IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MARY MARLENE GROVE and LARRY E. GROVE, Plaintiffs, v. MELBA E. BROWN and HUBERT E. BROWN, JR., Defendants.	)	
MELBA E. BROWN, HUBERT E. BROWN, JR. and HEARTFELT HOME HEALTH II, LLC (a Delaware limited liability company), Counterclaim Plaintiffs, v. MARY MARLENE GROVE, LARRY E. GROVE, TIMOTHY GROVE, MICHELLE GROVE, SHAWN GROVE, ANGELA GROVE, ANNA KEITHLEY, NO PLACE LIKE HOME LLC (a Delaware limited liability company), NO PLACE LIKE HOME, LLC (a Maryland limited liability company) and HEART-N-HAND HOME CARE, LLC (a Maryland limited liability company), Counterclaim Defendants.	)	Civil Action No. 6793-VCG

MEMORANDUM OPINION

Date Submitted: May 2, 2013
Date Decided: August 8, 2013

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GLASSCOCK, Vice Chancellor

It requires a certain kind of courage to forgo a salary and strike out on one's own. When individuals launch a small business with little equity beyond their own sweat and dreams, what follows is often a long, hard struggle leading, ultimately, to failure. When that happens, the results should evoke admiration for their efforts and sympathy for their misadventure. This matter involves a rarer bird altogether: here, four individuals launched a small and poorly capitalized business and were, from the outset, wildly successful. Unfortunately, those individuals were unable to cooperate to enjoy the fruits of that success, choosing instead acrimony and, ultimately, this litigation.

I. BACKGROUND

This matter involves a dispute between Plaintiffs Mary Marlene Grove and Larry E. Grove and Defendants Melba E. Brown and Hubert E. Brown, Jr.[1] In 2010, the Groves and the Browns started a successful home health care agency, Heartfelt Home Health, LLC ("Heartfelt"), and they worked together without issue for over a year.

However, in preparing tax returns for their first year in business, and upon discovering that not all four members had made the requisite $10,000 initial capital contribution, the parties began to dispute the ownership of Heartfelt, and relationships in the workplace started to dissolve. The Groves, meanwhile,

[1] For clarity, I will refer to these individuals by their first names; no disrespect is intended.

established other home health care agencies in Maryland and Delaware without informing the Browns, and the Browns attempted to remove the Groves from Heartfelt by creating another LLC owned solely by the Browns and merging Heartfelt with that company. The Groves sued the Browns for a breach of fiduciary duty arising from the supposed merger. The Browns answered and counterclaimed for breach of fiduciary duty by Larry and Marlene Grove. The Browns also brought claims against associates of Larry and Marlene Grove—including their sons; Timothy and Shawn Grove; their daughters-in-law, Michelle and Angela Grove; and a friend of Marlene's, Anna Keithley—for aiding and abetting Larry's and Marlene's alleged breach of fiduciary duty. The matter was tried; this is my post-trial opinion.

A. Background of the Business and Events Leading to the Litigation

Marlene and Melba first met while working at the MBNA America bank.[2] Marlene worked in management, and Melba as a personal banking representative, until both accepted buy-outs from the company in 2005.[3] Several months later, Marlene started working at Home Health Services by TLC ("TLC"), after having been recommended for the job by Melba.[4] As the name suggests, TLC employed aides who delivered health care and assistance to patients in their homes. Melba

[2] Trial Tr. 29.
[3] Trial Tr. 30.
[4] Trial Tr. 33.

joined Marlene at TLC a year later, and the two again worked together through 2009.[5] After witnessing many layoffs at TLC and fearing that they would lose their jobs, Melba and Marlene began to discuss opening their own home health care business in late 2009.[6]

In December 2009, Marlene established Heartfelt Home Health, LLC ("Heartfelt").[7] Heartfelt is a home-care staffing agency that provides assistance to those in need of personal or health care services. Heartfelt offers a range of services, including companion, homemaker, and personal care services. On December 23, 2009, the Browns and the Groves entered into a limited liability company operating agreement (the "Operating Agreement"),[8] which named the Browns and the Groves as the four members of Heartfelt.[9] The Browns and the Groves then had the Operating Agreement notarized because, according to Mrs. Grove, they "wanted someone in authority to be able to indicate that what [they] decided was fair and legal as to setting up the business."[10] The Operating Agreement indicated that each of the four members owned an equal portion of Heartfelt and provided that each member was to supply $10,000 as an initial

