareholders Agreement expressly allowed SportTechie to repurchase Ogus' shares following his termination as an employee of the Company for "any reason or no reason."

Ogus also brought aiding and abetting claims against Bodie and Oak View for "substantially assist[ing]" Bloom and Kaufman's fraudulent behavior. The court dismissed this claim because Ogus did not plead sufficient facts—and merely made conclusory statements—that Bodie and Oak View had knowledge of the alleged fraudulent conduct.

Ogus also asserted that Kaufman breached his fiduciary duty as an officer and the in-house attorney of SportTechie in two manners. First, Ogus claimed that Kaufman "intentionally misrepresented information and omitted material information… regarding what the effect was on [Ogus] of documents he was asking Ogus to sign relating to [his] role at the Company." The court held that this was a reprise of the fraud claim against Kaufman and stated a claim for breach of fiduciary duty for the same reasons and to the same extent that the fraud claim survived as to him. Second, Ogus claimed that Kaufman "pressured and threatened [Ogus] to cause him to execute conversion and other key documents under arbitrary time constraints and without the advice of independent counsel." The court determined it was reasonably conceivable that Kaufman had breached his duty of loyalty by making coercive threats and applying undue pressure on Ogus so that he would sign the conversion documents—the first step of the alleged multi-part plan to eliminate Ogus from the Company.

Finally, Ogus asserted that Bodie, Bloom, Kaufman, and Oak View engaged in a civil conspiracy designed to enable Oak View to gain control of SportTechie. The alleged

conspiracy consisted of a multi-step fraudulent plan to remove Ogus from the Company and allow SportTechie to repurchase Ogus' shares "at below market price." The elements for civil conspiracy are the following: a confederation or combination of two or more persons, an unlawful act done in furtherance of the conspiracy, and damages resulting from the action of the conspiracy parties. First, the allegations—and the quick pace at which the sequence of events necessary to carry out the alleged plan took place—supported a reasonable inference that a confederation existed among Bodie, Bloom, Kaufman, and Oak View. Second, Ogus had stated claims for fraud and/or breach of fiduciary duty in connection with various actions that the three individual defendants took in furtherance of the alleged conspiracy. Third, Ogus alleged that he suffered damages as a result of the conspiracy and defendants did not challenge this contention. Based on these reasons, the court denied the motion to dismiss the civil conspiracy claim.

45. *MKE Holdings Ltd. v. Schwartz,* C.A. No. 2018-0729-SB (Del. Ch. Sept. 26, 2019) (V.C. Glasscock); *MKE Holdings Ltd. v. Schwartz,* C.A. No. 2018-0729-SB (Del. Ch. Jan. 29, 2020) (V.C. Glasscock)

In a September, 2019 decision, the Chancery Court addressed the derivative claims brought by plaintiffs, who were owners of Class A Units in Verdesian Life Sciences, LLC (the "Company"), claiming the managers of the Company (the "Managers") breached the operating agreement of the Company (the "Company Agreement") and their fiduciary duties in connection with certain acquisitions and management decisions made by the Company.

The Company Agreement vested the Board of Managers with the "full and exclusive discretion" to manage, control and make all decisions affecting the business and assets of the Company. Each Manager was appointed by entities affiliated with Paine Schwartz Partners, LLC ("Paine"), which collectively owned over 70% of the Class A Units of the Company. Paine also had a contractual relationship with the Company whereby Paine received management service fees based on the Company's financial performance and transaction fees on certain Company acquisitions.

First, the court evaluated the duties of the Managers under the Company Agreement. In accordance with Delaware law, the Company Agreement waived all fiduciary duties of each Manager so long as such Manager acted in a manner consistent with the terms of the Company Agreement. The Company Agreement then provided a tripartite standard to govern the Managers: each Manager was required to act "in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the Company, and with the care that an ordinarily prudent person in a similar position would use in similar circumstances. The court explained this standard imposed a subjective duty to act "in good faith" and an objective standard to act "in a manner he reasonably believes to be in or not opposed to the best interests of the Company." Finally, the requirement to exercise the care of an ordinarily prudent person imposed a simple negligence standard, which the court noted was a higher standard than that imposed on a corporate fiduciary under common law. The Company Agreement further provided that Managers were explicitly permitted to make conflicted decisions and would be exculpated from liability for a Manager's action "taken in good faith and reasonably believed to be in or not opposed to

the best interests of the Company, or for errors of judgment, neglect or omission." Reading the Company Agreement as a whole, the court determined the negligence standard was only "aspirational" and the Managers were only liable for actions taken in bad faith. The court reasoned that while the Company Agreement included an ordinary prudent person standard, any liability for an action that deviated from ordinary prudence would nonetheless be exculpated so long as the action was taken in good faith and was reasonably believed to be in or not opposed to the best interests of the Company. Accordingly, the Company Agreement effectively exculpated Managers for conflicted, negligent and other detrimental decisions, as long as they were taken in good faith.

The court then reviewed the actions of the Managers to determine if they acted in bad faith. Plaintiff first challenged the Company's acquisition of Specialty Fertilizer Products, LLP ("SFP") for $313.5 million in 2014. In connection with the acquisition, the Company received a report noting, *inter alia*, the sales for SFP were 15% lower than for the same period the previous year and a sales peak from 2013 was a "onetime benefit due to the business shift" of SFP (the "KPMG Report"). Further, United Suppliers, one of SFP's primary retail customers, warned the Company that SFP had presold a significant amount of its product in 2013, and would therefore be unable to achieve the same level of sales in the future. The Company funded the acquisition in part through new equity financing by offering its existing unitholders the opportunity to purchase additional Class A Units. In soliciting this financing, the Managers indicated SFP's 2013 earnings were a reliable indicator of its future performance. Paine received a transaction fee of $6 million in connection with the SFP acquisition.

The court rejected plaintiffs' argument that the Managers approved the SFP acquisition in bad faith because the Managers, through their relationships with Paine, indirectly had an interest in the transaction because Paine received transaction fees for acquisitions and management fees based on the Company's financial results. The court stated the contractual standard allowed Managers to make decisions that benefitted themselves, unless the decision taken was inimical to the Company's interest. Accordingly, the court determined that plaintiffs' argument had a fatal flaw: Paine, through its affiliates, owned over 70% of the Company, so the value of any transaction fees from the transaction would be dwarfed by potential loss to Paine of several hundred million dollars if the transaction was a bad deal for the Company. Further, the Paine affiliates participated in the equity financing. The court dismissed this claim for failure to state a claim.

Plaintiff next challenged the acquisition of QC Corporation ("QC") from Paine. The Company assumed QC's liabilities, including environmental liabilities and an $18 million intercompany loan, in the acquisition. Plaintiffs argued the QC acquisition was undertaken in bad faith to transfer an underperforming company from Paine to the Company, and that the Managers were motivated by the transaction fees Paine would receive. The court found the fact the Managers acquired a target with liabilities did not itself suggest the acquisition was inimical to the best interests of the Company. Further, the court acknowledged the QC acquisition was a conflicted transaction, but noted the governing contractual standard allowed for such activity by the Managers. The court dismissed this claim for failure to state a claim.

Finally, plaintiffs argued the Managers made several poor management decisions, including hiring choices, continued use of advance sales and discounts, changes in certain financial accounting practices and lavish spending, in bad faith and motivated by self-interest. The court rejected the inference plaintiffs asked it to draw – that the Managers' decisions were taken in subjective bad faith out of loyalty to Paine. The court found this inference was not reasonable because Paine, as the majority owner of the Company, benefitted when the Company's value increased. Further, Paine benefitted from management service fees tied to the Company's performance. The Managers could not be subject to liability solely based on an allegation they were poor or incompetent managers. The court also rejected plaintiffs' argument that the Managers should have caused the Company to withdraw its contractual agreement to pay Paine management service fees based on the Company's performance. Plaintiffs did not allege the Managers had the opportunity to withdraw from the contract, that the breach would have been efficient or that the arrangement was inimical to the Company. Accordingly, this claim was also dismissed for failure to state a claim.

In a subsequent opinion in January, 2020, the court addressed the three counts of plaintiffs' direct claims: (i) breach of the Company Agreement; (ii) fraud; and (iii) aiding and abetting. Defendants moved to dismiss all claims pursuant to Rule 12(b)(6) and the fraud claim under Rule 9(b).

