No. COA20-888 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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JAMES G. VERDONE, Plaintiff-Appellee, v. GEORGE F. VERDONE, JR., individually and in his capacity as co-executor of the Estate of Emily Verdone, TUMP, LLC, VERDONE LIMITED PARTNERSHIP, CATHERINE E. VERDONE, individually and in her capacity as co-executor of the Estate of Emily Verdone, ELSYA V. STOCKIN, individually and in her capacity as co-executor of the Estate of Emily Verdone, and JAMES G. VERDONE, in his capacity as co-executor of the Estate of Emily Verdone, Defendants-Appellants.	)	From Mecklenburg County

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PLAINTIFF-APPELLEE'S BRIEF

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PLAINTIFF-APPELLEE'S BRIEF

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STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Defendants-Appellants seek to overturn the trial court's Order Granting Plaintiff's Partial Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment ("Order"). The Order resolved two separate motions. First, it granted Plaintiff-Appellee's offensive Partial Motion for Summary Judgment as to Plaintiff's request for a declaratory judgment establishing that the Verdone Limited Partnership (the "Partnership") was dissolved as of April 1, 2014. Second, it denied Defendants-Appellants Motion for Summary Judgment ("Defendants' Motion") on Plaintiff's remaining claims—breach of fiduciary duty and breach of contract. (R. p 2216–17)

The Order is interlocutory because it did not resolve all of Plaintiff's claims. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). And while Plaintiff-Appellee does not dispute that appellate review is appropriate as to the *granting* of its motion for summary judgment (declaring the Partnership dissolved); appellate review is *not* appropriate as to the *denial* of Defendants-Appellants' Motion for Summary Judgment because there is no defensible argument that it affects a substantial right. *See Davidson v. Knauff Ins. Agency, Inc.*, 93

N.C. App. 20, 27, 376 S.E.2d 488, 492 (1989) (holding that plaintiff may appeal dismissal of its claims against both defendants because it affects a substantial right yet at the same time denying consideration of appeal of the trial court's denial of defendant's motion to dismiss "under substantial right analysis since there has been no final disposition whatsoever of that claim").

An interlocutory order can be appealed only when "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Nelson v. Alliance Hospitality*, No. COA-13-1325, 2014 N.C. App. LEXIS 521, at *7 (N.C. App. May 20, 2014) (quoting *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000)); *see, e.g.*, *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218 (1985) (dismissing the appeal because "[t]he order entered by the trial court . . . denying defendants' motions to dismiss and for summary judgment was not a final determination of defendants' rights.").

A. <u>The Denial of a Motion for Summary Judgment is Not Immediately Appealable.</u>

The North Carolina Supreme Court recognizes that "[p]ractically all courts which have considered the question . . . have held that the

denial of a motion for summary judgment is not appealable." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978) (citations omitted) (emphasis in original). "[T]here is good reason for withholding an appeal from a denial of summary relief" because "no substantial right [is] lost." *Id.* at 209, 240 S.E.2d at 344. Instead, the outcome is that the claim will proceed to trial, which provides "the trial court and the parties . . . an opportunity to develop more fully the facts in this dispute." *Id.*

In both cases relied upon by Defendants a substantial right was affected because the appellant challenged the dismissal of a claim, which is a *final resolution* of those claims. *See Liggett Grp., Inc. v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677-78 (1992); *Crouse v. Mineo*, 189 N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008). Here, Plaintiff's claims for breach of fiduciary duty and breach of contract – together with Defendants' corresponding defenses – can be resolved in full at trial.

B. <u>Defendants Have Failed to Demonstrate a Risk of Inconsistent Verdicts if the Declaratory Judgment and Breach of Fiduciary Duty Claims Are Tried Separately.</u>

The appellant has the burden "to show that the 'affected right is a substantial one, and that deprivation of that right, if not corrected before

appeal from final judgment, will potentially injure the moving party.'" *Nelson*, 2014 N.C. App. LEXIS 521, at *7 (quoting *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2nd 511, 513 (2002)). Defendants-Appellants' concern that claims not resolved at summary judgment will proceed to trial, while Plaintiff-Appellee's claim for declaratory judgment will not, does not implicate a substantial right. That would only occur if "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Id.* at *8 (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995)). If resolution of the claim being appealed is not fundamental to resolving the remaining claims, then there is no possibility of inconsistent verdicts and no substantial right is impacted. *See* 119 N.C. App. at 737, 460 S.E.2d at 336 (dismissing the appeal because the partial order granting summary judgment on defendants' third and fourth defenses did "not preclude defendants from fully defending against the [plaintiff's] claims, [therefore] no substantial right has been affected"). This is true even where unresolved claims "may involve the same factual issues as the claims on appeal." *CommunityOne Bank, N.A. v. Boone*

Station Partners, LLC, No. COA14-932, 2015 N.C. App. LEXIS 399, at *5 (N.C. App. May 19, 2015).

In *Nelson v. Alliance Hospitality*, this Court dismissed the appeal of an interlocutory order because "the factual bases for [the appellee's] claims [were] not intertwined." 2014 N.C. App. LEXIS 521, at *8–9. This Court explained that the declaratory judgment and judicial dissolution claim were "predicated on various agreements between the parties and operating agreements" and the fiduciary duty claims "arise from [appellee's] contention that because defendants did not make sufficient distributions from . . . sale proceeds, [appellee] suffered damages." *Id. at* *8. The Court concluded that "there is no risk of inconsistent verdicts" because the facts at issue for the appellee's judicial dissolution and declaratory judgment claims "have no bearing on the trial court's determination that defendants' failure to make distributions did not cause his injury." *Id.* at *9.

Similarly, here, the facts related to Plaintiff-Appellee's declaratory judgment claim that the Partnership is dissolved are not related to the facts underlying Plaintiff-Appellee's breach of fiduciary duty claim. The factual issues underlying Plaintiff-Appellee's claim for a declaratory

judgment are whether Emily Verdone resigned on April 1, 2014 and whether the parties took any actions to properly revoke the dissolution. Those issues are irrelevant to Plaintiff-Appellee's breach of fiduciary duty claims, which turn largely on whether Defendants-Appellants breached duties to disclosure material information and make a proper valuation when selling additional interests in the Partnership. The only direct connection between the declaratory judgment claim and the claims proceeding to trial is that they relate to the Partnership. The determination that the Partnership is dissolved in no way affects whether Defendants-Appellants have breached legal duties of fairness and disclosure owed to the limited partners. *See* 2015 N.C. App. LEXIS 399 at *7 ("This Court has held that there was no risk of inconsistent verdicts where the claims asserted against the defendants arose out of 'separate and distinct contract[s]' and involved differing legal duties owed to the plaintiff." (quoting *Myers v. Barringer*, 101 N.C. App. 168, 173, 398 S.E.2d 615, 618 (1990))).

It is well-established that "a party's preference for having all related claims determined during the course of a single proceeding does not rise to the level of a substantial right." *Id.* at *5 (quoting *Hamilton v.*

Mortg. Info. Servs., Inc., 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011)). Because the trial court's Order denying Defendants' Motion does not affect a substantial right, the Court should dismiss Defendants-Appellants' appeal as it relates to the trial court's denial of Defendants' Motion.

STATEMENT OF THE FACTS

Emily Verdone formed the Partnership on December 16, 1997. (R pp 192, 447) Since its formation in 1997, George F. Verdone ("Rick Verdone"), Catherine E. Verdone ("Cathy Verdone"), Elsya V. Stockin and James Verdone ("Plaintiff") (collectively the "Siblings") have all held a limited partnership interest in the Partnership. (R p 236) The Partnership was formed to hold a single asset—75 acres of property that Emily Verdone inherited (the "Property"). (R pp 411, 685) Among others, the purpose of the Partnership was "to maintain control of family assets," the Property, and "to provide resolution of any disputes which may arise among the family in order to preserve family harmony and avoid the expense and problem of litigation." (R pp 208, 448)

The Partnership has never owned any real property apart from the Property and is not an operating business. (R p 1016) The Partnership

does not have significant liabilities or expenses. (R p 1283) ("[T]he big expenses each year are normally to Southern States."); (R p 1285) (noting that the biggest expense in 2013 was legal fees); (R pp 680-683)

The Partnership Agreement sets forth the rights and obligations of the partners and governs the existence of the Partnership. Specifically, the Partnership Agreement sets forth four events that trigger the dissolution of the Partnership, including the "resignation . . . of a general partner." (R p 227) Section 22.2 of the Partnership Agreement provides that, notwithstanding Section 22.1, the Partnership shall not be dissolved upon the occurrence of certain terminating events if certain conditions are satisfied within ninety days. (R p 227) However, Section 22.2 does not apply to the resignation of a General Partner. (R p 227)

These provisions are consistent with the intent of the Partnership Agreement—Emily Verdone was to control the Partnership. The Partnership Agreement defined the General Partner of the Partnership as Emily Verdone. (R p 209) The Partnership Agreement also set forth that the General Partner, not the limited partners, managed the day-to-day business of the Partnership. (R pp 217, 223) Emily Verdone contributed the Property along with $1,000 cash to the Partnership. Each

of the limited partners contributed $2,296 in exchange for a 0.5% interest in the Partnership. (R p 236) Then, Emily Verdone gifted an additional 3% interest to each Sibling, giving each a 3.5% limited partnership interest in the Partnership. (R p 538.) From December 1997 to May 2013, Emily Verdone managed the Partnership and paid the expenses of the Partnership without changing the ownership interest of the Partners. (R p 685) Essentially, the Partnership was created and used as an entity to hold the Property and enable Emily Verdone to gift her children equal interests in the Property.

Emily Verdone was the General Partner and Managing General Partner of the Partnership from December 1997 through April 1, 2014. On April 1, 2014, Emily Verdone and Rick Verdone, acting in his capacity as sole member and manager of Tump, LLC ("Tump"), executed the Resignation of General Partner of Verdone Limited Partnership and Appointment of Successor General Partner ("Resignation"). (R p 779) The Resignation provides that "Emily McCoy Verdone hereby resigns as the General Partner of the Partnership as of the Effective Date of this Agreement." (R p 780) The Resignation also purports to appoint Tump as the successor General Partner of the Partnership. (R p 780)

After the Resignation, Neil Coghill ("Coghill"), the attorney for the Partnership, provided a summary of the key events of the Partnership to the limited partners. (R pp 735-736) Coghill represented that Emily Verdone resigned in accordance with the Partnership Agreement and that Emily Verdone appointed Tump as the successor managing general partner. (R p 735) Coghill's representations and communication suggested that the Resignation was in accordance with *all* the applicable provisions of the Partnership Agreement. (R p 736) Coghill expressly omitted any mention that Emily Verdone's resignation triggered dissolution under the Partnership Agreement. (R pp 735-736) Plaintiff relied on the Partnership's attorney to accurately communicate whether these actions had, in fact, been performed in accordance with the Partnership Agreement. (R p 689) Plaintiff never agreed to the continuation of the Partnership. (R pp 687-688)

After the Partnership's attorney informed Plaintiff and Elsya Stockin of Emily Verdone's resignation, Plaintiff continued to seek additional information about the Partnership's business. Plaintiff requested accounting records, a summary of the Partnership's operating expenses, and information about the future plans for the Partnership. (R

pp 689-690) Despite these requests, Plaintiff never received any useful information until after the initiation of this litigation. (R pp 689-691)

ARGUMENT

I. THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS.

Plaintiff-Appellant does not dispute that the rights of a limited partner in the Partnership are governed by the Partnership Agreement and, pursuant to the Partnership Agreement, Delaware law applies. (R p 471) However, that does not impact the trial court's jurisdiction over Plaintiff's claims.

A. Section 17-802 of DRULPA Does Not Apply Because Plaintiff Is Not Seeking a Judicial Dissolution.

Throughout this action Defendants have inappropriately relied upon laws related to *judicial* dissolution pursuant to Section 17-802 of the Delaware Revised Uniform Limited Partnership Act ("DRULPA") in order to contend that the trial court does not have subject matter jurisdiction over this action. *See* Appellee Br. at 20 (citing *Camacho v. McCallum*, No. 16-CVS-602, 2016 NCBC LEXIS 81, at *12 (N.C. Super. Ct. Oct. 25, 2016). But Plaintiff is not seeking *judicial* dissolution of the

limited partnership. Therefore, *Camacho* and Section 17-802 of DRULPA are inapplicable to this action.

Instead, Plaintiff is seeking a declaration that the Partnership non-judicially dissolved upon the resignation of Emily Verdone as General Partner in accordance with Section 22.1 of the Partnership Agreement. (R p 467) Section 17-801 of DRULPA governs non-judicial dissolution, providing that "[a] limited partnership is dissolved and its affairs shall be would up . . . upon the happening of events specified in the Partnership Agreement." 6 *Del. C.* § 17-801. No provision of the DRULPA or the Partnership Agreement grants the Delaware Chancery Court exclusive jurisdiction to determine a Delaware limited partnership dissolved pursuant to 6 *Del. C.* § 17-801.

B. Section 17-111 of DRULPA Does Not Grant the Delaware Chancery Court Exclusive Jurisdiction Over Plaintiff's Claims.

For the first time on appeal, Defendants also contend that Section 17-111 of DRULPA provides the Delaware Chancery Court with exclusive jurisdiction to resolve the internal matters of a Delaware limited partnership, thereby depriving the trial court of jurisdiction over

Plaintiff's claims.[1] However, Section 17-111 of DRULPA does not provide the Delaware Chancery Court with exclusive jurisdiction over such actions. Instead, Section 17-111 states:

> [a]ny action to interpret, apply or enforce the provisions of a partnership agreement . . . or the duties, obligations or liabilities among partners . . . or any provision of this chapter, or any other instrument, document, agreement or certificate contemplated by any provision of [DRULPA], *may* be brought in the Court of Chancery.

6 Del. C. § 17-111 (2020) (emphasis added). The statute *permits* that such actions *may* be brought in the Delaware Chancery Court. *Id.*

This permissive jurisdictional grant is necessary because of the Delaware court system's structure. The Delaware Chancery Court is a court of limited jurisdiction; "[i]t can acquire subject matter jurisdiction over a case where "(1) an invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction." *Doberstein v. G-P Indus.*, No. 9995-VCP, 2015 Del. Ch. LEXIS 275, at *21 (Del. Ch. Oct. 30, 2015). Therefore, Section 17-111 provides that the Chancery Court has

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[1] For the reasons stated in the Grounds for Appellate Review the appeal of the denial of Defendants' Motion on Plaintiff's declaratory judgment claim should be dismissed because it is an interlocutory order that does not impact a substantial right.

jurisdiction over the matters related to interpretation and enforcement of actions related to limited partnerships regardless of their equitable nature.

But nothing in the statutory language or the synopsis for the statute reflects that the Generally Assembly intended to give the Chancery Court exclusive jurisdiction for all actions related to the interpretation and enforcement of a limited partnership. 6 Del. C. § 17-111; 69 Del. Laws c. 258, § 6 (1994); 77 Del. Laws c. 69, § 1 (2009); *see Sun Life Assur. Co. Can. v. Grp. One Thousand One, LLC*, 206 A.3d 261, 269 (Del. Sup. Ct. 2019) ("Legislative intent may be deduced from a statute's synopsis."). Where the General Assembly intends for the Court of Chancery to have exclusive jurisdiction, it expressly states the jurisdiction is exclusive. *See, e.g.*, 8 Del. C. § 145 (2021), 8 Del. C. § 205 (2021); 8 Del. C. § 220(c) (2021) ("The Court of Chancery is hereby vested with exclusive jurisdiction . . .."). Absent express reference to exclusive jurisdiction, the Chancery Court has interpreted statutes that provide specific types of actions "may be brought in the Court of Chancery," similar to Section 17-111, as providing nonexclusive jurisdiction to the Chancery Court. *See, e.g.*, *Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969,

973-74 (Del. Ch. 2016) (noting that 8 Del. C. § 111 provides "the Court of Chancery with nonexclusive jurisdiction to interpret . . . the validity of . . . corporate instruments," because the statute provides that such actions "may be brought in the Court of Chancery"); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 296 (Del. 1999) ("In general, the legislature's use of 'may' connotes the voluntary, not mandatory or exclusive, set of options.").

Even if the Delaware Generally Assembly intended for Section 17-111 to provide the Chancery Court with exclusive jurisdiction over actions related to the enforcement of a Delaware limited partnership agreement, it would not be enforceable against a North Carolina Court. "When a Delaware state statute assigns *exclusive jurisdiction* to a particular Delaware court, the statute is allocating jurisdiction among the Delaware courts. The state is *not* making a claim against the world that no court outside of Delaware can exercise jurisdiction over that type of case." *In re Kloiber*, 98 A.3d 924, 939 (Del. Ch. 2014) *vacated on other grounds* 2014 Del. Ch. LEXIS 190 (Del. Ch. Sept. 3, 2014). This is because

the State of Delaware cannot "as a matter of power within our federal republic . . . arrogate that authority to itself." *Kloiber*, 98 A.3d at 939.[2]

Therefore, under the teaching of *Kloiber*, even if Section 17-111 granted exclusive jurisdiction in Delaware to the Chancery Court (which it does not), that jurisdictional grant does not divest a North Carolina court of the power to adjudicate a properly filed case. *See id.* at 939-40. Given that three of the four limited partners are located in North Carolina and the partnerships sole asset is located in North Carolina, Section 17-111 of DRULPA does not preclude the trial court from having subject matter jurisdiction over Plaintiff's claims.

II. THE TRIAL COURT DID NOT ERR IN DECLARING THAT THE PARTNERSHIP HAS BEEN DISSOLVED SINCE APRIL 1, 2014.

Defendants-Appellants do not dispute that Emily Verdone's April 2014 resignation as General Partner triggered a dissolution of the Partnership under the express terms of the Partnership Agreement. Nor do they argue that the Partnership Agreement contains any relevant

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[2] Defendants' citation to *Albert v. Alex. Brown Mgmt. Servs.* is inapposite. There, the Delaware Superior Court interpreted Section 17-111 of DRULPA to require actions related to internal partnership affairs to be litigated in the Delaware Chancery Court, rather than the Delaware Superior Court. *Albert v. Alexi. Brown Mgmt. Servs.*, No. 04C-05-250 PLA, 2004 Del. Super. LEXIS 303, at *18-19 (Del. Super. Sept. 15, 2004).

savings provision under which such dissolution was avoided or revoked. Instead, Defendants-Appellants contend that the Partnership's status should be determined, not by looking to the terms of the Partnership Agreement (which the partners expressly adopted) but rather by looking to the general statutory provisions in DRULPA (which they did not). But Delaware law is emphatically clear that partners are free to craft the terms of their own limited partnership and that a Court may not substitute the judgment and agreement of the partners – as reflected in the Partnership Agreement – with default terms from DRULPA. Further, even if DRULPA's default dissolution provisions applied, which they do not, in this case none would support Defendants-Appellants' assertion that dissolution was avoided or revoked.

A. The Partnership Agreement's Dissolution Provisions Control – Not the Default Provisions Set Forth in DRULPA.

"[T]he partnership agreement is the cornerstone of a Delaware limited partnership, and effectively constitutes the entire agreement among the partners with respect to the admission of partners to, and the creation, operation and termination of, the limited partnership." *Elf Atochem N. Am., Inc.*, 727 A.2d at 291 (quoting Martin I. Lubaroff & Paul Altman, Delaware Limited Partnerships § 1.2 (1999) (footnote omitted)).

Both the Delaware Supreme Court and Delaware Chancery Court have consistently held that DRULPA "furnish[es] answers *only* in situations where the partners have not expressly made provisions in their partnership agreement' or where the agreement is inconsistent with mandatory statutory provisions."[3] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002). Because the policy of DRULPA is "to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements," 6 *Del. C.* § 17-1101 (2020), the Partnership Agreement is the controlling and "operative document" and "the statute merely provides the 'fall-back' or default provisions where the partnership agreement is silent." *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, No. 6301-VCP, 2011 Del. Ch. LEXIS 90, *22-23 (Del. Ch. 2011). Therefore, courts should only "look for guidance from the statutory default rules" if "the partners have not

[3] Mandatory statutory provisions are "likely to be those intended to protect third parties, not necessarily the contracting members," *Elf Atochem N. Am., Inc.*, 727 A.2d at 292, but even if Section 17-801 is mandatory, it explicitly allows for the partnership agreement to define what events trigger dissolution. *See* 6 Del. C. § 17-801(5). Thus, Section 22.1 and Section 22.2 of the Partnership Agreement are not inconsistent with Section 17-801.

expressly made provisions in their partnership agreement" to address the issue. *Id.*

More specifically, Defendants-Appellant's reliance on DRULPA's default dissolution provisions is improper because "[w]here the operating agreement addresses dissolution, the terms of the agreement govern." A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 10.07 (2018)); *see also Elf Atochem N. Am., Inc.*, 727 A.2d at 291 (quoting Martin I. Lubaroff & Paul Altman, Delaware Limited Partnerships § 1.2 (1999) (footnote omitted) ("Once partners exercise their contractual freedom in their partnership agreement, the partners have a great deal of certainty that their partnership agreement will be enforced in accordance with its terms.").

B. There Has Been a Non-judicial Dissolution of the Partnership.

Under Delaware law, there are four stages in the life of a limited partnership: "formation, dissolution, winding up, and termination." *Paciaroni v.* Crane, 408 A.2d 946, 952 (Del. Ch. 1979). Dissolution, the second stage, "does not terminate the partnership," but "is merely the commencement of the winding up process." *Id.*; *United States ex rel. JKJ P'ship 2011 LLP v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1119 (Del

Ch. 2020). It occurs automatically upon the occurrence of a dissolution event. *See* 6 Del. C. § 17-801 (2020).

Here, the Partnership is dissolved, and has been since Emily Verdone's resignation as General Partner – an express event of dissolution under Section 22.1(c) of the Partnership Agreement. (R p 467) That section is mandatory, providing that the Partnership "shall be dissolved and terminated" upon the occurrence of certain events, including the "dissolution, retirement, **resignation**, death, disability or legal incapacity of a general partner." (R p 467)

Defendants-Appellants do not disagree that Emily Verdone resigned as General Partner on April 1, 2014. (R pp 1210-1211, 1334) Nor do Defendants-Appellants disagree that Section 22.1 of the Partnership Agreement makes the resignation of a General Partner a dissolution event. (R p 467). Thus, whether the partnership dissolved is not in dispute. The question before the Court is whether Defendants-Appellants can demonstrate that dissolution was later avoided or

revoked. It was not, and the trial court was correct in finding that the Partnership dissolved in April 2014 and remained dissolved thereafter.[4]

C. The Partners Did Not Avoid Dissolution Under Any Applicable Savings Clause Provision.

i. The Partnership Agreement's savings clause provisions do not permit avoidance of dissolution upon resignation of a General Partner.

Section 22.1 of the Partnership Agreement provides that the "Partnership shall be dissolved and terminated and its business wound up" upon the occurrence of any the following four events: (1) the filing of any action to declare the General Partner bankrupt; (2) the joint determination of the Managing General Partner and the holders of at least 50% of the Limited Partner Interest that the Partnership should be

[4] The fact that the Partnership did not quickly move through the third and fourth stages, winding up and termination, does not mean it somehow regressed back to the first stage or otherwise became "undissolved". Indeed, Delaware courts have recognized "the possible lengthy duration of the winding up period," and explained that "the partnership continues until the winding up of partnership affairs is completed." *Techmer Accel Holdings, LLC v. Amer*, No. 4905-VCN, 2010 Del. Ch. LEXIS 252, at *14-15 (Del. Ch. 2010). *See also,* 2 Corp & Commercial Practice in DE Court of Chancery § 10.07 (2020) ("[T]here is no specified time period in the statutes for winding up the business of a Delaware limited partnership . . . other than the general guidance to "gradually settle and close the . . . business.").

dissolved; (3) the dissolution, retirement, *resignation*, death, disability or legal incapacity of a general partner; (4) the sale, exchange, or other disposition of all or substantially all of the property of the Partnership without making provision for the replacement thereof**.** (R p 467)

After defining the exclusive list of dissolution events in Section 22.1, in Section 22.2 the partners set forth the limited circumstances in which dissolution might be avoided. Importantly, the partners agreed that dissolution could be avoided only with respect to two of the four dissolution events. Specifically, Section 22.2 permits the partners – through certain actions irrelevant here – to avoid dissolution if the dissolution event is either the joint determination of the Managing General Partner and holders of at least 50% of the Limited Partner interests, or the sale, exchange, or other disposition of the Partnership. The partners did not agree that anything could avoid dissolution where, as here, the dissolution is triggered by the resignation of a General Partner.[5] (R p 467)

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[5] Leaving out a savings provision in the case of a General Partner's resignation makes sense under the circumstances. Emily Verdone was the original General Partner and her children of course agreed that it was appropriate for her to manage the partnership.

ii. Even if the default provisions of DRULPA applied – which they do not – there is no applicable savings provision.

The fact that here the partners executed a Partnership Agreement expressly articulating the events of dissolution and the limited circumstances in which dissolution can be avoided should end this Court's analysis. However, the Partnership would be dissolved even if the default provisions of DRULPA were applied. DRULPA Section 17-801 provides a menu of statutory default rules related to events that trigger non-judicial dissolution and procedures to avoid dissolution. Section 17-801 provides that "[a] limited partnership is dissolved, and its affairs shall be wound up upon the first to occur of the following." 6 Del. Ch. § 17-801. Then it provides the four different dissolution events (obviously applicable when the Partnership Agreement does not speak to this topic).

If Section 17-801 is applicable at all – which it is not – the relevant subsection is Section 17-801(5). That section provides that a limited partnership is dissolved "upon the happening of events specified in a partnership agreement." 6 Del. Ch. § 17-801(5). It contains no savings provision by which partners might avoid dissolution in a manner not

provided for in such partnership agreement. So even a strict application of DRULPA would require the Court to apply the dissolution provisions of the Partnership Agreement as written. Notably Section 17-801(5) provides no method of avoiding dissolution save what is set forth in the Partnership Agreement itself.

Defendants-Appellants rely heavily on Section 17-801(3) which, like the Partnership Agreement, provides for dissolution upon the resignation of a General Partner but, unlike the Partnership Agreement, contains a savings provision. However, Defendants-Appellants' argument ignores clear Delaware precedent prioritizing agreed-upon terms of a Partnership Agreement rather than inconsistent default terms of DRULPA. 2011 Del. Ch. LEXIS 90, *22-23. Where the Partnership Agreement expressly has provisions addressing non-judicial dissolution, the Partnership Agreement, not DRULPA controls. *See In re LJM2 Co-Investment, L.P.*, 866 A.2d 762, 776-77 (Del. Ch. 2004). And even under DRULPA, Section 17-801(5) requires the Court to apply contractual

dissolution provisions as written, without reference to any statutory savings clause.[6]

D. The Partners Have Not Properly Revoked the Dissolution.

"[D]issolution . . . does not terminate the partnership," but "is merely the commencement of the winding up process." 408 A.2d at 952; *United States ex rel. JKJ P'ship 2011 LLP v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1119 (Del Ch. 2020). Once a partnership's status is dissolved, Section 17-806 of DRULPA establishes three methods by which partners may revoke the dissolution prior to the filing of the certificate of cancellation. *See* 6 Del. Ch. § 17-806(1)-(3). The applicable

[6] If the Court is going to look beyond the Partnership Agreement and apply Section 17-801(3) instead of Section 17-801(5)—providing the parties with a method to avoid dissolution triggered by the General Partner's resignation, despite the partners agreement that they would not be able to continue the partnership if that dissolution event occurred—which it should not do, then the Court must remand this issue to the trial court because there is a genuine dispute of fact regarding whether, within ninety days after Emily Verdone's withdrawal, the partners satisfied the savings clause requirements set forth in 6 Del. Ch. § 17-801(3)(i)(B)(i). Defendants have failed to establish that there are no genuine disputes of material fact regarding whether "*more than 50 percent of the then-current percentage* . . . of the limited partnership owned by the *remaining partners*" affirmatively "*agree[ed] or* vote[ed] to continue the business of the partnership" *and* "appoint[ed] . . . one or more additional general partners." 6 Del. Ch. § 17-801(3)(i)(B)(i).

method to revoke dissolution depends upon the event that triggered dissolution:

- Section 17-806(1) provides the method for revoking dissolutions "effected by the vote or consent of the partners";

- Section 17-806(2) provides the method for revoking dissolutions triggered under 17-801(1) ("[a]t the time specified in a partnership agreement,") or 17-801(5) ("[u]pon the happening of events specified in a partnership agreement") ***with specific exceptions including*** a dissolution effected by "an event of withdrawal of a general partner."

- Section 17-803(3) provides the method to revoke a dissolution "effected by an event of withdrawal of a general partner."

6 Del. Ch. § 17-806 (2020).

Emily Verdone's resignation as General Partner in April 2014 was indisputably a withdrawal. While Appellants seek to apply the revocation requirements of 17-806(2) – the express language of that section precludes its application where the dissolution event is "an event of withdrawal of a general partner." 6 Del. Ch. § 17-806(2). Accordingly, Section 17-806(3), which expressly applies when a general partner withdraws, governs the means of revocation.

The record contains no facts to support a revocation of dissolution in accordance with 6 Del. Ch. § 17-806(3). Section 17-806(3) requires "the

vote or consent of all remaining general partners; and limited partners who own more than 2/3 of the then-current percentage or other interest in the profits of the limited partnership owned by all of the limited partners." 6 Del. Ch. § 17-806(3). On March 15, 2019, almost five years after Emily Verdone resigned as general partner (triggering dissolution), and two months after Plaintiff initiated this litigation, Rick Verdone, in his capacity as a limited partner and controlling member and manager of Tump, and Cathy Verdone, in her capacity as a limited partner, executed the Revocation of Dissolution of Verdone Limited Partnership. (R pp 639-644). At the time Rick and Cathy Verdone each owned 27.06% of the Limited Partnership Interests of the Partnership. (R p 648) This totals 54.12% of the total interests of the limited partners. Therefore, Rick and Cathy Verdone did not own two-thirds of the then-current percentage owned by the limited partners. Because the Revocation was not signed or approved by more than two-thirds of the then-current owners of the interest in the Partnership the revocation is not effective.

E. Plaintiff-Appellee's Declaratory Judgment Claim is Not Barred by Defendants-Appellants' Affirmative Defenses.

Defendant-Appellants' likewise fail to demonstrate any disputed material facts with respect to their affirmative defenses (let alone facts warranting judgment in Defendants-Appellants' favor).

i. No statute of limitations bars Plaintiff-Appellee's claim seeking a declaratory judgment regarding the current status of the Partnership in light of an undisputed dissolution event.

Both North Carolina and Delaware recognize that a court has "the power to declare rights, status and other legal relations, whether or not further relief is or could be claimed." N.C. Gen. Stat. § 1-253 (2020); *accord* 10 Del. C. § 6501 (2021). While a declaratory judgment claim may be based on an underlying claim for relief (e.g. a declaration that a contract was breached or money is owed), an underlying claim for relief is not a prerequisite. Declaratory judgment may also simply seek to establish the current status of the parties' legal relationship. *See id.*

Generally, there is no statute of limitations that applies to declaratory judgment claim. *See Luckenbach S.S. Co. v. United States*, 312 F.2d 545, 548 (2nd Cir. 1963) (explaining that statutes of limitation "are applicable not to the form of relief but to the claim on which the relief

is based."). Instead, in Delaware, the test for whether a claim for declaratory judgment can be adjudicated is one of justiciability. Namely, whether Plaintiffs' claim

> (1) . . . involv[es] the rights or other legal relations of the party seeking declaratory relief; (2) . . . in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) . . . between parties whose interests are real and adverse; [and] (4) [that involves an] issue . . . ripe for judicial determination.

K & K Screw Prods., L.L.C. v. Emerick Capital Invs., Inc., No. 5633-VCP, 2011 Del. Ch. LEXIS 119, at *23-24 (Del. Ch. Aug. 9, 2011). Defendants-Appellants do not, and cannot, argue that Plaintiff-Appellee's declaratory judgment claim as to the status of the Partnership is not clearly justiciable. The parties are presently disputing this very issue. Moreover, it is important for the parties to have a judicial determination on this issue so that they understand the status of the Partnership and their legal interests therein.

In some circumstances, depending on the context, a declaratory judgment claim may be subject to a statute of limitations. To determine if a statute of limitations applies, the Court must determine if an underlying claim for relief is the basis for a party's declaratory judgment action. If so, the statute of limitations for that underlying claim for relief

may likewise govern the declaratory judgment action. *See Brokenbrough v. Stiftel*, No. 93C-11-206, 1994 Del. Super. LEXIS 417, at *3 (Del. Super. 1994) (finding that, where the plaintiff's declaratory judgment claim sought a declaration that his rights were violated pursuant to 42 U.S.C. § 1983, which would entitle him to money damages, the statute of limitations governing § 1983 claims applies).

This rule is entirely inapplicable, however, where there is no underlying claim for relief and the action merely seeks a declaration of a current fact or status. Contrary to Defendants-Appellants' arguments, *see* Appellants' Br. at 44-46, Plaintiff-Appellee does not allege that Emily Verdone's resignation as General Partner breached the Partnership Agreement nor that Defendants-Appellants are in breach by virtue of the resulting dissolution. Plaintiff-Appellee is asking the Court to declare the status of the Partnership, which in this case automatically occurs when specified events set forth in the Partnership Agreement or Section 17-801 of DRUPLA, occur. *See Paciaroni v. Crane*, 408 A.2d 946, 947 (Del. Ch. 1979) ("The dissolution of a partnership is defined as the change in the relation of the partners . . .."). Therefore, there is no analogous breach of contract claim that would set the statute of

limitations into motion for Plaintiff's declaratory judgment claim. Unlike in *Kraft*, here, Plaintiff is not alleging wrongful act in violation of a statute that triggers the three-year statute of limitations in 10 Del. Ch. § 8106. Indeed, unlike any case applying a statute of limitations in the declaratory judgment context, Plaintiff is not alleging a wrongful act at all. Plaintiff simply sought to establish the fact that the Partnership – at the time of summary judgment – was dissolved. That status was true in April 2014 and remains true today. The passage of time should not preclude Plaintiff from seeking declaratory relief regarding the undeniably dissolved status of the Partnership following Emily Verdone's resignation.

ii. Any applicable statute of limitations has been equitably tolled.

Delaware courts will toll a statute of limitations "where the plaintiff's injury went undetected as a result of his 'justifiable reliance on a professional or expert whom [he had] no ostensible reason to suspect of deception,' even when affirmative inquiry or investigation may have revealed the injury."[7] *AM Gen. Holdings LLC v. Renco Group, Inc.*, No.

[7] Plaintiff's claim for a declaratory judgment that the Partnership is dissolved is also not barred by laches because there is no evidence that
(continued on next page)

7639-VCS, 2016 Del. Ch. LEXIS 132, *46-47 (Del. Ch. Aug. 22, 2016). Delaware "courts have found inherently unknowable injuries where: a client did not know his accountant committed malpractice in the preparation of tax returns until the Internal Revenue Service came knocking . . . because the plaintiff[ ] w[as] demonstrably unaware of the injury they had sustained at the hands of . . . consultants [he] had every reason to trust not to injure [him]." *AM Gen. Holdings LLC v. Renco Group, Inc.*, No. 7639-VCS, 2016 Del. Ch. LEXIS 132, *46-47 (Del. Ch. Aug. 22, 2016.)

Here, Plaintiff learned on April 25, 2014 that Emily Verdone resigned as the General Partner. (R pp 687, 735, 779-780) Coghill, the attorney for the Partnership, on behalf of Tump, the General Partner, sent Plaintiff and the other limited partners an e-mail sending copies of the resignation and representing that the resignation and appointment of a successor General Partner occurred pursuant to the terms of the Partnership Agreement. (R pp 735, 779-780) Plaintiff reasonably relied

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Plaintiff had knowledge of the claim prior to initiating this suit nor have Defendants offered any evidence of "[a]n unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant." *Reid v. Spazio*, 970 A.2d 176 (Del. 2009).

upon the representation of the Partnership's attorney, made on behalf of the Tump, the General Partner, that the resignation was made in accordance with the Partnership Agreement.

If a statute of limitations applies to Plaintiff's claim for declaratory judgment, which Plaintiff contests, then the statute of limitations has been equitably tolled because Jim Verdone reasonably relied upon the Partnership attorney's representation and the General Partner believing, as fiduciaries to the Partnership and the limited partners, they would execute the Partnership as required by the Partnership Agreement.

Finally, Defendants have not satisfied the burden to show that the Court can conclude, as a matter of law, that Plaintiff-Appellee's reliance on the General Partner and Partnership's attorney were unreasonable. Therefore, at most, there is a genuine dispute of material fact regarding whether the statute of limitations was equitably tolled, which must be decided by a jury.

iii. Plaintiff has not waived his declaratory judgment claim.

There is no evidence to support Defendants contention that Plaintiff waived the right to seek a declaratory judgment claim that the

Partnership is dissolved as a result of Emily Verdone's resignation. "[T]he Delaware Supreme Court has 'held that three elements must be demonstrated to invoke the waiver doctrine: (1) that there is a requirement or condition capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition." *Bomberger v. Benchmark Builders, Inc.*, No. 11572-VCMR, 2016 Del. Ch. LEXIS 130 (Del. Ch. Aug. 19, 2016) (quoting *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 27 A.2d 522, 529-30 (Del. 2011)). The Delaware Chancery Court has explained that "[t]he standard for demonstrating waiver is 'quite exacting;' because waiver is redolent of forfeiture, 'the facts relied upon to demonstrate waiver must be unequivocal.'" *Simon-Mills II, LLC v. Kan Am United States XVI Ltd. P'ship*, No. 8520-VGC, 2017 Del. Ch. LEXIS 50, *100-101 (Del. Ch. Mar. 30, 2017). "The question of waiver is normally a jury question, unless the facts are undisputed and give rise to only one reasonable inference." *Mergenthaler v. M & K Bus Serv.*, No. 90C-12-85, 1995 Del. Super. LEXIS 41, *5 (1995) (quoting *George v. Frank A. Robino, Inc.*, Del. Supr., 334 A.2d 223, 224 (1975)).

There is no reasonable inference that Plaintiff waived his right to enforce a valid and unambiguous term of the Partnership Agreement. First, as discussed above, Plaintiff reasonably relied upon the General Partner to operate the Partnership in terms with the Partnership Agreement and representations of the Partnership's attorney that the Partnership's general partner resigned and that a successor partner was appointed in compliance with the Partnership Agreement. It was not until 2018, upon advice from personal counsel, did Plaintiff discover that Neil Coghill's representation was false and that the Partnership was dissolved as of Emily Verdone's resignation.

There are no unequivocal facts in the record to establish that Plaintiff agreed to continue the Partnership after the resignation of Emily Verdone. In fact, to the contrary, the record shows that after a year of silence regarding the issue, Plaintiff was informed that the resignation had occurred. Further, there is no evidence that the parties agreed that the resignation of Emily Verdone would no longer constitute a dissolution triggering event.

Despite Defendants conclusory statements that the business continued as usual after April 1, 2014, the record does not support that.