[5] Trial Tr. 39.
[6] Trial Tr. 39.
[7] Trial Tr. 41.
[8] Defs.' Ex. 28 (Operating Agreement), at 1.
[9] *Id.* at 3.
[10] Trial Tr. 44.

capital contribution.[11]

Heartfelt operations began in early 2010.[12] The company was "very successful" and achieved a "respectable operating profit" during its first year.[13] Marlene served as the Director of Operations, performing various tasks such as hiring, booking, invoicing, and managing the accounts receivable.[14] Melba researched and created various forms needed for Heartfelt.[15] Larry performed assorted maintenance projects, and Hubert maintained a register of payments and managed the technology setup for Heartfelt.[16] In February 2010, Marlene's son, Timothy Grove, began working with Heartfelt as a records specialist.[17] In June 2010, Timothy's wife Michelle joined Heartfelt as a staffing coordinator.[18] Though Melba expressed her concern about working with members of the Grove family at the time, she ultimately agreed to both hires.[19] The Browns, the Groves, Timothy, and Michelle continued to work well together until early 2011.

The unexpected success of Heartfelt led to discussions in January 2011 between Marlene, Melba, and Hubert about possibly expanding into Maryland and southern Delaware. The parties now disagree over the nature and extent of these

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[11] Trial Tr. 44-47.
[12] Compl. ¶ 3.
[13] Compl. ¶ 8.
[14] Trial Tr. 57.
[15] Trial Tr. 60.
[16] Trial Tr. 59-61.
[17] Trial Tr. 302.
[18] Trial Tr. 302.
[19] Trial Tr. 301.

discussions. The Groves argue that they approached the Browns about opening a new business in Maryland with the Grove family, and that the Browns indicated that they were not interested in joining because they disliked being in business with family and Melba "did not want to travel."[20] Marlene did concede, however, that she never specifically asked the Browns to become members of Heart-N-Home or its Maryland and Delaware successors after these conversations.[21]

For their part, the Browns maintain that though Heartfelt was financially stable enough to expand, they wanted to focus on establishing the existing business in Delaware before opening new offices.[22] The Browns further insist that they never decided *not* to expand to other locations.[23] Melba repeatedly testified that expanding Heartfelt to Maryland, Pennsylvania or Sussex County remained "on the table."[24] The Browns further testified emphatically that they did not grant Marlene or any other Heartfelt employees the right to engage in business competing with Heartfelt.[25]

Though the parties disagree on what was said concerning an expansion of

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[20] Trial Tr. 64-66.
[21] Trial Tr. 100.
[22] Trial Tr. 155-56.
[23] The Browns cite to meeting minutes between Marlene, Melba and Hubert dated as late as February 2011, one month prior to the Groves' establishment of Home MD, where the parties discussed "expansion of Heartfelt into PA, Maryland, Kent and Sussex." Trial Tr. 315.
[24] Trial Tr. 306-07.
[25] All of Heartfelt's members and employees signed agreements not to disclose Heartfelt's confidential information nor engage in competitive activities following the termination of employment with Heartfelt. Defs.' Ex. 202, at DX20130-37.

Heartfelt's business, what the parties subsequently *did* is not disputed. While still working at Heartfelt, and without informing the Browns, Marlene formed a new home health agency, a Maryland LLC called Heart-N-Hand Home Care, LLC ("Heart-N-Hand"), on March 10, 2011.[26] Counterclaim Defendants Larry Grove, Timothy Grove, and Shawn Grove were named as Directors of Heart-N-Hand, and Marlene was included as an initial member responsible for billing, legal, and compliance matters. Marlene later changed the Name of Heart-N-Hand to No Place Like Home, LLC ("Home MD"). Home MD was located in Elkton, Maryland, less than ten miles from Heartfelt's offices in Newark, Delaware.[27]

Meanwhile, a dispute over the parties' ownership percentages and capital account balances began in April 2011 when Melba, Marlene, and Larry met with an accountant to discuss the preparation of Heartfelt's 2010 tax return.[28] In a meeting on April 5, 2011, Heartfelt's accountant expressed concern over the fact that both Larry and Melba were short on their required initial $10,000 capital contributions as specified by the Operating Agreement and proposed that Marlene and Hubert transfer to their respective spouses an amount sufficient for Larry and Melba to reach the $10,000 mark.[29] Accordingly, Hubert gave Melba $6,500, to

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[26] Defs.' Ex. 73.
[27] *See* Google Maps, Driving Directions from 402 West Pulaski Highway, Elkton, MD to 698 Old Baltimore Pike, Newark, DE, http://goo.gl/maps/sCLXJ (last visited July 31, 2013).
[28] *See* Trial Tr. 325-26.
[29] Trial Tr. 584-85.