As determined in the courts earlier opinion, in order for a Manager to be liable for breach of the Company Agreement, a Manager must act in bad faith. Plaintiffs argued the Managers breached the Company Agreement by acting in bad faith and engaged in fraud by soliciting equity contributions to fund the purchase price of the SFP acquisition by failing to disclose material information regarding the value of SFP. At the pleading stage, the Managers did not provide a reason for why such information was withheld. The court determined that without a competing explanation from the Managers, it was not unreasonable to infer the information was withheld on the basis of bad faith. Further, given the plaintiff-friendly inferences applicable at the pleading stage, the court assumed the withheld information was material. With respect to the fraud claim, the court found plaintiffs' complaint supported an inference that the Managers took affirmative action designed or intended to prevent, and which did prevent, the discovery of the withheld information, and, consequently, an accurate picture regarding SPF's value.

The court next addressed plaintiffs' argument that the Company offered preferred units ("Class P Units") in breach of the Company Agreement. The Class P Units entitled Class P unitholders to receive double the Class P Unit price in the event of a sale. In addition, the Class P Units would supersede Class A Units in priority in the event of a distribution from a liquidity event.

Plaintiffs first argued that the offering breached the Company Agreement because the Company's management was also allowed to participate in the Class P offering, which would be dilutive to plaintiffs. The court rejected this argument because although plaintiffs had preemptive rights under the Company Agreement with respect to the

offering, there was an exclusion from the preemptive rights for offerings made to management pursuant to the Company's equity incentive plan and this offering was made pursuant to the equity incentive plan.

Plaintiffs also argued that the unit price for the Class P offering was too high and the liquidation preference of the Class P Units was too destructive to the value of the Class A Units. The court analogized this situation to the court's decision in *WatchMark v. Argo*. In *WatchMark*, a preferred stockholder of a corporation challenged the decision by the corporation to issue a new series of preferred stock to raise capital and any preferred stockholder who did not participate in the issuance would have its shares converted to common shares to the pro-rata extent of its non-participation. All preferred stockholders in *WatchMark* had an equal opportunity to participate. The court in *WatchMark* held that because any disparate treatment resulting from the issuance was a self-imposed consequence and not the result of self-dealing, the preferred stock issuance was in good faith and entitled to the protection of the business judgment rule. In this case, the court held that, because the Managers must act in bad faith to breach the Company Agreement, plaintiffs must plead bad faith in order to survive a motion to dismiss. Because plaintiffs had an equal opportunity to participate in the Class P offering and any disparate treatment from the Class P Units was a "self-imposed" consequence of not participating, plaintiffs claim must be dismissed.

Finally, the court dismissed plaintiffs' claim against Paine for aiding and abetting the Managers' breach of the Company Agreement. Delaware law generally does not recognize a claim for aiding and abetting a breach of contract. The court explained that because the Company Agreement eliminated fiduciary duties and replaced them with defined contractual duties, plaintiffs could not use an aiding and abetting claim.

46. *Saba Capital Master Fund, Ltd. v. BlackRock Credit Allocation Income Trust*, C.A. No. 2019-0416-MTZ (Del. Ch. June 27, 2019) (V.C. Zurn); *BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.*, No. 297, 2019 (Del. Jan. 13, 2020) (J. Valihura)

This case involved a shareholder's challenge to the re-election of incumbent board members of two-closed end investment funds. Plaintiff, Saba Capital Master Fund, Ltd., was a shareholder of defendants BlackRock Credit Allocation Income Trust ("BTZ") and BlackRock New York Municipal Bond Trust ("BQH" and together with BTZ, the "Trusts"), each a Delaware statutory trust registered as a closed-end investment company. The bylaws for each Trust (the "Bylaws") contained an identical Article I, Section 7 ("Section 7") that provided how shareholders nominated trustees to the board of trustees (the "Board") for the Trusts. Section 7 required shareholders to give timely written notice of a nomination (a "Nomination Notice") and enumerated the required contents for a proper Nomination Notice. In addition, Article II Section 1 ("Section 1") of the Bylaws provided an expansive list of qualifications that prospective trustees must meet to serve on the Board.

Plaintiff delivered a Nomination Notice to the Trusts nominating four individuals for election to each of the Boards in compliance with Section 7 and Section 1. In response,

counsel for the Trusts emailed plaintiff requesting additional information with respect to the nominees pursuant to Section 7. The email contained a questionnaire that contained approximately ninety-five questions relating to the proposed nominees. This dispute turned primarily on the requirement in Section 7(e)(ii) that any additional information requested by the Board to determine if the proposed nominee met the qualifications under Section 1 must be delivered no later than five business days after the request. Plaintiff did not submit the questionnaire within that five day deadline and was informed its Nomination Notices were invalid under the Bylaws and Delaware law.

This memorandum opinion addressed plaintiff's request for preliminary relief to allow its nominees to be presented and votes to be counted in the election. Plaintiff filed this action asserting four claims, but sought preliminary relief only with respect to its claims that by rendering the Nomination Notices invalid for failure to timely return the questionnaires, defendants (i) violated the Bylaws ("Count III") and (ii) breached their fiduciary duties ("Count IV"). The court determined that because the relief plaintiff sought would upend, not preserve, its status quo by requiring defendants to count votes they otherwise would not have, plaintiff was seeking a mandatory injunction and had to make a showing sufficient to support a grant of summary judgment.

To obtain a preliminary injunction, a party must demonstrate: (1) a reasonable probability of success on the merits; (2) that it will suffer irreparable injury without an injunction; and (3) that its harm without an injunction outweighs the harm to the defendants that will result from the injunction. The court first addressed the merits prong for injunctive relief.

The court found plaintiff made a sufficient showing on the merits under Count III, but not Count IV. With respect to Count III, plaintiff claimed (1) the questionnaire could not have been submitted as a Section 7(e)(ii) request, (2) even if it could, the questionnaire was not clearly posed as a Section 7(e)(ii) request and (3) even if it was, the questionnaire exceeded the scope permitted by Section 7(e)(ii). First, the court found that under a plain reading of the Bylaws, Section 7(e)(ii) was unambiguous and provided the exclusive method for the Boards to request supplemental information relating to Nomination Notices. Second, while the court agreed that the email was less than transparent when it referred only to a request for "additional information" under Section 7, it stated that plaintiff, a sophisticated entity that had already completed the Nomination Letters and understood the Bylaws, could only have been reasonably confused by the email if there was another method under Section 7 to request additional information about the nominations. Third, the court addressed plaintiff's argument that the questionnaire exceeded the scope of Section 7, which required shareholders to "update and supplement" their Nomination Notices, "if necessary" in response to a request from the applicable Board for "any subsequent information reasonably requested . . . to determine that the Proposed Nominee has met the director qualifications as set out in Section 1" of the Bylaws. At the request of the court, the parties categorized whether each question and corresponding subpart question related to the director qualifications set forth in Section 1. After reviewing these submissions, the court found thirty of the questions were not related to the Section 1's director qualifications. Accordingly, the court held

defendants were not permitted to rely on the five-day deadline for plaintiff's compliance because defendants issued a request that exceeded the Bylaws' scope.

Although the court did not need to address Count IV, it noted it would have denied plaintiff's relief under the mandatory injunction standard. Plaintiff asserted defendants' primary purpose in precluding plaintiff's nominations was to interfere with shareholders' ability to nominate and vote for trustees other than the incumbents and that they violated their fiduciary duties under Delaware law to ensure fair and reasonable nominating and voting procedures in the election of directors. Plaintiff advanced Count IV under *Blasius Industries, Inc. v. Atlas Corp.* and *Schnell, Inc. v. Chris-Craft Industries, Inc.* The court stated that proof that the defendants acted with the primary purpose of thwarting plaintiff's nominees under *Blasius*, or otherwise acted inequitably under *Schnell*, required more than merely laying out the timeline of defendants' conduct and speculation about bad intent or purpose. Moreover, the court criticized plaintiff's delay in filing suit, which in turn hampered its ability to obtain discovery.

Turning to the irreparable harm prong, the court found plaintiff demonstrated it would suffer irreparable harm absent injunctive relief. The court noted that courts have consistently found that corporate management subjects shareholders to irreparable harm by denying them the right to vote their shares, which includes the right to nominate a contesting slate, or unnecessarily frustrating them in their attempt to obtain representation on the board of directors. Therefore, the court assumed irreparable harm.