The Partnership was not an operating business, but instead held a piece of Property and had minimal operating expenses. After Tump was appointed as General Partner it made a capital call to raise funds for the Partnership. Plaintiff and Elsya Stockin objected to this capital call and asked numerous questions regarding the Partnership's finances and operations but received no answers. Neither Jim Verdone or Elsya Stockin were informed about the continued day-to-day operations of the Partnership or any plans related to the ongoing business of the Partnership. Because Defendants have failed to demonstrate any facts to suggest an unequivocal waiver of the Partnership's term that Emily Verdone's resignation caused the dissolution of the Partnership, Defendants' waiver defense fails.

iv. Plaintiff is not estopped from seeking a declaration that the Partnership is dissolved.

The party asserting estoppel has the burden to establish by clear and convincing evidence that "(i) they lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) they reasonably relied on the conduct of the party against whom estoppel is claimed; and (iii) they suffered a prejudicial change of position as a result of their reliance." *Nevins v. Bryan*, 885 A.2d 233, 249 (Del. 2005). "It is

essential that for the doctrine of equitable estoppel to be applied, the party claiming the benefit of the estoppel must be misled to his injury and change his position for the worse." *Dep't of Nat. Res. & Envtl. Control v. Phillips*, Civil Action No. 276, 1980 Del. Ch. LEXIS 545, at *29-30 (Del. Ch. Oct. 14, 1980).

Defendants have not offered any *evidence* to support the material elements of equitable estoppel. For example, there is no evidence demonstrating that they were misled by plaintiff in any respect, or that they relied on Plaintiff or any particular conduct by Plaintiff. And even if there were, there is no evidence of detriment. The Partnership owns the same asset it always has and, indeed, Defendant Rick Verdone contends that his interest in the Partnership has increased since Emily Verdone resigned as General Partner.

Defendants have failed to identify—let alone show by clear and convincing evidence—any facts that would establish Plaintiff is estopped from bringing a claim for a declaratory judgment that the Partnership has been dissolved since April 1, 2014.

III. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS-APPELLANTS MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF-APPELLEE'S BREACH OF FIDUCIARY DUTY CLAIM.

Defendants have not met their burden to demonstrate that the interlocutory order denying Defendants' Motion for Summary Judgment on Plaintiff's claim for breach of fiduciary duties is appropriate for appeal. Defendants-Appellants' Motion on Plaintiff's breach of fiduciary duty claim does not affect a substantial right because the claim is proceeding to trial where the facts can be more fully developed. *See Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 424, 302 S.E.2d 868, 871 (1983) (finding that the Court of Appeals did not have the discretion to choose to review the denial of a motion for summary judgment). Because the question of whether Rick Verdone and Tump breached the fiduciary duties they owe to the limited partners is not impacted by the Order that the Partnership's status is dissolved, the Court should dismiss the appeal as it relates to that claim. (R p 2218-19)

Even if this Court believes the appeal of the Order regarding the pending breach of fiduciary duty claim is proper, the Court should affirm the Order because Plaintiff-Appellee has standing to assert a direct claim and there are genuine disputes of material facts that preclude the Court

from ruling as a matter of law that Plaintiff's claim is barred by the statute of limitations.

A. Plaintiff-Appellee Has Standing to Assert a Direct Claim for Breach of Fiduciary Duty.

Plaintiff has standing to bring direct claims for the injury alleged because his interest has been directly harmed. The Delaware Supreme Court has held that the issue of "whether a stockholder's claim is derivative or direct . . . must turn solely on the following questions: (1) who suffered the alleged harm . . . and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). To bring a direct action "[t]he stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Id.* at 1039.

"The test for distinguishing direct from derivative claims in the context of a limited partnership is substantially the same as that used when the underlying entity is a corporation." *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 149 (Del. Ch. 2003). However, "[i]n the partnership context, the relationships among the

parties may be so simple and the circumstances so clear-cut that the distinction between direct and derivative claims becomes irrelevant." *Id.* at 150 (quoting *In re Cencom Cable Income Partners, L.P. Litig.*, No. 14634, 2000 Del. Ch. LEXIS 10, at *8 (Del. Ch. Jan. 27, 2000)).

The Partnership Agreement establishes that the General Partner owes all limited partners fiduciary duties. (R p 212) The record demonstrates that Rick Verdone and Tump did not provide Plaintiff and Elsya Stockin with all the information necessary for a reasonable investor to determine whether he should participate in the capital call and, more importantly, information that Rick Verdone had when he decided to participate in the capital call. (*See, e.g.*, R pp 688, 1158-1159) Additionally, there are disputes regarding whether Tump properly valued the Partnership when selling additional interests in the Partnership. While the fairness of the capital calls is an issue of fact to be decided by the jury, it is undisputed that Plaintiff's interest in the Partnership has been diluted because of the capital calls issued by Tump and Rick Verdone. (R p 691, 1157, 1218) This dilution is a direct injury to Plaintiff because it affects his ownership interest and voting rights. Thus, Plaintiff has stated a proper direct claim.

B. The Statute of Limitations Does Not Bar Plaintiff-Appellee's Breach of Fiduciary Duty Claim.

Plaintiff-Appellee's claim for breach of fiduciary duty with respect to first two capital calls made by Defendants-Appellants are not barred by the statute of limitations because the statute of limitations was equitably tolled. "Under the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary." *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008).

Here, Rick Verdone, acting on behalf of the General Partner Emily Verdone in May 2013 and acting on behalf of the General Partner Tump in May 2014, made offers to sell additional interests in the Partnership. (R p 688–690; *see also* R p 20, 90 ¶ 51, R p 19, 92 ¶ 88) It is undisputed that the General Partner has fiduciary duties to the limited partners. (R p 212) Furthermore, the record demonstrates that the first two capital calls were self-dealing transactions because Rick Verdone purchased additional interests in the Partnership. (*See* R p 22, 90 ¶ 59; R p 29, 93 ¶ 95) Here, there is a genuine dispute of material fact regarding whether Plaintiff reasonably relied upon the General Partner when executing the

offers to sell additional interests in the Partnership. Defendants have not presented any evidence to establish that Plaintiff-Appellee's reliance on the General Partner was unreasonable. Therefore, there is a question of fact for the jury to determine whether Plaintiff-Appellee's claim for breach of fiduciary duty related to the first and second offer to sell interests in the Partnership were equitably tolled.

CONCLUSION

Accordingly, and for the foregoing reasons, Plaintiff-Appellee respectfully request this Court affirm the Order granting Plaintiff's Partial Motion for Summary Judgment and denying Defendants' Motion on Plaintiff's declaratory judgment claim and dismiss the appeal on the Order denying Defendants' Motion.

Respectfully submitted, this the 30th day of March, 2021.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendix) as reported by the word-processing software.

s/Kaitlin M. Price

CERTIFICATE OF SERVICE

I hereby certify that on March 30th, 2021 the foregoing BRIEF OF PLAINTIFF-APPELLEE was served upon counsel of record by electronically filing a copy with the North Carolina Court of Appeals via the court's electronic filing system and via electronic mail using counsel's correct and current e-mail addresses, as follows:

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This the 30th day of March, 2021.

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Contents of Appendix

CONTENTS OF ADDENDUM

6 Del. C. § 17-111

This document is current through 83 Del. Laws, ch. 8.

Delaware Code Annotated > Title 6 Commerce and Trade (Subts. I — IV) > Subtitle II Other Laws Relating to Commerce and Trade (Chs. 12 — 50E) > Chapter 17 Limited Partnerships (Subchs. I — XII) > Subchapter I General Provisions (§§ 17-101 — 17-113)

§ 17-111. Interpretation and enforcement of partnership agreement.

Any action to interpret, apply or enforce the provisions of a partnership agreement, or the duties, obligations or liabilities of a limited partnership to the partners of the limited partnership, or the duties, obligations or liabilities among partners or of partners to the limited partnership, or the rights or powers of, or restrictions on, the limited partnership or partners, or any provision of this chapter, or any other instrument, document, agreement or certificate contemplated by any provision of this chapter, may be brought in the Court of Chancery.

History

69 Del. Laws, c. 258, § 6; 77 Del. Laws, c. 69, § 1.

Annotations

Revisor's note.

Section 6 of 77 Del. Laws, c. 69, provided: "This act shall become effective August 1, 2009."

Notes to Decisions

Jurisdiction.

— Equity.

A request for enforcement of any statutory rights pursuant to the Delaware Revised Uniform Limited Partnership Act (6 Del. C. § 17-101 et seq.) by a general partner in a limited partnership against that partnership or its co-partners is properly brought in the Court of Chancery. Schwartzberg v. Critef Assocs. Ltd. Pshp., 685 A.2d 365, 1996 Del. Ch. LEXIS 59 (Del. Ch. 1996).

When it was plain that limited partners' claims (against general partners of the limited partnerships that held the exchange funds in which the limited partners had lost millions of dollars), arose largely out of the limited partnership agreement, the court of chancery, rather than a superior court, was the proper place to seek relief. Albert v. Alex. Brown Mgmt. Servs., 2004 Del. Super. LEXIS 303 (Del. Super. Ct. Sept. 15, 2004).

Research References and Practice Aids

Delaware Law Reviews.

Article: A Review of Delaware Limited Partnership Cases: The Development of a Limited Partnership Jurisprudence, Louis G. Hering and Jeffrey R. Wolters and David A. Harris, 1 Del. L. Rev. 89 (1998).

End of Document

6 Del. C. § 17-801

This document is current through 83 Del. Laws, ch. 8.

Delaware Code Annotated > Title 6 Commerce and Trade (Subts. I — IV) > Subtitle II Other Laws Relating to Commerce and Trade (Chs. 12 — 50E) > Chapter 17 Limited Partnerships (Subchs. I — XII) > Subchapter VIII Dissolution (§§ 17-801 — 17-806)

§ 17-801. Nonjudicial dissolution.

A limited partnership is dissolved and its affairs shall be wound up upon the first to occur of the following:

(1) At the time specified in a partnership agreement, but if no such time is set forth in the partnership agreement, then the limited partnership shall have a perpetual existence;

(2) Unless otherwise provided in a partnership agreement, upon the vote or consent of (i) all general partners and (ii) limited partners who own more than 2/3 of the then-current percentage or other interest in the profits of the limited partnership owned by all of the limited partners;

(3) An event of withdrawal of a general partner unless at the time there is at least 1 other general partner and the partnership agreement permits the business of the limited partnership to be carried on by the remaining general partner and that partner does so, but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal if (i) within 90 days or such other period as is provided for in a partnership agreement after the withdrawal either (A) if provided for in the partnership agreement, the then-current percentage or other interest in the profits of the limited partnership specified in the partnership agreement owned by the remaining partners agree or vote to continue the business of the limited partnership and to appoint, effective as of the date of withdrawal, 1 or more additional general partners if necessary or desired, or (B) if no such right to agree or vote to continue the business of the limited partnership and to appoint 1 or more additional general partners is provided for in the partnership agreement, then more than 50 percent of the then-current percentage or other interest in the profits of the limited partnership owned by the remaining partners agree or vote to continue the business of the limited partnership and to appoint, effective as of the date of withdrawal, 1 or more additional general partners if necessary or desired, or (ii) the business of the limited partnership is continued pursuant to a right to continue stated in the partnership agreement and the appointment, effective as of the date of withdrawal, of 1 or more additional general partners if necessary or desired;

(4) At the time there are no limited partners; provided, that the limited partnership is not dissolved and is not required to be wound up if:

a.Unless otherwise provided in a partnership agreement, within 90 days or such other period as is provided for in the partnership agreement after the occurrence of the event that caused the last remaining limited partner to cease to be a limited partner, the personal representative of the last remaining limited partner and all of the general partners agree or vote to continue the business of the limited partnership and to the admission of the personal representative of such limited partner or its nominee or designee to the limited partnership as a limited partner, effective as of the occurrence of the event that caused the last remaining limited partner to cease to be a limited partner; provided, that a partnership agreement may provide that the general partners or the personal representative of the last remaining limited partner shall be obligated to agree to continue the business of the limited partnership and to the admission of the personal representative of such limited partner or its nominee or designee to the limited partnership as a limited partner, effective

as of the occurrence of the event that caused the last limited partner to cease to be a limited partner; or

b. A limited partner is admitted to the limited partnership in the manner provided for in the partnership agreement, effective as of the occurrence of the event that caused the last remaining limited partner to cease to be a limited partner, within 90 days or such other period as is provided for in the partnership agreement after the occurrence of the event that caused the last remaining limited partner to cease to be a limited partner, pursuant to a provision of the partnership agreement that specifically provides for the admission of a limited partner to the limited partnership after there is no longer a remaining limited partner of the limited partnership.

(5) Upon the happening of events specified in a partnership agreement; or

(6) Entry of a decree of judicial dissolution under § 17-802 of this title.

Unless otherwise provided in a partnership agreement, a limited partnership whose original certificate of limited partnership was filed with the Secretary of State and effective on or prior to July 31, 2015, shall continue to be governed by clause (ii) of paragraph (2) of this section and clause (i)(B) of paragraph (3) of this section as in effect on July 31, 2015 (except that “in writing” shall be deleted from such clause (i)(B) of paragraph (3) of this section).

History

63 Del. Laws, c. 420, § 1; 65 Del. Laws, c. 188, § 1; 69 Del. Laws, c. 258, § 41; 71 Del. Laws, c. 78, §§ 39-41; 72 Del. Laws, c. 128, §§ 13-15; 72 Del. Laws, c. 386, §§ 24, 25; 80 Del. Laws, c. 44, § 11; 80 Del. Laws, c. 269, § 9.

End of Document

6 Del. C. § 17-802

This document is current through 83 Del. Laws, ch. 8.

Delaware Code Annotated > Title 6 Commerce and Trade (Subts. I — IV) > Subtitle II Other Laws Relating to Commerce and Trade (Chs. 12 — 50E) > Chapter 17 Limited Partnerships (Subchs. I — XII) > Subchapter VIII Dissolution (§§ 17-801 — 17-806)

§ 17-802. Judicial dissolution.

On application by or for a partner the Court of Chancery may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

History

63 Del. Laws, c. 420, § 1; 65 Del. Laws, c. 188, § 1.

End of Document

6 Del. C. § 17-1101

This document is current through 83 Del. Laws, ch. 8.

Delaware Code Annotated > Title 6 Commerce and Trade (Subts. I — IV) > Subtitle II Other Laws Relating to Commerce and Trade (Chs. 12 — 50E) > Chapter 17 Limited Partnerships (Subchs. I — XII) > Subchapter XI Miscellaneous (§§ 17-1101 — 17-1112)

§ 17-1101. Construction and application of chapter and partnership agreement.

(a) This chapter shall be so applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

(b) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(c) It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.

(d) To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

(e) Unless otherwise provided in a partnership agreement, a partner or other person shall not be liable to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for the partner's or other person's good faith reliance on the provisions of the partnership agreement.

(f)A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to an other person that is a party to or is otherwise bound by a partnership agreement; provided, that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

(g) Sections 9-406 and 9-408 of this title do not apply to any interest in a limited partnership, including all rights, powers and interests arising under a partnership agreement or this chapter. This provision prevails over §§ 9-406 and 9-408 of this title.

(h) Action validly taken pursuant to 1 provision of this chapter shall not be deemed invalid solely because it is identical or similar in substance to an action that could have been taken pursuant to some other provision of this chapter but fails to satisfy 1 or more requirements prescribed by such other provision.

(i)A partnership agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms.

History

6 Del. C. 1953, § 1729; 59 Del. Laws, c. 105, § 1; 63 Del. Laws, c. 420, § 1; 65 Del. Laws, c. 188, § 1; 67 Del. Laws, c. 348, § 27; 69 Del. Laws, c. 258, § 47; 72 Del. Laws, c. 386, § 27; 73 Del. Laws, c. 222, § 2; 74 Del. Laws, c. 265, §§ 15, 16; 77 Del. Laws, c. 69, § 5; 77 Del. Laws, c. 288, § 29.

End of Document

8 Del. C. § 145

This document is current through 83 Del. Laws, ch. 8.

Delaware Code Annotated > Title 8 Corporations (Chs. 1 — 6) > Chapter 1 General Corporation Law (Subchs. I — XVIII) > Subchapter IV Directors and Officers (§§ 141 — 146)

§ 145. Indemnification of officers, directors, employees and agents; insurance.

(a)A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful.

(b)A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(c)

(1) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith. For indemnification with respect to any act or omission occurring after December 31, 2020, references to "officer" for purposes of this paragraphs (c)(1) and (2) of this section shall mean only a person who at the time of such act or omission is deemed to have consented to service by the delivery of process to the registered agent of the corporation pursuant to § 3114(b) of Title 10 (for purposes of this sentence only, treating residents of this State as if they were nonresidents to apply § 3114(b) of Title 10 to this sentence).

(2) The corporation may indemnify any other person who is not a present or former director or officer of the corporation against expenses (including attorneys' fees) actually and reasonably incurred by such person to the extent he or she has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein.

(d) Any indemnification under subsections (a) and (b) of this section (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the present or former director, officer, employee or agent is proper in the circumstances because the person has met the applicable standard of conduct set forth in subsections (a) and (b) of this section. Such determination shall be made, with respect to a person who is a director or officer of the corporation at the time of such determination:

(1) By a majority vote of the directors who are not parties to such action, suit or proceeding, even though less than a quorum; or

(2) By a committee of such directors designated by majority vote of such directors, even though less than a quorum; or

(3) If there are no such directors, or if such directors so direct, by independent legal counsel in a written opinion; or

(4) By the stockholders.

(e) Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

(f) The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office. A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to or repeal or elimination of the certificate of incorporation or the bylaws after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

(g)A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section.

(h) For purposes of this section, references to "the corporation" shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, and employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent corporation, or is or was serving at the request of such constituent corporation as a

director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under this section with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued.

(i) For purposes of this section, references to "other enterprises" shall include employee benefit plans; references to "fines" shall include any excise taxes assessed on a person with respect to any employee benefit plan; and references to "serving at the request of the corporation" shall include any service as a director, officer, employee or agent of the corporation which imposes duties on, or involves services by, such director, officer, employee or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the corporation" as referred to in this section.

(j) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(k) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise. The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees).

History

8 Del. C. 1953, § 145; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 6; 57 Del. Laws, c. 421, § 2; 59 Del. Laws, c. 437, § 7; 63 Del. Laws, c. 25, § 1; 64 Del. Laws, c. 112, § 7; 65 Del. Laws, c. 289, §§ 3-6; 67 Del. Laws, c. 376, § 3; 69 Del. Laws, c. 261, §§ 1, 2; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 120, §§ 3-11; 77 Del. Laws, c. 14, § 3; 77 Del. Laws, c. 290, §§ 5, 6; 78 Del. Laws, c. 96, § 6; 82 Del. Laws, c. 256, § 9.

8 Del. C. § 205

This document is current through 83 Del. Laws, ch. 8.

Delaware Code Annotated > Title 8 Corporations (Chs. 1 — 6) > Chapter 1 General Corporation Law (Subchs. I — XVIII) > Subchapter VI Stock Transfers (§§ 201 — 205)

§ 205. Proceedings regarding validity of defective corporate acts and stock [For application of this section, see 80 Del. Laws, c. 40, § 16].

(a) Subject to subsection (f) of this section, upon application by the corporation, any successor entity to the corporation, any member of the board of directors, any record or beneficial holder of valid stock or putative stock, any record or beneficial holder of valid or putative stock as of the time of a defective corporate act ratified pursuant to § 204 of this title, or any other person claiming to be substantially and adversely affected by a ratification pursuant to § 204 of this title, the Court of Chancery may:

(1) Determine the validity and effectiveness of any defective corporate act ratified pursuant to § 204 of this title;

(2) Determine the validity and effectiveness of the ratification of any defective corporate act pursuant to § 204 of this title;

(3) Determine the validity and effectiveness of any defective corporate act not ratified or not ratified effectively pursuant to § 204 of this title;

(4) Determine the validity of any corporate act or transaction and any stock, rights or options to acquire stock; and

(5) Modify or waive any of the procedures set forth in § 204 of this title to ratify a defective corporate act.

(b) In connection with an action under this section, the Court of Chancery may:

(1) Declare that a ratification in accordance with and pursuant to § 204 of this title is not effective or shall only be effective at a time or upon conditions established by the Court;

(2) Validate and declare effective any defective corporate act or putative stock and impose conditions upon such validation by the Court;

(3) Require measures to remedy or avoid harm to any person substantially and adversely affected by a ratification pursuant to § 204 of this title or from any order of the Court pursuant to this section, excluding any harm that would have resulted if the defective corporate act had been valid when approved or effectuated;

(4) Order the Secretary of State to accept an instrument for filing with an effective time specified by the Court, which effective time may be prior or subsequent to the time of such order, provided that the filing date of such instrument shall be determined in accordance with § 103(c)(3) of this title;

(5) Approve a stock ledger for the corporation that includes any stock ratified or validated in accordance with this section or with § 204 of this title;

(6) Declare that shares of putative stock are shares of valid stock or require a corporation to issue and deliver shares of valid stock in place of any shares of putative stock;

(7) Order that a meeting of holders of valid stock or putative stock be held and exercise the powers provided to the Court under § 227 of this title with respect to such a meeting;

(8) Declare that a defective corporate act validated by the Court shall be effective as of the time of the defective corporate act or at such other time as the Court shall determine;

(9) Declare that putative stock validated by the Court shall be deemed to be an identical share or fraction of a share of valid stock as of the time originally issued or purportedly issued or at such other time as the Court shall determine; and

(10) Make such other orders regarding such matters as it deems proper under the circumstances.

(c) Service of the application under subsection (a) of this section upon the registered agent of the corporation shall be deemed to be service upon the corporation, and no other party need be joined in order for the Court of Chancery to adjudicate the matter. In an action filed by the corporation, the Court may require notice of the action be provided to other persons specified by the Court and permit such other persons to intervene in the action.

(d) In connection with the resolution of matters pursuant to subsections (a) and (b) of this section, the Court of Chancery may consider the following:

(1) Whether the defective corporate act was originally approved or effectuated with the belief that the approval or effectuation was in compliance with the provisions of this title, the certificate of incorporation or bylaws of the corporation;

(2) Whether the corporation and board of directors has treated the defective corporate act as a valid act or transaction and whether any person has acted in reliance on the public record that such defective corporate act was valid;

(3) Whether any person will be or was harmed by the ratification or validation of the defective corporate act, excluding any harm that would have resulted if the defective corporate act had been valid when approved or effectuated;

(4) Whether any person will be harmed by the failure to ratify or validate the defective corporate act; and

(5) Any other factors or considerations the Court deems just and equitable.

(e) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions brought under this section.

(f) Notwithstanding any other provision of this section, no action asserting:

(1) That a defective corporate act or putative stock ratified in accordance with § 204 of this title is void or voidable due to a failure of authorization identified in the resolution adopted in accordance with 204(b) of this title; or

(2) That the Court of Chancery should declare in its discretion that a ratification in accordance with § 204 of this title not be effective or be effective only on certain conditions,

may be brought after the expiration of 120 days from the later of the validation effective time and the time notice, if any, that is required to be given pursuant to § 204(g) of this title is given with respect to such ratification, except that this subsection shall not apply to an action asserting that a ratification was not accomplished in accordance with § 204 of this title or to any person to whom notice of the ratification was required to have been given pursuant to § 204(d) or (g) of this title, but to whom such notice was not given.

History

79 Del. Laws, c. 72, § 5; 80 Del. Laws, c. 40, § 9.

End of Document

8 Del. C. § 220

This document is current through 83 Del. Laws, ch. 8.

Delaware Code Annotated > Title 8 Corporations (Chs. 1 — 6) > Chapter 1 General Corporation Law (Subchs. I — XVIII) > Subchapter VII Meetings, Elections, Voting and Notice (§§ 211 — 233)

§ 220. Inspection of books and records.

(a) As used in this section:

(1)"Stockholder" means a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person.

(2)"Subsidiary" means any entity directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises control, and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, statutory trusts and/or joint ventures.

(3)"Under oath" includes statements the declarant affirms to be true under penalty of perjury under the laws of the United States or any state.

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:

(1) The corporation's stock ledger, a list of its stockholders, and its other books and records; and

(2)A subsidiary's books and records, to the extent that:

a.The corporation has actual possession and control of such records of such subsidiary; or

b.The corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand:

1.The stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation; and

2.The subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.

In every instance where the stockholder is other than a record holder of stock in a stock corporation, or a member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, be accompanied by documentary evidence of beneficial ownership of the stock, and state that such documentary evidence is a true and correct copy of what it purports to be. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the corporation at its registered office in this State or at its principal place of business.

(c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to subsection (b) of this section or does not reply to

the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The Court may summarily order the corporation to permit the stockholder to inspect the corporation's stock ledger, an existing list of stockholders, and its other books and records, and to make copies or extracts therefrom; or the Court may order the corporation to furnish to the stockholder a list of its stockholders as of a specific date on condition that the stockholder first pay to the corporation the reasonable cost of obtaining and furnishing such list and on such other conditions as the Court deems appropriate. Where the stockholder seeks to inspect the corporation's books and records, other than its stock ledger or list of stockholders, such stockholder shall first establish that:

(1) Such stockholder is a stockholder;

(2) Such stockholder has complied with this section respecting the form and manner of making demand for inspection of such documents; and

(3) The inspection such stockholder seeks is for a proper purpose.

Where the stockholder seeks to inspect the corporation's stock ledger or list of stockholders and establishes that such stockholder is a stockholder and has complied with this section respecting the form and manner of making demand for inspection of such documents, the burden of proof shall be upon the corporation to establish that the inspection such stockholder seeks is for an improper purpose. The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem just and proper. The Court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon such terms and conditions as the order may prescribe.

(d) Any director shall have the right to examine the corporation's stock ledger, a list of its stockholders and its other books and records for a purpose reasonably related to the director's position as a director. The Court of Chancery is hereby vested with the exclusive jurisdiction to determine whether a director is entitled to the inspection sought. The Court may summarily order the corporation to permit the director to inspect any and all books and records, the stock ledger and the list of stockholders and to make copies or extracts therefrom. The burden of proof shall be upon the corporation to establish that the inspection such director seeks is for an improper purpose. The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other and further relief as the Court may deem just and proper.

History

8 Del. C. 1953, § 220; 56 Del. Laws, c. 50; 63 Del. Laws, c. 25, § 9; 70 Del. Laws, c. 79, §§ 11, 12; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 339, § 39; 74 Del. Laws, c. 84, §§ 5-8; 77 Del. Laws, c. 253, §§ 20-23.

End of Document

10 Del. C. § 6501

This document is current through 83 Del. Laws, ch. 8.

Delaware Code Annotated > Title 10 Courts and Judicial Procedure (Pts. I — VII) > Part IV Special Proceedings (Chs. 57 — 78) > Chapter 65 Declaratory Judgments (§§ 6501 — 6513)

§ 6501. Power of courts; form and effect of declaration.

Except where the Constitution of this State provides otherwise, courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree.

History

Code 1935, § 4685A; 46 Del. Laws, c. 269, § 1; 10 Del. C. 1953, § 6501; 63 Del. Laws, c. 63, § 1.

End of Document

N.C. Gen. Stat. § 1-253

Current through Session Laws 2021-4 of the 2021 Regular Session of the General Assembly, but does not reflect possible future codification directives relating to Session Laws 2020-95 through 2020-97 and 2021-1 through 2021-4 from the Revisor of Statutes pursuant to G.S. 164-10

NC - General Statutes of North Carolina Annotated > CHAPTER 1. CIVIL PROCEDURE > SUBCHAPTER 08 . JUDGMENT > ARTICLE 26. DECLARATORY JUDGMENTS

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

History

1931, c. 102, s. 1

1993 Del. SB 310

Enacted, June 27, 1994

Reporter
1994 Del. ALS 258; 69 Del. Laws 258; 1993 Del. SB 310

DELAWARE ADVANCE LEGISLATIVE SERVICE > DELAWARE 137TH GENERAL ASSEMBLY DELAWARE > CHAPTER 258 > SENATE BILL 310

Synopsis

AN ACT TO AMEND CHAPTER 17, TITLE 6 OF THE DELAWARE CODE RELATING TO THE CREATION, REGULATION, OPERATION AND DISSOLUTION OF DOMESTIC LIMITED PARTNERSHIPS AND THE REGISTRATION AND REGULATION OF FOREIGN LIMITED PARTNERSHIPS, AND TO AMEND CHAPTER 23, TITLE 6 OF THE DELAWARE CODE RELATING TO THE AVAILABILITY OF THE DEFENSE OF USURY.

Text

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (three-fifths of all members elected to each House thereof concurring therein):

Section 1. Amend Section 17-101, Chapter 17, Title 6 of the Delaware Code by redesignating paragraphs "(6)" through "(12)", as paragraphs "(7)" through "(13)", by redesignating paragraph "(13)" as paragraph "(15)", by adding at the end of the definition of "limited partnership" before the "." found in redesignated paragraph "(8)" the words ", and includes, for all purposes of the laws of the State of Delaware, a registered limited liability limited partnership", and by adding new paragraphs designated as paragraphs "(6)" and "(14)" in their appropriate numerical order reading as follows:

"(6) 'Knowledge' means a person's actual knowledge of a fact, rather than the person's constructive knowledge of the fact."

"(14) 'Registered limited liability limited partnership' means a limited partnership complying with Section 17-214 of this title."

Section 2. Amend Section 17-102(3), Chapter 17, Title 6 of the Delaware Code by deleting said subsection in its entirety and by substituting in lieu thereof the following:

"(3) Must be such as to distinguish it upon the records in the Office of the Secretary of State from the name of any corporation, limited partnership, business trust, registered limited liability partnership or limited liability company reserved, registered or organized under the laws of the State of Delaware or qualified to do business or registered as a foreign corporation, foreign limited partnership or foreign limited liability company in the State of Delaware; provided, however, that a limited partnership may register under any name which is not such as to distinguish it upon the records in the Office of the Secretary of State from the name of any domestic or foreign corporation,

limited partnership, business trust, registered limited liability partnership or limited liability company reserved, registered or organized under the laws of the State of Delaware with the written consent of the other corporation, limited partnership, business trust, registered limited liability partnership or limited liability company, which written consent shall be filed with the Secretary of State; and"

Section 3. Amend Section 17-103(b), Chapter 17, Title 6 of the Delaware Code by deleting the words "together with a duplicate copy, which may be either a signed or conformed copy," in the three places where such words are contained in Section 17-103(b), and the last sentence of Section 17-103(b) in its entirety, and by adding a new sentence immediately following the last sentence of Section 17-103(b) reading as follows: "Unless the Secretary of State finds that any application, notice of transfer, or notice of cancellation filed with the Secretary of State as required by this subsection does not conform to law, upon receipt of all filing fees required by law he shall prepare and return to the person who filed such instrument a copy of the filed instrument with a notation thereon of the action taken by the Secretary of State."

Section 4. Amend Section 17-107, Chapter 17, Title 6 of the Delaware Code by adding after the words "business with", the punctuation mark ",".

Section 5. Amend Subchapter I, Chapter 17, Title 6 of the Delaware Code by adding thereto a new section to be designated as "Section 17-110" to read as follows:

"Section 17-110. Contested Matters Relating to General Partners; Contested Votes.

(a) Upon application of any partner, the Court of Chancery may hear and determine the validity of any admission, election, appointment or withdrawal of a general partner of a limited partnership, and the right of any person to be a general partner of a limited partnership, and, in case the right to serve as a general partner is claimed by more than 1 person, may determine the person or persons entitled to serve as general partners; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers and records of the limited partnership relating to the issue. In any such application, service of copies of the application upon the registered agent of the limited partnership shall be deemed to be service upon the limited partnership and upon the person or persons whose right to serve as a general partner is contested and upon the person or persons, if any, claiming to be a general partner or claiming the right to be a general partner; and the registered agent shall forward immediately a copy of the application to the limited partnership and to the person or persons whose right to serve as a general partner is contested and to the person or persons, if any, claiming to be a general partner or the right to be a general partner, in a postpaid, sealed, registered letter addressed to such limited partnership and such person or persons at their post-office addresses last known to the registered agent or furnished to the registered agent by the applicant partner. The Court may make such order respecting further or other notice of such application as it deems proper under the circumstances.

(b) Upon application of any partner, the Court of Chancery may hear and determine the result of any vote of partners upon matters as to which the partners of the limited partnership, or any class or group of partners, have the right to vote pursuant to the partnership agreement or other agreement or this chapter (other than the admission, election, appointment or withdrawal of general partners). Service of the application upon the registered agent of the limited partnership shall be deemed to be service upon the limited partnership, and no other party need be joined in order for the Court to adjudicate the result of the vote. The Court may make such order respecting further or other notice of such application as it deems proper under the circumstances.

(c) Nothing herein contained limits or affects the right to serve process in any other manner now or hereafter provided by law. This section is an extension of and not a limitation upon the right otherwise existing of service of legal process upon nonresidents."

Section 6. Amend Subchapter I, Chapter 17, Title 6 of the Delaware Code by adding thereto a new section to be designated as "Section 17-111" to read as follows:

"Section 17-111. Interpretation and Enforcement of Partnership Agreement.

Any action to interpret, apply or enforce the provisions of a partnership agreement, or the duties, obligations or liabilities of a limited partnership to the partners of the limited partnership, or the duties, obligations or liabilities among partners or of partners to the limited partnership, or the rights or powers of, or restrictions on, the limited partnership or partners, may be brought in the Court of Chancery."

Section 7. Amend Section 17-204(a)(2), Chapter 17, Title 6 of the Delaware Code by adding at three places in the subsection immediately following the words "certificate of amendment", the words "or a certificate of correction".

Section 8. Amend Section 17-204(a)(4), Chapter 17, Title 6 of the Delaware Code by adding at four places in the subsection immediately following the words "certificate of merger or consolidation", the words "or certificate of termination of a merger or consolidation".

Section 9. Amend Section 17-206(a), Chapter 17, Title 6 of the Delaware Code by deleting the words ", together with a duplicate copy, which may be either a signed or conformed copy," and the words "(3) Return the duplicate copy, similarly endorsed, to the person who filed it or his representative", and by adding after the words "certificate of amendment", the words ", correction, termination of a merger or consolidation", and immediately following the words "(2) File and index the endorsed certificate; and" the words "(3) Prepare and return to the person who filed it or his representative a copy of the original signed instrument, similarly endorsed, and shall certify such copy as a true copy of the original signed instrument".

Section 10. Amend Section 17-206(a)(1), Chapter 17, Title 6 of the Delaware Code by adding after the words "certificate of amendment," the words "the certificate of correction, the certificate of termination of a merger or consolidation,".

Section 11. Amend Section 17-206(b), Chapter 17, Title 6 of the Delaware Code by adding immediately following "(or judicial decree of amendment)", the words ", certificate of correction", and by adding the following sentence at the end of said subsection:

"Upon the filing of a certificate of termination of a merger or consolidation, the certificate of merger or consolidation identified in the certificate of termination of a merger or consolidation is terminated."

Section 12. Amend Section 17-206(c), Chapter 17, Title 6 of the Delaware Code by adding immediately following the words "certificate of amendment," the words "a certificate of correction, a certificate of termination of a merger or consolidation,".

Section 13. Amend Section 17-207(a), Chapter 17, Title 6 of the Delaware Code by adding after the word "amendment", the word ", correction".

Section 14. Amend Section 17-207(a)(2), Chapter 17, Title 6 of the Delaware Code by adding after the word "amend", the word ", correct", and by adding after the word "amendment", the word ", correction".

Section 15. Amend Section 17-207(b), Chapter 17, Title 6 of the Delaware Code by adding after the words "cause the amendment", and after the words "for its amendment", the word ", correction", and by adding after the words "certificate of amendment," the words "certificate of correction,".

Section 16. Amend Section 17-211(a), Chapter 17, Title 6 of the Delaware Code by adding after the words "a

common-law trust," the words "a limited liability company,", and by adding after the word "general", the words "(including a registered limited liability partnership)".

Section 17. Amend Section 17-211(e), Chapter 17, Title 6 of the Delaware Code by adding the following sentence at the end of said subsection:

"If a certificate of merger or consolidation provides for a future effective date or time and if an agreement of merger or consolidation is terminated or amended to change the future effective date or time as permitted by Section 17-211(b) of this title prior to the future effective date or time, the certificate of merger or consolidation shall be terminated by the filing of a certificate of termination of a merger or consolidation which shall identify the certificate of merger or consolidation and the agreement of merger or consolidation which has been terminated or amended and shall state that the agreement of merger or consolidation has been terminated or amended."

Section 18. Amend Section 17-211, Chapter 17, Title 6 of the Delaware Code by adding new subsections to be designated as "(i)" and "(j)" to read as follows:

"(i) Except as provided by agreement with a person to whom a general partner of a limited partnership is obligated, a merger or consolidation of a limited partnership that has become effective shall not affect any obligation or liability existing at the time of such merger or consolidation of a general partner of a limited partnership which is merging or consolidating.

(j) If a limited partnership is a constituent party to a merger or consolidation that shall have become effective, but the limited partnership is not the surviving or resulting entity of the merger or consolidation, then a judgment creditor of a general partner of such limited partnership may not levy execution against the assets of the general partner to satisfy a judgment based on a claim against the surviving or resulting entity of the merger or consolidation unless:

(1) A judgment based on the same claim has been obtained against the surviving or resulting entity of the merger or consolidation and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(2) The surviving or resulting entity of the merger or consolidation is a debtor in bankruptcy;

(3) The general partner has agreed that the creditor need not exhaust the assets of the limited partnership that was not the surviving or resulting entity of the merger or consolidation;

(4) The general partner has agreed that the creditor need not exhaust the assets of the surviving or resulting entity of the merger or consolidation;

(5) A Court grants permission to the judgment creditor to levy execution against the assets of the general partner based on a finding that the assets of the surviving or resulting entity of the merger or consolidation that are subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the surviving or resulting entity of the merger or consolidation is excessively burdensome, or that the grant of permission is an appropriate exercise of the Court's equitable powers; or

(6) Liability is imposed on the general partner by law or contract independent of the existence of the surviving or resulting entity of the merger or consolidation."

Section 19. Amend Subchapter II, Chapter 17, Title 6 of the Delaware Code by adding thereto a new section to be designated as "Section 17-212" to read as follows:

"Section 17-212. Contractual Appraisal Rights.

A partnership agreement or an agreement of merger or consolidation may provide that contractual appraisal rights with respect to a partnership interest or another interest in a limited partnership shall be available for any class or group of partners or partnership interests in connection with any amendment of a partnership agreement, any

merger or consolidation in which the limited partnership is a constituent party to the merger or consolidation, or the sale of all or substantially all of the limited partnership's assets. The Court of Chancery shall have jurisdiction to hear and determine any matter relating to any such appraisal rights."

Section 20. Amend Subchapter II, Chapter 17, Title 6 of the Delaware Code by adding thereto a new section to be designated as "Section 17-213" to read as follows:

"Section 17-213. Certificate of Correction.