bring her cash contribution to $10,000, and Marlene gave Larry $3,657. The Groves argue that the balance of Larry's contribution, $6,343, was satisfied by his donations of furniture and equipment to Heartfelt. The Browns, however, dispute the value of those donations and argue that they did not satisfy Larry's contribution obligation.[30]

From that time, the relationship between the Groves, especially Marlene, and the Browns grew confrontational. Though Hubert testified that he and Marlene never fought,[31] Marlene recalled engaging in arguments with Hubert.[32] Marlene and Larry's son, Timothy, also testified that he had witnessed confrontations between Marlene and Hubert in which Hubert hit Marlene's desk and "talk[ed] down" to her.[33] Marlene began avoiding the Browns at work.[34] On May 10, 2011, Timothy resigned from his position at Heartfelt because of the conflicts. A month later, Marlene "fired" Michelle from her position at Heartfelt, in what an unemployment-insurance-appeals-board referee characterized as a "sham

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[30] Accordingly, Mr. Brown did not give any information regarding Larry's furniture donations to the accountant when supplying financial information. The accountant knew about alleged property donations but did not ask for figures to value the property. Trial Tr. 602-606. The Browns also insist that at no time did the Groves ask that Larry be allowed to include property as part of his capital contribution and thus that Larry remains $6,343 shy of his required contribution.

[31] Trial Tr. 156.

[32] Trial Tr. 84-85.

[33] Trial Tr. 438.

[34] Trial Tr. 85.

discharge."[35] The parties were ultimately unable to come to an agreement to resolve the tax dispute, and the Browns now assert that they actually own 63% of Heartfelt, and the Groves own 37%,[36] because the Groves' collective cash contribution was $13,657,[37] whereas the Browns' contribution was $23,248.[38]

As the dispute over the parties' capital contributions and ownership intensified, the Groves continued establishing their own competing health care businesses. On May 3, 2011, Marlene solicited and received via email a licensing agreement for Generation software, the same software package used by Heartfelt, to be used at Home MD.[39] That same day, Marlene also received an application for workers compensation insurance coverage for Home MD, which she completed and submitted on June 21, 2011.[40] Then, after successfully starting Home MD, the Groves expanded their business to Delaware. On July 6, 2011, Anna Keithley, Marlene's sister, signed the Certificate of Formation to create a Delaware LLC, No

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[35] On June 8, 2011, Michelle Grove did not show up for work. Marlene explained to Melba that Michelle had gone to the beach and, because of sunburn, could not return to work for several days. Trial Tr. 454. Marlene then fired Michelle on June 14, 2011, without consulting the Browns. Trial Tr. 321-22. However, before she was allegedly terminated from Heartfelt, Michelle filed a claim against Heartfelt to collect unemployment benefits on June 12, 2011 and was named a "Director" for No Place Like Home on June 13, 2011. Michelle's application for unemployment benefits reached the Unemployment Insurance Appeals Board, where the referee denied the request, characterized the firing as a "sham discharge," and found that Marlene did not have the authority to fire Michelle. *See* Defs.' Ex. 21, Report of Del. Div. of Labor Referee, at 2.

[36] Trial Tr. 146.

[37] Trial Tr. 138.

[38] Trial Tr. 141.

[39] Defs.' Ex. 15, Email from Generations Homecare System to Marlene Grove, at 19 (May 3, 2011).

[40] Defs.' Ex. 11, Fax from Marlene Grove, at CP0306 (June 21, 2011).

Place Like Home LLC ("Home DE"), with the help of Marlene.[41] Home DE was headquartered on the same street—in fact, *the same building*—as Heartfelt.[42] Later that month Home DE opened another office in Lewes, Delaware.[43]

The Groves ultimately decided to try to sever ties with the Browns. On May 31, 2011, the Groves sent the Browns a proposal letter suggesting that a purchase price of $941,000 would "be necessary for Mr. and Mrs. Brown to purchase Mr. and Mrs. Grove's interest in [Heartfelt]."[44] The proposal also demanded that the parties "agree that the documents signed by Mr. and Mrs. Grove and their family members that purport to be covenants not to compete are invalid and unenforceable."[45] Additionally, on July 1, 2011 the Groves notified the Browns via email of their intention to file a certificate of dissolution, to liquidate Heartfelt, and to notify the contractor and then-sole client of Heartfelt, Delaware Hospice, of