Finally, the court found the balance of hardships favored injunctive relief. The court explained there was little possibility of hardship to the individual defendants on the Boards because the incumbent directors had no vested right to continue to serve as directors and would suffer no harm if defeated. In addition, the related costs defendants would incur due to soliciting additional votes and potentially issuing corrective disclosures in a short time period were partially self-imposed because they set the meeting date (three weeks earlier than last year's meeting date) after plaintiff filed its initial complaint.

The court enjoined defendants from applying Section 7(e)(ii) to invalidate plaintiff's nominations to the Boards based on its return of the additional information questionnaire after the five-day deadline.

On appeal to the Delaware Supreme Court, the Trusts challenged the injunction issued by the Court of Chancery requiring the Trusts to count the votes of the nominees presented by Saba at the Trusts' respective annual meetings. The Trusts contended that the Court of Chancery erred by issuing the injunction because Saba's nominees were ineligible for election due to their failure to timely provide supplemental information in accordance with the clear and unambiguous bylaws. The Trusts also argued that the Court of Chancery erred in holding that Saba's claims for equitable relief were not barred by laches.

The Supreme Court agreed with the Court of Chancery's holding that Section 7(e)(ii) provided the exclusive method for requesting supplemental information. However, the Supreme Court held that Saba's nominations were deemed ineligible under Section 7 due to their failure to respond to the Trusts' request for supplemental information. The Supreme Court did not want to create uncertainty in the electoral setting by allowing election-contest participants to let pass a clear and unambiguous deadline contained in an advance-notice bylaw, particularly one that had been adopted on a "clear day." If Saba believed the questions exceeded the limits of Section 7(e)(ii), it could not remain silent and let the deadline pass without risking disqualification of its nominees.

The Supreme Court next addressed the Trusts' argument that the Court of Chancery erred by determining Saba was not guilty of laches. The Trusts argued that Saba unreasonably waited to file its action on June 4th, thirty-five days after Saba was informed its director nominations were invalid. The Supreme Court agreed with the Court of Chancery that, based on the prior year's July 30 meeting date, Saba had reason to believe the meeting would be in late July. Further, the Supreme Court rejected the Trusts' argument that the delay was harmful because of the costs associated with corrective disclosures and soliciting additional votes in a compressed period. As the Court of Chancery noted, each Trust set its meeting date earlier than the previous year, so costs related to its rapid approach were "partially self-imposed." Accordingly, the Supreme Court found no error in the Court of Chancery's rejection of the Trusts' laches contentions.

47. *Marubeni Spar One, LLC v. Williams Field Services – Gulf Coast Company, L.P.*, C.A. No. 2018-0908-SG (Del. Ch. Jan. 7, 2020) (V.C. Glasscock)

Gulfstar One, LLC ("Gulfstar" or "Company"), a midstream oil and gas company, owned and operated the Tubular Bells platform—a floating production system located 135 miles southeast of New Orleans, Louisiana in the Gulf of Mexico. The Tubular Bells platform received and transported oil and gas products ashore for processing and refining. Defendant Williams Field Services – Gulf Coast Company, L.P. ("Williams") built the Tubular Bells platform to serve the Tubular Bells field. Williams, both a member and the operating member of Gulfstar, owned a 51% interest in Gulfstar. Plaintiff Marubeni Spar One, LLC ("Marubeni") invested in infrastructure projects related to offshore oil and gas reserves. Marubeni was a member of Gulfstar and owned a 49% interest in Gulfstar. The profits from Gulfstar's Tubular Bells field operation were to be divided 51% to Williams, 49% to Marubeni.

The Tubular Bells platform was designed as a "hub" and capable of expanding production by handling oil and gas from additional sources. Marubeni held an option to participate in the construction of new projects from neighboring fields (each, an "Expansion Project"). In the event that Marubeni elected to partake in an Expansion Project, the revenues were to be split 87.75% to Williams and 12.25% to Marubeni, net of expenses incurred. Marubeni ultimately participated in one Expansion Project that served the neighboring Gunflint field (the "Gunflint Project"). This litigation commenced because the parties disagreed over which expenses were "incurred" in connection with the Gunflint Project. Each party interpreted the Amended and Restated Operating Agreement (the "LLC Agreement") in a manner that advanced its own

economic interests. Williams did not allocate certain expenses to the Gunflint Project, but rather allocated them exclusively to Tubular Bells. This action benefited Williams because its profit percentage was higher from the Gunflint Project: Williams received 87.75% of the net proceeds from the Gunflint Project, but only 51% of the net proceeds for production from the Tubular Bells field. Marubeni argued that Williams had failed to properly allocate expenses associated with the Gunflint Project to the Gunflint Project. Marubeni filed a complaint and asserted the following claims against Williams: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) breach of fiduciary duty. Williams moved to dismiss and Marubeni filed a motion for partial summary judgment.

The court first examined whether Williams' expense allocation for the Gunflint Project aligned with the definition of Third Party Production Amount ("TPPA") in the LLC Agreement. The parties disagreed over the meaning of the cash outflows portion of TPPA, which read: "less associated cash outflows (including capital expenditures, operating expenditures and any other costs associated with such Expansion Project) incurred by the Company in connection therewith." Williams contended that only those expenses which would not have been incurred "but for" the Gunflint Project should be allocated to the Gunflint Project. These included the costs of hooking the Gunflint Project into the Tubular Bells platform and the Gunflint Project's direct operating costs. Marubeni proposed that a proportional amount of costs as between the Gunflint Project and Tubular Bells should, as a matter of fairness, be allocated to the Gunflint Project thought Marubeni maintained that the LLC Agreement actually allocated all Tubular Bells expenses to the Gunflint Project.

The court stated that, when interpreting a contract, a court should attempt to determine the parties' shared intent by (1) looking at the document as a whole and (2) construing words in accordance with their plain meaning. It deemed the contract to be ambiguous because the language dealing with the cost allocation of an Expansion Project was "reasonably or fairly susceptible of different interpretations or may have two or more different meanings." It concluded that "the intention of the parties [was] unclear, and interpretation would benefit from a record." Since the court could not rule on the contractual language as a matter of law, it denied Williams' motion to dismiss Marubeni's claim for breach of contract and Marubeni's motion for partial summary judgment.

The court then turned to Marubeni's claim that Williams had breached the implied covenant of good faith and fair dealing. The court noted that the implied covenant of good faith and fair dealing is a "tool of construction" that "may be available as a gap filler." In this case, however, Marubeni failed to identify any contractual gap. The parties' contract expressly covered the subject at issue: investment by Marubeni in an Expansion Project and the allocation of any resulting profits. The court would not rewrite the parties' bargain by replacing "unfair" terms with "fair" terms. Because the parties merely disagreed about the meaning of a contractual provision, the court refused to invoke the implied covenant of good faith and fair dealing. The court therefore

dismissed Marubeni's claim against Williams for breach of the implied covenant of good faith and fair dealing.

Finally, the court analyzed Marubeni's claim that Williams had breached its fiduciary duty as the operating member of Gulfstar. The court noted that the parties to an LLC agreement are free to modify default fiduciary duties in their agreement. In this case, the LLC Agreement provided that Williams, as operating member, would be held liable only for "gross negligence, fraud, or willful misconduct." Because Marubeni alleged that Williams breached its purely contractual duty to allocate expenses incurred in connection with the Gunflint Project, the court dismissed Marubeni's claim against Williams for breach of fiduciary duty.

48. *Stanco v. Rallye Motor Holding, LLC,* C.A. No. 2019-0751-SG (Del. Ch. Dec. 23, 2019) (V.C. Glasscock)

Plaintiff, the former managing member of defendant Rallye Motors Holding LLC, a Delaware limited liability company ("Rallye"), filed a suit against Rallye to inspect books and records under Section 18-305 of the Delaware LLC Act. While plaintiff was a manager of Rallye at the time the LLC Agreement was entered into, at the time plaintiff brought the action he was a non-managing member and owned 5.5% of Rallye's membership units. Plaintiff sought to inspect Rallye's books and records to evaluate: (1) the status of his ownership interest in Rallye, (2) the value of his ownership interest in Rallye, (3) the business and financial condition of Rallye, (4) the performance of Rallye's management after failing to make distributions to plaintiff and other shareholders, (5) the independence of Rallye's management, (6) the propriety of Rallye's disclosures, and (7) the current business being transacted by Rallye. Rallye moved to dismiss the action and argued that a provision in the LLC Agreement of Rallye providing that disputes arising from the LLC Agreement "shall be venued" in the courts of two counties of the State of New York prevented plaintiff from bringing this action in the Court of Chancery.