Whenever any certificate authorized to be filed with the Office of the Secretary of State under any provision of this chapter has been so filed and is an inaccurate record of the action therein referred to, or was defectively or erroneously executed, such certificate may be corrected by filing with the Office of the Secretary of State a certificate of correction of such certificate. The certificate of correction shall specify the inaccuracy or defect to be corrected, shall set forth the portion of the certificate in corrected form and shall be executed and filed as required by this chapter. The corrected certificate shall be effective as of the date the original certificate was filed, except as to those persons who are substantially and adversely affected by the correction, and as to those persons the corrected certificate shall be effective from the filing date."

Section 21. Amend Subchapter II, Chapter 17, Title 6 of the Delaware Code by adding thereto a new section to be designated as "Section 17-214" to read as follows:

"Section 17-214. Limited Partnerships as Registered Limited Liability Limited Partnerships.

(a) To become and to continue as a registered limited liability limited partnership, a limited partnership shall, in addition to complying with the requirements of this chapter:

(1) file an application or a renewal application, as the case may be, as provided in Section 1544 of the Uniform Partnership Law of the State of Delaware, as permitted by the limited partnership's partnership agreement or, if the limited partnership's partnership agreement does not provide for the limited partnership's becoming a registered limited liability limited partnership, with the approval (i) by all general partners, and (ii) by the limited partners or, if there is more than one class or group of limited partners, then by each class or group of limited partners, in either case, by limited partners who own more than 50 percent of the then current percentage or other interest in the profits of the limited partnership owned by all of the limited partners or by the limited partners in each class or group, as appropriate;

(2) comply with Section 1546 of the Uniform Partnership Law of the State of Delaware; and

(3) have as the last words or letters of its name the words 'Limited Partnership' or the abbreviation 'L.P.' followed by the words 'Registered Limited Liability Limited Partnership', or the abbreviation 'L.L.L.P.', or the designation 'LLLP'.

(b) In applying Section 1544 and Section 1550 of the Uniform Partnership Law of the State of Delaware to a limited partnership:

(i) an application to become a registered limited liability limited partnership, a renewal application to continue as a registered limited liability limited partnership, a certificate of amendment of an application or a renewal application, or a withdrawal notice of an application or a renewal application shall be executed by at least one general partner of the limited partnership; and

(ii) all references to partners mean general partners only.

(c) If a limited partnership is a registered limited liability limited partnership, its partners who are liable for the debts, liabilities and other obligations of the limited partnership shall have the limitation on liability afforded to partners of registered limited liability partnerships under the Uniform Partnership Law of the State of Delaware."

Section 22. Amend Section 17-301(a), Chapter 17, Title 6 of the Delaware Code by deleting the words "acquiring a partnership interest as a limited partner".

Section 23. Amend Section 17-301(b), Chapter 17, Title 6 of the Delaware Code by deleting the words "acquiring a partnership interest as a limited partner".

Section 24. Amend Section 17-301(b)(1), Chapter 17, Title 6 of the Delaware Code by deleting the words "a person acquiring a partnership interest directly from the limited partnership,", and by substituting in lieu thereof the words "a person who is not an assignee of a partnership interest, including a person acquiring a partnership interest directly from the limited partnership and a person to be admitted as a limited partner of the limited partnership without acquiring a partnership interest in the limited partnership," and by deleting the word "or" appearing at the end of said subsection.

Section 25. Amend Section 17-301(b)(2), Chapter 17, Title 6 of the Delaware Code by deleting the period appearing at the end of said subsection and by substituting in lieu thereof "; or".

Section 26. Amend Section 17-301(b), Chapter 17, Title 6 of the Delaware Code by adding a new paragraph to said subsection to be designated as paragraph "(3)" to read as follows:

"(3) Unless otherwise provided in an agreement of merger or consolidation or a partnership agreement, in the case of a person acquiring a partnership interest in a surviving or resulting limited partnership pursuant to a merger or consolidation approved in accordance with Section 17-211(b) of this title, at the time provided in and upon compliance with the partnership agreement of the surviving or resulting limited partnership."

Section 27. Amend Section 17-301(c), Chapter 17, Title 6 of the Delaware Code by adding at the end of said subsection a new sentence reading: "Unless otherwise provided in a partnership agreement, a person may be admitted to a limited partnership as a limited partner of the limited partnership without acquiring a partnership interest in the limited partnership.".

Section 28. Amend Section 17-303(b)(1), Chapter 17, Title 6 of the Delaware Code by adding immediately before the ";" appearing at the end of said subsection the words ", or to be a member, manager, agent or employee of a limited liability company which is a general partner".

Section 29. Amend Section 17-303(b)(7), Chapter 17, Title 6 of the Delaware Code by adding immediately before the ";" appearing at the end of said subsection the words "or partners or to appoint, elect or otherwise participate in the choice of a representative or another person to serve on any such committee, and to act as a member of any such committee directly or by or through any such representative or other person".

Section 30. Amend Section 17-303(b)(8), Chapter 17, Title 6 of the Delaware Code by redesignating paragraph "l." of said subsection as paragraph "m.", by amending paragraph "k." of said subsection by deleting the word "or" as it appears at the end of said paragraph, and by adding a new paragraph to said subsection to be designated as paragraph "l." to read as follows:

"l. The making of, or calling for, or the making of other determinations in connection with, contributions; or".

Section 31. Amend Section 17-303(b)(9), Chapter 17, Title 6 of the Delaware Code by deleting said subsection in its entirety and by substituting in lieu thereof the following:

"(9) To serve on the board of directors or a committee of, to consult with or advise, to be an officer, director, stockholder, partner (other than a general partner of a general partner of the limited partnership), member, manager, trustee, agent or employee of, or to be a fiduciary or contractor for, any person in which the limited partnership has an interest or any person providing management, consulting, advisory, custody or other services or products for, to or on behalf of, or otherwise having a business or other relationship with, the limited partnership or a general partner of the limited partnership; or".

Section 32. Amend Section 17-401(a), Chapter 17, Title 6 of the Delaware Code by adding to said subsection immediately following the first sentence of the subsection a new sentence reading as follows:

"Unless otherwise provided in a partnership agreement, a person may be admitted to a limited partnership as a general partner of the limited partnership without acquiring a partnership interest in the limited partnership."

Section 33. Amend Section 17-402(a), Chapter 17, Title 6 of the Delaware Code by amending paragraph "(9)" of said subsection by deleting the word "or" as it appears at the end of said paragraph, by amending paragraph "(10)" of said subsection by deleting the "." as it appears at the end of said paragraph and by adding in lieu thereof "; or", and by adding a new paragraph to said subsection to be designated as paragraph "(11)" to read as follows:

"(11) In the case of a general partner who is not an individual, partnership, corporation, trust or estate, the termination of the general partner."

Section 34. Amend Section 17-403, Chapter 17, Title 6 of the Delaware Code by adding two new subsections to said section to be designated as subsection "(c)" and subsection "(d)" to read as follows:

"(c) Unless otherwise provided in the partnership agreement, a general partner of a limited partnership has the power and authority to delegate to one or more other persons the general partner's rights and powers to manage and control the business and affairs of the limited partnership, including to delegate to agents and employees of the general partner or the limited partnership, and to delegate by a management agreement or another agreement with, or otherwise to, other persons. Unless otherwise provided in the partnership agreement, such delegation by a general partner of a limited partnership shall not cause the general partner to cease to be a general partner of the limited partnership.

(d) A judgment creditor of a general partner of a limited partnership may not levy execution against the assets of the general partner to satisfy a judgment based on a claim against the limited partnership unless:

(1) A judgment based on the same claim has been obtained against the limited partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(2) The limited partnership is a debtor in bankruptcy;

(3) The general partner has agreed that the creditor need not exhaust the assets of the limited partnership;

(4) A Court grants permission to the judgment creditor to levy execution against the assets of the general partner based on a finding that the assets of the limited partnership that are subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the limited partnership is excessively burdensome, or that the grant of permission is an appropriate exercise of the Court's equitable powers; or

(5) Liability is imposed on the general partner by law or contract independent of the existence of the limited partnership."

Section 35. Amend Subchapter V, Chapter 17, Title 6 of the Delaware Code by adding thereto a new section to be designated as "Section 17-505" to read as follows:

"Section 17-505. Defense of Usury Not Available.

No obligation of a partner of a limited partnership to the limited partnership arising under the partnership agreement or a separate agreement or writing, and no note, instrument or other writing evidencing any such obligation of a partner, shall be subject to the defense of usury, and no partner shall interpose the defense of usury with respect to any such obligation in any action."

Section 36. Amend Section 17-603, Chapter 17, Title 6 of the Delaware Code by deleting from the last sentence of said subsection the words "set forth in this chapter", and by substituting in lieu thereof "under applicable law".

Section 37. Amend Section 17-605, Chapter 17, Title 6 of the Delaware Code by adding a new sentence to the end of said section to read as follows:

"Except as provided in the partnership agreement, a partner may be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him is equal to a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited partnership."

Section 38. Amend Section 17-607(b), Chapter 17, Title 6 of the Delaware Code by deleting from the last sentence of said subsection the words "a partnership", and by substituting in lieu thereof the word "an".

Section 39. Amend Section 17-702(a)(3), Chapter 17, Title 6 of the Delaware Code by adding immediately following the word "assignment", the words "of a partnership interest".

Section 40. Amend Section 17-702, Chapter 17, Title 6 of the Delaware Code by adding a new subsection to be designated as "(d)" to read as follows:

"(d) Unless otherwise provided in the partnership agreement, a limited partnership may acquire, by purchase, redemption or otherwise, any partnership interest or other interest of a partner in the limited partnership. Unless otherwise provided in the partnership agreement, any such interest so acquired by the limited partnership shall be deemed canceled."

Section 41. Amend Section 17-801(3), Chapter 17, Title 6 of the Delaware Code by deleting the word "all" in said subsection and by substituting in lieu thereof the words "not less than a majority in interest of the remaining".

Section 42. Amend Section 17-804(a)(1), Chapter 17, Title 6 of the Delaware Code by adding immediately following the words "distributions to partners", the words "and former partners".

Section 43. Amend Section 17-902(a)(1), Chapter 17, Title 6 of the Delaware Code by deleting the words "An original", and the words ", together with a duplicate copy," and by adding the word "A" immediately before the words "copy executed by a general partner".

Section 44. Amend Section 17-902(b), Chapter 17, Title 6 of the Delaware Code by adding after the words "or a partnership", the words ", a limited liability company, a business or other trust or association,".

Section 45. Amend Section 17-903(b), Chapter 17, Title 6 of the Delaware Code by deleting Section 17-903(b) in its entirety and inserting in lieu thereof the following: "(b) The Secretary of State shall prepare and return to the

person who filed the application or his representative a copy of the original signed application, similarly endorsed, and shall certify such copy as a true copy of the original signed application."

Section 46. Amend Section 17-1004, Chapter 17, Title 6 of the Delaware Code by deleting said section in its entirety and by substituting in lieu thereof the following:

"Section 17-1004. Expenses.

If a derivative action is successful, in whole or in part, as a result of a judgment, compromise or settlement of any such action, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, from any recovery in any such action or from a limited partnership."

Section 47. Amend Section 17-1101(d), Chapter 17, Title 6 of the Delaware Code by adding the words "or other person" after the words "a partner" and before the words "has duties", by adding the words "or other person" after the words "any such partner" and before the words "acting under", by adding the words "or other person's" after the words "for the partner's" and before the words "good faith reliance", and by adding the words "or other person's" after the words "and (2) the partner's" and before the words "duties and liabilities".

Section 48. Amend Section 17-1107(a)(2), Chapter 17, Title 6 of the Delaware Code by deleting "$ 10", and by substituting in lieu thereof "$ 2.50".

Section 49. Amend Section 17-1107(a)(3), Chapter 17, Title 6 of the Delaware Code by deleting the word "or" appearing after the words "under Section 17-211 of this title", and by substituting in lieu thereof a ",", and by adding after the words "under Section 17-210 of this title," the words "a certificate of termination of a merger or consolidation under Section 17-211(e) of this title, a certificate of correction under Section 17-212 of this title or a certificate of restoration under Section 17-1109(h) of this title,".

Section 50. Amend Section 17-1107(a)(4), Chapter 17, Title 6 of the Delaware Code by deleting "$ 10", and by substituting in lieu thereof "$ 20".

Section 51. Amend Section 17-1107(a)(5), Chapter 17, Title 6 of the Delaware Code by deleting "$ l per page", and by substituting in lieu thereof "$ 5 for the first page and $ 1 for each additional page copied".

Section 52. Amend Section 17-1107(a)(10), Chapter 17, Title 6 of the Delaware Code by deleting "$ 10", and by substituting in lieu thereof "$ 20".

Section 53. Amend Section 17-1109(g), Chapter 17, Title 6 of the Delaware Code by deleting said subsection in its entirety and by substituting in lieu thereof the following:

"(g) A domestic limited partnership or foreign limited partnership that neglects, refuses or fails to pay the annual tax when due shall cease to be in good standing as a domestic limited partnership or registered as a foreign limited partnership in the State of Delaware."

Section 54. Amend Section 17-1109(h), Chapter 17, Title 6 of the Delaware Code by adding at the end of said subsection the following new sentence:

"A fee as set forth in Section 17-1107(a)(3) of this title shall be paid at the time of the filing of any such certificate."

Section 55. Amend Section 2306, Chapter 23, Title 6 of the Delaware Code by deleting said section in its entirety and by substituting in lieu thereof the following:

"Section 2306. Defense of Usury as Available to Certain Entities and Associations.

No corporation, limited partnership, business trust or limited liability company, and no association or joint stock company having any of the powers and privileges of corporations not possessed by individuals or partnerships, shall interpose the defense of usury in any action."

Section 56. This Act shall become effective on August 1, 1994.

History

Approved by the Governor June 27, 1994

Delaware is chosen by many people as a forum in which to form a limited partnership. Limited partnerships are formed in Delaware under the Delaware Revised Uniform Limited Partnership Act (the "Act"). This bill continues the practice of periodically amending the Act to keep it current. The following is a section-by-section review of the amendments of the Act which are being proposed.

Section 1. Section 17-101 of the Act sets forth definitions which apply throughout the Act. Section 1 of the bill confirms that, for purposes of the Act, "knowledge" means actual knowledge, and adopts a definition of "registered limited liability limited partnership," which is a new type of limited partnership.

Section 2. This section amends Section 17-102(3) of the Act to provide that, in addition to being distinguishable from the names of corporations and other limited partnerships, the name of a limited partnership must be distinguishable from the name of a business trust, registered limited liability partnership or limited liability company.

Section 3. This section amends Section 17-103(b) of the Act to reflect the Secretary of State's current practice of requiring that only one copy of a paper which is being filed with the Secretary of State be filed.

Section 4. This section amends Section 17-107 of the Act to correct a typographical error by adding a missing comma.

Section 5. This section adds a new Section 17-110 to the Act which confirms that the Court of Chancery may hear and determine contested matters relating to the admission, election, appointment or withdrawal of a general partner. In connection with its consideration of such matters, the Court is granted various powers. The section also confirms that the Court of Chancery may hear and determine other matters relating to votes of partners in connection with a limited partnership.

Section 6. This section adds a new Section 17-111 to the Act which confirms that an action for the interpretation or enforcement of a limited partnership agreement may be brought in the Court of Chancery.

Section 7 Through Section 15. These sections make changes in Section 17-204 of the Act (dealing with the execution of certificates), Section 17-206 of the Act (dealing with the filing of certificates), and Section 17-207 of the Act (dealing with liability for false statements in certificates) to reflect two new certificates (a certificate of correction and a certificate of termination of a merger or consolidation) provision for which is made elsewhere in the bill, and provide for the payment of a fee to the Delaware Secretary of State in connection with the filing of the new certificates. Section 7 also amends Section 17-206(a) of the Act to reflect the Secretary of State's current practice of requiring that only one copy of a paper which is being filed with the Secretary of State be filed.

Section 16 Through Section 18. These sections deal with Section 17-211 of the Act which relates to mergers and consolidations involving limited partnerships. Section 16 confirms that an "other business entity" with which a limited partnership may merge or consolidate includes a limited liability company and that a general partnership includes a registered limited liability partnership. Section 17 provides for the filing of a certificate of termination of a merger or consolidation when a merger or consolidation has been abandoned after the filing of a certificate of merger or consolidation containing a future effective date or time. Section 18 adds two new subsections to Section 17-211 of the Act. New subsection (i) confirms that, subject to an agreement with a person to whom a general partner of a limited partnership is obligated, a merger or consolidation of a limited partnership does not affect any obligation or liability of the general partner existing at the time of the merger or consolidation. New subsection (j) provides that, following a merger or consolidation in which the limited partnership of which a person is a general partner is not the surviving or resulting entity, a judgment creditor may not execute against the assets of the general partner until the assets of the surviving or resulting entity of the merger or consolidation have been exhausted, unless the surviving or resulting entity is a debtor in bankruptcy, unless there is an agreement permitting execution against the assets of the general partner, unless an appropriate court order has been obtained or unless the general partner is independently liable, such as under a contract of guaranty.

Section 19. This section adds a new Section 17-212 to the Act which confirms that a partnership agreement or an agreement of merger or consolidation may provide for contractual appraisal rights, and confirms the jurisdiction of the Court of Chancery to hear and determine matters relating to contractually granted appraisal rights.

Section 20. This section adds a new Section 17-213 to the Act which provides for the use of a certificate of correction. The new section is similar to a corresponding provision found in the Delaware General Corporation Law. A certificate of correction may be used when any certificate filed with the Delaware Secretary of State under the Act is an inaccurate record of the action referred to therein or was defectively or erroneously executed. The corrected certificate is effective as of the date the original certificate was filed, except as to those persons who are substantially and adversely affected by the correction, as to whom the corrected certificate is effective from its filing date.

Section 21. This section adds a new Section 17-214 to the Act which provides for the formation of a type of limited partnership to be known as a "registered limited liability limited partnership." The new section permits a limited partnership to take advantage of, subject to the requirements of, recent amendments of Delaware's Uniform Partnership Law relating to registered limited liability partnerships. To become a registered limited liability limited partnership, in addition to complying with the requirements of the Act, a limited partnership would have to file an application under 6 Del.C. Section 1544, comply with 6 Del.C. Section 1546 relating to insurance and financial responsibility, and modify its name to indicate that it is a limited partnership which is a registered limited liability limited partnership.

Section 22 Through Section 27. These sections amend Section 17-301 of the Act. The amendments confirm that a person may be admitted to a limited partnership as a limited partner without acquiring an economic interest in the limited partnership and provide a mechanic for admitting persons as limited partners of a limited partnership following a merger or consolidation.

Section 28 Through Section 31. These sections relate to Section 17-303 of the Act which sets forth the Act's "democracy" provisions. Section 28 confirms that a limited partner may be a member, manager, agent or employee of a limited liability company which is a general partner of a limited partnership without endangering the limited partner's limited liability. Section 29 confirms that in serving on or appointing a person to serve as a representative on a committee of a limited partnership, a limited partner does not endanger its limited liability. Similarly, Section 30 confirms that in making, or calling for, or participating in a determination relating to, a capital contribution to a limited partnership, a limited partner does not endanger its limited liability. Section 31 redrafts a subsection of Section 17-303 to confirm that involvement by a limited partner in an entity in which a limited partnership has an investment or with which a limited partnership has a relationship will not cause the limited partner to lose its limited liability.

Section 32. This section amends Section 17-401(a) of the Act to confirm that a person may be admitted to a limited partnership as a general partner without acquiring an economic interest in the limited partnership.

Section 33. This section amends Section 17-402(a) of the Act to provide a catchall to the definition of what constitutes an event of withdrawal of a general partner under the Act. In the case of a general partner who is not an individual, partnership, corporation, trust or estate, which entities are covered elsewhere in the definition of events of withdrawal, termination of the general partner will constitute an event of withdrawal under the Act. An example of such an entity would be a limited liability company.

Section 34. This section amends Section 17-403 of the Act which deals with a general partner's powers and liabilities by adding two new subsections to the Act. New subsection (c) confirms the power and authority of a general partner to delegate. Unless otherwise provided in a partnership agreement, such a delegation by a general partner will not cause the general partner to cease to be a general partner of the limited partnership. New subsection (d) confirms that a judgment creditor of a general partner of a limited partnership may not execute against the assets of the general partner to satisfy a judgment based on a claim against a limited partnership unless the assets of the limited partnership have been exhausted, the limited partnership is a debtor in bankruptcy, the general partner has agreed that the assets of the limited partnership need not be exhausted, a court grants an appropriate order or liability is independently imposed on the general partner, such as under a guaranty.

Section 35. This section adds a new Section 17-505 to the Act which provides that the defense of usury is not available with respect to an obligation of a partner of a limited partnership to the limited partnership.

Section 36. This section amends Section 17-603 of the Act to confirm that a partnership agreement may provide limitations on the ability of a limited partner to withdraw from a limited partnership or to assign its partnership interest in the limited partnership.

Section 37. This section amends Section 17-605 of the Act which deals with with distributions in kind to confirm that, if a distribution in kind is being made proportionately among partners, a partner may be required to accept such a distribution.

Section 38. This section amends Section 17-607(b) of the Act to confirm that the section does not affect any obligation or liability of a limited partner under any agreement.

Section 39. This section amends Section 17-702(a)(3) of the Act to add words clarifying that the "assignment" to which reference is made in the Act is an assignment of a partnership interest.

Section 40. This section amends Section 17-702 of the Act by adding a new subsection which provides that, unless otherwise provided in a partnership agreement, a limited partnership may acquire interests of a partner in the limited partnership and that any such interest so acquired shall be deemed to be canceled.

Section 41. This section amends Section 17-801(3) of the Act to conform the Act to a position recently taken by the Internal Revenue Service. Under the circumstances described in Section 17-801(3) of the Act, the Internal Revenue Service will now permit a limited partnership to be continued upon the agreement of not less than a majority in interest of the remaining partners as contrasted with the Internal Revenue Service's previous position which required the agreement of all partners.

Section 42. This section amends Section 17-804(a)(1) of the Act to clarify the application of a limitation found in the Act relating to distributions to former partners of a limited partnership.

Section 43. This section amends Section 17-902(a)(1) of the Act to reflect the Secretary of State's current practice of requiring that only one copy of a paper which is being filed with the Secretary of State be filed.

Section 44. This section amends Section 17-902(b) of the Act relating to foreign limited partnerships to provide that a foreign limited liability company or business or other trust or association will not be deemed to be doing business in Delaware solely by reason of its being a partner in a Delaware limited partnership.

Section 45. This section amends Section 17-903(b) of the Act to reflect the Secretary of State's current practice of requiring that only one copy of a paper which is being filed with the Secretary of State be filed.

Section 46. This section amends Section 17-1004 of the Act relating to the recovery of expenses in a derivative action involving a limited partnership to conform the text of the section to similar provisions found elsewhere in Delaware law.

Section 47. This section amends Section 17-1101(d) of the Act to confirm that provisions found in a partnership agreement relating not only to the duties and liabilities of partners, but also to the duties and liabilities of other persons, are enforceable.

Section 48 Through Section 52. These sections amend Section 17-1107 of the Act relating to fees to add to the Act fees in connection with the filing of the new certificate of termination of a merger or consolidation and the new certificate of correction provided for in this bill, and for the filing of the certificate of restoration provided for under Section 17-1109(h) of the Act. The sections also increase certain fees now provided for in the Act.

Section 53. This section amends Section 17-1109(g) of the Act to provide that a limited partnership which has failed to pay its annual tax when due shall cease to be in good standing on the date the tax was due but not paid.

Section 54. This section amends Section 17-1109(h) of the Act which provides for the use of a certificate of restoration in a situation in which a limited partnership has failed to pay its annual tax and wishes to be restored to good standing. The section provides for the payment of a fee in connection with the use of such a certificate.

Section 55. This section amends Section 2306 of Title 6 of the Delaware Code dealing with the defense of usury to provide that a limited partnership, business trust or limited liability company may not raise a defense of usury in any action.

Section 56. This section provides that the amendments shall become effective on August 1, 1994.

Sponsor

Sen. Sharp; Rep. Smith

End of Document

2009 Del. HB 142

Enacted, June 26, 2009

Reporter
2009 Del. ALS 69; 77 Del. Laws 69; 2009 Del. HB 142

DELAWARE ADVANCE LEGISLATIVE SERVICE > DELAWARE 145TH GENERAL ASSEMBLY > CHAPTER 69 > HOUSE BILL 142

Synopsis

AN ACT TO AMEND TITLE 6 OF THE DELAWARE CODE RELATING TO THE CREATION, REGULATION, OPERATION AND DISSOLUTION OF DOMESTIC LIMITED PARTNERSHIPS AND THE REGISTRATION AND REGULATION OF FOREIGN LIMITED PARTNERSHIPS.

Text

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1.

Amend Section 17-111, Chapter 17, Title 6 of the Delaware Code by inserting the words “or any provision of this chapter, or any other instrument, document, agreement or certificate contemplated by any provision of this chapter,” immediately before the words “may be brought”.

Section 2.

Amend Section 17-211(c) (4), Chapter 17, Title 6 of the Delaware Code by inserting the words “, registered office or registered agent” immediately after the words “to change its name”.

Section 3.

Amend Section 17-211(g), Chapter 17, Title 6 of the Delaware Code by inserting the words “and shall be effective notwithstanding any provision of the partnership agreement relating to amendment or adoption of a new partnership agreement, other than a provision that by its terms applies to an amendment to the partnership agreement or the adoption of a new partnership agreement, in either case, in connection with a merger or consolidation” immediately before the “.” in the second sentence thereof.

Section 4.

Amend Section 17-302(f), Chapter 17, Title 6 of the Delaware Code by inserting the words, “, including as permitted by Section 17-211(g) of this title” immediately after the words “as otherwise permitted by law” in the first sentence thereof and by inserting the words “, including as permitted by Section 17-211(g) of this title” immediately before the “.” in the second sentence thereof.

Section 5.

Amend Section 17-1101, Chapter 17, Title 6 of the Delaware Code by inserting a new subsection (h) at the end of such section reading as follows:

"(h) Action validly taken pursuant to one provision of this chapter shall not be deemed invalid solely because it is identical or similar in substance to an action that could have been taken pursuant to some other provision of this chapter but fails to satisfy one or more requirements prescribed by such other provision."

Section 6.

This Act shall become effective August 1, 2009.

History

Approved by the Governor June 26, 2009

This bill continues the practice of amending periodically the Delaware Revised Uniform Limited Partnership Act (the "Act") to keep it current and to maintain its national preeminence. The following is a section-by-section review of the proposed amendments of the Act. Section 1. This section amends Section 17-111 of the Act to clarify the jurisdiction of the Court of Chancery with respect to matters pertaining to Delaware limited partnerships. Section 2. This section amends Section 17-211(c)(4) of the Act to permit a change of the registered office or registered agent to be set forth in a certificate of merger filed by a surviving domestic limited partnership. Section 3. This section amends Section 17-211(g) of the Act to confirm the ability by merger or consolidation to amend a partnership agreement or adopt a new partnership agreement for a limited partnership that is the surviving or resulting limited partnership in a merger or consolidation by obtaining the approval required by Section 17-211(b) of the Act, unless the partnership agreement by its terms limits such amendment or adoption. Section 4. This section amends Section 17-302(f) of the Act to confirm that each reference in such section to "as otherwise permitted by law" includes an amendment made as permitted by Section 17-211(g) of the Act. Section 5. This section amends Section 17-1101 of the Act to clarify that the doctrine of independent legal significance, as developed in Delaware corporation law, applies in the context of Delaware limited partnerships. The amendment is not intended to limit development or application, with respect to Delaware limited partnerships, of the doctrine of independent legal significance as developed in cases arising under Delaware corporation law. Section 6. This section provides that the proposed amendments of the Act shall become effective August 1, 2009.

Sponsor

Marshall M

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AM Gen. Holdings LLC v. Renco Group, Inc.

Court of Chancery of Delaware

May 23, 2016, Submitted; August 22, 2016, Decided

C.A. No. 7639-VCS, C.A. No. 7668-VCS

Reporter
2016 Del. Ch. LEXIS 132 *

AM GENERAL HOLDINGS LLC, directly and derivatively on behalf of Ilshar CAPITAL LLC, Plaintiff v. THE RENCO GROUP, INC., IRA L. RENNERT, and ILR CAPITAL LLC, Defendants, and ILSHAR CAPITAL LLC, Nominal Defendant. THE RENCO GROUP, INC., Plaintiff, v. MacANDREWS AMG HOLDINGS LLC, MacANDREWS & FORBES HOLDINGS INC., and RONALD O. PERELMAN, Defendants, and AM GENERAL HOLDINGS LLC, Nominal Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Subsequent History: Rehearing denied by *AM Gen. Holdings LLC v. Renco Group, Inc., 2016 Del. Ch. LEXIS 168 (Del. Ch., Nov. 10, 2016)*

Prior History: *AM Gen. Holdings LLC v. Renco Group, Inc., 2012 Del. Ch. LEXIS 289 (Del. Ch., Dec. 21, 2012)*

LexisNexis® Headnotes

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN1[] **Affirmative Defenses, Statute of Limitations**

See *Del. Code Ann. tit. 10, § 8108*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] Entitlement as Matter of Law, Appropriateness

The function of summary judgment is the avoidance of a useless trial when there is no genuine issue as to any material fact. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Del. Ch. Ct. R. 56(c). A fact is material if it might affect the outcome of a suit under the governing law. A material issue of fact exists if a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Need for Trial

HN3[] Entitlement as Matter of Law, Genuine Disputes

The movant bears the initial burden of demonstrating that there is no question of material fact. When the movant carries that burden, the burden shifts to the nonmoving party to present some specific, admissible evidence that there is a genuine issue of fact for trial. A court must view the evidence most favorably to the non-moving party. Del. Ch. Ct. R. 56(e). Even so, the non-moving party may not rely on allegations or denials in the pleadings to create a material factual dispute.

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > Preliminary Considerations > Equity > Relief

HN4[] Equity, Adequate Remedy at Law

The statute of limitations at *Del. Code Ann. tit. 10, § 8106* requires a plaintiff to bring a breach of contract claim within three years of the accrual of the cause of action. The cause of action for a breach of contract accrues at the moment of the wrongful act, even if the plaintiff is ignorant of the wrong. Although statutes of limitations are not controlling in equity, equity follows the law and, in appropriate circumstances, applies the statute of limitations by analogy, denying relief when claims are brought after the analogous statutory period.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Contracts Law > ... > Damages > Types of Damages > Compensatory Damages

Contracts Law > ... > Damages > Types of

Damages > Consequential Damages

HN5[] Breach of Contract Actions, Elements of Contract Claims

Legal claims seeking legal relief include a breach of contract claim requesting money damages.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN6[] Affirmative Defenses, Laches

A finding of laches generally requires the presence of three factors: a claimant's knowledge of the claim, unreasonable delay in bringing the claim, and resulting prejudice to the defendant.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN7[] Affirmative Defenses, Statute of Limitations

Del. Code Ann. tit. 10, § 8108 provides that in the case of a mutual, running account between the parties, the limitation, specified in *Del. Code Ann. tit. 10, § 8106*, shall not begin to run while such account continues open and current.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN8[] Breach of Contract Actions, Elements of Contract Claims

In Delaware, the courts have defined a mutual running account as one account upon which the items of either side belong and on which they would reciprocally operate so that a balance between the two may be ascertained.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Intent

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN9[] Breach of Contract Actions, Elements of Contract Claims

No particular format is required for an account to be deemed mutual and running; instead, a court looks to whether the parties intended that their respective entries would contribute to one account subject to future settlement or resolution. The two sides of that account must be linked or connected in some way by an express or implied agreement under which entries on each side of the ledger reciprocally offset so that the balance between the two may be determined. The statute of limitations does not begin to run on a claim relating to a mutual, running account until the date the account is closed.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN10[] Breach of Contract Actions, Elements of Contract Claims

Delaware statutes of limitations proceed on the principle, that it is to the interest of the public to afford a security against the prosecution of claims, when from lapse of time, the circumstances showing the true nature or state of the transaction may be incapable of explanation by reason of delay. The mutual, running accounts rule derives from a particular application of the familiar principle that statutes of limitations do not begin to run until a cause of action accrues. The concerns regarding stale claims that animate statutes of limitations do not arise when facts that beget the cause of action have not played out and the cause of action, therefore, has not yet accrued.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Intent

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN11[] Breach of Contract Actions, Elements of Contract Claims

In the case of a mutual, running account, the gravamen of the parties' dispute against one another is a single number—the balance of the mutual, running account they share—and thus the cause of action's accrual date resets each time that number changes. Stepwise transactions that contribute to the aggregate ending balance are baked into the controversy regarding the final number for statute of limitations purposes. Accounts of this nature can arise either from express creation or impliedly by conduct evidencing the parties' mutual intent continuously to adjust reciprocal demands as part of an unsettled course of dealing.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN12[] Breach of Contract Actions, Elements of Contract Claims

The ne plus ultra mutual, running account for purposes of *Del. Code Ann. tit. 10, § 8108* is an account maintained by two parties that, at any given point in time, shows a positive balance for one side and a negative balance for the other. In other words, the account would carry a theoretical single balance that would fluctuate as offsetting debits and credits were posted to the ledger. Every entry therefore necessarily would be reciprocal.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN13[] **Affirmative Defenses, Statute of Limitations**

Statutes of limitations generally do not begin to run until all of the elements of a claim have occurred. In the context of breach of contract claims, the date of breach typically supplies the accrual date as the elements of the claim can be linked to the act constituting the breach. If the continuing breach exception applies, however, the statute begins to run the moment full damages can be determined and recovered, which may not happen until the contract terminates. The continuing breach doctrine is narrow and typically is applied only in unusual situations.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN14[] **Affirmative Defenses, Statute of Limitations**

To determine whether a breach (or series of breaches) is continuing, Delaware courts consider whether the breach(es) can be divided such that the plaintiff could have alleged a prima facie case for breach of contract after a single incident. If so, the courts have determined that the continuing breach doctrine does not apply even when confronted with numerous repeated wrongs of similar, if not same, character over an extended period. Stated differently, the doctrine of continuing breach will not serve to extend the accrual date for a breach of contract claim when the alleged wrongful acts are not so inexorably intertwined that there is but one continuing wrong.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Construction Contracts

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Real Property Law > ... > Liens > Nonmortgage Liens > Mechanics' Liens

HN15[] **Types of Contracts, Construction Contracts**

The general purpose inquiry in the context of mechanics' liens or construction contracts informs whether parties to a contract intended the contract to be continuous or severable.

Evidence > Burdens of Proof > Allocation

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > Tolling

HN16[] **Burdens of Proof, Allocation**

Application of the time of discovery rule delays the starter's gun for the statute of limitation in certain narrowly carved out limited circumstances when

the facts at the heart of the claim are so hidden that a reasonable plaintiff could not timely discover them. These scenarios include instances: (1) wherein the defendant has fraudulently concealed key facts; (2) wherein the injury was inherently unknowable such that discovery of its existence is a practical impossibility; and (3) wherein a plaintiff reasonably relies on the competence and good faith of a fiduciary who is alleged to have engaged in wrongful self-dealing (also referred to as the equitable tolling doctrine). In any of these factual circumstances, the time of discovery rule operates to toll the statutory period until the claimant is on inquiry notice of its claim—that is, until facts surface that would lead a reasonably prudent person to discover the wrong. A plaintiff bears the burden of proving that tolling for the time it took to discover its claims is appropriate.

Governments > Legislation > Statute of Limitations > Tolling

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN17[] **Statute of Limitations, Tolling**

Delaware courts have tolled the statute of limitations when the plaintiffs were demonstrably unaware of the injury they had sustained at the hands of contractors or consultants they had every reason to trust not to injure them.

Contracts Law > ... > Affirmative Defenses > Statute of Limitations > Equitable Estoppel

Torts > ... > Statute of Limitations > Tolling > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN18[] **Statute of Limitations, Equitable Estoppel**

Under the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of fraudulent concealment, wherein a plaintiff reasonably relies on the competence and good faith of a fiduciary. This tolling exception aims to ensure that fiduciaries cannot use their own success at concealing their misconduct as a method of immunizing themselves from accountability for their wrongdoing.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

HN19[] **Limited Liability Companies, Management Duties & Liabilities**

While managing members of a Delaware limited liability companies may owe default fiduciary duties, the Delaware Limited Liability Company Act, *Del. Code Ann. tit. 6, § 18-101 et seq.*, enables contracting parties to alter and even eliminate equitable fiduciary duties in the limited liability company context. *Del. Code Ann. tit. 6, § 18-1101(c)*.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN20[] **Preclusion of Judgments, Law of the Case**

The law of the case doctrine requires that issues already decided by the same court should be adopted without relitigation, and once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless a compelling reason to do so appears.

Civil Procedure > ... > Pleadings > Amendment

of Pleadings > Relation Back

HN21[] **Amendment of Pleadings, Relation Back**

See Del. Ch. Ct. R. 15(c)(2).

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN22[] **Breach of Contract Actions, Elements of Contract Claims**

For relation back purposes, a separate independent violation of the same contract provision does not arise out of the same conduct, transaction or occurrence as did the first, unrelated violation.

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Judges: Joseph R. Slights III, Vice Chancellor.

Opinion by: Joseph R. Slights III

Opinion

MEMORANDUM OPINION

SLIGHTS, Vice Chancellor

I. INTRODUCTION

Two business ventures pairing the plaintiff, The Renco Group, Inc. ("Renco"), with defendant, MacAndrews AMG Holdings **[*2]** LLC ("MacAndrews AMG"), have brought much success to their investors. Unfortunately, the attempt at collaboration has also generated seemingly endless litigation between the members as they battle over the distribution of profits from both joint ventures. This action, involving one of those ventures, AM General Holdings LLC ("Holdco"), was initiated more than four years ago, in June 2012. Since then the parties have litigated parallel actions with remarkable intensity.[1] In this

[1] *See, e.g.*, *AM Gen. Hldgs. LLC v. The Renco Gp., Inc., 2015 Del. Ch. LEXIS 149, 2015 WL 3465956 (Del. Ch. May 29, 2015)*; *AM Gen. Hldgs. LLC v. The Renco Gp., Inc., 2015 Del. Ch. LEXIS 104, 2015 WL 1726418 (Del Ch. Apr. 9, 2015)*; *The Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC, 2015 Del. Ch. LEXIS 25, 2015 WL*

latest motion, styled as a motion for partial summary judgment, MacAndrews AMG seeks an order declaring that the statute of limitations bars Renco from recovering damages on its claims that MacAndrews AMG breached Holdco's operating agreement to the extent the damages were sustained more than three years before Renco filed its complaint.[2] MacAndrews AMG acknowledges that the statute of limitations, on any reading of the record, does not bar the entirety of Renco's three separate breach of contract claims. Nevertheless, it maintains that the motion, if granted, will "substantially reduce the scope and stakes of this litigation."[3]

Renco opposes the motion on three alternative grounds: either the statute of limitations has not begun to run because the breaches relate to mutual, running accounts that have not yet closed;[4] or the claims of breach have not yet accrued because the breaches are continuous; or the statute of limitations was tolled because Renco was unable to discover the breaches until substantially after they occurred.