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[41] Defs.' Ex. 8, Keithley Depo., at DX10615.
[42] Trial Tr. 155.
[43] Defs.' Ex. 109, at DX10667.
[44] Defs.' Ex. 22, at DX20025.
[45] *Id.* Marlene, Larry, Timothy, and Michelle had each entered into confidentiality and non-compete agreements with Heartfelt. The agreements provide:

> Thus, to avoid the inevitable disclosure of the Company's trade secret and confidential information, I agree and acknowledge that, during the twelve month period following my resignation from the employment with the Company, I will not directly or indirectly engage in (whether as an employee, consultant, agent, proprietor, principal, corporate officer, Director, partner, stockholder or otherwise) or participate in the financing, management, or control of any person, firm, corporation or business that competes with the Company or is a customer of the Company and is located within the state of the principal office of the Company from which I render a majority of services on behalf of the Company.

Defs.' Ex. 23, Heartfelt Home Employee Health Safety & Confidentiality Agreement, at 20137.

the dissolution of Heartfelt.[46]

The Browns testified that they were surprised to receive this letter.[47] They responded on June 8, 2011, proposing that the parties select an "independent, accredited and reasonably available appraiser with recent, relevant and local experience in the field of closely-held business valuations" to "determine, in a written opinion, the fair market value of Heartfelt on a going-concern basis as of June 30, 2011."[48] The Groves, unwilling to concede that they owned less than 50% of Heartfelt, refused the Brown's offer.[49]

In response to the threatened dissolution, the Browns attempted to use self-help to freeze out the Groves from Heartfelt. On July 5, the Browns purported to merge Heartfelt with Heartfelt Home Health II, LLC ("Heartfelt II"), relying on their alleged 63% ownership of Heartfelt as the basis of their authority to complete the merger. Mrs. Grove first learned of the merger after she was physically barred from entering the Heartfelt office on the morning of July 6, 2011.[50] The Browns also prepared, but never sent, a check for $72,604.99 as payment for the Groves' interest in Heartfelt. The Browns arrived at this value through consulting with a valuation analyst, Mr. Paul Seitz, who calculated the liquidation value of the

[46] Defs.' Ex. 22, at DX20030-32.
[47] Trial Tr. 176-77.
[48] Trial Tr. 123-24.
[49] Trial Tr. 125.
[50] Trial Tr. 95.

Groves' interest in Heartfelt. Before the Browns could send the check, the Groves initiated this suit.[51]

B. Nature and Stage of Proceedings

The Groves filed a verified complaint against the Browns on August 18, 2011, seeking monetary damages for an alleged breach of fiduciary duties by the Groves. On October 27, 2011, the Browns filed an answer. The Browns, joined by Heartfelt Home Health II, LLC also filed nine counterclaims against the Plaintiffs and Counterclaim Defendants Timothy Grove, Michelle Grove, Shawn Grove, Angela Grove, Anna Keithley, Home DE, Home MD, and Heart-N-Hand.[52] All but the first two counterclaims, for breach of fiduciary duty and for aiding and abetting a breach of fiduciary duty, were waived at trial.[53] The matter was tried on January 14, 15, and 16, 2013.

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[51] Trial Tr. 174.

[52] The Browns brought the following counterclaims: Count I against the Groves for breach of fiduciary duty; Count II against Timothy Grove, Michelle Grove, Shawn Grove, Angela Grove, Anna Keithley, Heart-N-Hand, Home DE, and Home MD for aiding and abetting a breach of fiduciary duty; Count III against Marlene Grove, Larry Grove, Timothy Grove, and Michelle Grove for breach of contract; Count IV against the Marlene Grove, Larry Grove, Timothy Grove, and Michelle Grove for misappropriation of trade secrets; Count V against all Counterclaim Defendants for civil conspiracy; Count VI against Heart-N-Hand, Home DE, and Home MD for unjust enrichment and imposition of a constructive trust; Count VII against Marlene Grove for conversion of a computer and software and conversion of Heartfelt Funds; Count VIII against Marlene Grove for breach of the implied covenant of good faith and fair dealing by converting Heartfelt funds and carrying out a sham discharge of Michelle Grove; and Count IX against Larry Grove for assault against Hubert Brown. Defs.' Verified Answer, Defenses, and Counterclaims ¶¶ 105-154.

[53] In response to the Court's inquiry of whether or not the Defendants planned to pursue their counterclaims at trial, counsel to the Defendants replied: "No, well we are pursuing the counterclaim for breach of fiduciary duties." Trial Tr. 26.