The court first noted that as a default, plaintiff, as a member of Rallye, had a right to inspect books and records under Section 8.3 of the LLC Agreement and Section 18-305 of the LLC Act. However, Rallye argued that plaintiff had waived his right to bring such an action in the Court of Chancery via the venue provision in Section 12.7 of the LLC Agreement. Section 12.7 of the LLC Agreement required that "any and all disputes relating to this Agreement shall be venued in either the Supreme Court of the State of New York, Nassau County, Commercial Division and/or the Surrogate's Court located in New York County."

Plaintiff argued that the venue provision of the LLC Agreement was not enforceable against him and cited Section 18-109(d) of the LLC Act. The court noted that LLCs are "creatures of contract" but that, "[n]onetheless, there are statutory limits to the freedom of LLCs and their members to contract." Turning to the language of Section 18-109(d), the court emphasized the language "a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company" and noted that the provision implies, but does not state explicitly, that

managing-members may waive their right to a Delaware venue. At the time the LLC Agreement was entered into, plaintiff was a manager as well as a member. However, at the time the action was filed, plaintiff was "a member who [was] not a manager." The court questioned whether, under those circumstances, plaintiff could be held to have waived his statutory right to a Delaware venue for books and records and observed that the statute may be ambiguous in that situation.

Plaintiff and defendant offered competing arguments as to the purpose of Section 18-109(d). Rallye argued that the purpose of Section 18-109(d) is to prevent oppression of members who have limited (or no) bargaining power as to the terms of LLC agreements. Therefore, Rallye reasoned that a manager may waive the right to a Delaware venue for litigation involving the LLC's internal affairs even if such person is later removed as a manger. Plaintiff, on the other hand, argued that the statute is intended to protect members who wish to litigate internal affairs matters by ensuring a forum in Delaware and that this interest would be best vindicated by construing the ability to waive as of the time the action is filed.

The court, however, declined to resolve the ambiguity in the statute and denied Rallye's motion to dismiss on different grounds. The court explained that generally, except as limited by contractual waiver, the members of a Delaware LLC have the right to litigate books and records demands in the Court of Chancery. The court noted that for waivers of rights to be enforceable, they must encompass knowledge of the right and a clear expression of the intent to relinquish the right. The court held that the language of the LLC Agreement did not clearly evince a waiver of the right to venue in the Court of Chancery for books and records actions. The court further explained that the New York venue provision of the LLC Agreement applied to "[a]ny and all disputes arising out of this Agreement." However, the court noted that the dispute in this case was not solely about rights under the LLC Agreement, but rather also about a statutory right to books and records.

The court also found that it was clear that, at the time plaintiff entered the LLC Agreement, he could not have intended to waive his rights to a books and records demand as a manager. When plaintiff was acting not only as a manager but the managing member of Rallye, he would have access to the Company's books and records. The court noted that it was only because plaintiff was removed as manager that he sought to vindicate his statutory rights as a member.

49. *AlixPartners, LLP v. Mori*, C.A. No. 2019-0392-KSJM (Del. Ch. Nov. 26, 2019) (V.C. McCormick)

Defendant Giacomo Mori ("Mori") was an employee of AlixPartners S.r.l. ("Alix S.r.l") in Milan, Italy and a partner of AlixPartners Holdings, LLP, a Delaware limited liability partnership ("Alix Holdings"). Mori's employment relationship with Alix S.r.l was governed by an employment agreement (the "Employment Agreement"), which contained an Italian choice of law provision but did not contain a forum selection clause. Mori's partnership in Alix Holdings was governed by the Alix Holdings LLP Agreement (the "LLP Agreement"), an equityholders' agreement (the "Equityholder Agreement")

and an LLP Interest and Option Plan (the "Option Plan"). Mori received equity in Alix Holdings pursuant to a number of award agreements (the "Award Agreements"). Each of the LLP Agreement, Equityholder Agreement, Option Plan and Award Agreements either contained or was subject to a Delaware forum selection provision and a Delaware choice of law provision.

Following Mori's termination as an employee of Alix S.r.l., Alix S.r.l and Alix Holdings, together with AlixPartners, LLP, also a Delaware limited liability partnership ("Alix" and together with Alix S.r.l and Alix Holdings "AlixPartners"), brought this action against Mori for (1) breach of various provisions of the Employment Agreement, (2) breach of various provisions of the LLP Agreement, (3) misappropriation of trade secrets, (4) conversion, (5) declaratory judgment as to AlixPartners' contractual right to repurchase or terminate Mori's equity and (6) declaratory judgment concerning Mori's contractual non-solicitation obligations. Mori filed a motion to dismiss on the grounds that the court lacked subject matter jurisdiction, lacked personal jurisdiction and was an improper venue and that AlixPartners had failed to state a claim in its complaint. The court denied Mori's motion to dismiss but granted Mori a stay on litigation relating to claims arising under the Employment Agreement.

Mori argued that the court did not have subject matter jurisdiction over this dispute because a European Union procedural regulation enforceable as law in Italy and a provision of the Italian Civil and Labour Procedure Code (the "Foreign Laws") limited the courts that may hear an employment dispute involving, respectively, individuals employed in Italy or Italian citizens, such as Mori. The court found that neither of the Foreign Laws deprived it of subject matter jurisdiction. A Delaware court will exercise subject matter jurisdiction, notwithstanding a foreign law that vests jurisdiction exclusively in its own courts, when the claims at issue are transitory in nature. A claim is transitory in nature when "the right and the remedy [are] not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal." The claims at issue in this case were transitory in nature. The substance of the claims was based in contract and tort, and "[n]o contemporary legal order's law of contract or tort seeks to localize . . . actions sounding in tort or contract." Furthermore, the Foreign Laws were procedural laws rather than substantive laws and therefore did not govern the rights and remedies at issue. Because the Foreign Laws were merely procedural and the claims were transitory, the court declined to limit the exercise of its subject matter jurisdiction in accordance with the Foreign Laws.

The court next considered Mori's claim that the court lacked personal jurisdiction over Mori. The court noted that the Mori was bound by a forum selection clause in each of the LLP Agreement, the Equityholders' Agreement, the Option Plan and the Award Agreements, and therefore consented to personal jurisdiction in Delaware. Only if a party "clearly shows that enforcement of the forum selection clause is unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching," will the court find that the court lacks personal jurisdiction over a party notwithstanding the binding forum selection clause. Here, Mori did not claim that the forum selection clause was the product of fraud or overreaching. Instead, Mori argued that the forum selection

clause should not be enforced against him because he merely joined the agreements and had no ability to negotiate their terms. The court declined to find this reason sufficient to void a forum selection clause. The court went on to say that the Mori was bound by the forum selection clauses because the Mori accepted benefits which flowed from the agreements that contained the forum selection clauses. Therefore the court found that the forum selection clauses in the various agreements granted the court personal jurisdiction over Mori.

The court also found that the forum selection clauses provided sufficient grounds to find that the court was a proper venue for the claims arising out of the agreements that contained the forum selection clauses. The forum selection clauses also displaced consideration of the common law doctrine of *forum non conveniens*. As to the claims arising under the Employment Agreement, which did not have a forum selection clause, the court held that the doctrine of *forum non conveniens* provided grounds for a stay of proceedings. While Mori had not shown there was a sufficiently overwhelming hardship to warrant dismissal of the claims arising under the Employment Agreement on the grounds of *forum non conveniens*, the court did find that Mori had met the lesser burden required to obtain a stay of litigation in Delaware. To carry this lesser burden, Mori needed to show that "the relevant factors preponderate in favor of granting a stay," where the relevant factors were (i) "the relative ease of access to proof," (ii) "the availability of compulsory process for witnesses;" (iii) "the possibility of the view of the premises;" (iv) whether the controversy is dependent on the application of Delaware law, (v) the pendency of a similar action in another jurisdiction, and (vi) "all other practical problems that would make the trial of the case easy, expeditious and inexpensive." Primarily because the claims involved aspects of uniquely Italian law and litigation in Italy of the claims arising under the Employment Agreement "might very well be easier, more expeditious, and less expensive," the court granted Mori a stay of litigation for these claims so that they might proceed in Italy's courts.