After carefully reviewing the record and the parties' submissions, I am satisfied that the parties' complex business association in Holdco did not involve a mutual, running account. Renco has alleged **[*4]** clearly divisible and separately actionable breaches of the Holdco Agreement which do not arise from a single, perpetual account. Nor does the record support Renco's contention that MacAndrews AMG has engaged in a single, continuous breach of contract such that its claims for breach will not accrue until the Holdco Agreement is terminated. If they have occurred, the breaches have been separate and any related causes of action accrued at the time of breach. Finally, the undisputed record offers no bases for Renco to advance a "time of discovery" or "equitable tolling" rejoinder to MacAndrews AMG's well-supported statute of limitations defense. Renco knew or should have known of the alleged breaches at the time they occurred.

Each of the separate breach claims at issue in this motion is subject to a three year statute of limitations that began to run at the time of breach. Accordingly, MacAndrews AMG's motion for partial summary judgment must be granted.

II. FACTUAL BACKGROUND

A. The Parties and Their Joint Venture

Prior to August 2004, Renco was the sole member of AM General LLC ("AM General"), a Delaware limited liability company that manufactured and sold specialized vehicles including, **[*5]** among others, a military vehicle known as the "Humvee."[5] In August 2004, Renco and MacAndrews & Forbes Holdings Inc. ("MacAndrews & Forbes") negotiated a rather complex joint-venture transaction. Pursuant to the Holdco Agreement, which memorialized the transaction, the parties

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394011 (Del. Ch. Jan. 29, 2015); *AM Gen. Hldgs. LLC v. The Renco Gp., Inc., 2014 Del. Ch. LEXIS 246, 2014 WL 6734250 (Del. Ch. Nov. 28, 2014)*; *AM Gen. Hldgs. LLC v. The Renco Gp., Inc., 2013 Del. Ch. LEXIS 266, 2013 WL 5863010 (Del. Ch. Oct. 31, 2013)*; *The Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC, 2013 Del. Ch. LEXIS 155, 2013 WL 3369318 (Del. Ch. June 25, 2013)*; *AM Gen. Hldgs. LLC v. The Renco Gp. Inc., 2013 Del. Ch. LEXIS 102, 2013 WL 1668627 (Del. Ch. Apr. 18, 2013)*; *AM Gen. Hldgs. LLC v. The Renco Gp., Inc., 2012 Del. Ch. LEXIS 289, 2012 WL 6681994 (Del. Ch. Dec. 21, 2012)*.

[2] *See* Limited Liability Company Agreement of AM General Holdings **[*3]** LLC ("Holdco Agreement"), attached as Ex. A to the Transmittal Aff. of Meghan M. Dougherty in Supp. of MacAndrews AMG Holdings LLC's Mem. of Law in Supp. of its Mot. for Partial Summ. J. ("Dougherty Aff. 1"). In an earlier decision, this Court dismissed claims against all defendants except MacAndrews AMG. *See* *Renco, 2015 Del. Ch. LEXIS 25, 2015 WL 394011, at *4, *11*.

[3] MacAndrews AMG Holdings LLC's Mem. of Law In Supp. of Its Mot. for Partial Summ. J. 2.

[4] *See* *10 Del. C. § 8108* (***HN1***[↑] "In the case of a mutual and running account between parties, the limitation specified in *§ 8106* [three years] of this title shall not begin to run while such account continues open and current.").

[5] Verified Second Am. Compl. ("SAC") ¶ 3.

created Holdco as the entity through which the joint venture would be executed. Renco contributed AM General to Holdco along with its wholly owned subsidiary, General Engine Products LLC ("GEP").[6] For its part, MacAndrews & Forbes, through its wholly-owned subsidiary, MacAndrews AMG, contributed cash.[7]

As part of the joint-venture transaction, Holdco and ILR Capital LLC **[*6]** ("ILR Capital"), a Renco affiliate, also formed and became members of Ilshar Capital LLC ("Ilshar"), a company that made investments for the benefits of its members. MacAndrews AMG was designated as the managing member of Holdco; ILR Capital was designated as managing member of Ilshar.[8] The joint-venture structure thus contemplated that MacAndrews AMG and Renco each would maintain minority interests in the entity managed by the other party.[9]

B. The Holdco Agreement

Under the Holdco Agreement, Renco and MacAndrews AMG each maintain capital accounts in Holdco to reflect their interests in the enterprise.[10] Renco's capital account began at roughly $387 million, which reflected the value of its initial capital contribution.[11] MacAndrews AMG's capital account began at $110 million.[12] The balance in each capital account fluctuates based on a contractually-defined allocation and distribution scheme. Renco is entitled to a preferred allocation of $15 million annually if AM General hits certain performance benchmarks, 100% of the profits (and 100% of the losses) from activities related to GEP's sale of its 6.5L Diesel Engines **[*7]** (the "GEP Business") and 30% of the profits (and 30% of the losses) generated by AM General after deductions of the $15 million preferred allocation and distributions from the GEP Business.[13] MacAndrews AMG retains the remaining 70% of AM General's profits and losses.[14]

The parties' capital accounts diminish each time Holdco makes a distribution, which occurs periodically.[15] According to Renco, MacAndrews AMG received $1.7 billion in distributions from Holdco between August 2004 and December 31, 2011.[16] The capital accounts are to remain open until Holdco is liquidated, at which point each Holdco member will receive the balance in its account.[17]

To account for the fact that MacAndrews AMG maintains sole and exclusive management authority over AM General and GEP,[18] Renco sought and obtained a number of contractual protections to

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[6] *Id.* ¶¶ 4, 65. GEP builds and sells engines—principally a 6.5-liter diesel engine (the "6.5L Diesel Engine")—to customers that include AM General. AM General uses GEP's engines in at least two ways: for installation in new Humvees and for sale as replacement parts in existing Humvees. The latter practice occurs through AM General's service, parts and logistics division ("SPLO"). *Id.*

[7] MacAndrews AMG's $110 million contribution amounted to 22.13% of the total contributions made to Holdco. Holdco Agreement sched. A.

[8] *Id.* ¶¶ 28, 31; Holdco Agreement §§ 1.1, 6.1.

[9] *See* Compl. ¶¶ 30-31; Holdco Agreement §§ 6.1-.4.

[10] Holdco Agreement § 4.3.

[11] SAC ¶ 33; Holdco Agreement sched. A.

[12] *See* sources cited *supra* note 11.

[13] Holdco Agreement § 8.1.

[14] *Id.*

[15] *Id.* §§ 4.3, 9.1.

[16] SAC ¶ 36.

[17] *Id.* ¶¶ 34-35.

[18] Holdco Agreement § 6.2(d) ("[T]he Managing Member shall have the power and authority to . . . direct the management of the AM General Business, including setting its policy and overall direction, [and] managing the day-to-day business operations and affairs of AM General and its Subsidiaries, supervising their officers and directors, appointing and terminating their officers and employees and delegating duties to such Persons . . . ."); *id.* § 1.1 (defining "Managing Member" as MacAndrews AMG).

ensure its investment was managed fairly.[19] Several provisions in the Holdco Agreement arguably serve that purpose:

> **Section 6.2(d)** — requires that "all transactions" between "AM General or any of its Subsidiaries, on one hand, and a Member or any Affiliates **[*8]** thereof, on the other hand, shall be no less favorable . . . than would be the case in an arms'-length transaction."
>
> **Section 6.4(c)** — requires Renco's approval for certain actions, including "any sale, transfer, distribution or other disposition of any of the assets or Capital stock of GEP, other than . . . in the Ordinary Course of Business."
>
> **Section 6.4(s)** - requires mutual consent for "the payment of a management fee or similar fee . . . by[ ] [Holdco], AM General or any of its Subsidiaries," to "an affiliate" of MacAndrews AMG or MacAndrews & Forbes . . . .
>
> **Section 8.1(a)** — provides Renco with a preferred allocation of "[a]ll GEP Profits and Losses . . . ." **Section 8.3(b)** - allows Renco to cause MacAndrews AMG to distribute cash to Renco if MacAndrews AMG's Revalued Capital Account falls (or will fall) below the level specified in § 9.4(c).
>
> **Section 9.4(c)** - bars distributions to MacAndrews AMG if MacAndrews AMG's Revalued Capital Account would, as a result, become "equal to or less than 20% of the aggregated Revalued Capital Account of all Members."
>
> **Section 10.1** — requires MacAndrews AMG to maintain "books of account" for Holdco which are "open to inspection and examination at reasonable times by each Member" and to supply detailed financial information annually and performance **[*9]** reports monthly to each Member.
>
> **Section 12.3(a)** — preserves "the duties and liabilities of a Covered Person otherwise existing at law or in equity" unless the Holdco Agreement restricts those duties and liabilities.[20]

[*10] C. Renco Uncovers Practices Relating to GEP That It Alleges Breach the Holdco Agreement

Renco alleges that MacAndrews AMG has engaged in an ongoing scheme "to unfairly enrich [the Defendants] at the expense of minority stake-holders" by leveraging its position as managing member of Holdco to drive down profits from the GEP Business in a manner that has resulted in diminished distributions to the Renco capital account.[21] MacAndrews AMG has targeted three aspects of this alleged scheme that involve claims of breach of the Holdco agreement that it asserts are time barred by the statute of limitations—Renco's claims that MacAndrews AMG caused: (1) AM General to charge GEP unauthorized management fees and royalties; (2) AM General to charge engineering, research and development ("ER&D") costs unrelated to the 6.5L Diesel Engine to the GEP Business; and (3) GEP to charge AM General unjustifiably low prices for its engines (so-called "transfer pricing").[22]

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[19] SAC ¶ 37.

[20] *See* *Renco, 2015 Del. Ch. LEXIS 25, 2015 WL 394011, at *2* (discussing in detail the structure and relevant provisions of the Holdco Agreement) (internal footnotes omitted). The Holdco Agreement defines the "Revalued Capital Account" of each member as "the Capital Account balance such Member would have if all of the assets of the Company were sold for their respective gross fair market values . . . and the resulting Profits, Losses, and all other items of income, gain, loss and deduction were allocated to the Members pursuant to Sections 8.1, 8.2, 8.3 and 8.4." Holdco Agreement § 4.4.

[21] *Id.* ¶ 7.

[22] *Id.* ¶¶ 51-68.

1. The Unauthorized Management Fees and Royalties

Renco's distrust of MacAndrews AMG reared as early as July 19, 2005. On that date, Renco's outside counsel, Michael C. Ryan, sent a letter to MacAndrews & Forbes accusing MacAndrews **[*11]** AMG of violating the Holdco Agreement by implementing inappropriate "royalty and management fee arrangements."[23] According to Mr. Ryan, those "arrangements" had been put in place "at some point after the creation of [the] joint venture" and were later memorialized in a Management Agreement between AM General and GEP, effective as of August 10, 2004.[24] Mr. Ryan stated that Renco first received a copy of the Management Agreement on June 24, 2005.[25] The letter then cited Sections 6.4 and 8.1 of the Holdco Agreement in support of Renco's claim that MacAndrews AMG was in breach of contract[26] — the same two provisions Renco now cites in support of its breach claims in this action—and quantified the damages suffered to date.[27] Mr. Ryan included in his letter a request that MacAndrews AMG agree to submit aspects of the dispute to arbitration.[28]

By letter dated August 1, 2005, Barry F. Schwartz, general counsel for MacAndrews & Forbes, responded to Renco's charge that royalties and management fees paid to MacAndrews AMG were unauthorized and in breach of the Holdco Agreement. In doing so, Mr. Schwartz highlighted MacAndrews AMG's "broad authority" as managing member "to manage the day-to-day business and operations of AM General and its subsidiaries," and countered Renco's position that the decisions to authorize either the royalties or management fees were significant enough to require Renco's consent.[29] Mr. Schwartz closed his letter by committing to discuss the issues further.[30] The parties did not resolve the issue and the royalties and management fees continued to be billed to and paid by GEP. They are now a component of Renco's breach claim.

2. The Unauthorized ER&D Costs

Renco has consistently maintained that the Holdco Agreement allows only ER&D costs relating to the development of the 6.5L Diesel Engine to be charged to the GEP Business when calculating GEP Profits **[*13]** and Losses for purposes of making distributions to Holdco members. Yet, according to Renco, MacAndrews AMG charged to the GEP Business more than $130 million of ER&D costs associated with engines other than the 6.5L Diesel without explanation or justification.[31] AM General has charged these ER&D costs to the GEP Business since as early as November 2006, as Renco was aware.[32]

Renco kept tabs on its investment by attending AM General's monthly business review meetings.[33] During 2006 and 2007 Renco learned that GEP sought to expand its business by meeting with potential partners and investigating new engine models—that is, engines other than the 6.5L Diesel Engine.[34] Relatedly, in 2006 and 2009, Renco

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[23] Dougherty Aff. 1 Ex. C (July 19, 2005 Letter) 1-3.

[24] *Id.* The Management Agreement obligated GEP to pay AM General royalties of 2.5% for the use of AM General intellectual property and a monthly management fee in excess of $100,000. Dougherty Aff. 1 Ex. B (Management Agreement) § 4(b)-(c).

[25] July 19, 2005 Letter 2.

[26] *Id.* 1-3.

[27] *Id.* 6; SAC ¶¶ 108-09, 114; *see also* Transmittal Aff. of William J. Natbony ("Natbony **[*12]** Aff.") Ex. H (Consulting Report) 6 (quantifying royalty payments and management fees for select periods).

[28] July 19, 2005 Letter 3.

[29] Dougherty Aff. 1 Ex. F 2-5.

[30] *Id.*

[31] SAC ¶¶ 61-64.

[32] Dougherty Aff. 1 Ex. D; *see* sources cited *infra* note 34.

[33] Consulting Report 3.

[34] *See* Transmittal Aff. of Meghan M. Dougherty in Supp. of MacAndrews AMG Holdings LLC's Reply Br. in Supp. of its Mot.

received information indicating that GEP had incurred development expenses associated with different engines.[35] MacAndrews AMG continued to charge these ER&D costs to the GEP Business and this practice is now a component of Renco's breach claim.[36]

3. The Unauthorized Transfer Pricing

GEP profits and losses are directly affected by **[*15]** the prices at which it sells engines to AM General. Higher prices mean more profit for GEP as seller and less for AM General as buyer. In its Second Amended Complaint, Renco alleged for the first time in the litigation that MacAndrews AMG caused GEP to manipulate the transfer prices of engines sold to AM General in a manner that improperly shifted profits from Renco's capital account to MacAndrews' AMG's capital account.[37] But Renco had directed that allegation against MacAndrews AMG as early as December 2005.[38]

In September 2005, Renco advised AM General that it had retained independent accountants at Crowe Chizek & Co. LLC ("Crowe Chizek") "to examine the books of account of AM General for the purpose of confirming the accuracy of information received from the Company."[39] During October and November 2005, Crowe Chizek completed diligence at Renco's direction, which entailed inquiring about "transfer pricing between GEP and [AM General]," AM General's "methodology for pricing engines," any "price list[s] for different engines," and a "contract between [AM General] and GEP fixing the prices."[40] Perhaps most pointedly, in a November 21, 2005 email, Crowe Chizek **[*16]** indicated it needed "a better understanding" of "sales between [AM General] and GEP," and asked an AM General employee:

> What is the rationale for sales to GM and [AM General] being 15% lower than other customers (I'm guessing that it is volume related). Is there a contract for GM and [AM General] prices that I can agree [sic] the sales prices to? Renco has also asked that I sample some of the other sales prices. When would GEP be able to justify a price increase to AMG? In one of your notes you mentioned that there was a price increase in 2003.[41]

In a response letter dated December 5, 2005, MacAndrews AMG took the position that "inquiries concerning the potential for intercompany price adjustments" were "beyond the scope of the review of [AM General's] books and records that Crowe has been authorized to pursue."[42] It nonetheless explained that it had conducted an internal review and concluded that "a decrease in such prices is justified to reflect the recent price concessions that [AM General] and SPLO granted to the government for fiscal years 2005-2007."[43]

Crowe Chizek disagreed. In the report it

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for Partial Summ. J. ("Dougherty Aff. 2") Ex. A (indicating **[*14]** that during a business review meeting on April 26, 2006, GEP reported that it "took a business group to Austria to review the Steyr engine" and met with "Cummins . . . and . . . learned of a developed, but not fielded V6 diesel . . . that we will follow up on"); Dougherty Aff. 2 Ex. B (indicating that during a business review meeting on June 21, 2006, GEP reported that it "[c]ontinued discussions with Steyr Motors" and "[p]articipated in field demonstration and limited technical discussions"); Dougherty Aff. 2 Ex. C (indicating that during a business review meeting on December 18, 2007, GEP reported that its current and future engine development programs included numerous models aside from the 6.5L Diesel Engine).

[35] Dougherty Aff. 1 Ex. D (February 1, 2007 email indicating that GEP's "G&A" expenses—presumably referring to general and administrative expenses—included "development work on the ECV 1.5 engine"); Dougherty Aff. 2 Ex. E (July 16, 2009 email providing an account readout listing "IR&D" "Project Expenses" as including costs associated with "P250 and Steyr Projects" as well as "P200, P300 and P400 engines").

[36] SAC ¶¶ 61-64.

[37] *Id.* ¶¶ 66-69.

[38] *See* Dougherty Aff. 1 Ex. E.

[39] Natbony Aff. Ex. F.

[40] Natbony Aff. Ex. G.

[41] Dougherty Aff. 1 Ex. G.

[42] Dougherty Aff. 1 Ex. E

[43] *Id.*

ultimately **[*17]** submitted to Renco, dated December 2, 2005, Crowe Chizek indicated that GEP's "selling prices to [AM General] and GM are less than the prices to other customers due to the volume of engines purchased."[44] Renco chose not to pursue its claim relating to transfer pricing until it filed its Second Amended Complaint in this litigation.

D. Procedural History

Renco filed its initial complaint on June 29, 2012. That complaint contains allegations that MacAndrews AMG manipulated the capital accounts through the use of management fees, royalties, and improper ER&D cost apportionment. It does not mention transfer pricing. Transfer pricing allegations first appeared in the Second Amended Complaint, which was filed on February 7, 2014. That complaint sets forth nine causes of action on theories of breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duties, aiding and abetting breaches of contract and fiduciary duties, tortious interference **[*18]** with contract, fraudulent transfer, and related requests for declaratory judgment.

This Court's January 29, 2015 ruling on Defendants' motion to dismiss whittled extant claims down to three—all that remain are Renco's claims against MacAndrews AMG for breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), and related requests for declaratory judgment (Count VIII).[45] The surviving claims include allegations that MacAndrews AMG caused Holdco to make inappropriate loans to MacAndrews AMG affiliates, that MacAndrews AMG refused to disclose certain information in contravention of Section 10.1 of the Holdco Agreement and that MacAndrews AMG took distributions at inappropriate times given the state of the members' capital accounts.[46] The Motion does not address these allegations; the only claims MacAndrews AMG has challenged on statute of limitations grounds are breach of contract claims relating to management fees, royalties, ER&D costs, and transfer pricing.

The parties do not dispute that much, if not most, of **[*19]** the conduct giving rise to Renco's claims relating to management fees, royalties, ER&D costs, and transfer pricing occurred long before the three years preceding the filing of Renco's complaint on June 29, 2012. Indeed, the conduct that has prompted Renco to allege that MacAndrews AMG breached the Holdco Agreement by charging excessive management fees and royalties began as early as twelve years ago;[47] the claim alleging improper ER&D charges to the GEP Business relates to conduct that began as early as ten years ago.[48] When Renco filed its Second Amended Complaint on February 7, 2014, the facts relating to its transfer pricing claim were nearly ten years old.[49]

Knowing full well that the statute of limitations is

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[44] Consulting Report 5. The consulting report further indicates that Crowe Chizek had "analyzed the sales transactions between GEP and [AM General] for the months of November 2003, May 2004, November 2004 and May 2005." *Id.*

[45] *Renco, 2015 Del. Ch. LEXIS 25, 2015 WL 394011, at *11*. Counts numbered III, IV, V, VI, VII, and IX were dismissed, which explains why the remaining Counts lack numerical continuity.

[46] SAC ¶¶ 72-94, 117-19.

[47] The Management Agreement obligating GEP to pay AM General management fees and royalties is dated August 10, 2004, and provides that payments would commence October 31, 2004. Management Agreement § 4.

[48] See Dougherty Aff. 1 Ex. D (indicating that GEP incurred "Engineering" costs unrelated to the 6.5L Diesel Engine during November 2006).

[49] According to MacAndrews AMG, the three-year statute of limitations (1) limits recovery for any improperly charged management fees, royalties, and ER&D costs to those charged after June 29, 2009 (three years **[*20]** before Renco asserted those claims in the initial complaint); and (2) limits recovery for all transfer pricing-related damages to those incurred after February 7, 2011 (three years before Renco asserted that claim in the Second Amended Complaint).

implicated here, Renco has packaged its multiple breach claims into a single box that it labels MacAndrews AMG's "manipulat[ion] [of] the calculation of the Capital Accounts of Holdco."[50] In doing so, Renco would have the Court characterize its capital account as a "mutual running account." This characterization, in turn, allows Renco to argue that any breach of the Holdco Agreement that affects the Renco capital accounts does not accrue for statute of limitations purposes until the accounts are no longer "open and current."[51] Alternatively, Renco contends that its breach claims have not yet accrued because MacAndrews AMG is engaged in a single, ongoing breach of the Holdco Agreement by continuously diverting profits from Renco's capital account into its own capital account. As for its breach claims relating to the ER&D costs and transfer pricing, even if they accrued more than three years prior to the filing **[*21]** of its complaint, Renco maintains that these two claims are subject to tolling under either the time of discovery doctrine or as a matter of equity. Finally, Holdco argues that its amended claims regarding transfer pricing should relate back to the filing of its original complaint.

The parties' dispute implicates the two most common points of contention in the realm of statute of limitations jurisprudence: (1) when does the cause of action accrue; and (2) should the statute of limitations be tolled? While the analysis can be fact intensive, often the record on summary judgment leaves no doubt as to the resolution of either point. This is such a case.

III. ANALYSIS

A. The Standard of Review

HN2[↑] "The function of summary judgment is the avoidance of a useless trial where there is no genuine issue as to any material fact."[52] Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories **[*22]** and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[53] "A fact is material if it might affect the outcome of the suit under the governing law."[54] A material issue of fact exists if "a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way."[55]

HN3[↑] The movant bears the initial burden of demonstrating that there is no question of material fact.[56] When the movant carries that burden, the burden shifts to the nonmoving party "to present some specific, admissible evidence that there is a genuine issue of fact for trial."[57] The court must view the evidence most favorably to the non-moving party.[58] Even so, the non-moving party may not rely on allegations or denials in the pleadings to create a material factual dispute.[59]

B. The Statute of Limitations

HN4[↑] The statute of limitations at *10 Del. C. §*

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[50] The Renco Gp., Inc.'s Mem. of Law in Opp'n to MacAndrews AMG Holdings LLC's Mot. for Partial Summ. J. ("Answering Mem.") 1.

[51] *10 Del. C. § 8108* (adjusting the three-year statute of limitations for "mutual running accounts"). The parties agree that both the members' capital accounts remain "open and current."

[52] *Emmert v. Prade, 711 A.2d 1217, 1219 (Del. Ch. 1997)*.

[53] *Ct. Ch. R. 56(c)*.

[54] *Deloitte LLP v. Flanagan, 2009 Del. Ch. LEXIS 220, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009)*.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Ct. Ch. R. 56(e)*; *Fike v. Ruger, 754 A.2d 254, 260 (Del. Ch. 1999)*, *aff'd*, *752 A.2d 112 (Del. 2000)*.

[59] *Fike, 754 A.2d at 260*.

8106 requires a plaintiff to bring a breach of contract claim within three years of the accrual of the cause of action. The cause of action for a breach of contract accrues at "the moment of the wrongful act, even if the plaintiff **[*23]** is ignorant of the wrong."[60] Although statutes of limitations are not controlling in equity, "equity follows the law and, in appropriate circumstances, applies the statute of limitations by analogy, denying relief when claims are brought after the analogous statutory period."[61]

C. **Mutual, Running Account**

As noted, the Holdco Agreement called for the members of Holdco to maintain two separate capital accounts into which distributable profits from Holdco would be deposited and from which chargeable losses or expenses of Holdco would be deducted. Renco argues that this dual-capital account arrangement functions as a mutual running account that will "remain open and current" until Holdco is dissolved or liquidated.[62] Citing ***HN7***[⬆] 10 Del. C. § 8108, which provides that "[i]n the case of a mutual, running account between the parties, the limitation, **[*25]** specified in § 8106 of this title, shall not begin to run while such account continues open and current," Renco maintains that the statute of limitations has not yet begun to run.

Section 8108 leaves the term "mutual, running account" undefined. As must occur when a statute leaves room for interpretation, courts, treatises and legal encyclopedias endeavor to fill the statutory gap. ***HN8***[⬆] In Delaware, our courts have defined a mutual running account as "one account upon which the items of either side belong and on which they would reciprocally operate so that a balance between the two may be ascertained."[63] The treatises and legal encyclopedias offer similar definitions.[64]

HN9[⬆] No particular format is required for an account to be deemed "mutual and running"; instead, the court looks to whether the parties intended that their respective entries would contribute to one account subject to future

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[60] Fike, 754 A.2d at 260 (citing In re Dean Witter P'ship Litig., 1998 Del. Ch. LEXIS 133, 1998 WL 442456 (Del. Ch. July 17, 1998)).

[61] *Id.*; *accord* Knutkowski v. Cross, 2014 Del. Ch. LEXIS 206, 2014 WL 5106095, at *1 (Del. Ch. Oct. 13, 2014). The claims that MacAndrews AMG now argues are time-barred—claims for breach of contract seeking money damages—are legal claims seeking legal relief. Kraft v. WisdomTree Invs., Inc., 145 A.3d 969, 2016 Del. Ch. LEXIS 115, 2016 WL 4141112, at *4 (Del. Ch. Aug. 3, 2016) (***HN5***[⬆] "Legal claims seeking legal relief [include] a breach of contract claim requesting money damages . . . ."). Chancellor Bouchard recently observed in *Kraft* that "there is not currently a clear answer" in our case law "as to whether statutes of limitations are to be applied strictly to purely legal claims" brought in the Court of Chancery. After thoughtfully considering the question, the Chancellor endorsed a strict application of the statute of limitations with respect to purely legal claims on the rationale that "a plaintiff pressing a purely legal claim in the Court of Chancery should not be able to avoid the statute of limitations by invoking the doctrine of laches when the limitations period would have conclusively barred the same claim had **[*24]** it been brought in a court of law." 2016 Del. Ch. LEXIS 115, [WL] at *6. In its briefing on the motion, Renco has not attempted to evade application of the statute of limitations by arguing that this Court should apply the doctrine of laches and that one or more of the three elements of laches have not been met. *See* 2016 Del. Ch. LEXIS 115, [WL] at *4 (***HN6***[⬆] "A finding of laches generally requires the presence of three factors: the claimant's knowledge of the claim, unreasonable delay in bringing the claim, and resulting prejudice to the defendant.") Thus, the issue of whether I ought to apply Section 8106's limitations period strictly is not properly before the Court and I do not address it. Emerald P'rs v. Berlin, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

[62] *See* Holdco Agreement § 9.2 (allocating distributions upon liquidation); *id.* § 13.3 (directing distributions to occur during wind-up).

[63] Brown v. Consol. Fisheries Co., 165 F. Supp. 421, 423 (D. Del. 1955); *accord* Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 435 (D. Del. 1999); Weymouth v. Dep't of Corr., 1983 Del. Ch. LEXIS 495, 1983 WL 17987, at *6 (Del. Ch. July 18, 1983).

[64] *See, e.g.*, 31 *Williston on Contracts* § 79.26 (4th ed. 2015) ("[I]t is generally held essential, in order to constitute such an account as shall fall within the principle in question, that there shall be mutual open, current dealings and claims subject to a future final balance."); 1 Am. Jur. 2d Accounts & Accounting § 22 (2016) ("The 'last item' within this rule must arise from the mutual act and consent of both parties, with the understanding, express or implied, **[*26]** that it is to enter into and become a part of their mutual dealing or account and is the subject of future adjustment in ascertaining the general balance due on the account.").

settlement or resolution.[65] The two sides of that account "must be . . . linked or connected in some way by an express or implied agreement" under which entries on each side of the ledger "reciprocally offset so that the balance between the two may be determined."[66] The statute of limitations does not begin to run on a claim relating to a mutual, running account until the date the account is closed.[67]

To understand better how to apply *Section 8108*, it is useful to consider for a moment the purpose of the statutorily defined limitations period for claims involving mutual, running accounts.[68] In his treatise on Delaware practice, Judge Woolley explains that ***HN10***[⬆] statutes of limitations "proceed on the principle, that it is to the interest of the public to . . . afford a security against the prosecution of claims, where from lapse of time, the circumstances showing **[*28]** the true nature or state of the transaction . . . may be incapable of explanation by reason of [delay]."[69] The mutual, running accounts rule derives from a particular application of the familiar principle that statutes of limitations do not begin to run until a cause of action accrues.[70] The concerns regarding stale claims that animate statutes of limitations do not arise when facts that beget the cause of action have not played out and the cause of action, therefore, has not yet accrued.

HN11[⬆] In the case of a mutual, running account, the gravamen of the parties' dispute against one another is a single number—the balance of the mutual, running account they share—and thus the cause of action's accrual date resets each time that number changes.[71] Stepwise transactions that

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[65] *Brown, 165 F. Supp. at 423* ("The material question is the mutuality or agreement, express or implied, which which [sic] the items, respectively, were made and the mutual expectation of the parties of a future settlement or adjustment and the intent to treat the items as one account."); 31 *Williston on Contracts* § 76.29 (4th ed. 2015) ("It is essential...that the items of the account shall have been regarded as constituting one account **[*27]** by the parties.").

[66] *Matter of Burger, 125 B.R. 894, 902 (Bankr. D. Del. 1991)* (quoting *Brown, 165 F. Supp. at 423*); *see also John D. Perovich, When is Account "Mutual" for Purposes of Rule that Limitations Run from Last Item in Open, Current and Mutual Account*, 45 A.L.R. 3d 446 (1972) (noting that, among courts applying the mutual account rule, "there is almost universal agreement that an account is mutual only where there are items debited and credited on both sides, which items operate to extinguish the other pro tanto, so that the balance on either side is the debt between the parties."); *1 Am. Jur. 2d Accounts & Accounting § 6* ("All that is necessary to establish a mutual account is to show that an account was kept and that the parties regarded the items as constituting one account and as capable of being set off, one against the other, so that it is only the net balance which constitutes the claim." (footnotes omitted)).

[67] *E.g.*, *Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 2004 Del. Ch. LEXIS 19, 2004 WL 405913, at *7 (Del. Ch. Mar. 2, 2004)*; *Brown, 165 F. Supp. at 423*.

[68] Although *Section 8108*'s earliest statutory ancestor was first codified in the Delaware Code of 1852, Delaware courts have had few occasions to interpret the statute. Accordingly, I have looked elsewhere for guidance.

[69] 1 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware* § 508 (photo. reprint 1985) (1906) (noting the importance of fixing an appropriate time at which the cause of action accrues in order to fix an appropriate time at which the cause of action will expire).

[70] *See Greer Limestone Co. v. Nestor, 175 W. Va. 289, 332 S.E.2d 589, 592-93 (W. Va. 1985)* ("[The mutual running account] rule is predicated on the general principle that the statute of limitations begins to run when a cause of action accrues."); *cf. McArthur v. McCoy, 21 S.D. 314, 112 N.W. 155, 156 (S.D. 1907)* (applying a statute providing that "[i]n **[*29]** an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side").

[71] *See Sheldon Grain & Feed Co. v. Schuetz, 207 Kan. 108, 483 P.2d 1033, 1035 (Kan. 1971)* ("In such case the last item so credited to the party against whom the balance is due is not payment of any particular item against him, but is in a sense treated as part payment of every item rightfully charged against him in the entire account."); *Spencer v. Sowers, 118 Kan. 259, 234 P. 972, 973 (Kan. 1925)* (explaining that an account will be deemed a **[*30]** mutual, open, current account "where pursuant to the original, express, or implied intention there is but one single and indivisible liability arising from such series of related reciprocal debits and credits, which liability is to be fixed on the one part or the other as the balance shall indicate at the time of settlement or following the last pertinent entry of the account"); *Wesley v. Walter A. Brown, 196 A.2d 921, 921 (D.C. 1964)* ("It is settled law that where there is a mutual open account between two parties it is implied that they have mutually consented that the items occurring from time to time in favor of the respective parties shall operate as mutual set-offs, and that the shifting balance,

contribute to the aggregate ending balance are baked into the controversy regarding the final number for statute of limitations purposes. Accounts of this nature can arise either from express creation or impliedly by conduct evidencing the parties' mutual intent continuously to adjust reciprocal demands as part of an "unsettled course of dealing."[72]

HN12[↑] Under these principles, the *ne plus ultra* mutual, running account for purposes of *Section 8108* is an account maintained by two parties that, at any given point in time, shows a positive balance for one side and a negative balance for the other. In other words, the account would carry a theoretical single balance that would fluctuate as offsetting debits and credits were posted to the ledger. Every "entry" therefore necessarily would be reciprocal. *Williston* defines mutual, running accounts using this format as an example, and *American Jurisprudence* describes them similarly.[73]

The only case the parties have cited where a Delaware court enforced *Section 8108* as a counter to a statute of limitations defense fits this example, albeit not perfectly.[74] *Burger* involved a contractual arrangement that obligated each co-venturer in a business to pay specific ongoing future debts: one co-venturer was indebted to his counterparty for revenues; the other was obligated to pay certain variable costs of the business (rent, etc.). The Bankruptcy Court deemed this arrangement to be a mutual, running account.[75] Although the arrangement involved two separate debt streams, it could at all **[*34]** times be reduced to a single account balance owed to one side or the other once all offsetting entries were applied because the debts were owed directly by and between business partners.

The parties' capital accounts, by contrast, are structured as two separate accounts that are neither reducible to a single balance nor representative of joint indebtedness. To the contrary, the drafters of

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when either or both shall call for it, shall be the debt, and for this reason the statute of limitations does not run during such a state of mutual dealings, but only from the date of the last item . . . ."); *Greer, 332 S.E.2d at 593* ("With regard to an account, whether an open, book, or running account, the general rule is that the statute of limitations ordinarily begins to run on the date that each credit charge is made in the absence of some express agreement between the parties.").

[72] *McArthur, 112 N.W. at 156*; *see also id. at 156-57* ("As the plain purpose of our Legislature was to except from the **[*31]** six-year statutory bar, made applicable to all contractual obligations express or implied, only mutual accounts containing reciprocal demands between the parties, the important prerequisite is a condition of mutuality and reciprocity of dealing sufficient to reasonably justify the inference of an understanding between the parties that the items of one account are to be set off against the items of the other account, so far as they go . . . ."); *E.P. Hinkel & Co. v. Wash. Carpet Corp., 212 A.2d 328, 330 (D.C. 1965)* (noting that "[i]tems were entered on both sides at periodic intervals which operated to extinguish each other pro tanto" and "the claims upon each side were set off against each other" as facts supporting the conclusion that there was a mutual account); *Wesley, 196 A.2d at 921*; *Green v. Caldcleugh, 18 N.C. (1 Dev. & Bat.) 320, 323 (N.C. 1835)* ("[I]t seems to us that the true principle to be extracted . . . applies only in those cases, where these items are clearly parts of one continuing, mutual account, which, by the assent of the parties, are to be charged therein, whenever the same shall be adjusted. This assent may be shown by direct evidence of an agreement to that effect. It may be inferred also, when each party keeps a running account of the debits and credits of the account . . . . In these cases, the new items are evidence affirming **[*32]** the continuance of an unsettled account at that time, and warranting the fair presumption of a promise to settle it, and to pay the balance, which may be ascertained on settlement.").

[73] 31 *Williston on Contracts* § 79:26 (4th ed. 1972); *1 Am. Jur. 2d Accounts & Accounting § 6* (2015) ("All that is necessary to establish a mutual account is to show that an account was kept and that the parties regarded the items as constituting one account and as capable of being set off, one against the other, so that it is only the net balance which constitutes the claim."); *see also In re Lebling's Estate, 42 Pa. D. & C. 151, 153-54, 23 Erie Co. L. J. 223 (Pa. Orph. 1941)* (describing mutual accounts as requiring reciprocal demands, "as, for example, when A & B dealing together, **[*33]** A sells B an article of furniture, or any other commodity, and afterwards B sells A property of the same or a different description, this constitutes a reciprocal demand, because A and B have a demand or right of action against each other"); ***Jones v. Massey, 1 Del. Cas. 63, 64 (Del. Ct. Q. Sess. 1795)*** (providing that an acceptable jury charge for "mutual dealings" for "accounts [that] are not closed" could include an illustrative example as follows: "suppose I sell to one of you a horse and charge you with it, you sell me a cow and charge me with it, and then a parcel of sheep and charge me with them, and so on . . . .").

[74] *Burger, 125 B.R. at 902*.

[75] *Id.*

the Holdco Agreement took pains to segregate the capital accounts to ensure that each separate balance could expand and contract without a corresponding effect on the other. For example, Section 4.3(b)(i)-(ii) of the Holdco Agreement provides that a member's capital account will increase by the amount of cash contributed by that member to Holdco; Section 4.3(c)(i)-(ii) provides that the member's capital account will decrease each time that member receives a distribution. Thus, a debit or credit to one account would not necessarily have an offsetting effect on the other.[76] The "intent to treat the items as one account" is nowhere reflected in the Holdco Agreement.[77]

Moreover, unlike a mutual, running account, the periodic distributions to members from their respective capital accounts are calculated based on the proportionate values in *each* account. For example, MacAndrews AMG is not entitled to receive distributions if its Revalued Capital Account dips below 20% of Holdco's aggregated Revalued Capital Accounts.[78] Unauthorized allocations to or distributions from the capital account of one member can therefore create immediate, actionable losses for the other member long before the accounts are settled—indeed, that *precise* outcome is alleged in this action. Classic mutual, running account scenarios, by contrast, are constantly fluid and unsettled until the final balance reveals the full extent of what is at stake between the parties.

Although profit and loss allocations are split between accounts pursuant to contractually-defined **[*36]** interest percentages, the capital accounts cannot be understood, "as constituting one account . . . capable of being set off, one against the other, so that it is only the net balance which constitutes the claim."[79] It is not surprising that Renco has not cited to a single case where a Delaware court has applied the mutual, running account exception in a format that approximates the capital accounts created by the Holdco Agreement. Any such application would allow joint-venturers to hold back on otherwise accrued claims, for strategic reasons or otherwise, until some indeterminate time down the road when the joint venture either dissolves or is otherwise terminated. "[I]t makes little sense as a matter of policy to interpret *[Section 8106]* so broadly as to permit a party to sit on its contractual rights" in this manner.[80] Accordingly, I reject Renco's argument that the three-year statute is tolled under *Section 8108*.