II. ANALYSIS

A. The Plaintiffs' Claims

The threshold issue in this case is the percentage of the parties' ownership interests in Heartfelt. If, as the Groves allege, the Browns owned 50% of Heartfelt, then the Browns lacked the legal authority to merge Heartfelt with Heartfelt II. The ownership of Heartfelt is governed by the Operating Agreement, which identifies Hubert Brown, Melba Brown, Larry Grove, and Marlene Grove as the sole members of the LLC.[54] Delaware law gives parties broad latitude as to the structure of an LLC and the duties of its members through the contractual provisions of their LLC agreement.[55] Where an LLC agreement fails to address a certain issue, Delaware's Limited Liability Company Act (the "LLC Act") provides default rules.[56]

In interpreting contracts, this Court gives effect to the intent of the parties as expressed in the plain, ordinary meaning of the text of the contract.[57] Only when the words of the contract are ambiguous should the Court resort to extrinsic

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[54] Defs.' Ex. 28 § 1.9.

[55] *See* 6 *Del. C.* § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.").

[56] *See* 2 R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations & Business Organizations § 20.3 at 20–3 (2009) ("The Act's basic approach . . . [is] to furnish answers only in situations in which the members have not made provision in their limited liability company agreement.").

[57] *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008).

evidence to interpret the language of the contract.[58] The simple fact that the parties may disagree as to the meaning of a contract is not evidence that the contract itself is ambiguous.[59] "Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[60]

Here, The Operating Agreement provides that

> [t]he Members initially shall contribute a total of $40,000 to the Company capital. The description and each individual portion of this initial contribution are as follows:
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> | | | |
> |---|---|---|
> | Hubert E. Brown Jr. | $10,000.00 | 25% |
> | Melba E. Brown | $10,000.00 | 25% |
> | Larry E Grove | $10,000.00 | 25% |
> | Mary Marlene Grove | $10,000.00 | 25%[61] |

The Operating Agreement further provides that profits and losses should be divided among the members "in proportion to each Member [sic] relative capital interest in the company."[62]

I find that these terms are unambiguous and that the Operating Agreement therefore provides that each of the four members was—and is today—an equal 25% owner of Heartfelt. Nothing in the Operating Agreement indicates that the allocation of relative ownership interests was contingent on the Members' actions

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[58] *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1291 (Del. 2007).
[59] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[60] *Id.*
[61] Defs.' Ex. 28 § 2.1.
[62] Defs.' Ex. 28 § 3.1.

post-signing. Though the Operating Agreement imposes an obligation on the members to provide capital to Heartfelt, the Operating Agreement does not provide that one member's failure to do so divests that member of his or her share of the company.

Though I find that the Operating Agreement is unambiguous, even if I were to consider extrinsic evidence,[63] my conclusion as to the parties' ownership percentages would remain unchanged. Both the Groves and the Browns signed membership certificates which indicated that each of the four members owned an equal 25% interest in the company.[64] Melba Brown explained that they created the certificates in late 2009, after the LLC was formed, as part of a loan application to a credit union.[65] Though the Browns dispute the validity of these certificates by pointing out that they are undated and lack the Heartfelt seal, I consider the certificates not as contracts in themselves, but as overt statements of the signatories' understanding that each of the four members owned equal shares of the LLC.[66]

The conduct of the parties subsequent to Heartfelt's formation also confirms that both the Groves and the Browns believed that they were equal co-owners of

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[63] *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). Relevant extrinsic evidence may include "overt statements and acts of the parties." *Supermex Trading Co., v. Strategic Solutions Grp., Inc.*, 1998 WL 229530, at *3 (Del. Ch. May 1, 1998).
[64] Defs.' Ex. 29.
[65] Trial Tr. at 290-95.
[66] Trial Tr. at 294-300.

Heartfelt. The Browns and the Groves originally sought the loan from the credit union so as to avoid capitalizing Heartfelt with personal funds, representing that each was a 25% owner.[67] When the credit union denied the loan application, the parties decided to fund the business out of their own pockets.[68] The Groves collectively contributed approximately $13,000, with $10,000 of that ultimately credited to Marlene's capital account and $3,000 to Larry's.[69] Melba Brown testified that she discussed with the Groves the shortfall in Larry's capital account "on several occasion[s]."[70]

The Brown's evident belief that Larry Grove *could have* and *should have* made up for the $7,000 shortfall in his capital account provides additional evidence that, at the time the LLC Agreement was signed, the parties did not believe that ownership was conditional on providing the appropriate capital contribution. They were not, at the time, contending that Larry had lost any part of his interest in Heartfelt. Rather, the Browns were concerned that he had failed to live up to his earlier commitment to actually provide capital as required in the Operating Agreement. The Browns treated Larry as a member of, and a debtor to, Heartfelt. They did not take the position at that time that Larry was in fact *not* a member of the LLC, and therefore not entitled to share in the profits of the company.