Finally, Mori argued that AlixPartners' complaint failed to state a claim relating to (i) breach of the LLP Agreement, (ii) misappropriation of trade secrets, (iii) conversion and (iv) seeking a declaration of Mori's obligation under the non-solicitation provision of the Award Agreements. As to claims (i), (ii) and (iii), Mori argued that, under Italian law, Mori had a right to collect confidential information regarding his employment relationship with Alix S.r.l. for use in an employment action and that, therefore, Mori was legally entitled to perform the actions about which claims (i), (ii) and (iii) were concerned. The court found that, notwithstanding any right Mori may have had under Italian law, AlixPartners had adequately pleaded claims (i), (ii) and (iii) because they pleaded that Mori "misappropriated" confidential information "for his own benefit" rather than "to launch a legal challenge." Therefore, claims (i), (ii) and (iii) were sufficient to state a claim. Mori challenged claim (iv) on the basis that the non-solicitation provision about which AlixPartners sought a declaration was unenforceable as a matter of law. Mori argued that the non-solicitation provision found in each Award Agreement was unenforceable as a matter of law because it could last indefinitely. The court dismissed this argument as to two of the Award Agreements, as the scope of the non-solicitation provision contained therein was definite. The court considered more

closely the remaining Award Agreements, noting that Mori was correct that the non-solicitation provisions could potentially continue indefinitely. The court decided that, notwithstanding the troublesome nature of such indefinite non-solicitation provisions, this indefiniteness was not sufficient to render the non-solicitation provisions unenforceable as a matter of law. The court therefore found that AlixPartners' complaint sufficiently pleaded all claims contained therein.

In sum, the court found (1) that it had subject matter jurisdiction over the case notwithstanding the Foreign Laws purporting to deny the court jurisdiction; (2) that it had personal jurisdiction over Mori on account of the forum selection clauses to which Mori was bound; (3) that Mori could not object to Delaware as a proper forum for claims arising out of agreements that contained forum selection clauses; (4) that there were sufficient grounds to stay the litigation in Delaware of claims arising from agreements that did not contain forum selection clauses; and (5) that the complaint sufficiently alleged all claims.

50. *JJS, LTD. v. Steelpoint CP Holdings, LLC*, C.A. No. 2019-0072-KSJM (Del. Ch. Oct. 11, 2019) (V.C. McCormick)

In this ruling on a motion to dismiss for failure to state a claim, the Court of Chancery dismissed five of plaintiffs' six claims and allowed only the claim for breach of fiduciary duty to proceed. Pro Performance Sports, LLC (the "Company") was managed by a board of managers with six managers. Four of these managers approved a sale of substantially all assets of the Company for $40 million and a subsequent liquidating distribution (the "Transaction"). Under the Company's limited liability company agreement (the "Company Agreement"), the Series A Preferred Unitholder (the "Unitholder") was to receive the entirety of the sale proceeds upon liquidation and the common unitholders were to receive nothing. The Transaction was then approved by the Unitholder and a majority in interest of all other classes of unitholders voting together, where the votes in favor of the transaction were either cast by the Unitholder or affiliates of the Unitholder. Three common unitholders, as plaintiffs, commenced this action against the Unitholder, the Company and the four managers who approved the Transaction asserting six claims: (i) breach of the LLC Agreement, (ii) declaratory relief that the approval of the common unitholders was required to approve the sale, (iii) breach of Section 18-305 of the LLC Act, which concerns a unitholders' right to inspect an LLC's books and records, (iv) breach of the implied covenant of good faith, (v) reformation of the Company Agreement, and (vi) breach of fiduciary duties.

The court considered the first two claims together, as their substance was identical: plaintiffs claimed that the Company Agreement gave the common unitholders the right to vote as a separate class when authorizing certain transactions, such as the Transaction, and that the defendants breached this provision by authorizing the Transaction without the consent of the common plaintiffs. The contested provision read: "The Company shall not, without the approval of the Series A Preferred Unitholder and the ***majority of the holders*** of the Series B Preferred Units, the Series C Preferred Units and the Voting Common Units . . ." (emphasis in original). The court held that this language did not grant to the common unitholders the right to vote as a separate class to authorize the

Transaction, but rather gave that right only to the Unitholder because (i) other provisions of the Company Agreement also gave to the Unitholder unique voting rights, and doing so here is consistent with the Company Agreement as a whole; (ii) interpreting the provision to grant to all classes of unitholders the right to vote as a class would render the phrase "without the approval of the [Unitholder]" mere surplusage; and (iii) elsewhere the Company Agreement features clear language granting to all classes of unitholders the right to vote as a class, and because the language here differed from the other clear grants of a class-voting right the meaning must also differ. Because the Company Agreement unambiguously did not grant to the common unitholders the right to vote as a class to authorize the Transaction, the court dismissed plaintiffs' claim for breach of the Company Agreement and the claim seeking a declaration that the Company Agreement granted the common unitholders such a right.

The court dismissed the plaintiffs' claim seeking to inspect the Company's books and records because there were no special circumstances that would justify granting the inspection demand now that the plaintiffs had filed suit. The court noted two special circumstances in which an inspection demand would be granted after the plaintiff seeking inspection filed suit concerning the subject matter of the inspection demand: (i) where the delay associated with the inspection demand creates a risk that the suit will be time-barred, and (ii) when the complaint "has been dismissed without prejudice and with leave to amend." As no such special circumstances existed in this case, the court dismissed this claim.

The court also dismissed plaintiffs' claim that defendants breached the implied covenant of good faith and fair dealing. The court noted that the implied covenant is implicated when a contract is silent concerning some particular issue. Here, all issues raised by defendant were brought in reference to an express provision of the Company Agreement. Because the Company Agreement was not silent regarding any issue in the plaintiffs' complaint, the implied covenant was not implicated and the court dismissed plaintiffs' claim that defendants had breach the implied covenant.

The court next considered plaintiffs' claim for reformation on the basis of fraud or mistake noting that the plaintiffs argued neither that they were defrauded nor that there was a mutual mistake regarding the plaintiffs' right to a class vote. Absent fraud or mutual mistake, the sole basis for reforming the contract was that the plaintiffs made a unilateral mistake. Plaintiffs argued that their mistake arose from provisions of a term sheet agreed upon during the initial negotiation of the Company Agreement, which unambiguously granted to the common unitholders a right to vote as a class to authorize a transaction like the one at issue in this case, inconsistent with the Company Agreement, which the court had already found did not grant to the common unitholders such a right. The court held that any mistake based on an inconsistency between the term sheet and Company Agreement was insufficient grounds for reformation of the contract because (i) the term sheet was, by its express terms, non-binding; (ii) the difference between the term sheet provision and the Company Agreement provision was easily discoverable; and (iii) it was not apparent that the Company Agreement provision would have been

unacceptable to the plaintiffs. Therefore the court dismissed the plaintiffs' claim for reformation.

Finally, the court considered plaintiffs' claim for breach of fiduciary duty by the defendants. The Company Agreement provided that the standards governing the fiduciary duties owed to unitholders of the Company were the same as the fiduciary duties owed to stockholders of a Delaware corporation. In accordance with these standards, plaintiffs alleged that the four managers who approved the Transaction were not disinterested, independent managers, and that the approval and authorization of the Transaction should be reviewed under the entire fairness standard. The court considered the interests and independence of the four managers and found that plaintiffs had alleged sufficient facts to state a claim for breach of fiduciary duty as one manager was personally interested in the Transaction and the other three were controlled by the Unitholder, who was found to have, for purposes of considering this motion to dismiss, a sufficient conflict of interest with the common unitholders to be an interested person. The first manager received a severance payment in conjunction with the Transaction that plaintiffs alleged was equivalent to two years of salary. Such a payment created a sufficient possibility of a personal interest in the Transaction that the allegation stated a claim. The other three managers of the Company were appointed by the Unitholder and had either ownership or employment relationships with the Unitholder. While merely showing that an interested party appointed a manager is insufficient to demonstrate that the manager is controlled by the interested party, an ownership or employment relationship with the interested party in conjunction with the appointment is sufficient to state a claim. Therefore, the court found that the three managers were controlled by the Unitholder, who was found to be interested in the transaction for purposes of this motion to dismiss. Because the plaintiffs sufficiently alleged that a majority of the board of managers of the Company were either interested in or controlled by an interested party to the Transaction, the court held that the plaintiffs had sufficiently stated a claim for breach of fiduciary duty. The court denied the defendants' motion to dismiss this final claim and granted the motion to dismiss as to the other five claims.