D. **Continuing Breach**

Renco next asserts that MacAndrews AMG's misconduct, since 2004, has amounted to a single "continuing breach" of the Holdco Agreement. If the Court adopts this characterization of Renco's breach claims, then even those claims that preceded the filing of the complaint by nearly ten years

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[76] There may, at times, be an offsetting effect in the event of a contribution or distribution to or from a capital account. An offset would occur, for example, if a contribution adjusted **[*35]** each party's ownership percentage in a way that activated Section 9.4(c)'s parity mechanism that prevents distributions to MacAndrews AMG if its Revalued Capital Account falls below 20% of the Revalued Capital Accounts of all members. But that offset is not automatic; it depends upon the occurrence of a particular set of triggers.

[77] *See* *Brown, 165 F. Supp. at 423*.

[78] Holdco Agreement § 9.4(c).

[79] *1 Am. Jur. 2d Accounts & Accounting § 6*.

[80] *TIFD III-X LLC v. Fruehauf Prod. Co., LLC, 883 A.2d 854, 865 (Del. Ch. 2004)* (addressing the application of the statute of limitations to a counterclaim for recoupment); *see also* *Fike, 754 A.2d at 263* (rejecting argument that untimely claims relating to accounts in a partnership could be revived after the expiration of the statute of limitations by the partnership's dissolution). Renco cites a case, **[*37]** *Gearhart v. Etheridge, 131 Ga. App. 285, 205 S.E.2d 456 (Ga. Ct. App. 1974)*, in which the Georgia Court of Appeals affirmed a lower court's holding that joint venturers in a corporation created a mutual account by making "advances individually and jointly in payment of indebtedness, interest payments, current operating expenses, notes and other debts in connection with a corporation which they sought to control." *Gearhart, 205 S.E.2d at 458*. *Gearhart* is distinguishable from this case, however, because there is no indication that the *Gearhart* parties kept separate accounts that would each rise and fall based on the number and nature of inputs contemplated in the Holdco Agreement's various apportionment provisions.

would not have accrued for statute of limitations purposes.

HN13[] Statutes of limitations generally do not begin to run "until all of the elements of the claim have occurred."[81] In the context of breach of contract claims, the date of breach typically supplies the accrual date as **[*38]** the elements of the claim can be linked to the act constituting the breach.[82] If the continuing breach exception applies, however, the statute begins to run the moment "full damages can be determined and recovered,"[83] which may not happen until the contract terminates.[84] The continuing breach doctrine is "narrow" and "typically is applied only in unusual situations."[85]

HN14[] To determine whether a breach (or series of breaches) is "continuing," Delaware courts consider whether the breach(es) can be divided such that the "plaintiff could have alleged a *prima facie* case for breach of contract . . . after a single incident."[86] If so, our courts have determined that the "continuing breach" doctrine does not apply even when confronted with "numerous repeated wrongs of similar, if not same, character over an extended period."[87] Stated differently, the doctrine of continuing breach will not serve to extend the accrual date for a breach of contract claim "where the alleged wrongful acts are not so inexorably intertwined that there is but one continuing wrong."[88]

Renco cites *Branin v. Stein Roe Investment Counsel, LLC*[89] for the proposition that a "continuing breach" **[*39]** can occur even when the damages flowing from the breach can be calculated at various intervals during the course of conduct giving rise to the claim. Renco's effort to meld the unique facts in *Branin* with its claim that MacAndrews AMG has engaged in a continuing breach of the Holdco Agreement falls short.

In *Branin*, the Court held that an employer was in continuous breach of its operating agreement by repeatedly declining (at least five times) to indemnify the plaintiff-employee during the course of his decade-long litigation against the employer.[90] The damages at issue were, in theory, calculable on a rolling basis since they amounted to the steadily rising cost of plaintiff's legal fees and costs. Even though the employee's damages arguably were calculable, the court stressed that they were uncertain because his right to indemnification depended on the court in the underlying lawsuit *not* finding that the employee acted in bad faith or outside the scope of his authority.[91] The court added that this contractual limitation, pervasive in indemnification arrangements, justified following the common approach in indemnification cases of finding that the cause of action for indemnification does **[*40]** not accrue until the underlying litigation concluded.[92] Here, because neither the nature of the breach claims nor the Holdco Agreement itself presented any inherent contingency that would render Renco's otherwise

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[81] *Price v. Wilm. Trust Co., 1995 Del. Ch. LEXIS 65, 1995 WL 317017, at *2 (Del. Ch. May 19, 1995)*.

[82] *Smith v. Mattia, 2010 Del. Ch. LEXIS 14, 2010 WL 412030, at *4 (Del. Ch. Feb. 1, 2010)*.

[83] *Branin v. Stein Rose Inv. Counsel, LLC, 2015 Del. Ch. LEXIS 203, 2015 WL 4710321, at *7 (Del. Ch. July 31, 2015)* (quoting *Burger, 125 B.R. at 901-02*).

[84] *See Smith, 2010 Del. Ch. LEXIS 14, 2010 WL 412030, at *4*.

[85] *Desimone v. Barrows, 924 A.2d 908, 924-25 (Del. Ch. 2007)* (citation omitted).

[86] *Price, 1995 Del. Ch. LEXIS 65, 1995 WL 317017, at *2-3*.

[87] *Id.*

[88] *1995 Del. Ch. LEXIS 65, [WL] at *3* (quoting *Ewing v. Beck, 520 A.2d 653, 662 (Del. 1987)*).

[89] *2015 Del. Ch. LEXIS 203, 2015 WL 4710321, at *7 (Del. Ch. July 31, 2015)*.

[90] *2015 Del. Ch. LEXIS 203, [WL] at *1-2, *7*.

[91] *2015 Del. Ch. LEXIS 203, [WL] at *7*.

[92] *Id.*

calculable damages uncertain, *Branin* is inapposite.

Renco next argues that MacAndrews AMG's alleged breaches were, in fact, "inexorably intertwined" since each was merely a component of MacAndrews AMG's broader scheme to pad its capital account at Renco's expense. Similarly, Renco argues that the "critical inquiry" in determining whether a contract's obligations are continuous or severable is "whether the obligations under the contract are all done for the 'same general purpose,'"[93] which Renco characterizes as "the management and operation of AM General and the protection of Renco's interests in light of the fact that Renco was a non-managing, minority member of Holdco."[94]

Even assuming (without deciding) that the "general purpose" inquiry applies beyond the context of mechanics' liens or construction contracts,[95] Renco overstates its import. ***HN15***[⬆] The "general purpose" inquiry informs whether parties to a contract intended the contract to be continuous **[*41]** or severable.[96] In this instance, however, the provisions Renco alleges were breached are clearly separable.[97]

Renco's claims of breach are based on MacAndrews AMG's violations of specific, identifiable provisions of the Holdco Agreement that occurred each time MacAndrews AMG charged unauthorized management fees and royalties, misallocated ER&D costs and manipulated transfer pricing.[98] Each time GEP was charged with allegedly unauthorized management fees, royalties and ER&D costs, and each time GEP received deflated transfer prices, constituted a separate breach that had a separate effect on Renco's capital account. These alleged breaches resulted in itemized damages that were determinable the moment they occurred such that "[c]omplete and adequate relief, if justified, **[*43]** could be shaped immediately or at any point" after Renco initiated the litigation.[99] Indeed, Renco has quantified these damages in its pleadings.[100] While the alleged breaches were repetitive, they were not "continuing" in the legal sense.

Renco has two remaining tolling theories, but does

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[93] *Smith, 2010 Del. Ch. LEXIS 14, 2010 WL 412030, at *4* (quoting *Joseph Rizzo & Sons v. Christina Momentum, L.P., 1992 Del. Super. LEXIS 95, 1992 WL 51850, at *3 (Del. Super. Feb. 21, 1992)*).

[94] Answering Mem. 36.

[95] *See* *Joseph Rizzo & Sons, 1992 Del. Super. LEXIS 95, 1992 WL 51850, at *3* (citing *53 American Jurisprudence 2d Mechanics' Liens § 196*, as well as Minnesota and Maryland case law, for two propositions: (1) that "where work done or material furnished during different time periods-whether pursuant to additional contracts, under an 'account', etc.,-is considered 'continuous', courts will recognize the work as an 'entire' or 'continuous contract'"; and (2) "[t]he key consideration in determining whether an entire or continuous contract is present is whether the work was done or materials furnished for the same 'general purpose.'"); *Smith, 2010 Del. Ch. LEXIS 14, 2010 WL 51850, at *4* & n.29 (citing *Joseph Rizzo & Sons* for the proposition that "[t]he critical inquiry" in determining whether a construction contract was continuous or severable was "whether the obligations under the contract are all done for the same general purpose").

[96] *Smith, 2010 Del. Ch. LEXIS 14, 2010 WL 412030, at *4* & n.31 (holding that "[w]hether the obligations under a contract are continuous or severable turns on the parties' intent" and thereafter focusing on what both parties to a construction contract contemplated the deadline for performance to be); *cf.* *Joseph Rizzo & Sons, 1992 Del. Super. LEXIS 95, 1992 WL 51850, at *3* ("The key consideration in determining whether an entire or continuous contract is present is **[*42]** whether the work was done or materials furnished for the same 'general purpose.'").

[97] Further, it cannot be the case that a party can unlock the possibility of tolling under the continuing breach doctrine simply by characterizing contractual obligations as collectively contributing to some broader end. Were that convention countenanced, the continuing breach doctrine might expand far beyond its logical scope since virtually every contract has a "general purpose" broader than the various intermediate objectives its individual terms accomplish.

[98] It is alleged that these actions violated sections 6.4(c), 6.4(s), and 8.1 of the Holdco Agreement. SAC ¶¶ 111-16.

[99] *Kahn v. Seaboard Corp., 625 A.2d 269, 271 (Del. Ch. 1993)*.

[100] Renco alleges that MacAndrews AMG's wrongful imposition of management fees and royalties and misallocation of ER&D costs have resulted in the wrongful diversion of $84.8 million and $91 million, respectively, from Renco's capital account. SAC ¶¶ 59, 63. Although no precise damages figure appears for Renco's transfer pricing claim, the Court can discern no reason why money damages resulting from those alleged breaches could not have been ascertained at the moment the allegedly discounted prices were charged.

not argue that either preserves any aspect of its royalty and management fee claims. Accordingly, I note at this juncture that MacAndrews AMG's motion for partial summary judgment is granted with respect to those claims. Renco first brought the royalty and management fee claims in its original complaint, which **[*44]** was filed June 29, 2012. Royalty and management fee claims that accrued more than three years before that date may not be prosecuted in this action.

E. The Time of Discovery Rule

Renco seeks to toll the statute of limitations with respect to its claims relating to ER&D costs and transfer pricing by invoking the so-called "time of discovery rule." ***HN16***[⬆] Application of the time of discovery rule delays the starter's gun for the statute of limitation in certain "narrowly carved out limited circumstances" when the facts at the heart of the claim are "so hidden that a reasonable plaintiff could not timely discover them."[101] These scenarios include instances: (1) where the defendant has fraudulently concealed key facts; (2) where the injury was "inherently unknowable" such that discovery of its existence "is a practical impossibility"; and (3) where a "plaintiff reasonably relies on the competence and good faith of a fiduciary" who is alleged to have engaged in wrongful self-dealing (also referred to as the "equitable tolling doctrine").[102] In any of these factual circumstances, the time of discovery rule operates to toll the statutory period until the claimant is on inquiry notice of its claim—that is, **[*45]** until facts surface that would lead a reasonably prudent person to discover the wrong.[103] Renco bears the burden of proving that tolling for the time it took to discover its claims is appropriate.[104]

To carry its burden, Renco contends it was unable to discover the predicate facts that support its ER&D and transfer pricing claims because it relied upon the good faith and competence of its alleged fiduciary, MacAndrews AMG, and did not, therefore, have any basis or obligation to inquire whether MacAndrews AMG was properly managing the GEP business. Renco's position calls three separate questions: (1) whether the discovery rule applies because Renco's injury was inherently unknowable; (2) whether MacAndrews AMG's status as a fiduciary implicates equitable tolling; and (3) if the answer to either of those questions is yes, when (if ever) was Renco on inquiry notice of its ER&D and transfer pricing claims? **[*46]** Because I conclude that the answers to the first two questions are "no," I need not reach the third.

1. Renco's Alleged Injuries Were Not Inherently Unknowable

In *Krahmer v. Christie's Inc.*, this court undertook a thorough review of Delaware's inherently unknowable injury exception.[105] The court traced the exception to *Layton v. Allen, 246 A.2d 794, 1968 Del. LEXIS 256*, where the Supreme Court of Delaware tolled the statute of limitations for a medical malpractice claim brought seven years after a doctor, unbeknownst to the patient, left a surgical instrument in the patient's body.[106] The inherently unknowable injury sustained by the blamelessly ignorant plaintiff in *Layton* was, quite

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[101] *Krahmer v. Christie's Inc., 903 A.2d 773, 778 (Del. Ch. 2006)*.

[102] *Dean Witter, 1998 Del. Ch. LEXIS 133, 1998 WL 442456, at *5-6*; *accord* *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc., 2007 Del. Ch. LEXIS 140, 2007 WL 2982247, at *14 (Del. Ch. Oct. 9, 2007)*; *Krahmer, 903 A.2d at 778*.

[103] *See* *Dean Witter, 1998 Del. Ch. LEXIS 133, 1998 WL 442456, at *5-6*; *Fike, 754 A.2d at 261* ("[T]he limitations period is tolled until such time that persons of ordinary intelligence and prudence would have facts sufficient to put them on inquiry which, *if pursued*, would lead to the discovery of the injury." (internal quotation marks omitted) (emphasis in original)).

[104] *See* *Fike, 754 A.2d at 261*.

[105] *903 A.2d 773, 778-80 (Del. Ch. 2006)*.

[106] *Id. at 779*.

literally, impossible to uncover.[107]

Over time Delaware courts have expanded the doctrine and have applied it in instances where the plaintiff's injury went undetected as a result of his "justifiable reliance on a professional or expert whom [he had] no ostensible reason to suspect of deception," even when affirmative **[*47]** inquiry or investigation may have revealed the injury.[108] For example, our courts have found inherently unknowable injuries where: a client did not know his accountant committed malpractice in the preparation of tax returns until the Internal Revenue Service came knocking;[109] a landowner did not know his plumber had performed faulty work until his septic system malfunctioned;[110] and a warehouse owner did not know his roofing contractor had installed a defective roof until the roof failed.[111] ***HN17***[] In each of these cases Delaware courts tolled the statute of limitations because the plaintiffs were demonstrably unaware of the injury they had sustained at the hands of contractors or consultants they had every reason to trust not to injure them.

The relationship between Renco and MacAndrews AMG hardly fits this mold. Indeed, Renco had ample opportunity and incentive to discover precisely the sort of injury it now alleges it has suffered as a result of MacAndrews AMG's breach of the Holdco Agreement. Both Renco and MacAndrews AMG were sophisticated businesses who approached their joint venture at arm's length with equal bargaining power.[112] During negotiations, Renco suspected MacAndrews **[*48]** AMG might mismanage the venture to its benefit and insisted that the Holdco Agreement contain protective measures that would make MacAndrews AMG accountable.[113] Renco secured broad inspection rights of Holdco's books and records and a covenant that MacAndrews AMG would make regular disclosures to each member.[114] With these protections in hand, Renco cannot be heard to argue that discovery of the facts supporting its breach claims regarding the ER&D costs and transfer pricing was a "practical impossibility."[115]

Not surprisingly, Renco seeks to minimize the contractual tools at its disposal to uncover wrongdoing by arguing that MacAndrews AMG failed to provide information and make records available for inspection as required by the Holdco Agreement. Even if true, these failures to provide information do not render that information inherently unknowable. From the outset of the parties' relationship, Renco closely monitored its stake in the venture through investigations conducted by an independent accounting firm and its own **[*49]** direct contact with MacAndrews & Forbes affiliates.[116] Renco does not allege that MacAndrews AMG fraudulently concealed or misstated information Renco requested during the course of these investigations. Instead, Renco asserts that MacAndrews AMG repeatedly denied Renco's requests for information.[117] If true, Renco had recourse under the Holdco Agreement to enforce its rights to obtain information. More importantly, at the moment MacAndrews AMG

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[107] *Id.* The court in *Layton* noted that its purpose was to "create a separate exclusion that was to apply only in the narrow circumstances which involve an inherently unknowable injury sustained by a blamelessly ignorant plaintiff." *Id.*

[108] *Dean Witter, 1998 Del. Ch. LEXIS 133, 1998 WL 442456, at *5*; *see also Krahmer, 903 A.2d at 779-80*.

[109] *See Isaacson, Stolper & Co. v. Artisan's Sav. Bank, 330 A.2d 130, 131 (Del. 1974)*.

[110] *See Rudginski v. Pullella, 378 A.2d 646, 649 (Del. Super. 1977)*.

[111] *See Pack & Process, Inc. v. Celotex Corp., 503 A.2d 646, 650-51 (Del. Super. 1985)*.

[112] SAC ¶ 28 (describing "a long and complicated negotiation involving teams of lawyers, accountants and financial professionals on each side").

[113] *Id.* ¶¶ 37-38.

[114] Holdco Agreement § 10.1.

[115] *Dean Witter, 1998 Del. Ch. LEXIS 133, 1998 WL 442456, at *5*.

[116] *See supra* notes 38-44 and accompanying text.

[117] SAC ¶¶ 2, 48, 119.

refused Renco's demands that it provide information as required by the Holdco Agreement, Renco no longer could assume "blamelessly ignorant" status for purposes of invoking the time of discovery tolling exception.[118] Renco's injuries, to the extent they existed and were caused by MacAndrews AMG, were hardly inherently unknowable as contemplated by *Layton* and its progeny.

2. Equitable Tolling Does Not Apply

HN18[↑] "Under the theory of equitable tolling, the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary."[119] This tolling exception aims "to ensure that **[*50]** fiduciaries cannot use their own success at concealing their misconduct as a method of immunizing themselves from accountability for their wrongdoing."[120] Renco argues that it reasonably relied on the good faith of MacAndrews AMG, a fiduciary by virtue of its position as Holdco's managing member, to manage the GEP business in a manner that was consistent with the Holdco Agreement and the best interests of all members. Whether equitable tolling applies in this instance hinges on whether MacAndrews AMG is, in fact, Renco's fiduciary.

Holdco is a Delaware limited liability company.[121] ***HN19***[↑] While managing members of a Delaware LLCs may owe default fiduciary duties,[122] the LLC Act enables contracting parties to alter and even eliminate equitable fiduciary duties in the LLC context.[123] MacAndrews AMG points to a network of contractual duties established in the Holdco Agreement that it contends supersedes any fiduciary duties it may have owed to Renco. Within that network, MacAndrews AMG cites specifically to Section 12.3(a), which provides, in its entirety:

> Without limiting any other provisions hereof, to the extent that, at law or in equity, a Covered Person has duties (including fiduciary duties) and liabilities **[*51]** relating thereto to the Company or to any other Covered Person, a Covered Person acting under this Agreement shall not be liable to the Company or to any other Covered Person for its good faith reliance on the provisions of this Agreement. The provisions of this Agreement, to the extent that they **restrict the duties** and liabilities of a Covered Person otherwise existing at law or in equity, are agreed by the parties hereto to **replace such other duties** and liabilities of such Covered Person.[124]

This Court already determined in this litigation that Section 12.3(a) could not be reconciled with Renco's breach of fiduciary duty claim against MacAndrews **[*52]** AMG—a claim that was grounded in the same factual allegations of self-dealing Renco has again raised in its opposition to this motion:

> Under common law precedent (and a plain reading of Section 12.3(a)), the **Holdco**

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[118] *Dean Witter, 1998 Del. Ch. LEXIS 133, 1998 WL 442456, at *5*.

[119] *1998 Del. Ch. LEXIS 133, [Wl] at *6*; *see also* *Forsythe, 2007 Del. Ch. LEXIS 140, 2007 WL 2982247, at *14*.

[120] *In re American Int'l Gp. Inc., 965 A.2d 763, 813 (Del.Ch. 2009)*.

[121] Holdco Agreement at 1 (invoking the Delaware Limited Liability Company Act, *6 Del. C. § 18-101 et seq.*) ("the LLC Act")).

[122] *Feeley v. NHAOCG, LLC, 62 A.3d 649, 660-61 (Del. Ch. 2012)* (citing *Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206, 1217-18 (Del. 2012)*).

[123] *6 Del. C. § 18-1101(c)*; *accord* *Auriga Capital Corp. v. Gatz Props., 40 A.3d 839, 849 (Del. Ch. 2012)*, *aff'd sub nom.* *Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206 (Del. 2012)* ("LLC agreements may displace fiduciary duties altogether or tailor their application . . . ."); *see* *Zimmerman v. Crothall, 62 A.3d 676, 703 (Del. Ch. 2013)* (holding that "the parties, through [the LLC at issue's operating agreement] and consistent with their prerogative under *6 Del. C. § 18-1101(c)*, [had] 'restricted' the fiduciary duties that the Director Defendants owed in the context of their dealings with the Company").

[124] Holdco Agreement § 12.3(a) (emphasis added).

> **Agreement provisions supersede the fiduciary duties that otherwise might apply to the conduct challenged here**. The Holdco Members chose to govern their relationship with a complex, negotiated agreement. If Defendants have violated any of Plaintiff's rights, the Holdco Members' agreement—not some general duty of loyalty or care—governs the remedy to which Plaintiff is entitled. Thus, the fiduciary duty claims against MacAndrews AMG as managing member, and [MacAndrews & Forbes] and Perelman as controllers, are all dismissed.[125]

It is true, as Renco points out, that the Court stopped short of holding that MacAndrews AMG does not act as a fiduciary with regard to Holdco in a broader sense.[126] Nevertheless, the Court's determination that provisions within the Holdco Agreement replaced any fiduciary duties that might have governed **[*53]** MacAndrews AMG's management of the capital accounts or the GEP Business is now law of the case.[127] As relates to the statute of limitations, this means Renco cannot claim it was entitled to rely on MacAndrews AMG's competence and good faith as a fiduciary as a basis to invoke equitable tolling, particularly with regard to conduct this Court already has determined did not implicate fiduciary duties.

F. **Relation Back**

Renco's final tolling argument applies only to its transfer pricing claim, which was first raised in the Second Amended Complaint filed on February 7, 2014. Renco argues that this claim should relate back to the date of the original complaint under *Court of Chancery Rule 15(c)(2)*, which provides that ***HN21***[↑] "[a]n amendment of a pleading relates back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of **[*54]** the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."[128]

In *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, this court held, ***HN22***[↑] for relation back purposes, that "a separate independent violation of the same contract provision does not 'arise' out of the same conduct, transaction or occurrence as did the first, unrelated violation."[129] Renco's original complaint does not infer, much less allege, that MacAndrews AMG breached the Holdco Agreement by causing GEP to sell AM General 6.5L Diesel Engines for inappropriately low prices. Indeed, the original complaint makes no mention of transfer pricing at all. Consequently, the transfer pricing claim cannot relate back.

IV. CONCLUSION

Renco has failed to demonstrate that any material issue of fact exists with regard to the accrual of its breach of contract claims relating to management fees, royalties, ER&D costs or transfer pricing. Nor has it demonstrated that *Section 8106*'s three-year statute of limitations may be tolled to allow claims that **[*55]** accrued more than three years prior to the filing of the complaint to proceed. Accordingly, MacAndrews AMG's motion for partial summary judgment must be granted. Judgment will be entered for MacAndrews AMG on Renco's breach

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[125] *Renco, 2015 Del. Ch. LEXIS 25, 2015 WL 394011, at *8* (emphasis added). The Court went on to dismiss aiding and abetting claims asserted against MacAndrews & Forbes and Perelman "for lack of an underlying fiduciary breach." *Id.*

[126] Answering Mem. 39 n.9.

[127] ***HN20***[↑] "The 'law of the case' doctrine requires that issues already decided by the same court should be adopted without relitigation, and once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless a compelling reason to do so appears." *May v. Bigmar, Inc., 838 A.2d 285, 288 n.8 (Del. Ch. 2003)*.

[128] *Ct. Ch. R. 15(c)(2)*.

[129] *2012 Del. Ch. LEXIS 171, 2012 WL 3201139, at *18 (Del. Ch. Aug. 7, 2012)* (declining to allow an amended claim of breach of contract to relate back to an earlier claim of breach arising out of the same contractual provision).

of contract and implied covenant claims relating to MacAndrews AMG's wrongful charges of management fees, royalties, and ER&D costs to GEP that occurred before June 29, 2009, and on Renco's similarly styled claims relating to MacAndrews AMG's manipulation of transfer pricing that occurred before February 7, 2011.

IT IS SO ORDERED.

/s/ Joseph R. Slights III

Vice Chancellor

Neutral
As of: March 30, 2021 7:09 PM Z

Bomberger v. Benchmark Builders, Inc.

Court of Chancery of Delaware

June 14, 2016, Submitted; August 19, 2016, Decided

Civil Action No. 11572-VCMR

Reporter
2016 Del. Ch. LEXIS 130 *

Stephen W. Bomberger v. Benchmark Builders, Inc., et al.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Prior History: *Julian v. Eastern States Constr. Serv., 2008 Del. Ch. LEXIS 86 (Del. Ch., July 8, 2008)*

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1 **Motions to Dismiss, Failure to State Claim**

The standard of review for dismissal pursuant to Del. Ch. Ct. R. 12(b)(6) is well established. A motion to dismiss will be denied if the complaint's well-pled factual allegations would entitle the plaintiff to relief under any reasonably conceivable set of circumstances. The court accepts all well-pled facts as true and draws all reasonable inferences in favor of the plaintiff. The court, however, need not accept conclusory allegations unsupported by specific facts or draw unreasonable inferences.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Waivers

Evidence > Burdens of Proof > Allocation

HN2 **Contract Conditions & Provisions, Waivers**

Waiver of a contractual right implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights, and the facts relied upon to prove waiver must be unequivocal. As such, the Delaware Supreme Court has held that three elements must be demonstrated to invoke the waiver doctrine: (1) that there is a requirement or condition capable of being waived; (2) that the

waiving party knows of that requirement or condition; and (3) that the waiving party intends to waive that requirement or condition.

Business & Corporate
Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Evidence > Burdens of Proof > Clear & Convincing Proof

HN3[] **Consideration, Promissory Estoppel**

To prevail on his claim for promissory estoppel, a plaintiff must, through clear and convincing evidence, satisfy the following four elements: (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise.

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Michael J. Maimone, Esquire, Greenberg Traurig LLP, Wilmington, DE.

Judges: Tamika Montgomery-Reeves, Vice Chancellor.

Opinion by: Tamika Montgomery-Reeves

Opinion

This Letter Opinion addresses the defendants' motion to dismiss the plaintiff's verified complaint. For the reasons stated herein, the defendants' motion is granted in part and denied in part.

I. BACKGROUND

In 1988, Plaintiff Steven W. Bomberger co-founded Defendant Benchmark Builders, Inc. ("Benchmark" or the "Company") along with three brothers, Defendants Francis and Richard Julian and non-party Eugene Julian (for simplicity's sake, "Francis," "Richard," and "Eugene"). Bomberger also entered into an employment agreement with Benchmark, dated October 15, 1988, and purchased 150 shares of Benchmark stock thereunder for $100 per share.

Bomberger, Francis, Richard, and Eugene, as the Company's principal stockholders, entered into the Agreement of the Principal Shareholders of Benchmark Builders, Inc., dated March 2, 1994 (the "Shareholders Agreement"). Under the Shareholders Agreement, only Benchmark employees may hold shares of Benchmark stock, and if a stockholder's employment **[*2]** with Benchmark is terminated for any reason other than death, total disability, or retirement at the age of sixty-two, then the Company has the right to repurchase his Benchmark stock at the lower of either his original purchase price or the stock's current net book value.

In May of 2015, when he was fifty-eight years old, Bomberger's employment with Benchmark was terminated. Later that month, Francis, on behalf of Benchmark's board of directors (the "Board") offered to repurchase Bomberger's shares for $747 per share. Bomberger, however, refused the Board's $747 per share offer and asserted that his shares had a net book value of $3,925.15 per share. As such, on August 28, 2015, Benchmark informed Bomberger that it was exercising its right under the

Shareholders Agreement to repurchase his shares for the price he originally paid—*i.e.*, $100 per share.

Thereafter, on October 2, 2015, Bomberger filed his verified complaint (the "Complaint"), asserting four claims against Benchmark, Francis, Richard, William Alexander, William J. DiMondi, Dean C. Pappas, and Kang Development, LLC (collectively, "Defendants"). Defendants then filed a motion to dismiss the Complaint under *Court of Chancery Rule 12(b)(6)*. This Letter Opinion **[*3]** resolves that motion to dismiss.

II. ANALYSIS

HN1[] The standard of review for dismissal pursuant to *Rule 12(b)(6)* is well established. A motion to dismiss will be denied if the Complaint's well-pled factual allegations would entitle the plaintiff to relief under any reasonably conceivable set of circumstances.[1] The Court accepts all well-pled facts as true and draws all reasonable inferences in favor of the plaintiff.[2] The Court, however, need not accept conclusory allegations unsupported by specific facts or draw unreasonable inferences.[3]

A. Defendants' Motion To Dismiss Is Partially Granted as to Bomberger's Waiver Claim

In Count I of the Complaint, Bomberger seeks a declaration that Benchmark waived its right under the Shareholders Agreement to repurchase Bomberger's shares for the price he originally paid. ***HN2***[] Waiver of a contractual right "implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights," and "[t]he facts relied upon to prove waiver must be unequivocal."[4] As such, the Delaware Supreme Court has "held that three elements must be demonstrated to invoke the waiver doctrine: (1) that there is a requirement or condition **[*4]** capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition."[5] Bomberger relies heavily on this Court's decision in *Julian v. Eastern States Construction Service, Inc.*[6] ("*Julian I*") for his argument that the Company's prior interactions with Eugene in a related situation resulted in a waiver of its repurchase right under the Shareholders Agreement.

In *Julian I*, the Court addressed a dispute between the three Julian brothers that culminated in Eugene's termination from Benchmark in 2003. Because "by the end of 2003, [Eugene] no longer had a formal relationship with Benchmark other than as a stockholder[,] . . . Benchmark had the right to demand the reacquisition of [Eugene's] Benchmark shares" under the Shareholders Agreement.[7] The Court found, however, that "Benchmark knew of, and intentionally chose not to enforce, this right . . . to demand the buy-back of [Eugene's] Benchmark shares," until late 2005 or early 2006.[8] Specifically, "[a]t a February 10, 2006 Benchmark board of directors meeting, the board decided by a vote **[*5]** of 2-1, with Bomberger dissenting, to waive enforcement of the" provision in the Shareholders Agreement that would have

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[1] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC, 27 A.3d 531, 537 & n. 13 (Del. 2011)*.

[2] *Id.*

[3] *Price v. E.I. duPont de Nemours & Co., Inc., 26 A.3d 162, 166 (Del. 2011)*.

[4] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc., 871 A.2d 428, 444 (Del. 2005)* (citing *Realty Growth Inv'rs v. Council of Unit Owners, 453 A.2d 450, 456 (Del. 1982)*).

[5] *Amirsaleh v. Bd. of Trade of City of New York, Inc., 27 A.3d 522, 529-30 (Del. 2011)* (citing *Bantum v. New Castle Cty. Vo—Tech Educ. Ass'n, 21 A.3d 44, 50 (Del. 2011)*).

[6] *2008 Del. Ch. LEXIS 86, 2008 WL 2673300 (Del. Ch. July 8, 2008)* ("*Julian I*").

[7] *Julian I, 2008 Del. Ch. LEXIS 86, 2008 WL 2673300, at *16*.

[8] *Id.*

required Eugene to sell his shares at the lesser of his original purchase price and the net book value.[9] Instead, the Board made an "arrangement for the Company to purchase Eugene's shares of stock in the Company based on the year end 2005 net book value," which was significantly higher than the $100 per share price that Eugene had originally paid.[10] The Court held, therefore, that "Francis and Richard waived their right to insist upon such a resale by knowingly failing to try to enforce that right until December 2005 or later" and allowed Eugene to "retain his stock in Benchmark" despite the Shareholders Agreement's resale obligations.[11]

Bomberger argues that both (1) the Company's delay in seeking to repurchase Eugene's shares (the "2003 Waiver") and (2) the Board's February 10, 2006 express waiver of the Company's right to repurchase Eugene's shares at his original repurchase price (the "2006 Waiver") constitute *permanent* waivers of the Company's right to repurchase Benchmark shares under the **[*6]** Shareholders Agreement at the lower of the original purchase price and the net book value.[12] As such, Bomberger maintains that "[t]he Company's prior waivers of its putative right to have required [Eugene] to resell his Benchmark stock apply with full force and effect to Bomberger and the resale of his Benchmark Shares."[13]

Bomberger, however, misapplies and misconstrues the Court's decision in *Julian I*. The Court held that Benchmark had waived its right to repurchase Eugene's shares based solely on its "fail[ure] to enforce that claimed right in a timely fashion," as the Company delayed over two years.[14] By contrast, the Board sought to repurchase Bomberger's shares at his original purchase price within three months of his termination. Nothing in the Complaint, therefore, indicates that Benchmark unreasonably delayed in asserting its repurchase right under the Shareholders Agreement. Bomberger's waiver claim, therefore, is flawed because it improperly extends the individualized, fact-specific waiver in *Julian I* to Bomberger's distinct circumstances.[15] Thus, Count I is dismissed with prejudice to the extent that it relies on the 2003 Waiver found in *Julian I*.

Whether the 2006 Waiver itself constitutes a permanent waiver as to Benchmark's ability to repurchase *any* stockholder's shares at the original purchase price, however, is a separate question. The Complaint alleges, and the Court in *Julian I* recognized, that the 2006 Waiver constituted an express waiver of a portion of the Shareholders Agreement.[16] But, the Complaint does not include any allegations regarding whether the Board, at the time of the 2006 Waiver, intended to extend that waiver to all Benchmark stockholders, or solely to Eugene. Because, however, the Complaint adequately alleges that the 2006 Waiver constituted an express waiver, this aspect of Count I is dismissed without prejudice.[17]

B. Defendants' [*8] Motion To Dismiss Is Partially Granted as to Bomberger's Fiduciary Duty Claim

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[9] *2008 Del. Ch. LEXIS 86, [WL] at *5*.

[10] Compl. ¶¶ 46-47 (alleging a 2005 net book value of $10,964 per share).

[11] *2008 Del. Ch. LEXIS 86, [WL] at *1*.

[12] Compl. ¶ 89.

[13] *Id.* ¶ 93.

[14] *Julian I, 2008 Del. Ch. LEXIS 86, 2008 WL 2673300, at *17*.

[15] *See AeroGlobal Capital, 871 A.2d at 446* (indicating that a party's **[*7]** "conduct under the circumstances" should be evaluated to determine whether they "evidenced an intentional, conscious and voluntary abandonment of [their] claim or right").

[16] *See* Compl. ¶ 91 ("Francis and Richard (i) caused the Company to waive its putative right to repurchase [Eugene's] shares at the price he originally paid for his shares . . . and (ii) authorized the Company to repurchase [Eugene's] Benchmark stock based on the then-current 2005 net book value of his shares."); *Julian I, 2008 Del. Ch. LEXIS 86, 2008 WL 2673300, at *5* (same).

[17] *See Ct. Ch. R. 15(aaa)*.

In Count II of the Complaint, Bomberger asserts a claim against the Board—consisting of Francis, Richard, Alexander, DiMondi, and Pappas—for breach of fiduciary duty. Bomberger advances two bases on which the Board purportedly breached its fiduciary duties. First, Bomberger contends that "the Benchmark Board terminated his employment due to his age in order to deprive him of his ability to resell his shares to Benchmark at their net book value under . . . the Shareholders Agreement."[18] According to Bomberger, his termination constituted a fiduciary duty breach because (1) as a discriminatory action, it was a violation of positive law, which "amounts to bad faith and a breach of the duty of loyalty,"[19] and (2) "[t]he Benchmark Board's disparate treatment of Bomberger was motivated by the remaining Julian family members, who collectively comprise a controlling majority of Benchmark's issued and outstanding stock."[20] The parties note, however, that Bomberger currently is pursuing an age-based discrimination claim before the Equal Employment Opportunity Commission (the "EEOC") against Benchmark.[21] Because Bomberger's fiduciary **[*9]** duty claim presumes the unlawfulness of his termination, the EEOC's resolution of his age-based discrimination claim bears directly on his claim. Thus, I dismiss this portion of Count II without prejudice as to Bomberger's ability to reassert that claim pending the resolution of the EEOC action.

Second, the Complaint alleges that Francis and Richard "caus[ed] the issuance of new Benchmark shares to the [younger members of the Julian family], which diluted the per share value of the minority shareholders' stock," but did not dilute their own stock.[22] In their opening brief, Defendants dispute whether those issuances constituted fiduciary duty breaches.[23] Bomberger, however, did not pursue this aspect of his fiduciary duty claim in his brief. Instead, at oral argument, Bomberger's counsel simply stated that "one of the claims that Mr. Bomberger makes in Count II is that the Benchmark board took the affirmative step to take dilutive action, action which effectively diluted Mr. Bomberger and other minority-member shareholders of the company."[24] That conclusory statement alone is insufficient to maintain that aspect of Bomberger's **[*10]** fiduciary duty claim.[25] And, even if Bomberger had pursued this claim with more vigor, I note that the Complaint refutes these allegations by indicating that Bomberger actually was given the opportunity to participate in Benchmark's subsequent equity offerings.[26] Thus, I grant Defendants' motion to dismiss as to this portion of Count II.

C. Defendants' Motion To Dismiss Is Denied as to Bomberger's Promissory Estoppel Claim

In Count III of the Complaint, Bomberger contends that Benchmark is required, under the doctrine of promissory estoppel, to pay Bomberger the net book value for his shares rather than his original purchase price. ***HN3***[↑] To prevail on his claim for promissory estoppel, Bomberger must, through clear and convincing evidence, satisfy the following four elements:

> (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably

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[18] Pl.'s Answering Br. 22.

[19] *Id.* at 21 (citing *Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006)*).

[20] Compl. ¶ 99.

[21] *See* Defs.' Opening Br., Ex. C.

[22] Compl. ¶ 64.

[23] Defs.' Opening Br. 11-12.

[24] Oral Arg. Tr. 33.

[25] *See CNB-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC, 2011 Del. Ch. LEXIS 25, 2011 WL 353529, at *10 n.98 (Del. Ch. Jan. 28, 2011)* (finding claims waived where a plaintiff "failed meaningfully to brief or argue them" (citing *Emerald P'rs v. Berlin, 726 A.2d 1215, 1224 (Del. 1999)*)).

[26] *See* Compl. ¶ 105 (noting that Benchmark granted Bomberger stock options in 2011, 2012, and 2013).

> relied **[*11]** on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise.[27]

I conclude that the Complaint pleads sufficient facts from which I may infer that Bomberger's promissory estoppel claim is reasonably conceivable.