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[67] Trial Tr. at 293-94.
[68] Trial Tr. at 299.
[69] Trial Tr. at 297.
[70] Trial Tr. at 299.

Tellingly, Melba Brown *herself* initially failed to provide the capital contribution mandated by the Operating Agreement. This shortfall was not made up until April 2011, more than a year after the Groves and the Browns signed the Operating Agreement. Accordingly, I find that even if I were to consider extrinsic evidence, it supports an interpretation of the Operating Agreement that grants an equal 25% share to each of the company's members.

The parties certainly could have written their Operating Agreement to make a member's interest in the LLC contingent on providing the appropriate capital contribution. The LLC Act provides that

> A limited liability company agreement *may provide that* the interest of any member who fails to make any contribution that the member is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company.[71]

Here, the Heartfelt Operating Agreement did not include any such provision. Instead, it *required* a contribution of $10,000 from each 25% owner.

Because the Browns were 50% owners of Heartfelt, not 63% owners, I find that the purported merger transaction, in which Heartfelt merged into a company wholly owned by the Browns, was a legal nullity. The Heartfelt Operating Agreement is silent as to how the Company may merge or consolidate. The LLC Act therefore provides the default mechanism for merger: "an agreement of merger

[71] 6 *Del. C.* § 18-502(c) (emphasis added).

. . . shall be approved by each domestic limited liability company which is to merge or consolidate . . . by members who own *more than* 50 percent of the then current percentage . . . in the profits of the domestic limited liability company."[72] Because the Browns never owned more than 50% of Heartfelt, they lacked the legal authority to effectuate the Merger.

The Browns, in addition to arguing that they were entitled to unilaterally merge Heartfelt into a new entity under their control, also contend that their conduct was reasonable in light of the Groves' "threat" to dissolve the LLC.[73] Perhaps recognizing that tit for tat is not a justification for breach of fiduciary duty under Delaware law, the Browns provide no legal argument to support their position in post-trial briefing. I note, also, that the "threat" of dissolution was illusory. The Groves had no more authority to unilaterally dissolve Heartfelt than the Browns did to seize it for themselves.[74]

Because I find that the merger was a nullity, the Browns and the Groves remain equal members of the original Heartfelt LLC.

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[72] 6 *Del. C.* § 18-209(b) (emphasis added).

[73] Hubert Brown, when asked when he decided to carry out the merger, responded "We decided to merge Heartfelt when we were threatened by notice from the Groves that they were going to file a certificate of dissolution." Trial Tr. 168.

[74] *See* 6 *Del. C.* § 18-801(a)(3) ("A limited liability company is dissolved and its affairs shall be wound up . . . upon the affirmative vote or written consent . . . by members who own more than two-thirds of the then-current percentage or other interest in the profits of the limited liability company."). Because the Operating Agreement is silent as to dissolution, the LLC Act controls.

B. The Defendants' Counterclaims

I now turn to the Browns' counterclaim that Larry and Marlene Grove breached their fiduciary duties by usurping a corporate opportunity of Heartfelt, and that the other individual Counterclaim Defendants—Timothy Grove, Michelle Grove, Shawn Grove, Angela Grove, and Anna Keithley—aided and abetted that breach.

1. Breach of Fiduciary Duty

First, I address the claims for breach of fiduciary duty against Marlene and Larry Grove. The Groves were managing members of Heartfelt at the time they organized Home DE and Home MD and owed fiduciary duties to the other members.[75] I find that the Groves violated those fiduciary duties by wrongfully taking for themselves the corporate opportunities of Heartfelt.

The corporate opportunity doctrine is a consequence of a fiduciary's duty of loyalty, and it exists to prevent officers or directors of a corporation—or, as in this case, a managing member of an LLC—from personally benefiting from opportunities belonging to the corporation. A corporate officer or director may not take a business opportunity as his own if:

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[75] *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 663 (Del. Ch. 2012) (holding that, absent contrary language in an LLC agreement, managing members of an LLC owe default fiduciary duties to the other members of the LLC). Here, neither side disputes that all four members were "managing members," and both sides testified that all four played some role in the day-to-day management of Heartfelt. Both sides also agree that each member owed fiduciary duties to the LLC.