51. *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, C.A. No. 2018-0372-JTL (Del. Ch. Oct. 7, 2019) (V.C. Laster)

Boardwalk Pipeline Partners, LP (the "Partnership"), a master limited partnership that engaged in storing and transporting natural gas, and its general partner, Boardwalk GP, LP (the "General Partner"), were controlled by Loews Corporation through Loews' indirect ownership of the General Partner's general partner ("GPGP"). Loews also owned slightly more than half of the Partnership's common units. The Partnership's limited partnership agreement (the "LPA") included a call right that gave the General Partner the option under specified circumstances to acquire all of the Partnership's common units that the General Partner or its affiliates did not already own. If the General Partner decided to exercise the call right, the Partnership would mail an exercise notice to the record holders of common units. The date three days before the notice was mailed was the "end date", and the common units were priced by averaging the daily closing prices of the common units during the 180 trading days immediately prior to that end date. Thus, the purchase price would not be affected by the notice of the exercise of

the call right. However, the Partnership announced in its public filings in April 2018 that the General Partner was seriously considering whether to exercise the call right. Three months later, the General Partner exercised the call right and purchased the common units at what plaintiffs, former common unit holders, alleged was an artificially depressed price.

The factual context in which this case arose involved a change in rate-setting policies by the Federal Energy Regulatory Commission (the "FERC") applicable to natural gas transporters like the Partnership. In March 2018, the FERC announced its policy change, which meant that MLP pipelines would no longer be permitted to recover income tax allowances when calculating their costs of service. In addition, the FERC solicited comments on how the policy change would affect depreciation, including the rules governing accumulated deferred income tax, or "ADIT", that builds up on the pipeline's balance sheet by virtue of accelerated depreciation. The day after the FERC issued its revised policy and comment solicitation, the Partnership issued a press release, noting that it did not expect the FERC's new policy to "have a material impact on the company's revenues". Then, on April 30, the Partnership filed its 10-Q in which it clarified that it did not expect the FERC's new policy to "have a material impact on our revenues *in the near term*" (emphasis added). The 10-Q stated that the Partnership was evaluating whether to remain publicly traded, noting the existence of the call right and disclosing that the General Partner's owners had informed the Partnership that they were analyzing whether to exercise the call right in light of the FERC's new policy (the "Disclosure"). The Partnership and Loews held separate earnings calls that day, in which they reiterated the possible exercise of the call right.

The market price of the common units then fell by 16%. Investors objected to Loews and the General Partner relying on the FERC action to justify exercise of the call right, and some investors sued. The General Partner entered into settlement talks, in which the parties agreed to include 44 effected days in the 180-day average for determining the call price, and that the call price would be $12.06 per common unit. The parties filed their proposed settlement, and several unitholders (including plaintiffs in this action) objected.

At the end of June 2018, the Partnership announced that the General Partner would exercise the call right on July 18, 2018 at a price of $12.06 per common unit and reported that the General Partner received the tax opinion the LPA required for the call right to be exercised. Later that day, the FERC announced a final rule addressing several open issues for MLP pipeline rates. The impact of the final rule was potentially favorable to the Partnership. The General Partner exercised the call right as planned. The court did not approve the proposed settlement. Plaintiffs sued, alleging that the General Partner and its controllers engaged in a "deliberate scheme" to manipulate the price of common units for their benefit, and that the Disclosure was an integral part of that scheme. Specifically, plaintiffs alleged breaches of fiduciary duties, express contractual obligations, and the implied covenant of good faith and fair dealing, along with aiding and abetting and tortious interference claims against parties who could not be found primarily liable for breach. Defendants moved to dismiss all claims.

The court first addressed the breach of fiduciary duty claims. The LPA clearly eliminated all fiduciary duties. Thus, the court dismissed these claims. The court also dismissed the aiding and abetting breach of fiduciary duty claims, noting that because no fiduciary duties existed, no fiduciary relationship existed to support a claim for aiding and abetting.

The court then addressed the breach of contract claims in which plaintiffs alleged that the General Partner (1) failed to adhere to the LPA's express standard of conduct and (2) breached the LPA's requirements when it exercised the call right.

Section 7.9 of the LPA contained the contractual standards applicable to actions by the General Partner. It divided General Partner conduct into three categories, and established a standard for each. First, when acting in its capacity as the general partner in a situation that involved a conflict of interest, the General Partner had to show that it complied with one of four enumerated paths, one of which was that the action was fair and reasonable to the Partnership, taking into account the totality of the relationships between the parties involved (the "Conflict-of-Interest Provision"). Second, when acting in its capacity as the general partner in a situation that did not involve a conflict of interest, the General Partner was required to act in good faith, which the LPA defined as its subjective belief that the action was in the best interests of the Partnership. Third, when acting in its individual capacity, the General Partner was free to act without regard to any fiduciary duty or obligation to the Partnership or the Limited Partners, and was not required to act in good faith or pursuant to any other contractual standard imposed by the LPA or applicable law (the "Individual Capacity Provision"). Plaintiffs argued that the first category applied regardless of whether the General Partner was acting in its official capacity, as the language of the LPA did not explicitly so provide. However, the court noted that such an interpretation would disregard the broad authority given to the General Partner when acting in its individual capacity, run contrary to precedent, and would not be reasonable.

The court then applied the standards of conduct in the LPA to the exercise of the call right and the Disclosure. With respect to the call right, the court addressed plaintiff's assertion that the Conflict-of-Interest Provision governed. The court noted that the Individual Capacity Provision stated that it applied whenever the General Partner acted in its individual capacity, and the General Partner so acted when the phrase "at the option of the General Partner" or a variant thereof was used in the LPA. The LPA expressly stated that the call right was "exercisable at [the General Partner's] option" and, therefore, the Individual Capacity Provision governed. Thus, the General Partner had no duties with respect to its exercise and could not have breached the standards provision when exercising the call right. The court dismissed this breach of contract claim.

With respect to the Disclosure, the parties agreed that the General Partner acted in its official capacity when it decided to make the Disclosure. Thus, the question was whether the General Partner faced a potential conflict of interest in making the Disclosure. If so, the Conflict-of-Interest Provision would apply. The court found facts supporting a reasonable inference that the General Partner's course of action in making the Disclosure

involved a potential conflict of interest. The Disclosure was likely to have a negative effect on the price of common units, which in turn could affect the call price depending on the timing of the Disclosure. Defendants argued that they were obligated under federal securities law to make the Disclosure because the FERC's new policy and the knowledge of the General Partner's serious consideration of exercise of the call right were "material changes" in the Partnership's disclosed risk factors. However, the court found that was only one possible inference, and that it could not determine at the pleading stage whether federal securities laws required the Disclosure. The court noted that it was "reasonably conceivable" that the General Partner made the Disclosure early with the strategic goal of driving down the price of common units so that the General Partner could exercise the call right at a favorable price. Thus, it was reasonably conceivable that the General Partner faced a conflict of interest when deciding whether to make the Disclosure and, therefore, had to comply with one of four specified paths enumerated in the LPA. The only path that the General Partner could have complied with under the factual scenario at hand was the "fair and reasonable" path. The court found that, at the pleading stage, it was reasonably conceivable that making the Disclosure was not fair and reasonable to the Partnership. The court noted that the General Partner could consider the full range of entity constituencies when making its determination, but that on the facts pled, it was reasonably conceivable that the Disclosure was so highly unfair to one constituency—the Limited Partners—so as to make it not fair and reasonable to the Partnership. Thus, the court refused to dismiss this breach of contract claim.

Plaintiffs also alleged that the General Partner did not comply with the contractual requirements to exercise the call right. To exercise, the General Partner had to receive an opinion of counsel that the Partnership's pass-through tax status "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers". The General Partner received a tax opinion from Baker Botts, but plaintiffs alleged that the opinion was deficient for a number of reasons, and the court found merit in two of these assertions. First, plaintiffs adequately pled that the opinion failed to address the probable effect of the FERC policy on the "maximum applicable rate" that the Partnership could charge its customers as required by the LPA. Opinion counsel interpreted "maximum applicable rate" as recourse rates, but defendants were unable to establish that this interpretation was the only reasonable interpretation. Second, plaintiffs adequately pled that the tax opinion's methodology was flawed because it did not address the FERC's treatment of future ADIT balances. The court stated that FERC's treatment of future ADIT balances had the potential to flip the Partnership's tax treatment from a negative to a positive. Thus, at the pleading stage, plaintiffs were entitled to the reasonable inference that counsel chose to ignore the treatment of future ADIT balances to reach the conclusion that its client wanted.