First, the Complaint alleges a number of promises that Francis made to Bomberger regarding both Bomberger's employment status,[28] and the Board's intention, at all times, to pay Bomberger the net book value of his shares.[29]

Second, Francis reasonably should have expected that his promise would induce forbearance on Bomberger's part because Bomberger allegedly had lobbied the **[*12]** other parties to the Shareholders Agreement to amend that Agreement to remove the provision requiring that, if Benchmark repurchased a stockholder's shares, it would do so at the lower of the two prices.[30] Notably, in an April 22, 2013 email to DiMondi, Bomberger stated that he and Francis had spoken a number of times regarding an amendment to the Shareholders Agreement.[31] And, the Complaint expressly alleges that Francis made his promise to Bomberger "[i]n response to Bomberger's frequent pleas for a formal amendment to" the Shareholders Agreement and "to alleviate Bomberger's growing concern."[32]

Third, Bomberger relied on Francis's promise to his detriment by "declin[ing] to sign the proposed Amended and Restated [Shareholders] Agreement" and by "suspend[ing] his efforts to amend the Shareholders Agreement, at least until the Julian Brothers reached a resolution [to] remove [Eugene's] veto power."[33] Although the proposed amendment would have amended the Shareholders Agreement as Bomberger requested, he declined to execute that Agreement because he was concerned that excluding Eugene from the amendment "may run afoul of state law."[34] Even if the Shareholders Agreement could not have been amended **[*13]** without Eugene's consent, the Board arguably could have elected to repurchase Bomberger's shares at the net book value over Eugene's objection, as it did in the 2006 Waiver over Bomberger's objection.[35] And, although Francis was only one director on the five-member Board, the Complaint alleges that (1) "Francis and Richard systematically used their voting control to dominate" the Board, (2) "Francis's assurances carried the weight and authority of the Benchmark Board, which he had dominated for many years," and (3) "Francis's assurances were consistent with" the 2006 Waiver.[36]

Fourth, the Complaint's allegations, taken as true, indicate that injustice only can be avoided if Francis's promises are enforced because, absent such enforcement, Bomberger will be deprived of the alleged $3,925.15 per share net share.[37] book value of his Benchmark stock and instead will be forced to accept $100 per Defendants respond that

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[27] *Harmon v. Del. Harness Racing Comm'n, 62 A.3d 1198, 1201 (Del. 2013)* (quoting *Lord v. Souder, 748 A.2d 393, 399 (Del. 2000)*).

[28] *E.g.*, Compl. ¶ 14 (alleging that Francis told Bomberger that "the Benchmark Board would never terminate his employment without cause and force him to resell his shares at the original-purchase-price-value").

[29] *E.g., id.* ¶ 108 (alleging that Francis represented to Bomberger that "the Benchmark Board would never invoke" its right under the Shareholders Agreement to repurchase Benchmark shares at the original purchase price "as to Bomberger or any other Principal Shareholder whose employment was terminated without cause").

[30] *Id.* ¶ 58.

[31] *Id.* ¶ 60.

[32] *Id.* ¶ 58.

[33] *Id.* ¶ 115.

[34] *Id.* ¶ 60.

[35] *Id.* ¶¶ 4, 91.

[36] *Id.* ¶¶ 3, 114.

[37] *Id.* ¶ 73.

Francis only promised not to force Bomberger to resell his shares at his original purchase price,[38] and that Benchmark complied with that promise by offering to repurchase Bomberger's stock for $747 per share.[39] Yet, that argument ignores **[*14]** the fact that the Shareholders Agreement contemplates only two possible repurchase prices for an employee's stock: (1) the original purchase price or (2) the net book value. It is reasonably conceivable, therefore, that when Francis promised that the Company would never force Bomberger to resell his shares at his original purchase price, both Francis and Bomberger understood that meant that the Company would repurchase it at the net book value. Thus, I deny Defendants' motion to dismiss as to Count III.

D. Bomberger's Claim Against Kang Development, LLC Is Dismissed Without Prejudice

Finally, in Count IV of the Complaint, Bomberger seeks specific performance of an agreement related to Kang Development, LLC. Because the parties agree that Kang Development, LLC already has satisfied Bomberger's request, I dismiss Count IV without prejudice.[40]

III. CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is granted in part and denied in part.

IT IS SO ORDERED.

Sincerely,

/s/ Tamika Montgomery-Reeves

Vice Chancellor

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[38] *Id.* ¶ 14.

[39] *Id.* ¶ 72.

[40] Oral Arg. Tr. 12 (indicating that both parties agree that "Count IV should be dismissed without prejudice").

Brokenbrough v. Stiftel

Superior Court of Delaware, New Castle

January 20, 1994, Submitted ; February 1, 1994, Decided

C.A. No. 93C-11-206

Reporter
1994 Del. Super. LEXIS 417 *

JOHN BROKENBROUGH, Plaintiff, v. ALBERT J. STIFTEL, STEVEN P. WOOD, ROBERT J. PRETTYMAN, JOSEPH A. HURLEY, JAMES A. BAYARD, and JOSEPH M. BERNSTEIN, Defendants.

Notice: [*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Disposition: Upon consideration of defendant's Motion to Dismiss - GRANTED

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN1[⬇] **Legislation, Statute of Limitations**

Although caselaw states that limitations statutes do not apply to declaratory judgments as such, limitations periods are applicable not to the form of relief, but to the claim on which the relief is based.

Judges: Del Pesco

Opinion by: SUSAN C. DEL PESCO

Opinion

ORDER

Del Pesco, J.

This 1st day of February, 1994, upon consideration of the record in this case and the papers filed by the parties, it appears that:

(1) Plaintiff filed the instant lawsuit on November 22, 1993, alleging violations of his rights under the Delaware and United States Constitutions. On December 23, 1993, defendants filed a motion to dismiss. The motion is ripe for decision. This is the Court's decision on the motion.

(2) Plaintiff was convicted of delivery of cocaine on October 28, 1986. On November 18, 1987, the

conviction was affirmed by the Supreme Court of Delaware. *John Brokenbrough v. State of Delaware,* Del. Supr., No. 69, 1987, Horsey, J. (Nov. 18, 1987)(ORDER).

(3) Plaintiff then sued the police officer, prosecutors, defense counsel, and trial judge in his case. The complaint, which was filed on September 4, 1990, alleged the deprivation of plaintiff's rights in violation of *42 U.S.C. § 1983*. [1] On October 31, **[*2]** 1990, defendants moved to dismiss for plaintiff's failure to state a claim upon which relief could be granted. On April 23, 1991, this Court granted defendants' motion on the grounds that plaintiff's claim was barred by the applicable statute of limitations. *John Brokenbrough v. Joseph A. Hurley, et al.*, Del. Super., C.A. No. 90C-09-154-1-CV, Balick, J. (April 23, 1991) (ORDER). On May 6, 1991, plaintiff appealed to the Supreme Court of Delaware. On June 21, 1991, the defendants moved to affirm the lower Court's decision and on July 5, 1991, the Supreme Court affirmed. *John Brokenbrough v. Joseph A. Hurley, et al.,* Del. Supr., No. 171, 1991, Horsey, Walsh, Holland, J. (July 5, 1991)(ORDER).

[*3] (4) Plaintiff filed a second civil suit against substantially the same defendants on November 22, 1993. In his complaint, plaintiff states three claims: deprivation of his right of a fair and impartial trial; deprivation of his right against double jeopardy; and deprivation of his due process rights, all arising from the same events which he referred to in his first civil complaint.

(5) On December 23, 1993, defendants filed a motion to dismiss the complaint. The defendants seek dismissal on the ground that the complaint is frivolous and has previously been decided. Defendants also move this Court to impose sanctions upon plaintiff pursuant to Rule 11 of the Superior Court Rules of Civil Procedure.

(6) Plaintiff's claims in the instant case, like those asserted in September of 1990, are subject to a two-year statute of limitations. *See Marker v. Talley, Del. Super., 502 A.2d 972 (1985)*. The trial and appeal were more than two years prior to the filing of this complaint; thus, the complaint is time-barred.

(7) Plaintiff relies on the case of *Luckenbach S.S. Co. v. U.S., 312 F.2d 545 (1963)* for the proposition that limitations **[*4]** statutes do not apply to declaratory judgments. ***HN1***[⬆] Although the *Luckenbach* case does state that limitations statutes do not apply to declaratory judgments as such, limitations periods are applicable not to the form of relief, but to the claim on which the relief is based. *Id. at 548*. In the case at hand, the limitations period for the claim on which the relief is based is two years; thus the limitations period is not changed by the fact that the complaint claims to seek declaratory relief. Such mislabeling does not circumvent the fact that the defendant seeks a damages award based on what appears to be a claim pursuant to *42 U.S.C. § 1983*.

(8) Plaintiff also relies on the Delaware Superior Court case *State ex. rel. Secretary of Dept. of Trans. v. Regency Group, Del. Super., 598 A.2d 1123 (1991)* for the proposition that the statute of limitations should have been tolled. He argues that "defendants concealed the original indictment until it was discovered by plaintiff on February 14, 1989, when the grand jury indictment was obtained from the Prothonotary's Office." The *Regency Group* **[*5]** case states that the "commencement of the statute of limitations may be postponed until the victim discovers or should have discovered inherently unknowable injuries resulting from negligent conduct." *Id. at 1128*. Assuming, arguendo, that plaintiff's tolling argument has merit, plaintiff is outside the statute of limitations by acknowledging discovery on February 14, 1989.

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[1] Plaintiff's claims stemmed from his conviction. Specifically, plaintiff alleged that defendants held a meeting on October 27, 1986 in Judge Stiftel's chambers and agreed to alter the indictments being presented to the jury. He alleged that this action deprived him of a fair and impartial trial in that the conviction was reached on a count of the indictment which had been nolle prossed. He further alleged that this violated his right to protection against double jeopardy by trying him on counts which had previously been adjudicated.

Based on the foregoing, defendants' motion to dismiss is *GRANTED.*

IT IS SO ORDERED.

Judge Susan C. Del Pesco

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CommunityOne Bank, N.A. v. Boone Station Partners, LLC

Court of Appeals of North Carolina

January 22, 2015, Heard in the Court of Appeals; May 19, 2015, Filed

No. COA14-932

Reporter
2015 N.C. App. LEXIS 399 *; 241 N.C. App. 175; 773 S.E.2d 574; 2015 WL 2379194

COMMUNITYONE BANK, N.A., Plaintiff, v. BOONE STATION PARTNERS, LLC, STEPHEN D. SAIEED and DR. HOWARD F. MARKS, JR., Defendants.

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

Prior History: **[*1]** New Hanover County, No. 13 CVS 3888.

Disposition: DISMISSED.

Counsel: Hutchens, Senter, Kellam & Pettit, P.A., by Lacey M. Moore, for plaintiff-appellant.

Stubbs & Perdue, P.A., by Matthew W. Buckmiller, for defendants-appellees.

Judges: GEER, Judge. Judges STEPHENS and DILLON concur.

Opinion by: GEER

Opinion

Appeal by plaintiff from order entered 28 March 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 22 January 2015.

GEER, Judge.

Plaintiff CommunityOne Bank appeals from an order dismissing, pursuant to *Rule 12(b)(6) of the Rules of Civil Procedure*, all claims against defendant guarantors Stephen D. Saieed and Dr. Howard F. Marks, Jr. on the grounds that the statute of limitations had expired. Plaintiff's claims against defendant Boone Station Partners, LLC, the maker of the promissory note and owner of the real property securing that note, remain pending. This appeal is, therefore, interlocutory. Because there has been no certification pursuant to *Rule 54(b) of the Rules of Civil Procedure*, and plaintiff has failed to meet its burden of showing that this appeal affects a substantial right that will be lost absent

immediate appeal, we dismiss the appeal.

Facts

Plaintiff's amended complaint alleges the following. On 27 July 2007, Boone Station executed and delivered to plaintiff **[*2]** a promissory note in the amount of $7,910,921.26. On the same date, Boone Station executed and delivered to plaintiff a deed of trust on specified property securing the note, and defendants Saieed and Marks individually signed guaranties of the note. On 24 April 2009, Boone Station executed a Renewal Note ("the Note") increasing the loan principle to $9,605,000.00. Contemporaneously with the execution of the Renewal Note, defendant Marks entered into an additional guaranty. Subsequently, defendant Boone Station executed and delivered to plaintiff a Forbearance Agreement in which Boone Station acknowledged that it had defaulted on the Note, but agreed to pay the balance by 15 August 2010. Boone Station failed to pay the outstanding balance as provided in the Forbearance Agreement.

At plaintiff's request, the substitute trustee under the Deed of Trust instituted a special proceeding, Watauga County 11-SP-45, to foreclose on the real property as set forth in the deed of trust. On 10 June 2011, the property was sold at a public auction to the last and highest bidder for a price of $5,100,000.00. This amount was insufficient to extinguish the amount due and owing on the Note.

Meanwhile, on **[*3]** 10 May 2011, defendant Marks filed for Chapter 11 bankruptcy protection. On 15 June 2011, defendant Saieed executed and delivered to plaintiff an Agreement and Release in which he agreed to pay $20,000.00 to plaintiff by 1 August 2011 in full and final settlement of his debt obligation under the Note, Renewal, Deed of Trust, Forbearance Agreement and Guaranty Agreement. Defendant Saieed failed to pay the settlement amount on or before 1 August 2011, and defendant Marks' bankruptcy case was dismissed on 10 August 2012.

On 17 October 2013, plaintiff initiated this lawsuit against defendants to recover the balance remaining on the Note following the foreclosure sale. On 8 November 2013, defendants Saieed and Marks moved pursuant to *Rule 12(b)(6)* to dismiss the claims asserted against them on the grounds that they were barred by the statute of limitations. On 30 December 2013, plaintiffs filed an amended complaint, alleging the facts as described above. On 4 February 2014, defendants Saieed and Marks filed their answer and again moved to dismiss.

After a hearing on 3 March 2014, the trial court entered an order on 28 March 2014 granting defendants Saieed and Marks' motion to dismiss on the grounds that **[*4]** the statute of limitations on the claims against them had expired. Plaintiff appealed the order to this Court.

Discussion

Initially, we must address this Court's jurisdiction to hear this appeal. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)*. The order appealed from in this case is interlocutory because it leaves pending plaintiff's claims against Boone Station.

Generally, there is no right to appeal from an interlocutory order unless (1) the trial court certified the order for immediate appeal under *Rule 54(b) of the Rules of Civil Procedure*, or (2) the order affects a substantial right that would be lost without immediate review. *Myers v. Mutton, 155 N.C. App. 213, 215, 574 S.E.2d 73, 75 (2002)*. Here, the trial court did not make a *Rule 54(b)* certification. Consequently, this Court has jurisdiction over this appeal only if "'the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.'" *Jeffreys v.*

Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting *Southern Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co., 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988)*).

Plaintiff argues that a substantial right exists because "[t]he remaining claim involves the same factual issues that are present" in the claims on appeal "[t]hus, creating **[*5]** the possibility of inconsistent verdicts on the same issues." While the claims against Boone Station that are still pending may involve the same factual issues as the claims on appeal, plaintiff has failed to show, given the nature of the claims, any possibility of inconsistent verdicts.

"According to clearly-established North Carolina law, a party's preference for having all related claims determined during the course of a single proceeding does not rise to the level of a substantial right." *Hamilton v. Mortg. Info. Servs., Inc., 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011)*. A substantial right is only affected when "(1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995)* (emphasis added). Pertinent to this case, "[t]he mere fact that claims arise from a single event, transaction, or occurrence does not, without more, necessitate a conclusion that inconsistent verdicts may occur unless all of the affected claims are considered in a single proceeding." *Hamilton, 212 N.C. App. at 80, 711 S.E.2d at 190*.

In this lawsuit, plaintiff seeks to recover the balance remaining on a promissory note, executed by Boone Station as borrower and guaranteed by defendants Saieed and Marks, following a foreclosure sale of the property securing the debt that was **[*6]** insufficient to extinguish the debt. The trial court granted defendants Saieed and Marks' *Rule 12(b)(6)* motion to dismiss the claims against them on the grounds that the statute of limitations period had expired. Although Boone Station also moved to dismiss on the grounds that the statute of limitations had expired, its motion remains pending in the trial court.

Even if the claims against Boone Station and against defendant guarantors arise out of the same set of facts, plaintiff has failed to cite any authority showing a risk of inconsistent verdicts in the absence of an interlocutory appeal. Defendant guarantors' liability to plaintiff arises out of their guaranty contracts. As this Court has explained:

> A guaranty of payment is an absolute promise by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation *is independent of the obligation of the principal debtor*, "and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity."

Gillespie v. DeWitt, 53 N.C. App. 252, 258, 280 S.E.2d 736, 741 (1981) (emphasis added) (quoting *Inv. Props. v. Norburn, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972)*). Boone Station's liability to plaintiff, in contrast, is based upon separate contracts: the promissory notes and the deed **[*7]** of trust on Boone Station's property securing the notes.

This Court has held that there was no risk of inconsistent verdicts where the claims asserted against the defendants arose out of "separate and distinct contract[s]" and involved differing legal duties owed to the plaintiff. *Myers v. Barringer, 101 N.C. App. 168, 173, 398 S.E.2d 615, 618 (1990)* (holding in medical malpractice action that appeal of order granting summary judgment as to one but not all defendants was premature). Here, as in *Myers*, the claims arise from separate contracts and duties of the defendants. Plaintiff nonetheless argues that a possibility of inconsistent verdicts exists because although Boone Station's liability has not been determined yet, defendant guarantors have asserted defenses predicated on Boone Station's not being liable for any deficiency following the foreclosure sale.

In other words, it appears that plaintiff is contending that Boone Station could be found liable, but defendant guarantors would, as part of their defense, still be entitled to argue that Boone Station is not liable. Plaintiff, however, has pointed to nothing in the guaranties and has cited no cases suggesting that defendant guarantors could relitigate Boone Station's liability if, following entry of a final **[*8]** judgment, plaintiff appealed and obtained a reversal of the order dismissing its claims against defendant guarantors. Indeed, the sole case cited by plaintiff as support for this interlocutory appeal dismissed an appeal as interlocutory when the appellant, in the res judicata context, had similarly claimed a possibility of inconsistent verdicts but had failed to demonstrate that such a possibility actually existed. *See* *Heritage Operating, L.P. v. N.C. Propane Exch., LLC, 219 N.C. App. 623, 630, 727 S.E.2d 311, 316 (2012)* (concluding that appeal did not affect substantial right and dismissing it).

It is well established that "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]" *Jeffreys, 115 N.C. App. at 379, 444 S.E.2d at 253*. Plaintiff has failed to show that, under the circumstances of this case, the order affects a substantial right that would be lost absent an immediate appeal. Accordingly, we dismiss the appeal. *See* *High Point Bank & Trust Co. v. Hoffman Builders, Inc., 212 N.C. App. 419, 711 S.E.2d 774, 777-78, 2011 N.C. App. LEXIS 1048, at *13 (2011)* (unpublished) (in action against note maker and its guarantors to recover unpaid balance on note, dismissing as interlocutory appeal of trial court's order granting plaintiff's motion for summary judgment as to two out of three guarantors where defendants-appellants failed to show a possibility of inconsistent verdicts because "[a]ssuming any number or combination **[*9]** of the three Defendants are ultimately adjudged responsible for the indebtedness arising from the Note, their liability is joint and several, and there can only be one satisfaction").[1]

DISMISSED.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).

End of Document

[1] We recognize that ***High Point Bank*** is unpublished, and therefore not binding on this Court. However, we find its reasoning persuasive.

STATE ex rel. Department of Natural Resources & Envtl. Control v. PHILLIPS

Court of Chancery of Delaware, Sussex

July 29, 1980, DATE SUBMITTED ; October 14, 1980, DECIDED

Civil Action No. 276

Reporter
1980 Del. Ch. LEXIS 545 *

THE STATE OF DELAWARE, upon relation of the Department of Natural Resources and Environmental Control and the Department of Highways and Transportation, formerly The State Highway Department, Plaintiff, v. EMMONS B. PHILLIPS and MAE T. PHILLIPS, husband and wife, and BLAINE T. PHILLIPS and JANET COZART PHILLIPS, husband and wife, Defendants

Prior History: [*1] DECISION AFTER TRIAL: FOR PLAINTIFF

Counsel: William H. Sudell, Jr., Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, P.O. Box 1347, Wilmington, DE 19899, attorney for plaintiff; Nicholas H. Rodriguez, Esquire, SCHMITTINGER & RODRIGUEZ, P.A., P.O. Box 427, Dover, DE 19901, attorney for defendants

Opinion by: HARTNETT

Opinion

HARTNETT, Vice Chancellor

MEMORANDUM (Unreported) OPINION

After 13 years, this suit finally came to trial. It involves a dispute over the ownership of approximately 13 acres of land on the ocean in Sussex County. The disputed parcel is claimed by the State, as plaintiff, and by defendants Blaine Phillips and Janet Phillips, his wife. They were deeded the disputed parcel in 1960 and 1961 by the other defendants, Emmons Phillips and Mae Phillips, his wife, who are the parents of Blaine Phillips.

This is my decision in favor of the plaintiff after considering six days of trial testimony which ended on May 16, 1980, over 290 exhibits, the transcript of a three-day trial held in Superior Court in 1958 and the post-trial briefs of the parties.

As will be seen, the disputed parcel has never been patented or granted to private owners and therefore record title **[*2]** remains in the State. The evidence further shows that the disputed parcel was never described in any recorded deed to the Phillipses or anyone else prior to a 1959 deed whereby the Phillipses created a record title to the disputed parcel in themselves. The Phillipses at trial failed to sustain their burden of showing that they, or anyone else, acquired title to the disputed parcel by adverse possession or under the doctrine of presumed grant and they failed to establish facts which would estop the State from retaining title to the disputed parcel. From a preponderance of the evidence I find the facts to be:

I

Along the Atlantic Ocean there are several miles of "public lands", that is, lands which -- because they have never been granted to private owners -- are owned by the State. *State v. Phillips,* Del. Ch., 305 A.2d 644 (1973), *aff'd., Phillips v. State ex rel. Dept. of Nat. Res. & Env. Con.,* Del. Supr., 330 A.2d 136 (1974).In the late 1920's, pursuant to an Act of the General Assembly, the Public Lands Commission of the State commissioned Thomas L. Pepper, a surveyor, to review the land titles between Cape Henlopen and the Maryland line along the Atlantic **[*3]** Ocean and to determine and to plot the lands still in the ownership of the State. In 1929 he completed his work and prepared a Survey of the Public Lands which was recorded in the Office of the Recorder of Deeds, in and for Sussex County. Unfortunately, the

exact plot, as recorded, is no longer in the Recorder of Deeds' records, but a copy is in the possession of the Department of Transportation and was introduced as evidence in this trial. It is referred to as the "Pepper Survey". (PX 3).

This Pepper Survey has become the seminal plot by which other surveys, public and private, have evolved. It was based on old deeds and ancient land patents of record in Georgetown, Delaware, Annapolis, Maryland and elsewhere.

The Pepper Survey, in the area of the disputed parcel, shows three Patents: Fowle's Delight Patent, which is south of the disputed parcel, and Comfort Pasture Patent and Salt Meadow Patent, which are to the west of the disputed parcel. At the end of this Opinion is a plat prepared by the Court which shows the location of the three patents and the disputed parcel. It is based on the Pepper Survey and the trial testimony. The boundaries of these three Patents -- as placed **[*4]** on the Pepper Survey -- show that the disputed parcel is not a part of these three Patents but other lands of Phillips -- not in dispute -- are. The disputed parcel is shown on the Pepper Survey as being part of Tract No. 4 of the public lands.

In 1931 concrete markers were placed to mark the boundaries as shown on the Pepper Survey. Many of these markers still exist and at least two -- and perhaps four -- are still located on the boundary lines of the disputed parcel.

Almost all of the many plots and surveys introduced as evidence in this trial are consistent with the Pepper Survey -- even the surveys prepared for the Phillipses by Ike Bennett in 1943 and by Wingate and Eschenbach in 1960. The evidence does not show that the Pepper Survey is inaccurate to any material extent. I therefore find it is accurate and correctly shows the Public Lands in State ownership and the boundaries of the old Patents in this area.

II

The metes and bounds of the ancient Salt Meadow Patent and Comfort's Pasture Patent, as plotted on the Pepper Survey, show that the eastern boundary of those Patents does not extend eastward to the Atlantic Ocean but extends eastward only to Public Lands **[*5]** which lie between the Ocean and those Patents. There is no dispute as to the bounds of the Fowle's Delight Patent which lies to the south of the disputed parcel. Notwithstanding the Pepper Survey, the Phillipses have claimed that the Comfort Pasture and Salt Meadow Patents bordered the Ocean and that the disputed parcel is therefore within those Patents.

That claim was laid to rest by the 1976 decision of Chancellor Quillen in this case which held that the easternmost boundary of these Patents did not necessarily bind with the Atlantic Ocean. *State v. Phillips,* Del. Ch., No. 276 S. (Jan. 2, 1976). No evidence adduced at the trial convinces me that the eastern boundaries of the Salt Meadow Patent and the Comfort's Pasture Tract Patent bind with the Atlantic Ocean and I therefore hold that they do not.

It is clear that the disputed parcel is not a part of any of the ancient Patents which have been discovered to be of record and record title to the disputed parcel is still, therefore, vested in the State -- as part of the Public Lands.

III

The Phillipses also urge that the 13-acre disputed parcel of land is part of a much larger tract of land, title to which has **[*6]** been claimed -- at one time or another -- by the Williams Family because of their alleged adverse possession of it. The large tract claimed by the Williamses was bounded, roughly, on the south by the lands of the old U.S. Coast Guard Station -- now State lands; on the north by Kinksbush Gut which is near "the Narrows" -- an area of Assawoman Bay; on the west by Assawoman Bay; and on the east by the Public Lands or the Atlantic Ocean. Excluded from the Williamses' claim is a parcel of land of Banks which lies on the east side of Assawoman Bay and is otherwise completely surrounded by the Williamses' claim. The Phillipses maintain that the Williamses' claim extended eastward to the Ocean while the State maintains that the Williamses' claim extended eastward only to the Public Lands which border the Ocean. It is clear that George E. Williams claimed most of this large tract in 1931 and 1932 when he created record chains of title by executing deeds, and it is conceded that there was no record title to the Williamses to any part of the large tract claimed by them prior to 1931. The Williams Family claims it occupied and used the large tract between 1900 and 1931 and 1932 and acquired **[*7]** title to it by adverse possession. The State does not claim any lands contained within the bounds of the ancient Patents and for the most part the Williamses' claim is within those bounds.

George E. Williams in 1931 and 1932 executed two deeds to Marvel Pepper which conveyed part of the

tract the Williamses claimed by adverse possession (DX 5 and DX 4). In 1939 Marvel Pepper conveyed part of these lands to Edgar Arthur Simpler and Emmons B. Phillips by quit claim deed (DX 9). The Phillipses allege that the disputed 13-acre parcel was intended to be included within the lands described in the 1931 and 1932 deeds of Williams and the 1939 deed of Pepper. The 1939 deed of Pepper did not describe any of the lands conveyed by metes and bounds but only described the lands conveyed by reference to adjacent owners. The derivation in this 1939 deed, however, states that the lands conveyed were acquired by Marvel Pepper in the two deeds from George Williams in 1931 and 1932. The 1931 deed (DX 5; PX 35) described the lands by metes and bounds and by its terms did not include the disputed parcel, and the 1932 deed (DX 4; PX 35) described the lands as being all the lands included **[*8]** in a Patent called "Fowle's Delight" except for lands of Daisey (nee Banks). It is not contended that the disputed parcel is part of the Fowle's Delight Patent and it clearly is not.

The "adjacent owner" references to the State in the 1939 deed of Pepper to Phillips and Simpler are consistent with the claim of the State that the disputed parcel was always recognized as State or Public Lands and was not intended to be included in the lands conveyed by the 1939 deed. None of the deeds prior to 1959 describe the lands conveyed therein as being bounded on the east by the Atlantic Ocean.

I find that the 1931 and 1932 deeds of George E. Williams to Marvel Pepper and the 1939 Marvel Pepper deed to Simpler and Phillips did not include the disputed parcel as part of the lands conveyed therein. This is clear from the deeds themselves; (quoted infra), the bounds of the Patents, and the testimony in a 1958 trial by Thomas Pepper (DX 34) who prepared the 1931 and 1932 deeds for George E. Williams. It is also not inconsistent with the testimony of most of the members of the Williams' Family who testified as to an ancient writing allegedly written by George Williams (DX 11) and as **[*9]** to other facts.

The first recorded deed in which the disputed tract is described is a quit claim deed which Emmons B. Phillips et al executed in 1959 to a straw party (DX 38) and which created a record title to the disputed parcel. Eva Williams -- the widow of George E. Williams -- and the residuary legatee under his Will (Will Book AN, No. 39, Page 48), joined in this quit claim deed. This deed is also the first deed of record to state that the lands claimed by the Williamses or the Phillipses were bounded by the Ocean. Subsequently in 1960 and 1961 defendants Emmons B. Phillips and wife conveyed the disputed parcel to their son and daughter-in-law, also defendants in this litigation.

Because the 1939 Pepper deed to the Phillipses did not include the disputed parcel within the lands conveyed, the Phillipses have no privity of title with the title of the Williamses or the Peppers. The failure to include the disputed parcel within the lands conveyed by the deeds of Williams and Pepper also strongly indicates that neither Williams or Pepper claimed title to the disputed parcel.

IV

To understand my holding that there is no record title to the disputed parcel prior to **[*10]** the 1959 deed which the Phillipses executed to create record title in themselves, it may be helpful to review the actual language in the deeds relied upon by the parties. In 1931 and 1932 George and Eva Williams created a record chain of title to the lands claimed by them by executing two deeds to Marvel Pepper which described the lands conveyed as follows:

1. 1931 DEED (DX 5; PX 35):

All, that certain tract, piece or parcel of land situate, lying and being in Baltimore Hundred, Sussex County, Delaware, and lying on the east side of Assawaman Bay adjoining lands of Warren Lynch, Raymond Banks and lands of the State of Delaware, more particularly described as follows, to-wit: - Beginning at a post at Assawaman Bay, thence due East 4 perches, North 39 degrees East 23 perches, North 81 degrees East 38 perches, South 10-1/2 degrees East 103 perches, South 3-1/2 degrees West 62 perches, South 22 degrees East 24 perches, South 56 degrees West 13 perches, South 18 degrees West 14 perches, South 11 degrees East 36 perches, South 64 degrees West 3 perches, North 84-1/4 degrees West such a distance as will reach Assawaman Bay, thence along and with the several meanderings of said Bay **[*11]** including several small islands lying near the shore home to the place of beginning, containing 85 acres of land and marsh be the same more or less. Proper variations to be allowed on all lines.

As shown by the testimony of Thomas Pepper who prepared the deed (DX 34, p. 404), this deed was intended to convey only Comfort's Pasture which does not include the disputed parcel. The description therein is based upon the Pepper Survey and is consistent

therewith, It -- by its metes and bounds -- excludes the disputed parcel. The existence of the State's claim that the disputed parcel is part of the Public Lands is necessarily acknowledged by a reference to the State as an adjacent owner.

2. 1932 DEED (DX 4; PX 35):

All that certain tract, piece or parcel of Marsh and Beach land situate, lying and being in Baltimore Hundred, Sussex County, Delaware, adjoining lands of Raymond Banks, lands of The State of Delaware, and lying on the East side of Assawaman Bay, being all the lands included in a Patent called "Fowles Delight" except that part which was claimed by Thomas Daisey and plotted in Orphans Record No. 49, Page 522, etc., reference to said Patent and Orphans Court **[*12]** Record being had will more fully and at large appear.

This deed by its express terms conveyed only the lands contained in the Fowle's Delight Patent. It is undisputed that the disputed parcel is not part of the Fowle's Delight Patent which lies to the south of the disputed parcel. It also refers to adjacent State lands.

On June 21, 1939, Marvel Pepper conveyed part of the lands conveyed in the 1931 and 1932 deeds to him to Emmons Phillips and Edgar Arthur Simpler (Phillips's brother-in-law) (DX 9; PX 37). The description of the lands conveyed states:

All, the right, title and interest of said parties of the first part of, in and to ALL Those certain tracts, pieces or parcels of marsh and beach land situate, lying and being in Baltimore Hundred, Sussex County, Delaware, adjoining lands of Raymond Banks, lands of the State of Delaware and lands of Gilbert Wilkes and lying on the East side of Assawaman Bay, be the contents what they may. Being a part of the same lands conveyed to Marvel C. Pepper, one of the above named grantors, by George E. Williams and Eva M. Williams, his wife, by two Deeds, one bearing date August 22, 1930 (sic), and now of record in the Recorder's Office **[*13]** of the State of Delaware, in and for Sussex County, in Deed Book No. 284, Page 231, and the other Deed bearing date August 3, 1932, recorded in Deed Book No. 285, Page 336, &c., reference to which will more fully appear.

This description states that it is part of the lands conveyed by the 1931 and 1932 deeds set forth above. It therefore only conveys what was conveyed in those two deeds.

In the Sussex County Deed Records immediately following this 1939 deed to Simpler and Phillips from Marvel Pepper on the same page there is a recorded copy of a plot which purportedly shows the lands conveyed in the deed (PX 19). It is a copy of a portion of the Thomas Pepper 1929 Public Lands Survey, updated, and clearly shows that the disputed parcel was not to be included in the conveyance to Simpler and Phillips from Pepper. The original deed introduced in evidence in this trial, however, contains no plot annexed to it at the present time nor is there a reference in the language of the deed to any plot. (DX 9).

In 1943 Phillips and Simpler divided the lands they had acquired from Pepper in 1939. (DX 12, PX 20, PX 38). In their deeds dividing the lands they used metes and **[*14]** bounds descriptions prepared for them by Ike Bennett, a surveyor. The Bennett Survey followed the 1929 Pepper Survey and recognizes the Pepper Survey markers (PX 38, PX 21, PX 20). The deed to Phillips from Simpler (DX 12) conveys:

ALL, that certain piece, parcel or tracts of land lying and being situated in Baltimore Hundred, Sussex County and State of Delaware and lying on both sides of slag road leading from Fenwick Island to Bethany Beach bounded and described as follows.

To Wit: -- Beginning for tract number One at a cement bounder settled on the east side of the aforesaid slag road right of way and in line of State of Delaware lands thence with said right of way N. 5-1/2 degrees E. 692 Ft. to a stake and corner for lands deeded this day to Don, Arthur, and Maxine Simpler thence with said land S. 74 degrees 52' E. 328 ft. to a stake in line for State lands. thence with said State lands and high beach S. 1-1/4 degrees W. 707 ft. to a cement bounder & corner for State lands thence with same N. 75 degrees 24' W. 386 ft. home place of beginning, containing Five and Seventy-three one hundredths acres (5 73/100) more or less.

TRACT # 2

Situated on both sides of aforesaid road **[*15]** beginning at a cement bounder corner for lands of Raymond Banks and State lands thence running with said Banks land N. 77 degrees 10' W. 574 ft. to a cement bounder at the edge of Assawamma Bay thence across out in a northerly direction to a cement bounder and land of land of Thomas Pepper thence with same N. 88 degrees E. 439.7 ft. to a cement bounder and corner for said Pepper thence S. 15 degrees E. 198 ft. to a cement bounder and corner for State lands thence with same S. 46-3/4 degrees W. 119 ft. home place of

beginning. Containing Three and forty five one hundredths acres (3 45/100) more or less.

TRACT # 3

Situated on West side of aforesaid road Beginning at a cement bounder on the west edge of aforesaid right of way and line of lands for Raymond Banks thence with said right-of-way. S. 40 degrees E. 1201 ft. to a cement bounder N. 8 degrees E. or S. 8 W

and land deeded this day to Don, Arthur & Maxine Simpler thence with same N. 80 degrees 7' W. 951 ft. to a cement bounder at the water edge of Assawamma Bay thence with same in a northerly direction to a cement bounder and corner for lands of Raymond Banks thence with said Banks land S. 80 degrees 7' E. 1303.5 **[*16]** ft. to a cement bounder and iron axle thence N. 14 degrees 55' E. 628 ft. home place of beginning. Containing sixteen and fifty five one hundredths (16 55/100) acres more or less.

Said described lots being a part of the same lands that Marvel C. Pepper and Hattie S., his wife deeded by deed to Edgar Arthur Simpler and Emmons B. Phillips the twenty-first day of June A.D. 1939. Recorded at Georgetown in Deed Book E. 11 Vol. 317 Page 594.

The metes and bounds descriptions in the deeds between Emmons Phillips and Edgar Arthur Simpler excludes the disputed parcel.

All the recorded deeds therefore clearly show, despite Phillips's claim to the contrary, that the disputed parcel was never included in any recorded deed prior to the quit claim straw deed in 1959 in which the Phillipses created a record title to the disputed parcel in themselves.

At the time Phillips and Simpler purchased the lands from the Peppers in 1939 they were given, by the seller, a letter from an attorney which clearly showed that the title to the lands being conveyed was predicated on a claim of adverse possession by the Williamses (DX 8).

When the Phillipses placed 3 cottages on part of their lands in 1947 **[*17]** (not the lands now in dispute) they were placed (except for perches) within the bounds of the Fowle's Delight Patent and west of the eastern boundary of that Patent as shown on the Pepper Survey. When the Phillipses placed their "Pine Patch" cottage immediately adjacent to the disputed parcel in 1949 they placed it within the bounds of the Comfort Pasture Patent as shown on the Pepper Survey and not on the disputed parcel. The State makes no claim to any lands contained within the Fowle's Delight or Comfort Pasture Patents.

V

The disputed parcel as claimed by the Phillipses is now bounded on the east by the Atlantic Ocean; on the west by the public highway leading from Fenwick Island to Bethany Beach (Delaware Route 1, formerly Route 14); on the north by lands of Wilkes (formerly of Thomas Pepper) or public lands; on the south partly by public lands and partly by the Fowle's Delight Patent as deeded to Phillips and Simpler in 1939 by Marvel Pepper. The Phillips claim it lies entirely within the large tract claimed by the Williamses.

As previously discussed, there is no record of any conveyance of this disputed parcel from the sovereign to private owners by patent or **[*18]** other grant. Nor is there any record of any conveyance of it prior to 1959 when the Phillipses created a record title in themselves.

Prior holdings in this Court have established that if lands in this State have never been patented or granted to private owners, their title remains with the State, *Phillips v. State ex rel. Dept. of Nat. Res. & Env. Con.,* (1974), supra, unless the private owner can show he has acquired title by adverse possession or by the doctrine of presumed grant. *State v. Phillips,* Del. Ch., 400 A.2d 299 (1979).

Prior to 1843, title by adverse possession could not be acquired against the State. In 1843 and 1852 the General Assembly enacted legislation which permitted title to public lands to be acquired against the State by continued uninterrupted and peaceable possession for a period of 20 years -- except as to salt marshes, beach or shore. *State v. Phillips,* Del. Ch., 400 A.2d 299 (1979).

This Court held in this 1979 decision that the disputed parcel (except the land between high and low water mark -- immediately adjacent to the Ocean) is not beach or shore within the meaning of the statute. The State now concedes that the disputed **[*19]** parcel is not salt marsh. In 1953 the General Assembly repealed the statute permitting the acquisition of title by adverse possession running against the State. 49 *Del. L.,* Ch. 386 (July 15, 1953); *State v. Phillips* (1979) supra. Therefore, the burden of persuasion in this case fell upon the Phillipses to show that they or persons in privity with them acquired title to the 13-acre disputed parcel by 20 years adverse possession between 1843

and 1953 or that they acquired title under the doctrine of presumed grant prior to 1967 when this suit was commenced.