> (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.[76]

Conversely, a director or officer *may* take personal advantage of a corporate opportunity if:

> (1) the opportunity is presented to the director or officer in his individual and not corporate capacity; (2) the opportunity is not essential to the corporation; (3) the corporation holds no interest or expectancy in the opportunity; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity.[77]

Generally, for a corporation to have an expectant interest in any specific property, "there must be some tie between the property and the nature of the corporate business."[78] An opportunity may be said to be in the corporation's line of business where the opportunity embraces "an activity as to which [the corporation] has fundamental knowledge, practical experience and ability to pursue, which, logically and naturally, is adaptable to its business, and . . . consonant with its reasonable needs and aspirations for expansion."[79]

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[76] *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996) (citing *Guth v. Loft*, 5 A.2d 503, 509 (Del. 1939)).
[77] *Id.*
[78] *Johnston v. Greene*, 121 A.2d 919, 924 (Del. 1956).
[79] *Guth*, 5 A.2d at 514.

The determination of "[w]hether or not a director has appropriated for himself something that in fairness should belong to the corporation is 'a factual question to be decided by reasonable inference from objective facts.'"[80] The burden is on the fiduciary to show that he or she did not seize a corporate opportunity.[81] As the corporate opportunity doctrine stems from a director's fiduciary duty of loyalty to the corporation, the director bears the burden of demonstrating that there was no breach because either the corporation was presented the opportunity and rejected it, or because the corporation was not in a position to take the opportunity.[82] For example, one way that a director may satisfy this burden is by formally presenting the opportunity to the corporation's board of directors and confirming the board's disinterest.[83]

Applying these principles here, I find that Larry and Marlene Grove, as managing members of a Delaware LLC, breached their fiduciary duty of loyalty by usurping the business opportunities of Heartfelt. The business of Home DE and Home MD is the type of business that, absent a waiver from Heartfelt, would qualify as a corporate opportunity. Heartfelt would surely have been financially

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[80] *Johnston*, 121 A.2d at 923 (quoting *Guth*, 5 A.2d at 513).
[81] *Guth*, 5 A.2d at 512.
[82] *See Field v. Allyn*, 457 A.2d 1089, 1099 (Del. Ch. 1996).
[83] The Delaware Supreme Court has recognized a "safe harbor" for a director to pursue a corporate opportunity without breach of his fiduciary duty where the officer presents an opportunity to the broad of directors and the corporation decides not to pursue the opportunity. *Broz*, 673 A.2d at 156. However, "[i]t is not the law of Delaware that presentation to the board is a necessary prerequisite to a finding that a corporate opportunity has not been usurped." *Id.*

capable of capitalizing on that opportunity. The business was highly profitable, and, if the experiences of the parties here are indicative, there are few, if any, barriers to entering the market for low-skilled or unskilled home health staffing. Both Home entities are unquestionably engaged in the same market as Heartfelt, thereby infringing on Heartfelt's business interests. Accordingly, the only remaining issue is determining whether Heartfelt disclaimed its interest in expanding to Maryland and other parts of Delaware.

I find that the Groves have not met their burden of demonstrating that Heartfelt disclaimed its right to pursue this corporate opportunity. The only evidence of waiver was self-serving testimony from Marlene Grove that:

> Our business was going well . . . . So I asked [the Browns] in January of 2011 if they would like to go into a business in Maryland with T.J. and Michelle and my family . . . . And Mr. Brown indicated to me that he's not really looking at doing anything in Maryland. He wanted to look more into the aspect of being in Delaware, and I totally understood that and I said and that is fine. And I told him that I was going to pursue it, to put things together to possibly being in Maryland. And Mr. Brown stated to me, just to keep them informed of what was going on or how things were happening."[84]

Marlene also asserts that she followed up with Melba two more times, once in February and again in March of 2011. Marlene testified that Melba rebuffed her each time and told her "[n]o, we are not going to go into business in Maryland with

[84] Trial Tr. 64.

you."[85] However, Marlene acknowledged that she did not actually tell the Browns about the existence of any of her family's health care companies before this litigation commenced.[86]

Hubert Brown disagreed with Marlene's characterization of their discussions. He provided testimony—as self-serving as that of Marlene Grove—that neither he nor Melba ever disclaimed the opportunity to expand to Maryland or other parts of Delaware, but rather they wanted to proceed prudently and not expand the company too quickly.