The court dismissed breach of contract claims against GPGP because it was not party to the Partnership Agreement. However, the court did not dismiss breach of contract claims against the Partnership because the Partnership was a party to the LPA and it was not clear at the pleadings stage "the extent to which the Partnership could be liable for breach of its Partnership Agreement if the underlying breach was committed by the General Partner."

Plaintiffs alleged that the General Partner, GPGP and the Partnership breached the implied covenant of good faith and fair dealing by manipulating the call price. The court reviewed the LPA provisions that set forth the procedure for determining the call price and the "reasonable expectations" that its terms created at the time of contracting. The court noted that the procedure was "deliberately retrospective" so that the General Partner's decision to exercise the call right would not affect the call price. Thus, it was reasonable to infer at the pleading stage that the parties had a reasonable expectation that the General Partner would notify unitholders of its decision to exercise in a manner that would not affect the call price, and that such reasonable expectation implied a term that prevented the parties from manipulating the call process to affect the call price.

Plaintiffs alleged that GPGP, GPGP's sole member, and Loews tortiously interfered with the performance of the LPA. The court noted that Delaware adopted the Restatement (Second) of Torts test for tortious interference, and that the only non-straightforward element in this case was the element of justification and, specifically, whether the alleged interference with the contract was improper under the particular circumstances of this case. Based on the facts in the complaint, the court found that it was reasonably conceivable that GPGP, GPGP's sole member, and Loews interfered with the LPA "maliciously or in bad faith" by causing the Partnership to make the Disclosure to drive down the call price and by causing the General Partner to take advantage of the timing of the Disclosure to exercise the call right at a favorable price.

52. *Morris v. Spectra Energy Partners (DE) GP, LP*, C.A. No. 2019-0097-SG (Del. Ch. Sept. 30, 2019) (V.C. Glasscock)

In this case plaintiff, who was an owner of common units in Spectra Energy Partners, LP, a Delaware master limited partnership (the "MLP"), challenged a merger (the "Merger") between the MLP and Enbridge, Inc. ("Enbridge"), alleging that the general partner of the MLP agreed to the Merger in bad faith because it failed to receive any value for a derivative litigation asset. Plaintiff brought the action directly as a class action on behalf of all owners of public units of the MLP from May 17, 2018 through December 17, 2018 against defendant, Spectra Energy Partners (DE) GP, LP (the "GP"), a Delaware limited liability company and the general partner of the MLP. Enbridge was the ultimate parent of the MLP. Enbridge's predecessor-in-interest was Spectra Energy Corp (the "Sponsor").

Prior to the Merger, plaintiff had filed a derivative action (the "Derivative Claim") in connection with a reverse dropdown transaction in which the MLP sold pipeline interests to the Sponsor (the "Reverse Dropdown"). The GP's board of directors approved the Reverse Dropdown at the recommendation of a conflicts committee. The Derivative Claim alleged that the GP breached its good faith obligation under the partnership agreement of the MLP because the MLP did not receive sufficient value under the Reverse Dropdown. In June 2017, the court declined to grant the GP's motion to dismiss, holding that plaintiff made adequate allegations showing that under reasonably conceivable circumstances a facially unreasonable gap in consideration existed sufficient to infer subjective bad faith.

Enbridge acquired the Sponsor in February 2017 in a stock-for-stock merger transaction. On May 17, 2018 Enbridge proposed the Merger, in which the public unitholders of the MLP would receive 1.0123 common shares of Enbridge in exchange for each publicly held common unit of the MLP. Enbridge's offer was conditioned on the approval by the GP's conflicts committee (the "2018 Committee"). Upon the consummation of the Merger, plaintiff would lose standing in the Derivative Claim because he would no longer be a unitholder of the MLP. Plaintiff's counsel sent a letter to the 2018 Committee stating that Enbridge's offer was inadequate and failed to provide the MLP and its public unitholders with any value associated with the Derivative Claim. The court explained that under Delaware law, the Derivative Claim was considered a corporate asset. After several meetings involving both plaintiff's and the 2018 Committee's counsel and advisors, the 2018 Committee determined that the Derivative Claim did not have any value to the MLP other than the modest incremental value from the avoidance of the litigation costs that would have been incurred in pursuing the Derivative Claim and, therefore, only attributed $4 million of value to the MLP for the Derivative Claim. Ultimately, the 2018 Committee accepted an exchange ratio for the Merger of 1.111 Enbridge common share per MLP common unit and determined that the Merger was fair and reasonable to, and in the best interest of, the MLP and its public unitholders. The 2018 Committee's financial advisor explained that the incremental value to the MLP from the Derivative Claim was so small in comparison to the total value of the MLP that there was no meaningful impact on the exchange ratio. The Merger was approved by the MLP's unitholders on December 13, 2018. After the Merger closed, the court granted defendant's motion to dismiss the Derivative Claim because plaintiff lost standing to continue a derivative suit when he ceased to be a unitholder of the MLP.

In this action, plaintiff alleged that the GP allowed Enbridge to manufacture the Merger on terms that were unfair and unreasonable to the MLP and its public unitholders and that were not approved in good faith by the 2018 Committee or the GP's board of directors in breach of the MLP's limited partnership agreement. Plaintiff also alleged that the GP breached the implied covenant of good faith and fair dealing. Plaintiff's allegations were based on his claim that the 2018 Committee and the GP's board of directors failed to "attempt to (i) appropriately value the Derivative Claim, or (ii) secure any value for the Derivative Claim in its negotiations concerning the [Merger]." Aside from failure to appropriately secure value for the Derivative Claim, plaintiff did not challenge the fairness of the exchange ratio.

The court held that plaintiff lacked standing to bring the action. The court explained that under *Parnes v. Bally Entertainment Corp.* and *In re Primedia, Inc. Shareholders Litigation*, former stockholders that lose standing to pursue a derivative litigation because they ceased to be a stockholder as a result of a merger can, in certain circumstances, directly challenge the fairness of the merger that extinguished their right to pursue such derivative litigation. The test under *Primedia* for a plaintiff seeking to pursue such a direct claim was that "[f]irst, the plaintiff must plead an underlying derivative claim that has survived a motion to dismiss or otherwise could state a claim for which relief could be granted. Second, the value of the derivative claim must be material in the context of

the merger. Third, the complaint challenging the merger must support a pleadings-stage inference that the acquirer would not assert the underlying derivative claim and did not provide value for it." The court held that the first and third prongs were met. Plaintiff survived a motion to dismiss on the Derivative Claim in 2017, which was evidence that the underlying derivative claim was viable, and the record showed that the public unitholders, including plaintiff, did not receive value for the Derivative Claim. The court held that the second prong, however, was not met. The court explained that the second prong – materiality -- required a calculation of the value of the claim and then an analysis of the claim in the context of the Merger as a whole. The court stated that the Derivative Claim sought damages in the amount of $661 million. The court explained that this amount had to be discounted to reflect only the minority unitholders' beneficial interest in the litigation recovery, which was only 17%. As a result, even if the full amount of the damages was recovered, the value of the Derivative Claim for minority owners was $112,370,000. The court determined that plaintiff would have faced difficulties in succeeding in the litigation of the Derivative Claim and found that the chance of success for plaintiff was less than one-in-four. Based on a 25% chance of success, the value of the Derivative Claim was $28,092,500, which represented less than 1% of the total value of the Merger. The court held that 1% was not material and therefore plaintiff did not have standing to pursue his claims. Each of plaintiff's claims was therefore dismissed.

53. *Williams Field Services Group, LLC v. Caiman Energy II, LLC*, C.A. No. 2019-0350-JTL (Del. Ch. Sept. 25, 2019) (V.C. Laster)

This case addressed whether a transaction proposed by a member of a Delaware LLC was within the scope of authority set forth in the LLC agreement, which granted such member the sole and exclusive right to cause the LLC to approve a "Qualified IPO" and to take any action that was required or necessary to facilitate a "Qualified IPO." Defendants, certain members of Caiman Energy II, LLC ("Caiman II"), formed Caiman II to acquire and develop midstream assets in the Utica Shale in Ohio and Pennsylvania. Defendants had previously formed a predecessor entity, Caiman Energy, LLC ("Caiman I"), to pursue the same midstream business model except in the Marcellus Shale in West Virginia. Caiman II obtained funding from many of the same investors who had invested in Caiman I, including EnCap Capital Management ("EnCap").