Phillips's task is made difficult by a number of factors: (1) adverse possession was permitted to run against the State only between 1843 and 1953; (2) the disputed parcel and the surrounding areas are sand; (3) the disputed parcel and the surrounding area, for the most part, have always been vacant; (4) the record chain of title to the larger tract which abuts the disputed parcel on two sides is traceable only back to 1931 and the record chain of title to the disputed parcel commenced in 1959 when the Phillipses created the chain in themselves by a straw deed; and (5) the descriptions in the recorded deeds in **[*20]** the chain of title up to 1959 excluded the disputed parcel.

VI

In this trial the Phillipses attempted to show that the Williams Family -- who claimed lands in the area as long ago as 1900, and who were the grantors in the 1931 and 1932 deeds which first established a record chain of title to lands in this area -- claimed the disputed parcel as part of their claimed land holdings and intended to include the disputed tract in their 1931 and 1932 deeds to Pepper and that Pepper intended to include the disputed parcel in his 1939 deed to Phillips and Simpler. As previously indicated they were unable to show that these deeds included the disputed parcel.

The Phillipses also tried valiantly to show that they occupied the disputed parcel openly and notoriously since 1939; that the Peppers likewise occupied the disputed parcel from 1931 to 1939 and that the Williams Family so occupied it from 1900 to 1931. This they, unfortunately, also failed to do.

The evidence shows that as long ago as the 1920's the Williams Family erected or used various duck blinds, wooden tents, shacks and duck pens on part of the large tract claimed by them, but all of these structures were located on the bay **[*21]** side of the tract on lands which were within the bounds of the ancient land Patents and none of these structures were located on the disputed parcel which is sandy beach on the east side of the large tract. From prior to 1931 and even thereafter, the Williamses and their invitees hunted, gunned, fished, trapped, oystered and swam on part of the lands they claimed but the activities which might have been conducted on the disputed parcel were of a recreational nature such as swimming, gathering shells, fishing, picnicking, collecting wild berries and driftwood and rabbit and bird hunting. All of these latter activities have also been engaged in by the public on the public lands for many years.

Sometime before 1931 the Williamses used a water well and water storage barrel which were located near the disputed parcel either at the present location of the "Pine Patch cottage" or on lands to the north of the disputed parcel, both of which locations are within the ancient Patents. The Phillipses have not shown by a preponderance of the evidence that these facilities were located on the disputed parcel.

Arthur E. Baull testified he hauled sand from the area near or on the disputed **[*22]** parcel after 1935 and prior to 1939 but he also testified, in effect, that he did not haul any sand from lands of Pepper. Since the Phillips claim the disputed parcel was within the lands conveyed in the 1939 Pepper deed to them, Mr. Baull could not have removed the sand from the disputed parcel. There also was no formal public road to the area until 1939. I, therefore, conclude that the Phillipses did not show by a preponderance of the evidence that sand was removed from the disputed parcel prior to 1939. Other than these uses, Phillips introduced no evidence to show that anyone occupied or used the disputed parcel prior to 1939.

The Phillipses did show various uses by them of the disputed parcel from 1939 to 1959 -- such as hunting, picnicking, swimming, sunbathing, kite flying, ball playing, fishing and shell, driftwood and wild berry gathering -- which activities were also engaged in by the general public on the state public lands. They also planted indigenous shrubs and grasses. From 1939 to 1951 they sold sand which was removed by others by hand digging, but it is inconclusive whether the sand removal was from the disputed parcel. After 1959 the Phillipses **[*23]** continued their prior activities (except sand removal) and planted nonindigenous plants and trees which, however, resembled the natural growths. They also placed monuments and fences on the disputed parcel. In 1962 the vegetation, monuments and fences were destroyed by a storm. Beginning in 1959 they expressed their claim of ownership of the disputed parcel to various employees of the State Highway Department.

The State never formally notified the Phillipses of the State's claim to the disputed parcel until after 1959 but as early as 1955 the Phillipses knew of a new State survey being underway. In February of 1962 the State placed signs on the disputed parcel showing State

ownership and the State filed this suit in February of 1967.

The Phillipses have paid the taxes as assessed to them by Sussex County since 1939. Taxes were assessed against the disputed parcel commencing in 1960, after the 1959 deed was recorded whereby the Phillipses created a record in themselves, and until 1968.

There was some inconclusive and even inaccurate evidence that the reputation in the community was that the Williams Family owned land in the area -- even after 1932 when they conveyed the lands **[*24]** they claimed in this area to Pepper.

A handwritten memorandum written prior to 1949 by George E. Williams -- introduced as evidence by the Phillipses -- is more consistent with the State's position that George E. Williams did not claim the disputed 13-acre parcel than with the position of the Phillipses that he did claim it.

A 1960 survey prepared by Wingate & Eschenbach for the Phillipses follows the lines of the Pepper Survey except that Wingate & Eschenbach moved the eastern boundary of the disputed parcel eastward to the Ocean. The 1960 Wingate & Eschenbach Survey (DX 70) shows three existing markers on the disputed parcel boundary lines, which markers were from the Pepper Survey. No evidence was adduced to show any justification for Wingate & Eschenbach showing the eastern boundary of the disputed parcel to be the Ocean. The Wingate & Eschenbach Survey shows that the eastern boundary line of other lands of Phillips -- the title of which is not disputed by the State -- is the eastern line of the Fowle's Delight Patent -- which eastern line binds with the public lands and does not bind with the Ocean. This eastern Fowle's Delight Patent boundary line is as shown **[*25]** on the Pepper Survey.

Edgar Arthur Simpler, a co-grantee with Emmons Phillips in the 1939 deed from Pepper, testified in a 1958 trial (DX 34) that the tract claimed by George Williams was irregular in shape with a crooked boundary line which had been marked by flags in the 1930's. This testimony is in conflict with the assertion that the Williamses claimed all the land between the Ocean and the Bay from Kinksbush Gut to the U.S. Coast Guard Station.

VII

From the facts adduced at trial, it is clear that the Phillipses did not establish by a preponderance of the evidence that they, or their predecessors in title, occupied the disputed parcel by continued, uninterrupted and peaceable possession of the disputed parcel for the twenty years required to establish title by adverse possession against the State. *State v. Phillips,* Del. Ch., 400 A.2d 299, 303 (1979). In order to establish title by adverse possession it must be shown that the possession relied upon was open, notorious, hostile and exclusive for at least a twenty-year period. *State v. Phillips,* Del. Ch., 400 A.2d 299, 304 (1979); *David v. Steller,* Del. Supr., 269 A.2d 203 (1970); *Suplee v. Eckert,* **[*26]** Del. Ch., 39 Del. Ch. 143, 160 A.2d 590 (1960).

For the claim to be open and notorious it must be so public that the owner has notice of the possession; for a claim to be hostile it must be against a calim of ownership by all others; for possession to be exclusive it must be exclusive of the record owner and the public. *Steller v. David,* Del. Super., 257 A.2d 391 (1969), *rev'd on other* grounds, *David v. Steller,* supra. The adverse possession must be of a character sufficient to give the record owner notice that an adverse claim is being asserted. *Lewes Trust Co. v. Grindle,* Del. Supr., 53 Del. 396, 170 A.2d 280 (1961), *Suplee v. Eckert,* supra; *Marvel v. Barley Mill Road Homes,* Del. Ch., 34 Del. Ch. 417, 104 A.2d 908 (1954), 2 AM.JUR.2d, *Adverse Possession* § 48, p. 138 (1962).

Here the evidence shows that the activities supporting the claimed adverse possession of the disputed parcel by the Williamses, by the Peppers, and by the Phillipses -- at least prior to 1953 when the General Assembly repealed the statute permitting adverse possession to run against the State -- were the same activities that any member of the public would likely engage in on the public lands. These activities therefore **[*27]** could not put the State on notice that a private owner was claiming title to part of the public lands.

The State claims that a stricter standard of proof is required to establish adverse possession against the State than against private owners, but it is not necessary to decide this since the Phillipses have not met the burden required in private cases. See *United States v. Fullard-Leo,* 331 U.S. 256, 91 L. Ed. 1474, 67 S. Ct. 1287 (1947), *Morgan v. Moseley,* Ky. App., 206 Ky. 72, 266 S.W. 876 (1924).

XIII

The Phillipses also have not, by the preponderance of

the evidence, established title to themselves based on the doctrine of presumed grant. That doctrine has long been recognized in Delaware. *State v. Phillips,* Del. Ch., 400 A.2d 299 (1979); *Tubbs v. Lynch,* Del. Super., 4 Del. 521 (1847); *Walls Lessee v. M'Gee,* Del. Super., 4 Del. 108 (1844). However, it is clear that in Delaware, at least, the length of possession necessary to establish title by presumed grant is longer than the time period required to establish title by adverse possession. The minimum time in Delaware for title to be acquired by presumed grant is well over 30 years. *Tubbs v. Lynch,* supra; *Wall's Lessee v. McGee,* supra. **[*28]** A shorter period of time was not indicated in my 1979 decision in this case. My citing at 400 A.2d at 299 of *United States v. Fullard-Leo,* 331 U.S. 256, 91 L. Ed. 1474, 67 S. Ct. 1287 (1947) for the proposition that the doctrine of presumed grant is a general rule of American law does not overrule the clear holding of Delaware Courts that well over 30 years possession is necessary to invoke the doctrine.

Even if the Phillipses' activities on the disputed parcel commencing in 1959 were sufficient to notify the State of their claim -- which they were not -- these activities did not continue for even 20 years prior to 1967 when this suit was commenced -- certainly not for over 30 years. There has been no showing of adverse use for over 30 years by any claimant or any comination of claimants.

The doctrine of presumed grant is not strictly speaking based solely on possession, in any case. It is predicated on evidence being adduced which would show that a conveyance might have been executed. *State v. Phillips,* Del. Ch., 400 A.2d 299 at 305 (1979). It is only a presumption subject to rebuttal. 2A C.J.S., *Adverse Possession* § 326, p. 117 (1972). The evidence adduced at trial was sufficient **[*29]** to rebut any presumption of a grant of the disputed parcel by the State to Williams, Pepper or Phillips.

IX

The Phillipses also urge that even if they cannot establish their title to the disputed parcel by adverse possession or reliance on the doctrine of presumed grant, they can nevertheless prevail because the State is barred by equitable estoppel or laches from claiming title to the disputed parcel.

If an owner of land stands by and permits another to make improvements to the land in the good-faith belief that he has a right to do so, and the owner neither objects nor interposes to prevent the work, but rather silently permits the improver to proceed, he will be estopped to deny the improver's title or to assert his own or he will be liable for the value of the improvements. 31 C.J.S., *Estoppel* § 94, p. 505 (1964); 27 AM.JUR., *Improvements* § 1-35, p. 259-285 (1940); *McGinnes v. Department of Finance,* Del. Ch., 377 A.2d 16 (1977); *Timmons v. Campbell,* Del. Ch., 35 Del. Ch. 68, 111 A.2d 220 (1955); 3 Pomeroy, *Equity Jurisprudence* § 804 (5th ed. 1941).

It is essential that for the doctrine of equitable estoppel to be applied, the party claiming the benefit of **[*30]** the estoppel must be misled to his injury and change his position for the worse. He must believe and rely on the representations of the party sought to be estopped. *National Fire Ins. Co. v. Eastern Shore Lab., Inc.,* Del. Super., 301 A.2d 526 (1973); *Wilson v. American Insurance Company,* Del. Super., 58 Del. 394, 209 A.2d 902 (1965).

Laches is an inexcusable delay, without necessary reference to duration, in an assertion of a right. *Skouras v. Admiralty Enterprises, Inc.,* Del. Ch., 386 A.2d 674 (1978). Unless mounting to a statutory period of limitations, mere delay is not sufficient to constitute laches, if the delay has not worked to the disadvantage of another. *Shanik v. White Sewing Machine Corp.,* Del. Supr., 25 Del. Ch. 371, 19 A.2d 831 (1941). Prejudice or injury to the party raising laches is an essential element. So long as the position of the parties is not changed and there is no prejudice from delay, the doctrine of laches is inapplicable. See 2 Pomeroy, *Equity Jurisprudence* § 419 (5th ed. 1941).

The doctrine of laches and equitable estoppel are closely related, laches being an application of the general principles of estoppel. *Frank v. Wilson & Co.,* Del. **[*31]** Ch., 24 Del. Ch. 237, 9 A.2d 82 (1939). A common element of each theory is prejudice, that one party relies on the representations of the other to his detriment.

Although the contrary is apparently the majority view, in Delaware laches and equitable estoppel can be asserted against the State in certain circumstances, albeit, with less rigidity than against a private party. *Singewald v. Girden,* Del. Ch., 36 Del. Ch. 152, 127 A.2d 607 (1956); but see 30A C.J.S., *Equity* § 114, p. 34 (1965).

The only significant acts of the Phillipses on the 13-acre disputed parcel which could possibly be considered to be a substantial change of position was their additions to their Pine Patch Cottage. In 1949 the Pine Patch

Cottage was moved onto lands entirely within the bounds of the Comfort's Pasture Patent which the State concedes is owned by the Phillips. At that time, therefore, it was not located on any part of the 13-acre disputed parcel. Subsequently the Phillipses added to the Pine Patch Cottage and these additions encroached less than four feet upon the 13-acre disputed parcel. These encroachments were so slight and so difficult to see from the public highway, however, that they could not have put the State on **[*32]** notice of any adverse claim by the Phillipses, therefore, the State could not have been put in the stance of having stood by and voluntarily permitted the Phillipses to proceed with the improvements to their detriment. The other physical additions placed by the Phillipses on the disputed parcel consisted of strands of barbed wire and small trees furnished by the State, all of which were placed after 1960 and destroyed by the storm of 1962. These were not of a substantial character or cost, nor did they exist for a substantial period of time, nor were they made under such circumstances as would call for notice or protest from the State. 31 C.J.S., *Estoppel* § 94, p. 506 (1964). In fact, the Phillipses knew or should have known of the State's claim of title to the disputed parcel at this time. There is therefore no factual basis on which to assert a claim of estoppel or laches.

X

The holdings and decree of specific performance in a prior case in this Court (*Emmons B. Phillips et ux v. Max Berg et al,* C.A. No. 423, Sussex County, 1972, DX 197[d]) are neither *res judicata* nor *stare decis* to the issues in this case nor are they persuasive. That action **[*33]** was an amicable action between parties with the same interest, that is, the quieting of title to the lands then in question. The lands in question in that case were all part of Fowle's Delight Patent and there was no allegation that they were public lands. The factual and legal issues in that case and the present case were not the same and that opinion announced no new doctrine of law. It could not, therefore, be *stare decis* to the issues in this case. The parties in the 1972 case and those in this case and the land in issue were also different and therefore the 1972 judgment is not *res judicata* to the issues here. *State v. Phillips* (1979) supra. *Maldonado v. Flynn,* Del. Ch., 417 A.2d 378, 381 (1980).

The Superior Court's opinion and decrees in *Wienski v. Wilkes* (C.A. 131 and 133, 1956-1958, DX 39) are also not determinative of the issues in this case nor *res judicata* nor *stare decis* because that case also involved lands which had been patented or granted to private owners and were not alleged to be part of the parcel disputed in this case. The issue there was which private owners owned lands conceded to be in private ownership, thus there **[*34]** was no question that the lands still belonged to the State -- as is the case here.

In that trial, it should be noted, however, Eva Williams testified, in effect, that the Williams's occupancy was limited to the acres conveyed by she and her husband to the Peppers by the 1931 and 1932 deeds. As previously noted, those deeds did not convey the disputed parcel.

XI

This Court is aware of the holding in *Green v. Cowgill,* Del. Ch., 30 Del. Ch. 345, 61 A.2d 410 (1948) and *Marvel v. Barley Mill Road Homes, Inc.,* Del. Ch., 34 Del. Ch. 417, 104 A.2d 908 (1954). The teaching of those cases is that the Court of Chancery does not try title to land and that claims of adverse possession are best triable at law. The instant case, however, commenced in 1967 and it has been the subject of three opinions in this Court, of which two are reported. It has also been thrice appealed to the Delaware Supreme Court and the docket here consists of 348 entries. None of the parties suggested that the case be tried in the Superior Court. For these reasons, and the Court's familiarity with the issues and the record, I did not raise *sua sponte* the question of whether trial should take place in this Court or the Superior **[*35]** Court. Originally the issues presented in this case were clearly triable here, therefore, this Court had discretion to proceed to resolve the entire controversy. *Getty Ref. & Marketing Co. v. Park Oil, Inc.,* Del. Ch., 385 A.2d 147 (1978). Because of the unusual nature of this case, however, it should not be considered a precedent that this Court will determine adverse possession claims in other cases whether requested to do so or not.

For the reasons discussed, judgment must be entered in favor of plaintiff and against defendants. Plaintiff should submit a proposed final order. [SEE ILLUSTRATION IN ORIGINAL]

Doberstein v. G-P Indus.

Court of Chancery of Delaware

July 10, 2015, Submitted; October 30, 2015, Decided

C.A. No. 9995-VCP

Reporter
2015 Del. Ch. LEXIS 275 *; 2015 WL 6606484

ANNE L. DOBERSTEIN, Plaintiff, v. G-P INDUSTRIES, INC., a Delaware corporation, DAVID GREENPLATE, SR., Defendants.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

Pursuant to Del. Ch. Ct. R. 12(b)(6), the chancery court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As reaffirmed by the state's highest court, the governing pleading standard in Delaware to survive a motion to dismiss is reasonable conceivability. That is, when considering such a motion, a court must accept all well-pleaded factual allegations in the complaint as true, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof. This reasonable "conceivability" standard asks whether there is a "possibility" of recovery. If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss. The court, however, need not accept conclusory allegations unsupported by specific facts or draw unreasonable inferences in favor of the non-moving party. Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Motions to Dismiss, Failure to State Claim**

Generally, the court will consider only the pleadings on a motion to dismiss under Del. Ch. Ct. R. 12(b)(6). A judge may consider documents outside of the pleadings only when: (1) the document is integral to a plaintiff's claim and incorporated in the complaint or (2) the document is not being relied upon to prove the truth of its contents.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Inadequate Capitalization

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Sham Corporations

HN3[] Alter Ego, Corporate Formalities

To state a veil-piercing claim, the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors. Specific facts a court may consider when being asked to disregard the corporate form include: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the dominant shareholder siphoned company funds; and (5) whether, in general, the company simply functioned as a facade for the dominant shareholder. The decision to disregard the corporate entity generally results not from a single factor, but rather some combination of them, and an overall element of injustice or unfairness must always be present, as well. Most importantly, because Delaware public policy does not lightly disregard the separate legal existence of corporations, a plaintiff must do more than plead that one corporation is the alter ego of another in conclusory fashion in order for the court to disregard their separate legal existence.

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Civil Procedure > Preliminary Considerations > Equity > Relief

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

HN4[] Shareholder Duties & Liabilities, Piercing the Corporate Veil

The case law governing veil-piercing requires the court to consider whether the individual defendant abused the corporate form and, through that abuse, perpetrated fraud on an innocent third party. It is not enough to allege that the individual defendant made fraudulent statements about his progress toward completing his contractual obligations. Those types of allegations may or may not support a claim for fraud, but the individual defendant's wrongful acts must be tied to the manipulation of the corporate form in order to make veil-piercing justifiable on grounds of equity.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN5[] Management Duties & Liabilities, Fiduciary Duties

Negligent misrepresentation--also known as

equitable fraud--is separate from, and broader, than common law fraud, such that generally whatever amounts to common law fraud also amounts to equitable fraud. To claim equitable fraud, the plaintiff need not show that a statement was made with knowledge that it was false or in reckless disregard of the truth, as the chancery court has not required a showing of scienter, reflecting its willingness to provide a remedy for negligent or innocent misrepresentation. Yet, equitable fraud is not available in every case or to every plaintiff. It requires special equities, typically the existence of some form of fiduciary relationship, such as that between a director and stockholder or a trustee and cestui que trust, although other circumstances might be cited.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Elements

HN6 **Negligent Misrepresentation, Elements**

Sophisticated contractual parties who bargain at arm's length generally do not qualify for the kind of equitable protection that the negligent misrepresentation doctrine envisions in this regard. The "special equities" that can provide a basis for equitable fraud are relationships more akin to fiduciary duties or trustee relationships.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN7 **Motions to Dismiss, Failure to State Claim**

Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. Unjust enrichment, or quasi-contract, has developed as a theory of recovery to remedy the absence of a formal contract. When a complaint alleges an express, enforceable contract that controls the parties' relationship, a claim for unjust enrichment will be dismissed because the contract is the measure of plaintiffs' right.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN8 **Equitable Relief, Quantum Meruit**

A claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN9 **Subject Matter Jurisdiction, Jurisdiction Over Actions**

The Delaware Court of Chancery will dismiss an action under Del. Ch. Ct. R. 12(b)(1) if it appears from the record that the court does not have subject matter jurisdiction over the claim. The plaintiff bears the burden of establishing the chancery court's jurisdiction, and where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to the pleadings, he must support those allegations with competent proof.

Civil Procedure > Preliminary

Considerations > Equity > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

HN10[] Preliminary Considerations, Equity

The chancery court is one of limited jurisdiction. It can acquire subject matter jurisdiction over a case in three ways: (1) an invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction. The chancery court will not exercise subject matter jurisdiction where a complete remedy otherwise exists but where plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic "open sesame" to the chancery court.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN11[] Subject Matter Jurisdiction, Jurisdiction Over Actions

The issue of subject matter jurisdiction is so crucial that it may be raised at any time before final judgment.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Estate, Gift & Trust Law > Estate Administration > Conservators & Guardians > Guardians for Minors

HN12[] Management Duties & Liabilities, Fiduciary Duties

Under *Del. Code Ann. tit. 10, § 341*, the Delaware Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity. Equitable rights are rights that have traditionally not been recognized at common law. The most common example of equitable rights in the chancery court are fiduciary rights and duties that arise in the context of trusts, corporations, other forms of business organizations, guardianships, and the administration of estates.

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Governments > Courts > Common Law

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Civil Procedure > Preliminary Considerations > Equity > Relief

HN13[] Equity, Adequate Remedy at Law

Under *Del. Code Ann. tit. 10, § 342*, the Delaware Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of Delaware. Equitable remedies may be applied even where the right sued on is essentially legal in nature, but with respect to which the available remedy at law is not fully sufficient to protect or redress the resulting injury under the circumstances.

Civil Procedure > Preliminary

Considerations > Equity > Adequate Remedy at Law

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN14 **Equity, Adequate Remedy at Law**

The party seeking a court's intervention bears the burden of establishing the court's subject matter jurisdiction, and the court may consider evidence outside the pleadings in resolving that issue. Del. Ch. Ct. R. 12(b)(1). Further, in deciding whether or not equitable jurisdiction exists, the court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain by bringing his or her claim. In other words, the court must address the nature of the wrong alleged and the available remedy to determine whether a legal, as opposed to an equitable remedy, is available and sufficiently adequate.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > ... > Justiciability > Mootness > General Overview

HN15 **Judges, Discretionary Powers**

The Delaware Court of Chancery routinely decides controversies that encompass both equitable and legal claims. If a controversy is vested with equitable features which would support chancery jurisdiction of at least part of the controversy, then the Chancellor has discretion to resolve the remaining portions of the controversy as well. Once the court determines that equitable relief is warranted, even if subsequent events moot all equitable causes of action or if the court ultimately determines that equitable relief is not warranted, the court retains the power to decide the legal features of the claim pursuant to the cleanup doctrine.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN16 **Judges, Discretionary Powers**

If a controversy is vested with equitable features which would support chancery jurisdiction of at least part of the controversy, then the Chancellor has discretion to resolve the remaining portions of the controversy as well.

Counsel: **[*1]** Donald L. Logan, Esq., LOGAN & PETRONE, LLC, Wilmington, Delaware; Attorneys for Plaintiff.

Patrick McGrory, Esq., TIGHE & COTTRELL, P.A., Wilmington, Delaware; Attorneys for Defendants.

Judges: PARSONS, Vice Chancellor.

Opinion by: PARSONS

Opinion

MEMORANDUM OPINION

PARSONS, Vice Chancellor.

This is primarily a breach of contract action seeking damages for failure to perform under a residential renovation agreement. The plaintiff hired the defendants to substantially remodel her recently purchased residence, but the defendants suffered significant financial trouble and abandoned the project before completion. The plaintiff advances a number of theories of recovery, including fraud, intentional and negligent misrepresentation, breach of contract, and unjust enrichment. The defendants moved to dismiss three of the complaint's counts under *Court of Chancery Rule 12(b)(6)* for failure to state a claim and the remaining three counts along with the complaint entirely under *Rule 12(b)(1)* for lack of subject matter jurisdiction. For the reasons set forth below, I conclude that the plaintiff has not stated a claim upon which relief can be granted as to the first three counts and that this Court lacks subject matter jurisdiction over the remaining three counts. I therefore **[*2]** grant the defendants' motion and dismiss the complaint.

I. BACKGROUND[1]

A. Parties

Plaintiff, Anne L. Doberstein, is an individual who primarily works and resides in Switzerland. Doberstein also owns a residence located at 103 East Pembrey Drive in Wilmington, Delaware.

Defendant G-P Industries, Inc. ("G-P") is a Delaware corporation that provides general contracting and altering and remodeling services in Wilmington, Delaware. Defendant David Greenplate, Sr. is the president and registered agent of G-P. G-P and Greenplate are referred to, collectively, as "Defendants."

B. Facts

1. Doberstein hires G-P to renovate her house

In October 2012, Doberstein entered into a contract with G-P (the "Agreement"), under which G-P agreed to serve as the general contractor on a significant home renovation project at Doberstein's Wilmington residence (the "Project"). On October 17, 2012, Greenplate, on behalf of G-P, prepared the Project's estimates and the **[*3]** Agreement. He estimated that the Project would cost Doberstein a total of $494,498.[2] Under the terms of the Agreement, Doberstein was to provide advance deposits for subcontractors performing work on the basement as well as for the building permit. Otherwise, the Agreement did not contemplate Doberstein paying for any renovations before they were completed or paying subcontractors directly. Instead, G-P was to pay all subcontractors and to seek reimbursement through its invoices to Doberstein. In addition, G-P agreed to invoice Doberstein on the first of each month—with the exception of major material purchases, which were to be invoiced immediately—and to provide a three

[1] The facts recited herein are drawn from the allegations of the plaintiff's Verified Complaint (the "Complaint"). Those allegations and facts drawn from documents integral to the Complaint are presumed true for purposes of Defendants' motion to dismiss.

[2] Although they agree that the estimated $494,498 was the initial amount of the Agreement, the parties dispute the final amount covered by the Agreement. Based on the allegations in the Complaint and taking into account the additional $47,662 in supplemental estimates and change orders, I assume for purposes of this **[*4]** motion that the total amount of the Agreement was $542,159. *See* Compl. ¶ 6.

percent discount on labor charges when Doberstein paid in cash. G-P began work on the Project in November 2012. Defendants repeatedly assured Doberstein that the Project would be completed by the end of 2013.

Doberstein, who lives and works in Switzerland, began making monthly payments while abroad. On March 14, 2013, G-P sent Doberstein a $1,520 invoice for cabinet grade plywood. G-P had not yet begun construction on the portions of the Project that required the plywood, but purchased the plywood early because it was concerned that the cost would increase. Doberstein paid G-P to purchase the plywood in advance and store it until needed. Further, in that March 14 invoice and in an April 10, 2013 invoice, G-P offered Doberstein a three percent reduction on labor if she paid in cash directly to Greenplate. Doberstein paid a total amount of $33,950 in cash directly to Greenplate based on those two invoices.

2. Doberstein discovers issues with the Project's progress

In May 2013, Doberstein traveled from Switzerland to visit the Project site. Upon arrival, she discovered that little work had been completed, despite the fact that she had paid Defendants $127,820.10. After Doberstein returned to Switzerland, her interior designer, Matthew Pearson, spoke with Greenplate about the lack of progress. Greenplate explained that **[*5]** the Project had been delayed due to a lack of manpower, delays on other projects, and shuffling employees. He assured Pearson, however, that the Project still would be completed by the end of 2013.

On or about July 25 and 27, 2013, a neighbor, who also served as the president of the neighborhood homeowners' association, contacted Doberstein regarding the unkempt state of her property. The neighbor informed Doberstein that little progress had been made on the Project in the past several months, even after the meetings Doberstein and Pearson had with Greenplate. Doberstein contacted Greenplate, demanding action. On August 9, 2013, Greenplate sent a letter to Doberstein's neighbors, explaining that the Project had been delayed due to weather and manpower issues and stating that "we did stop working there in early May . . . ."[3] Despite halting work on the Project, G-P had sent Doberstein invoices from May through August for a total amount of $49,500.

Later in August 2013, Pearson began meeting weekly at the Project site with Greenplate and insisted that G-P prepare a schedule of the work to be done. During those weekly meetings, Pearson observed three to six workers on the Project **[*6]** at any given time. Doberstein and Pearson later discovered that the Project was unmanned most of the week and that the number of workers was increased on days when Greenplate would meet with one of them.

3. The Project's completion date gets delayed

In September 2013, Doberstein learned that, contrary to her explicit instructions, Pearson had not been copied on the invoices sent to her by G-P and Greenplate. Doberstein reiterated her request for Pearson to be copied on all invoices. Later that month, during one of their weekly meetings, Greenplate revealed to Pearson that the Project would not be completed until the end of January 2014. Doberstein did not respond well to this news. To ameliorate her displeasure, Greenplate told Doberstein that the Project would be substantially complete by the end of 2013, such that Doberstein could move in her things. Throughout the rest of 2013, G-P's invoicing accelerated in amount and frequency. By the end of December 2013, Doberstein had paid a total of $314,434.68 to G-P and Greenplate since the Project's inception, representing fifty-eight percent of the total $542,159 due under the Agreement, though the Project was nowhere near complete.

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[3] Compl. ¶ 12.

In January **[*7]** 2014, Pearson informed Greenplate that the Project had to be completed by March 1, because Doberstein's builders' risk insurance policy would expire on that date. After multiple requests from Pearson, Greenplate finally submitted a completion schedule, which contemplated a March 1 completion date. Greenplate then told Doberstein that G-P would need to bill every two weeks rather than monthly. As a result, Doberstein set up direct wire transfers from her bank account to G-P's account. Between January 1 and February 21, 2014, Doberstein paid an additional $146,930.34 via wire transfers to G-P. The Project's final invoice was issued to Doberstein on February 17, 2014 and was followed by G-P's urgent requests for payment over the following few days.

4. G-P goes out of business

On February 22, 2014, Doberstein, Pearson, Greenplate, and the flooring subcontractor met to discuss the Project. During the meeting, Greenplate admitted he would not have the Project complete by March 1, but promised Doberstein it would be complete by the end of April. Three days later, however, Greenplate fired G-P's employees and sent a letter to Doberstein and at least one other customer informing them that G-P **[*8]** would be abandoning their renovations, because financially, it was unable to continue in business. The letter stated that G-P's financial troubles were due, in part, to its underbidding of the Project, late payments by customers, and increased costs. In March, Greenplate and G-P abandoned the Project altogether. In April, Todd Breck, A.I.A., P.E., of Breckstone Architecture, inspected the Project and estimated that, at the time, the value of the work in place was approximately $298,272.98. To date, Doberstein has paid Defendants a total of $461,365.02.

C. Procedural History

On August 2, 2014, Doberstein filed the Complaint against Greenplate and G-P. On October 2, 2014, Defendants moved to dismiss the Complaint and filed an opening brief on December 8. On July 10, 2015, after completion of the briefing, I heard oral argument on that motion. During argument, Doberstein voluntarily dismissed Counts VII, VIII, and IX of the Complaint.[4] This Memorandum Opinion constitutes my rulings on Defendants' motion to dismiss with respect to the Complaint's remaining six counts.

D. Parties' Contentions

Doberstein asserts six remaining counts against Defendants. In Count I, she seeks to pierce G-P's corporate veil and hold Greenplate personally liable for his fraudulent statements and misrepresentations to her. In Count II, Doberstein avers that Greenplate and G-P fraudulently concealed their plan to abandon the Project after she had paid in full under the Agreement. In Count III, Doberstein alleges Greenplate and G-P intentionally misrepresented the amount due under various invoices in order to extract unwarranted payments from her. In Count IV, Doberstein avers that Greenplate and G-P negligently misrepresented information regarding the status, completion, and billing of the Project. Count V asserts a claim against G-P for breach of an express contract, which Defendants do not contest in their motion. Finally, in Count VI, Doberstein alleges that Greenplate and G-P have been unjustly enriched by the amount they received from her for work they did not perform on the Project.

Defendants counter, pursuant to *Rule 12(b)(6)*, that Counts I, IV, and VI should be dismissed for failure to state a claim that would **[*10]** entitle Doberstein to relief. Further, Defendants argue that if the equitable claims in Counts I, IV, and VI are dismissed under *Rule 12(b)(6)*, the remaining claims, which are legal in nature, should be

[4] July 10 Arg. Tr. 7. Count VII was a claim for breach of the implied covenant of good faith and fair dealing, Count VIII a claim **[*9]** for conversion, and Count IX a claim for replevin. *See* Compl. ¶¶ 71-86.

dismissed for lack of subject matter jurisdiction under *Rule 12(b)(1)*. Alternatively, if I do not dismiss the remainder of the action for lack of subject matter jurisdiction, Defendants assert that Counts II and III should be dismissed for failure to state a claim upon which relief can be granted.

II. ANALYSIS

A. Counts I, IV, and VI Must Be Dismissed Under *Rule 12(b)(6)* for Failure to State a Claim

1. Legal standard

HN1[↑] Pursuant to *Rule 12(b)(6)*, this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As reaffirmed by the Delaware Supreme Court, "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[5] That is, when considering such a motion, a court must "accept all well-pleaded factual allegations in the Complaint as true, . . . draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable **[*11]** set of circumstances susceptible of proof."[6] This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[7] If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[8] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[9] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[10]

HN2[↑] Generally, the Court will consider only the pleadings on a motion to dismiss under *Rule 12(b)(6)*. "A judge may consider documents outside of the pleadings only when: (1) the document is integral to a plaintiff's claim and incorporated in the complaint or (2) the document is not being relied upon to prove the truth of its contents."[11]

2. Count I: piercing the corporate veil

Doberstein claims that, despite Greenplate's otherwise limited liability, I should pierce G-P's corporate veil and hold him individually liable **[*12]** for his allegedly fraudulent conduct. *HN3*[↑] "To state a 'veil-piercing claim,' the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors."[12] Specific facts a court may consider when being asked to disregard the corporate form include: "(1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the dominant shareholder siphoned company funds; and (5) whether, in general, the company simply

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[5] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC, 27 A.3d 531, 537 (Del. 2011)* (footnote omitted).

[6] *Id. at 536* (citing *Savor, Inc. v. FMR Corp., 812 A.2d 894, 896-97 (Del. 2002)*).

[7] *Id. at 537 & n.13*.

[8] *Id. at 536*.

[9] *Price v. E.I. duPont de Nemours & Co., Inc., 26 A.3d 162, 166 (Del. 2011)* (citing *Clinton v. Enterprise Rent-A-Car Co., 977 A.2d 892, 895 (Del. 2009)*).

[10] *Crescent/Mach I P'rs, L.P. v. Turner, 846 A.2d 963, 972 (Del. Ch. 2000)* (Steele, V.C., by designation).

[11] *Allen v. Encore Energy P'rs, 72 A.3d 93, 96 n.2 (Del. 2013)*.

[12] *Crosse v. BCBSD, Inc., 836 A.2d 492, 497 (Del. 2003)*

functioned as a facade for the dominant shareholder."[13] The decision to disregard the corporate entity "generally results not from a single factor, but rather some combination of them, and 'an overall element of injustice or unfairness must always be present, as well.'"[14] Most importantly, "because Delaware public policy does not lightly disregard the separate legal existence of corporations, a plaintiff must do more than plead that one corporation is the alter ego of another in conclusory fashion in order for the Court to disregard their separate legal existence."[15]

Doberstein contends that her claim for veil-piercing is supported by her allegations that Greenplate repeatedly communicated false statements to her concerning the work being done at her property and that she relied on those statements to her detriment. She alleges that Greenplate and G-P increased the frequency and the amount of their billing during the last six weeks of the Project, despite the fact that they knew they shortly were going to abandon it and cease doing business.[16] According to Doberstein, because all the requisite elements of fraud are present, she has alleged a sufficient basis for disregarding the corporate identity of G-P and holding Greenplate personally liable. I disagree.

HN4[↑] The case law governing veil-piercing requires me to consider whether the individual defendant—*i.e.*, Greenplate—abused the corporate form and, through that abuse, perpetrated fraud on an innocent third party—*i.e.*, Doberstein. It is not enough to allege, as Doberstein does, that Greenplate made fraudulent statements about his progress toward completing **[*14]** his contractual obligations. Those types of allegations may or may not support a claim for fraud, but Greenplate's wrongful acts must be tied to the manipulation of the corporate form in order to make veil-piercing justifiable on grounds of equity. No such nexus is alleged here.

The Complaint alleges that Greenplate knew that G-P was going out of business and, therefore, induced Doberstein to make accelerated payments from January 1 to February 21, 2014, to extract as much money from her as possible. Doberstein has not pled, however, that Greenplate siphoned funds from G-P to himself during those last six weeks and thereby used the corporate form to shield those funds and himself from liability once G-P went out of business.[17] Absent such allegations, the Complaint states, at most, a claim for fraud against G-P due to actions taken by Greenplate on its behalf.[18] Because Doberstein failed to allege that Greenplate utlized G-P as a sham entity to defraud her, Count I must be dismissed for failure to state a claim.

3. Count IV: negligent misrepresentation

HN5[↑] Negligent misrepresentation—also known as "equitable fraud"—"is separate from, and

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[13] *MicroStrategy Inc. v. Acacia Research Corp., 2010 Del. Ch. LEXIS 254, 2010 WL 5550455, at *11 (Del. Ch. Dec. 30, 2010)* (internal quotation marks **[*13]** and citation omitted).

[14] *Id.* (citing *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V., 2008 Del. Ch. LEXIS 127, 2008 WL 4057745, at *12 (Del. Ch. Sept. 2, 2008)*).

[15] *Id.*

[16] Compl. ¶¶ 41-42.

[17] Although not discussed in the briefs, Doberstein alleges in the Complaint that Greenplate had her make direct payments to him in cash on two separate occasions in March and April **[*15]** 2013, Compl. ¶ 17, well before Greenplate allegedly knew of G-P's eventual demise. Although this allegation raises questions about Greenplate possibly siphoning off company funds, the Complaint does not plead facts satisfying the other four elements under *MicroStrategy* or demonstrating that an element of injustice or unfairness related to the corporate form of G-P was present during the March-April 2013 time period. The decision to disregard the corporate entity "generally results not from a single factor, but rather some combination of them, and 'an overall element of injustice or unfairness must always be present, as well.'" *MicroStrategy Inc., 2010 Del. Ch. LEXIS 254, 2010 WL 5550455, at *11*. Although Doberstein's allegations as to her two payments to Greenplate may establish a direct claim against him for fraud, they are insufficient, standing alone, to state a claim for piercing the corporate veil.