> We had plans to expand the company . . . into Maryland. But this was a newly created company. We wanted to take our time to build the company. We were doing great. There wasn't any reason for us to be jumping and going to any other places, except for just planning what we were doing and just establishing a name for ourself [sic] right here in Delaware, before we could start to branch out and do all these other things."[87]

Melba, unsurprisingly, corroborated Hubert's testimony and said that she, Marlene, and Hubert discussed "practically every day" the possibility that Heartfelt would expand to Maryland and southern Delaware.[88] Melba also testified that Marlene had *never* disclosed that she planned to create the Home entities nor invited the Browns to be a part of them.[89] On the contrary, Melba asserted that Heartfelt was actively considering expanding its operations to cover Maryland and Sussex

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[85] Trial Tr. 66.
[86] Trial Tr. 637.
[87] Trial Tr. 155-56.
[88] Trial Tr. 307.
[89] Trial Tr. 345.

County, Delaware.[90] In support of this assertion, the Browns produced handwritten notes which purport to be records of member meetings that took place from 2009 through 2011.[91] The notes dated May 17, 2010 indicate that there was a discussion of Heartfelt's expansion into Maryland and southern Delaware.[92] The notes from February 21, 2011 similarly state: "3. Expansion of Heartfelt to . . . MD, Kent & Sussex. Marlene stated that she will sell her house if this is done and move to Lewes Beach to manage the Heartfelt office in Lewes as was previously discussed in 2010."[93] Although the meeting notes for both dates note that Marlene was in attendance and that all members present agreed on the notes, Marlene denied that she ever saw the notes or agreed to their accuracy.[94]

Though I find all testimony presented on this issue of questionable credibility, the weight of the evidence favors the Browns' position that there was no express grant of permission for Marlene Grove to open up competing businesses in any location. It is unclear to what extent Marlene's testimony, even if I accepted it as true, supports a finding that Heartfelt waived a corporate opportunity. Marlene did not testify that she presented the opportunity to expand to nearby markets to *Heartfelt* ; she avers that she invited the Browns in their

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[90] Trial Tr. 306.
[91] Defs.' Ex. 137.
[92] Defs.' Ex. 137, at 0254.
[93] Defs.' Ex. 137, at 0253.
[94] Trial Tr. 635-36.

personal capacity to join her in creating new, competing entities. Presenting an opportunity to the Browns is not the same as presenting an opportunity to Heartfelt. And even if it were, Marlene's acknowledgment that she never actually told the Browns about the competing entities belies her testimony that the Browns gave her permission to create them. In any event, as mentioned above, the Groves have the burden of proving that they had the right to pursue opportunities which would otherwise belong to Heartfelt. I find that they have failed to meet that burden.

2. Aiding and Abetting

Finally, I reject the counterclaims for aiding and abetting because the Browns have failed to present any evidence that the Counterclaim Defendants knowingly participated in Marlene's and Larry's breaches of fiduciary duty. "Knowing participation in a . . . fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach."[95] The Counterclaim Plaintiffs have failed to argue, and the evidence at trial failed to produce, any evidence that the Counterclaim Defendants *knew* that Marlene and Larry owed fiduciary duties or that operation of the Home MD and

[95] *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001)

Home DE entities would constitute a breach of those duties. Accordingly, the aiding and abetting counterclaims fail.[96]

C. Remedy

The final question is the appropriate remedy for this breach of the Operating Agreement. Both parties have taken for themselves benefits that should have been shared with the other. The Browns attempted to effectuate a merger contrary to the LLC Act, and Heartfelt has doubtless amassed profits belonging to all four owners thereafter. Likewise, the Groves usurped opportunities that should have belonged to Heartfelt. This Court has "broad latitude to exercise its equitable powers to craft a remedy."[97] I find that the appropriate remedy in this case is to order each side to account to Heartfelt (and thus to one another) for those profits which they have wrongfully kept for themselves. Specifically, the Browns must account for the profits earned by Heartfelt II since the purported merger, and the Groves must account for the profits earned by Heart-N-Hand, Home DE, and Home MD.[98]

Though there is currently no application for dissolution under 6 *Del. C.* § 18-802, the bitterness and acrimony between these parties—though they once considered themselves friends—means that it is "not reasonably practicable to

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[96] As previously noted, the Brown's counterclaims for breach of contract were waived at trial. Trial Tr. 26.

[97] *Hogg v. Walker*, 622 A.2d 648, 654 (Del. 1993).

[98] The accounting should also determine the extent of any unpaid capital contributions which the members may owe to Heartfelt.

carry on the business in conformity with a limited liability company agreement."[99] Though I will not effectuate a judicial dissolution of this LLC *sua sponte*, I would hope that the parties could, in the interests of economy, present a petition for dissolution to be considered concurrently with the accounting. The parties could then divide their interests and pursue them separately. The parties should submit a form of order consistent with this decision.

[99] 6 *Del.C.* § 18-802.