The largest investor in Caiman II, The William Companies, Inc. ("Williams"), had recently purchased the assets of Caiman I. Williams therefore did not want Caiman II to use the capital that it invested in Caiman II to compete with the business that it had recently purchased from Caiman I and insisted on a geographic limitation that would restrict Caiman II to the Utica Shale. This geographic limitation was memorialized in the purpose provision of the Original Caiman II LLC Agreement and could not be altered without the approval of the Board required for a "Special Voting Item." While a Board action under the Original Caiman II LLC Agreement typically required the approval of a majority of the managers of the Board, there were certain "Special Voting Items" that also required the approval of at least one EnCap-appointed manager and at least one Williams-appointed manager. As a result, Caiman II would not be able to operate outside the Utica Shale without both EnCap's and Williams' consent.

In connection with a subsequent joint venture, Caiman II formed a new wholly-owned subsidiary called Blue Racer Midstream LLC ("Blue Racer") to serve as the vehicle to facilitate the transactions contemplated by the joint venture. Blue Racer became Caiman II's only revenue producing asset and the only entity through which Caiman II conducted business. In addition to entering into a new LLC Agreement for Blue Racer, the members of Caiman II also entered into an amended and restated LLC Agreement for Caiman II (the "Caiman LLC Agreement"). The parties negotiated a narrowed geographic limitation in the Caiman LLC Agreement because engaging in the business related to certain assets contributed to Blue Racer would have violated the purpose provision of the Original Caiman II LLC Agreement, but the revised purpose provision retained the same Special Item Voting approval requirement to alter the geographic limitation as contained in the Original Caiman II LLC Agreement. The Blue Racer LLC Agreement contained a substantively identical purpose provision.

Additionally, the Caiman LLC Agreement made the approval of a "Qualified IPO" a "Major Special Voting Item," which required the approval of one EnCap manager only. The list of Major Special Voting Items in the Caiman LLC Agreement therefore consisted of the following: "(i) to approve a Qualified IPO, or (ii) to take any action, authorize or approve, or enter into any binding agreement with respect to or otherwise commit to do any of the forgoing." Eventually, certain members of Caiman II ("Caiman Management") and EnCap began exploring the possibility of an "Up-C IPO." Under the contemplated Up-C IPO, the Caiman II entity structure would be inverted, with Caiman II transforming from its status as the top-tier entity in the structure into a post-IPO role as the lowest-tier subsidiary. Eventually, defendants focused on using the Up-C IPO to eliminate the purpose provisions in the Caiman LLC Agreement and the Blue Racer LLC Agreement. After Williams did not consent to the elimination of the purpose provisions, Caiman Management advised Williams that Caiman II could amend the purpose provisions as part of a Qualified IPO.

Williams filed suit asserting a claim for anticipatory breach of the Caiman LLC Agreement and seeking a declaratory judgment that defendants could not amend the purpose provisions without Williams' consent. Defendants filed counterclaims seeking declaratory judgments that they were entitled to effectuate the transactions contemplated by the Up-C IPO under the terms of the Caiman LLC Agreement. Section 6.8(c) of the Caiman LLC Agreement gave EnCap the sole and exclusive authority: "(i) to approve a Qualified IPO or (ii) to take any action, authorize or approve, or enter into any binding agreement with respect to or otherwise commit to do any of the foregoing." Defendants argued that Section 6.8(c)(ii) vested EnCap with the sole and exclusive authority to take any action if a Qualified IPO were involved, notwithstanding any other provision in the Caiman LLC Agreement that required a different vote to take such action. Williams, on the other hand, interpreted Section 6.8(c)(ii) to be limited only to grant EnCap the authority to take the steps necessary for EnCap to approve a Qualified IPO.

The court noted that defendants' interpretation of Section 6.8(c)(ii) would render Section 9.5(b) of the Caiman LLC Agreement surplusage. Section 9.5(b) identified specific actions that the Board could take in connection with a Qualified IPO and the rights that

certain members would have with respect to such actions. For example, a provision of Section 9.5(b) empowered EnCap "to take all such…actions as are required or necessary to facilitate the Qualified IPO…" (the "IPO Facilitation Clause"). The court explained that defendants' interpretation of Section 6.8(c) was unreasonable because it had "no natural limiting principle" and under defendants' interpretation, as long as EnCap was acting with respect to a Qualified IPO then a single EnCap Manager would have the ability to take any action whatsoever, notwithstanding any requirement in Section 9.5 or any other section of the Caiman LLC Agreement. Therefore, the court agreed with Williams' interpretation and held that Section 6.8(c)(i) gave EnCap the unilateral authority to approve a Qualified IPO and that the provisions of Section 6.8(c)(ii) were intended to ensure that EnCap had the power to take all actions with respect to the approval of a Qualified IPO, notwithstanding potential procedural impediments in the Caiman LLC Agreement such as quorum requirements or the power of the chairman of the Board to control the order of business and procedure at a meeting. Once EnCap had approved a Qualified IPO, then the IPO Facilitation Clause would govern what steps EnCap could take to effectuate the Qualified IPO.

Defendants argued that, in the alternative, EnCap could rely on Section 9.5(b)(1), which entitled EnCap to approve the transaction or transactions to effect the "IPO Exchange" as defined in the Caiman LLC Agreement (the "IPO Exchange Clause"). Section 9.5(a) described the requirements for an IPO Exchange, which included that the outstanding membership interests must be exchanged for or converted into equity securities of the IPO Issuer of the same class or series as the IPO Issuer proposed to be offered to the public in the Qualified IPO. Additionally, in the IPO Exchange the membership interests of each member of Caiman II were required either to be (i) converted or exchanged into securities of the same pre-IPO fair market value or (ii) cancelled for no consideration if the member would not receive anything in the distribution. The court therefore held that defendants could not rely on the IPO Exchange Clause as a source of authority for the Up-C IPO because EnCap was not using its authority to effectuate an IPO Exchange as defined in Section 9.5(a). The court noted that in the proposed Up-C IPO, the membership interests in Caiman II would not be converted into the same securities that the public would receive and therefore did not meet the IPO Exchange requirements.

Defendants further relied on the IPO Facilitation Clause to support their position that EnCap could effectuate the proposed Up-C IPO. The court first noted that under the plain language of the IPO Facilitation Clause, EnCap was entitled to take all such actions as required or necessary to facilitate the Qualified IPO. The court, citing to *CompoSecure, L.L.C. v. CardUX, LLC*, explained that the term "necessary" is a synonym for "required," and a requirement is something that must take place. Accordingly, the IPO Facilitation Clause entitled EnCap to take actions that were necessary or required to facilitate an IPO having the characteristics of a Qualified IPO as described in the Caiman LLC Agreement, but not to change what constitutes a Qualified IPO or its component parts and thereby grant itself different and greater rights.

The court additionally held that EnCap could not rely on the IPO Facilitation Clause to act unilaterally to amend the terms of the Caiman LLC Agreement to, among other

things, modify the purpose provision. Under the relevant provisions allowing EnCap to act unilaterally to approve a Qualified IPO, EnCap would be acting on behalf of the Board. The power of the Board to act under Sections 6.8(a), (b) and (c) was expressly subject to Section 12.2, which governed amendments to the Caiman LLC Agreement. The Board therefore could not invoke its authority under Section 6.8(a), (b) or (c) to amend the Caiman LLC Agreement. The court rejected defendants' argument that because the IPO Facilitation Clause began with the phrase "[n]otwithstanding anything to the contrary in this Agreement", EnCap could ignore mandatory provisions in the Caiman LLC Agreement and act unilaterally to amend those provisions. The court held that this language empowered EnCap to make all discretionary decisions in exercising the Board's authority for purposes of the Qualified IPO sections, but did not empower EnCap to override or amend the Caiman LLC Agreement.

Defendants further argued that even if there are steps in the Up-C IPO that required Williams' consent, Williams was required to consent under the second sentence of Section 9.5(b) (the "IPO Cooperation Clause"). Part (i) of the IPO Cooperation Clause obligated Williams to take such actions as may be reasonably requested by EnCap in connection with consummating the IPO Exchange and part (ii)(x) of the IPO Cooperation Clause required that Williams use commercially reasonable efforts to assist EnCap in undertaking the IPO Exchange in a tax-efficient manner. The court rejected this argument and noted that because the proposed Up-C IPO did not comply with the IPO Exchange requirements, the IPO Cooperation Clause did not apply. Additionally, the court noted in dicta that an obligation to take reasonable actions or use commercially reasonable efforts would not require a party to sacrifice its own contractual rights for the benefit of its counterparty.

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