[18] I express no opinion as to whether Doberstein might have a claim directly against Greenplate for fraud.

broader, than common law fraud,"[19] such that "generally whatever amounts to common law fraud also amounts to equitable fraud."[20] " **[*16]** [T]o claim equitable fraud, 'the plaintiff need not show that a statement was made with knowledge that it was false or in reckless disregard of the truth,'"[21] as this Court generally "has not required a showing of scienter, 'reflecting its willingness to provide a remedy for negligent or innocent misrepresentation.'"[22] Yet, "[e]quitable fraud is not available in every case or to every plaintiff. It requires special equities, typically the existence of some form of fiduciary relationship, such as that between a director and stockholder or a trustee and *cestui que trust*, although other circumstances might be cited."[23]

Doberstein contends that because she contracted with G-P to complete renovation work at her property while she was living abroad, she was "relying" on Defendants in a special way and, therefore, can bring this claim for equitable fraud. I do not find this argument persuasive. ***HN6***[⬆] Sophisticated[24] contractual parties who bargain at arm's length generally do not qualify for the kind of equitable protection that the negligent misrepresentation doctrine envisions in this regard.[25] The "special equities" that **[*17]** can provide a basis for equitable fraud are relationships more akin to fiduciary duties or trustee relationships. In this case, Doberstein entered into a contract for a major home renovation. Even though she was living abroad, Doberstein still periodically checked in on the progress of that Project. Moreover, Doberstein alleges that her designer, Pearson, was located in the vicinity of the property, monitored the progress of Defendants' work more closely, and reported back to her.[26] Nothing in the Complaint suggests that the relationship between Doberstein and Defendants was anything but a typical contractual relationship. The obligations owed to Doberstein, therefore, were contractual in nature, and her remedy for breaches of those obligations can be obtained through an action sounding in contract. As a result, the Complaint fails to state a claim for negligent misrepresentation.

4. Count [*18] VI: unjust enrichment

HN7[⬆] Unjust enrichment is the "'unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'"[27] Unjust enrichment, or "quasi-contract," developed "as a theory of recovery to remedy the absence of a formal contract."[28] When a complaint alleges an express, enforceable contract that controls the parties' relationship, a claim for unjust enrichment will be dismissed because the

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[19] *Airborne Health, Inc. v. Squid Soap, LP, 984 A.2d 126, 143 (Del. Ch. 2009)*.

[20] *Narrowstep Inc. v. Onstream Media Corp., 2010 Del. Ch. LEXIS 250, 2010 WL 5422405, at *13 (Del. Ch. Dec. 22, 2010)*.

[21] *Airborne Health, Inc., 984 A.2d at 144* (citing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2.03[b][1], at 2-33 (2009)).

[22] *Narrowstep Inc., 2010 Del. Ch. LEXIS 250, 2010 WL 5422405, at *13* (quoting *Airborne Health, Inc., 984 A.2d at 144*).

[23] *Id.* (citing *U.S. West, Inc. v. Time Warner, Inc., 1996 Del. Ch. LEXIS 55, 1996 WL 307445, at *24 (Del. Ch. June 6, 1996)* (Allen, C.)).

[24] Although there is no indication in the Complaint that Doberstein herself was a sophisticated party as to the subject matter of the Agreement, the assistance she received throughout the relevant period from Pearson likely qualifies her as such.

[25] *Id.; see also Osram Sylvania Inc. v. Townsend Ventures, LLC, 2013 Del. Ch. LEXIS 281, 2013 WL 6199554, at *15 (Del. Ch. Nov. 19, 2013)*.

[26] *See, e.g.*, Compl. ¶¶ 6-11; Pl.'s Answer Br. 3.

[27] *Kuroda v. SPJS Hldgs., L.L.C., 971 A.2d 872, 891-92 (Del. Ch. 2009)*.

[28] *Choupak v. Rivkin, 2015 Del. Ch. LEXIS 107, 2015 WL 1589610, at *20 (Del. Ch. Apr. 6, 2015)*.

"contract is the measure of plaintiffs' right."[29]

Defendants contend that because Doberstein pleads a breach of the Agreement in Count V, that contract is the measure of her rights. That is, because there is no independent basis upon which the unjust enrichment claim could proceed, it should be dismissed. Doberstein responds that her unjust enrichment claim is pled in the alternative to the breach of contract claim and that all the elements of unjust enrichment have been pled.

HN8[] "A claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim."[30] Doberstein has not identified any factual basis **[*19]** for her unjust enrichment claim independent of the allegations relating to her breach of contract claim. Indeed, in her brief, Doberstein states that she "has lost on the deal given that she paid the full amount due under the [Agreement], $494,498.00, only to be left with an [un]inhabitable home . . . ."[31] Thus, by her own assertions, the unjust enrichment claim relies on the same damages as the breach of contract claim. In those circumstances, I conclude that Count V cannot be maintained, because the Agreement provides the measure of Doberstein's rights here. Thus, Doberstein's unjust enrichment claim also must be dismissed under *Rule 12(b)(6)*.

B. The Remaining Counts Must be Dismissed Under *Rule 12(b)(1)* for Lack of Subject Matter Jurisdiction

1. Legal standard

HN9[] The Court of Chancery will dismiss an action under *Rule 12(b)(1)* "if it appears from the record that the Court does not have subject matter jurisdiction over the claim."[32] The plaintiff "bears the burden of establishing this Court's jurisdiction, and where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to the pleadings, he must support those allegations with competent proof."[33]

HN10[] This Court is one of limited jurisdiction.[34] It can acquire subject matter jurisdiction over a case in three ways: (1) an invocation of an equitable right;[35] (2) a request for an equitable remedy when there is no adequate remedy at law;[36] or (3) a statutory delegation of subject matter jurisdiction.[37] This Court "will not

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[29] *Wood v. Coastal States Gas Corp., 401 A.2d 932, 942 (Del. 1979)*.

[30] *Kuroda, 971 A.2d at 891*.

[31] Pl.'s Answer Br. 23.

[32] *AFSCME Locals 1102, Local 320 v. City of Wilmington, 858 A.2d 962, 965 (Del. Ch. 2004)* (internal **[*20]** citation omitted).

[33] *Yancey v. Nat'l Trust Co., 1993 Del. Ch. LEXIS 75, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993)* (internal citation omitted).

[34] *HN11*[] The issue of subject matter jurisdiction is so crucial that it may be raised at any time before final judgment. *See Appoquinimink Educ. Ass'n v. Appoquinimink Sch. Dist., 2003 Del. Ch. LEXIS 32, 2003 WL 1794963, at *3 n.24 (Del. Ch. Mar. 31, 2003)*.

[35] *See HN12*[] *10 Del. C. § 341* ("The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity."); *Christiana Town Ctr. LLC v. New Castle Cty., 2003 Del. Ch. LEXIS 60, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003)* ("Equitable rights are rights that have traditionally not been recognized at common law. The most common example of equitable rights in this court are fiduciary rights and duties that arise in the context of trusts, corporations, other forms of business organizations, guardianships, and the administration of estates."); *Azurix Corp. v. Synagro Techs., Inc., 2000 Del. Ch. LEXIS 25, 2000 WL 193117, at *2 (Del. Ch. Feb. 3, 2000)*.

[36] *HN13*[] *10 Del. C. § 342* ("The Court of Chancery shall not have jurisdiction to determine **[*21]** any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State."); *Christiana Town Ctr., 2003 Del. Ch. LEXIS 60, 2003 WL 21314499, at *3* ("Equitable remedies . . . may be applied even where the right sued on is essentially legal in nature, but with respect to which the available remedy at law is not fully sufficient to protect or redress the resulting injury under the circumstances.") (internal quotation marks omitted).

[37] *See Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC, 859*

exercise subject matter jurisdiction where a complete remedy otherwise exists but where plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic 'open sesame' to the Court of Chancery."[38]

HN14[↑] The party seeking a court's intervention bears the burden of establishing the court's subject matter jurisdiction,[39] and the court may consider evidence outside the pleadings in resolving that issue.[40] Further, "[i]n deciding whether or not equitable jurisdiction exists, the Court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain by bringing his or her claim."[41] In other words, "the court must address the nature of the wrong alleged and the available remedy to determine whether a legal, as opposed to an equitable remedy, is available and sufficiently adequate."[42]

Further, ***HN15***[↑] "[t]he Court of Chancery . . . routinely decides **[*22]** controversies that encompass both equitable and legal claims."[43] "[I]f a controversy is vested with equitable features which would support Chancery jurisdiction of at least part of the controversy, then the Chancellor *has discretion* to resolve the remaining portions of the controversy as well."[44] "Once the Court determines that equitable relief is warranted, even if subsequent events moot all equitable causes of action or if the court ultimately determines that equitable relief is not warranted, the court retains the power to decide the legal features of the claim pursuant to the cleanup doctrine."[45]

2. Counts II, III, and V: legal claims

Defendants contend, and Doberstein does not dispute, that Counts II, III, and V of her Complaint are legal claims. Moreover, the harms for which Doberstein seeks relief in the case of each of these claims can be remedied by money damages. Thus, there is no basis on which this Court could assert subject matter jurisdiction **[*23]** over one or more of these claims independently of the claims asserted in the other counts. If any of Doberstein's equitable claims were well-pled, I would have had discretion to resolve these legal claims under the so-called "cleanup doctrine."[46] Because I do not see a colorable equitable hook in any of the equitable claims Doberstein advanced in Counts I, IV, and VI, however, I do not consider it appropriate for this Court to retain jurisdiction over this action. For

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A.2d 989, 997 (Del. 2004).

[38] *Christiana Town Ctr., 2003 Del. Ch. LEXIS 60, 2003 WL 21314499, at *3* (quoting *IBM Corp. v. Comdisco, Inc., 602 A.2d 74, 78 (Del. Ch. 1991)*).

[39] *Maloney-Refaie v. Bridge at Sch., Inc., 958 A.2d 871, 2008 WL 2679792, at *7 (Del. Ch. 2008)* (quoting *Ropp v. King, 2007 Del. Ch. LEXIS 109, 2007 WL 2198771, at *2 (Del. Ch. July 25, 2007)*).

[40] *Ct. Ch. R. 12(b)(1)*; *Sloan v. Segal, 2008 Del. Ch. LEXIS 3, 2008 WL 81513, at *6 (Del. Ch. Jan. 3, 2008)* (citing *Simon v. Navellier Series Fund, 2000 Del. Ch. LEXIS 150, 2000 WL 1597890, at *5 (Del. Ch. Oct. 19, 2000)*; *see also Maloney-Refaie, 958 A.2d 871, 2008 WL 2679792, at *7* (citing *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC, 922 A.2d 417, 429 n.15 (Del. Ch. 2007)*).

[41] *Candlewood Timber Gp., 859 A.2d at 997*; *see also Diebold Computer Leasing, Inc. v. Commercial Credit Corp., 267 A.2d 586, 588 (Del. 1970)*.

[42] *IMO Indus., Inc. v. Sierra Int'l, Inc., 2001 Del. Ch. LEXIS 120, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001)*.

[43] *Nicastro v. Rudegeair, 2007 Del. Ch. LEXIS 158, 2007 WL 4054757, at *2 (Del. Ch. Nov. 13, 2007)* (citing WOLFE & PITTENGER, *supra* note 19, § 2-4 (supp. 2006) ("It is not at all unusual for cases properly within the subject matter jurisdiction of the Court of Chancery to involve both legal and equitable claims.")).

[44] *Getty Ref. & Mktg. Co. v. Park Oil, Inc., 385 A.2d 147, 149 (Del. Ch. 1978)* (emphasis added).

[45] *Prestancia Mgmt. Gp. v. Va. Heritage Found., II LLC, 2005 Del. Ch. LEXIS 80, 2005 WL 1364616, at *11 (Del. Ch. May 27, 2005)* (internal quotation marks omitted) (quoting *Beal Bank SSB v. Lucks, 2000 Del. Ch. LEXIS 80, 2000 WL 710194, at *2 (Del. Ch. May 23, 2000)*).

[46] *Darby Emerging Mkts. Fund, L.P. v. Ryan, 2013 Del. Ch. LEXIS 287, 2013 WL 6401131, at *6 (Del. Ch. Nov. 27, 2013)* ***HN16***[↑] ("[I]f a controversy is vested with equitable features which would support Chancery jurisdiction of at least part of the controversy, then the Chancellor *has discretion* to resolve the remaining portions of the controversy as well.").

that reason, and without expressing any opinion as to the merits of any of the remaining claims, I grant Defendants' motion to dismiss for lack of jurisdiction as to Counts II, III, and V.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss for failure to state a claim as to Counts I, IV, and VI is granted under *Rule 12(b)(6)*. I also grant Defendants' motion to dismiss Counts II, III, and V for lack of subject matter jurisdiction under *Rule 12(b)(1)*. Counts I, IV, and VI are dismissed with prejudice. **[*24]** As to Counts II, III, and V, Plaintiff may file within 60 days of the date of this Memorandum Opinion and Order a written election to transfer this action to an appropriate court for hearing and determination. If no such written election is filed within 60 days, this action will be dismissed without prejudice.

IT IS SO ORDERED.

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K&K Screw Prods., L.L.C. v. Emerick Capital Invs., Inc.

Court of Chancery of Delaware

April 28, 2011, Submitted; August 9, 2011, Decided

Civil Action No. 5633-VCP

Reporter
2011 Del. Ch. LEXIS 119 *

K&K SCREW PRODUCTS, L.L.C., a Delaware limited liability company, Plaintiff, v. EMERICK CAPITAL INVESTMENTS, INC., a Delaware corporation, Defendant.

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Jurisdiction, Subject Matter Jurisdiction**

The Court will dismiss an action under Del. Ch. Ct. R. 12(b)(1) if the record, which may include evidence outside of the pleadings, indicates that the Court does not have subject matter jurisdiction over the plaintiff's claim. The plaintiff bears the burden of establishing subject matter jurisdiction, and where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to the pleadings, he must support those allegations with competent proof.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN2[] **State Declaratory Judgments, Scope of Declaratory Judgments**

Pursuant to Delaware's Declaratory Judgment Act, *Del. Code Ann. tit. 10, § 6501*, Delaware courts have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. *Del. Code Ann. tit. 10, § 6501*. The purpose of the statute is to provide parties whose legitimate interests are cast into doubt by the assertion or threat of assertion of adverse claims with an opportunity to obtain judicial resolution before their adversaries bring suit against them. The Act, therefore, is a practical timing device that permits courts to adjudicate controversies earlier than the stage at which a matter is traditionally justiciable.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

HN3[] **State Declaratory Judgments, Grounds**

for Relief

The Delaware's Declaratory Judgment Act's timing innovation is subject to the limitation under Delaware law that declaratory relief is only available if an actual case or controversy between the parties exists. As such, the Supreme Court has explained that the claims put forth by the plaintiff still must meet the prerequisites of a live controversy. That is, the plaintiff's claims must: (1) involve the rights or other legal relations of the party seeking declaratory relief; (2) in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) between parties whose interests are real and adverse; and (4) that involves an issue ripe for judicial determination. If one of these elements is not satisfied, the Court risks rendering an advisory opinion, which is impermissible under Delaware law.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

HN4 **State Declaratory Judgments, Grounds for Relief**

There is no basis for invoking declaratory relief against one who has no role in contesting a claim. If a defendant has no interest that would be affected by a declaration, the defendant properly cannot be said to have a real and adverse interest to the Plaintiff.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

HN5 **Ripeness, Tests for Ripeness**

Ripeness refers to whether a suit has been brought at the correct time. It is essential for a controversy to be justiciable and, therefore, for the Court to have subject matter jurisdiction over it. To determine whether a controversy is ripe, a court must make a practical judgment as to whether the interest in postponing review until the question arises in a more concrete and final form is outweighed by the immediate and practical impact on the party seeking relief. In general, an action is not ripe when it is contingent, meaning that it is dependent on the occurrence of some future event(s) before its factual predicate is complete. Indeed, the Delaware Supreme Court has cautioned trial courts not to declare the rights of parties before they are convinced that, among other things, the material facts of the relevant dispute are static and the rights of the parties are presently defined rather than future or contingent. Thus, declaratory relief is appropriate with respect to claims based on facts that already have occurred and which do not depend on the occurrence of a future, contingent event.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

HN6 **Ripeness, Tests for Ripeness**

Under Delaware law, the willingness of the parties to litigate is immaterial in determining whether a controversy is ripe.

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

Governments > Courts > Authority to Adjudicate

HN7 **Entry of Judgments, Stays of Judgments**

The Court of Chancery possesses the inherent power to manage its docket, including the discretion to stay a case pending the resolution of

an arbitration on the basis of comity, efficiency, or common sense. Moreover, when determining whether to stay a case whose claims are not subject to arbitration, the Court may take into consideration the potential that a ruling in the arbitration will preclude further litigation in the case before the Court and vice versa, as well as the burden attendant to litigating two similar actions in different forums. Ultimately, the Court must make a practical judgment as to whether a stay is warranted under the circumstances of each case.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN8[] **Summary Judgment, Entitlement as Matter of Law**

A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Del. Ch. Ct. R. 56(c). When considering a motion for summary judgment, the Court must view the evidence and the inferences drawn from the evidence in the light most favorable to the nonmoving party. Moreover, summary judgment will be denied when the legal question presented needs to be assessed in the more highly textured factual setting of a trial. The Court, thus, maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN9[] **Summary Judgment, Supporting Materials**

In the face of a properly supported motion for summary judgment, the non-moving party must produce evidence that creates a triable issue of fact or suffer the entry of judgment against it. Furthermore, issues not briefed are deemed waived.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN10[] **Affirmative Defenses, Laches**

Laches bars a plaintiff from pursuing a claim if she waited an unreasonable length of time before asserting her claim and the delay unfairly prejudiced the defendant. While statutes of limitations are not automatically controlling in actions in equity, absent a tolling of the limitations period, a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches.

Governments > Legislation > Statute of Limitations > Pleadings & Proof

HN11[] **Statute of Limitations, Pleadings & Proof**

Where a cause of action at law arises outside of Delaware but litigation is brought in Delaware, the courts look to Delaware's borrowing statute to determine the applicable limitations period. The borrowing statute provides that where a cause of action arises outside of Delaware, an action cannot be brought in a court of Delaware to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of Delaware, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. *Del. Code Ann. tit. 10, § 8121*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN12 **Affirmative Defenses, Laches**

The limitations period for breaches of fiduciary duty is three years under Delaware law, *Del. Code Ann. tit. 10, § 8106*, and five years under Illinois law, *735 ILCS 5/13-205*. Therefore, pursuant to Delaware's borrowing statute, Delaware's shorter limitations period of three years arguably is the analogous statute of limitations for purposes of laches.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN13 **Contract Interpretation, Good Faith & Fair Dealing**

Under Illinois law, while an implied covenant of good faith and fair dealing inheres in every contract unless the parties expressly disavow it, the implied covenant is not an independent source of duties for the parties to a contract. Indeed, the Illinois Supreme Court held that there is no independent cause of action for a breach of the implied covenant except in the narrow context of cases involving an insurance company's obligation to settle with a third-party who sued the company's policy-holder.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN14 **Contract Interpretation, Good Faith & Fair Dealing**

The implied covenant of good faith and fair dealing is used as a tool of construction. In particular, where a contract specifically vests one of the parties with broad discretion in performing a term of the contract, the implied covenant requires that the discretion be exercised reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. Because the implied covenant does not support an independent cause of action, a violation of it is remediable only through a breach of contract action. Thus, in order to state a claim for breach of the implied covenant under Illinois law, a plaintiff must plead the existence of a contract that vests one party with discretion in the performance of its obligations and a breach of that contract.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN15 **Statute of Limitations, Time Limitations**

The limitations period for fraud actions is three years in Delaware, *Del. Code Ann. tit. 10, § 8106*, and five years in Illinois, *735 ILCS 5/13-205*. In addition, as both Delaware and Illinois have adopted the Uniform Fraudulent Transfer Act, the limitations period for claims sounding in fraudulent transfer or conveyance would run for no later than four years after accrual. *Del. Code Ann. tit. 6, § 1309*; *740 ILCS 160/10*.

Torts > ... > Statute of Limitations > Begins to Run > Actual Injury

HN16 **Begins to Run, Actual Injury**

Under Delaware law, a cause of action generally

accrues at the time of the alleged harmful act.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

HN17[] **Supporting Materials, Affidavits**

See Del. Ch. Ct. R. 56(f).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN18[] **Entitlement as Matter of Law, Materiality of Facts**

A fact is material if it might affect the outcome of the suit under the governing law.

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Judges: PARSONS, Vice Chancellor.

Opinion by: PARSONS

Opinion

PARSONS, Vice Chancellor.

In 1999, a company sold substantially all of its assets to a buyer in exchange for, among other things, $60 million in cash and an $11 million unsecured promissory note. The buyer obtained the majority of the cash component of the consideration by taking out loans secured by liens on the assets it had just purchased in the transaction. Pursuant to a subordination agreement, the seller would not receive substantial payments on its promissory note until the senior secured loans were paid off.

Over the next two years, the buyer began to suffer severe financial distress and defaulted on its senior secured loans. The senior **[*2]** lenders agreed, however, not to foreclose on their liens and seize the company's assets if the company obtained additional financing. To this end, in 2001, the buyer entered into a series of transactions that permitted it to obtain an additional cash loan of $1.5 million and a guaranty of future payments to the tune of $2.5 million from an affiliate of one of its members. In addition, if and when the buyer paid back the cash loan, it also would be required to pay the affiliate a bonus of $5 million. The new cash loan would be secured by the company's assets and would be senior to the seller's promissory note.

Immediately after the buyer's board approved the transaction in 2001, the seller and its sole stockholder brought suit to preliminarily enjoin the transaction from closing. This effort failed and the transaction closed. Shortly thereafter, the seller dismissed that litigation without prejudice. Since then, the buyer and the seller, as well as the seller's stockholder, vigorously have disputed, both in and out of court, the propriety of the transaction in 2001 and its effect on the priority of the seller's promissory note.

As such, the buyer brings this action seeking various declarations **[*3]** from this Court that it did not breach any duty, contractual or noncontractual, or commit any type of fraud when it entered into the transaction in 2001. In addition, it seeks declarations that, to the extent it may have breached any duty or committed fraud, any claims by the seller on these grounds are now time-barred. The buyer also has moved for summary judgment on its claims.

The seller responds by arguing that the buyer's requested declarations do not present a controversy ripe for adjudication by this Court and moves to dismiss the Complaint for lack of subject matter jurisdiction. Alternatively, the seller asks the Court to stay this action in favor of a co-pending arbitration proceeding or, at a minimum, to permit it leave to take discovery so it can respond to the buyer's motion for summary judgment.

For the reasons stated in this Opinion, I grant the buyer's motion for summary judgment and deny the seller's motion to dismiss, its request for a stay, and its request for leave to take discovery.

I. BACKGROUND

A. Parties

Plaintiff, K&K Screw Products, LLC ("K&K LLC" or the "Company"), is a Delaware limited liability company with its principal place of business in Glendale Heights, **[*4]** Illinois. It produces high-volume precision made-to-print automatic screw machine products for use in multiple industries.[1] Defendant, Emerick Capital Investments, Inc. ("ECI"), is a Delaware corporation formerly known as K&K Screw Products, Inc.[2] ECI's sole stockholder is Jack Emerick.

B. Facts[3]

1. The 1999 Transaction

On January 13, 1999, K&K Screw Products, Inc. entered into an Asset Purchase Agreement ("APA") under which it agreed to sell all of its assets to a group of investors led by Continental Illinois Venture Corporation ("CIVC").[4] To acquire the assets, the investors formed K&K LLC,[5] a limited liability company with eight initial members. K&K LLC is governed by the K&K Screw Products Acquisition, LLC Operating Agreement (the "Operating Agreement").[6]

Upon selling its assets, K&K Screw Products, Inc. changed its name to ECI and received: (1) $60 million in cash; (2) an $11 million promissory note (the "Seller's Note");[7] and (3) the buyer's assumption of certain liabilities of ECI. K&K LLC financed the asset purchase, in part, through a combination of funds invested by its members totaling approximately $19,471,853.[8] To make up the balance of the purchase price, K&K LLC obtained loans from Fleet Capital Corporation ("FCC") and a group of other lenders (collectively,

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[1] Verified Compl. (the "Complaint") ¶ 7.

[2] *Id.* ¶ 8.

[3] Many of the facts recited here are undisputed and are drawn from the Complaint and the seller's Answer. Thus, I have provided citations to the record only to the extent pertinent facts appear to be controverted.

[4] For ease of discussion, I refer to the transactions under and related to the execution of the APA as the "1999 Transaction."

[5] K&K LLC was formerly known as K&K Screw Products **[*5]** Acquisition, LLC. In addition, Emerick became a minority member of the Company, owning approximately 20% of its common equity. The remaining interests were acquired by CIVC or CIVC's coinvestors.

[6] Aff. of David Dolan ("Dolan Aff.") Ex. 29, the Operating Agreement.

[7] Compl. Ex. C, the Seller's Note.

[8] CIVC invested $15,402,483, Emerick invested $3,894,370, and the other members invested a combined $175,000. **[*6]** *See* Operating Agreement Sched. 1.

the "Senior Lenders").[9] These loans (the "Senior Loans") were executed under a Loan and Security Agreement dated as of January 13, 1999 (the "Senior Loan Agreement") and secured by liens on, and security interests in, substantially all of K&K LLC's post-acquisition assets.[10]

On the same day that ECI and K&K LLC entered into the APA, ECI entered into a Subordination Agreement with FCC that outlined the rights and obligations of the various parties with respect to the Seller's Note.[11] Under the Subordination Agreement, ECI agreed that it would not seek or demand payment on any amounts due or owing on the Seller's Note from K&K LLC until K&K LLC paid in full all "Senior Debt," including debt resulting from the Senior Loans.[12]

2. K&K LLC's 2001 financial crisis

In conjunction with an overall slow-down in the manufacturing sector, K&K LLC's financial performance declined **[*7]** dramatically in 2000. In fact, by September 2000, it had violated several of the covenants in the Senior Loan Agreement.[13] These violations constituted Events of Default under that Agreement, which gave the Senior Lenders the right to seek immediate payment of all amounts owed and to foreclose on their liens secured by the assets K&K LLC purchased from ECI in 1999.[14]

According to K&K LLC, the Senior Lenders then began pressuring K&K LLC to raise additional capital and offered to waive the Events of Default if it was able to do so at sufficient levels.[15] Faced with unattractive alternatives such as bankruptcy and attendant liquidation, K&K LLC's managers sought to negotiate with the Senior Lenders regarding a potential solution involving a capital influx.

On January 31, 2001 K&K LLC's board of managers (the "Board"), which included Emerick, Leonard Friedel, Marcus Wedner, Daniel Wilson, and David Dolan, met in the first of a series of meetings to discuss the Company's strategy for negotiating with the Senior Lenders.[16] From approximately March 2001 until May 2001, the Board engaged in "extensive talks" with the Senior Lenders about a possible **[*8]** loan restructuring and finance arrangements. To forebear action on the Company's Events of Default, the Senior Lenders insisted that any possible arrangement include an infusion of capital into K&K LLC and an immediate payment of some amount of the Senior Loans. Eventually, the Lenders indicated they would accept a $4 million support package, including a $1.5 million direct payment on the Senior Loans and a $2.5 million guaranty of future payments.[17]

On May 31, 2001, the Board met to discuss, among other things, the Senior Lenders' proposal. As with two prior Board meetings, Emerick did not attend.[18] According to K&K LLC, the state of the severely depressed credit markets around this time hampered the Company's ability to raise capital using outside

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[9] GMAC Commercial Finance LLC acquired the Senior Loans in 2004. *See* Dolan Aff. Ex. 12. The term "Senior Lenders" in this Opinion includes GMAC.

[10] *Id.* Ex. 1, the Loan and Security Agreement.

[11] *Id.* Ex. 22, the Subordination Agreement.

[12] *Id.* § 2. Under certain limited conditions, K&K LLC was permitted to make quarterly interest payments on the Seller's Note beginning February 1, 2004 and a single principal payment on January 13, 2006. *Id.* § 3. These payments, however, were conditioned upon there being no "Default" or "Event of Default" under the Subordination Agreement. *Id.*

[13] Dolan Aff. ¶¶ 4-5.

[14] *See id.* ¶ 5.

[15] *Id.* ¶ 6.

[16] The Company sent notice to Emerick, but he did not attend. *Id.* ¶ 8.

[17] *See id.* ¶ 12.

[18] Dolan Aff. ¶ 13; Def.'s Ans. to Verified Compl. ("Def.'s Ans.") ¶ 24.

sources.[19] As such, the Company reached a preliminary agreement with CIVC Partners Fund LP ("CIVC LP"), an entity affiliated with CIVC, which agreed to provide the $1.5 million in cash (the "CIVC Loan") and the guaranty that the Senior Lenders' sought in their proposal. According to the Company, the loan was to carry a 14% interest rate due to the high risk **[*9]** associated with lending $1.5 million to a highly distressed business. Furthermore, this loan would be secured by substantially all of K&K LLC's assets and would be senior to the Seller's Note and subordinate only to the Senior Loans.[20] Also as part of the contemplated transaction, CIVC LP would be entitled to a lump sum payment of $5 million if and when the $1.5 million cash loan plus interest was paid in full (the "CIVC Bonus"). Finally, the CIVC Loan called for K&K LLC to amend its Operating Agreement to enable it to issue $10 million in preferred membership units to its current investors who agreed to certain conditions, including reimbursing CIVC LP for the $2.5 million guaranty.[21]

3. The Board approves the 2001 Transaction

On August 8, 2001, the Board provided its members with copies of an Overview & Meeting Notification, which detailed the proposed restructuring with CIVC LP.[22] On August **[*10]** 10, 2001, it held a meeting to consider the proposed restructuring transaction, with Emerick, Friedel, Dolan, and Wedner participating.[23] Recognizing that the proposed restructuring would further subordinate the Seller's Note held by ECI, Emerick, as ECI's sole stockholder, requested an opportunity to submit to the Board an alternative financing proposal by August 14, 2001.[24] The Board agreed and indicated that it would inquire about the Senior Lenders' receptiveness to an alternative restructuring proposal from Emerick. The Board resolved by majority approval, however, that in the absence of a viable alternative from Emerick by August 14, K&K LLC would take steps to complete the restructuring proposal as outlined in the August 8 Board meeting notice.[25]

On August 14, Emerick informed Dolan that he would not be in a position to make an alternative financing proposal. The Board then finalized its approval for the CIVC LP proposal and implemented it. The parties disagree, however, as to whether Emerick voted in favor of the proposed transaction.[26]

On October 11, 2001, CIVC LP issued to K&K LLC a $1.5 million secured loan subordinate only to the Senior Loans and posted a $2.5 million guaranty (the "2001 Transaction").[27] In exchange, the Senior Lenders agreed to waive the Company's Events of Default and restructure certain terms of the Senior Loans as memorialized in Amendment No. 3, Consent and Waiver to Loan and Security Agreement, dated as of October 11, 2001.[28] In conjunction with the CIVC Loan, CIVC LP entered into a Subordination Agreement with the Senior Lenders, which subordinates that loan to the Senior Loans (the "CIVC Subordination Agreement").[29]

K&K LLC asserts that by entering into the 2001 Transaction, it avoided the necessity of filing for bankruptcy and has been able to continue doing business to this day.

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[19] Dolan Aff. ¶ 14.

[20] Aff. of Jack Emerick ("Emerick Aff.") ¶ 9.

[21] *See* Dolan Aff. ¶ 16; Def.'s Ans. ¶ 27.

[22] *See* Dolan Aff. Ex. 4.

[23] *See id.* Ex. 5.

[24] *Id.* ¶ 18; Def.'s Ans. ¶ 31.

[25] *See* Dolan Aff. Exs. 4-5; Def.'s Ans. ¶ 32.

[26] *Compare* Compl. ¶ 33 *with* Def.'s **[*11]** Ans. ¶ 32.

[27] With these funds, K&K LLC paid down $1.5 million of the balance owed on the Senior Loans. Dolan Aff. ¶ 21.

[28] *See id.* Ex. 6.

[29] *See id.* Exs. 24-28.

4. Subsequent disputes arise between K&K LLC and ECI

Shortly after the Board approved the 2001 Transaction, K&K LLC's relations with ECI and Emerick broke down. ECI claims that, although the Board sought Emerick's consent to the 2001 Transaction in September of **[*12]** that year, he refused to give it, in part, because he believed the Transaction would subordinate the Seller's Note, dilute his equity interest in the Company, and unfairly favor CIVC.[30] On December 7, 2001, ECI filed suit against the managers of K&K LLC, except Emerick, in the Chancery Division of the Circuit Court of Cook County, Illinois (the "First Illinois Action"). ECI claimed the 2001 Transaction was a self-interested transaction that unfairly favored the Company's majority owner and, therefore, constituted a breach of the defendants' fiduciary duties to the Company. ECI sought injunctive relief to prevent the Transaction from closing.[31] After the Illinois court denied ECI's request for preliminary injunctive relief—allegedly, because the Transaction already had closed—ECI voluntarily dismissed the suit without prejudice in 2002.

Since the First Illinois Action was dismissed, the parties to this suit, along with Emerick and others, have continued to butt heads on several fronts. On April 28, 2010, for example, Emerick, in his personal capacity, instituted a mediation against K&K LLC's members who were signatories to the Operating Agreement in 2001, alleging that they breached that Agreement by, among other things, causing the Company to enter into the 2001 Transaction. After the mediation attempt failed, the dispute was submitted to arbitration before the American Arbitration Association ("AAA"). The disputants then engaged in discovery regarding whether the members breached the Operating Agreement and whether Emerick suffered consequential damages as a result of that breach. **[*14]** A hearing in the arbitration is scheduled for October 2011. Emerick apparently instituted the mediation because he learned that K&K LLC was preparing to pay off the Senior Loans in the spring of 2010, but that the Company did not have sufficient funds to then repay the CIVC Loan, the CIVC Bonus, and the nearly $33 million owed on the Seller's Note.[32] As a result, ECI argues that one of the ways Emerick has been harmed by the 2001 Transaction is that it will cause K&K LLC to be unable to repay the Seller's Note, thereby diminishing the value of his interest in ECI.

In addition, on August 20, 2010, after this suit was filed, ECI and Emerick brought a separate action against CIVC and CIVC LP in Illinois state court, alleging that they tortiously interfered with Emerick's rights under the Operating Agreement when CIVC LP loaned money to the Company in 2001 (the "Second Illinois Action").[33] K&K LLC argues that, like the First Illinois Action and the arbitration, ECI and Emerick's claims in the Second Illinois Action again focus on the propriety of the 2001 Transaction and its effect on the Seller's Note.

5. K&K LLC's attempts to secure a new lender

K&K LLC alleges that the various complaints by ECI over the years have hindered its ability to secure a new senior lender. Although the Senior

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[30] Def.'s Combined Br. in Opp'n to Pl.'s Mot. for Summ. J. and in Support of Def.'s Mot. to Dismiss, or in the Alternative, to Stay ("DAB") 6. Similarly, I refer to Plaintiff's opening brief as "POB," its response to Defendant's answering brief as "PRB," and Defendant's response to PRB as "DRB."

[31] In support of its application for injunctive relief in the **[*13]** First Illinois Action, ECI argued that the Operating Agreement required the Board to obtain Emerick's consent before it entered into a material financial transaction with a member or an affiliate of a member. *Id.* (citing Operating Agreement §§ 7.2, 7.2.3). It also contended that the defendants needed Emerick's consent to amend the Operating Agreement to permit the creation of the preferred units contemplated in the 2001 Transaction. *Id.*

[32] *Id.* at 7.

[33] At the Argument, counsel for K&K LLC reported that the Second Illinois Action **[*15]** was dismissed with prejudice a few weeks earlier. Tr. of Apr. 28, 2011 Argument ("Tr.") 54.

Loans required repayment in full by January 13, 2004, the Company was unable to do so at that time or since. Hence, the Subordination Agreements and a series of amendments to them remain in force. Moreover, the Company has been in default on its Senior Loans since 2003 and the Senior Lenders have not waived the 2003 or later Events of Default. To prevent the Senior Lenders from foreclosing on their liens on the Company's assets, the Company has been forced to secure forbearance agreements with onerous conditions and incur additional fees and obligations.[34] K&K LLC further asserts that, to obtain more favorable terms, it has been working to reach an agreement with a new senior lender to assume the current Senior Loans.[35] It contends, however, that these efforts have been hampered by the uncertainty caused by ECI and Emerick's numerous claims against the Company and persons affiliated with it in various forums. **[*16]** Therefore, to remove that cloud of uncertainty, the Company filed this action.

C. Procedural History

Plaintiff filed a single-count Complaint on July 14, 2010, seeking a declaratory judgment that, among other things, ECI "has no legally valid or viable claim based on the [2001 Transaction] and the Seller's Note . . . ."[36] ECI answered the Complaint on August 4, 2010. On November 2, Plaintiff moved for summary judgment on its declaratory judgment claim. On December 15, ECI moved to dismiss the Complaint for lack of subject matter jurisdiction. Both motions were fully briefed and I heard argument on them on April 28, 2011. This Opinion constitutes my rulings on these two motions.

D. Parties' Contentions

In seeking summary judgment on Count I of the Complaint, Plaintiff contends that it satisfies the requirements for declaratory relief under *10 Del. C. § 6501*. Specifically, it argues that it is entitled as a matter of law to a declaration that K&K LLC did not breach any contractual obligation, express or implied, owed to ECI by entering into the 2001 Transaction. Plaintiff also seeks a declaration that, to the extent **[*17]** it owed noncontractual duties to ECI, which it characterizes as a third-party creditor of the Company, K&K LLC and its managers did not breach any such duty and, even if they did, ECI's claims are now barred by the doctrine of laches and the analogous limitations period.

In response, ECI urges the Court to deny summary judgment for K&K LLC because it has failed to identify an actual case or controversy between the parties to this litigation. Specifically, ECI argues that to the extent any cloud of litigation hangs over K&K LLC based on events arising from the 2001 Transaction, it is not caused by any of the issues on which K&K LLC seeks declaratory relief in this action. Rather, according to ECI, "the real controversy over the 2001 Transaction is whether the Members breached the Operating Agreement by causing the [C]ompany to enter into the 2001 Transaction without Emerick's consent and whether and to what extent that breach[] caused damaged to Emerick."[37] ECI contends that these issues are fairly presented in the ongoing arbitration proceeding, as is required under the Operating Agreement. ECI avers that it has not asserted since the First Illinois Action, nor does it have current **[*18]** plans to assert or reassert, claims relating to the substance of any of K&K LLC's requested declarations. Therefore, it contends that K&K LLC's Complaint impermissibly requests that this Court issue an advisory opinion regarding those issues and should be dismissed for lack of subject matter jurisdiction.

In addition, ECI argues that the Company's motion should be denied because it failed to demonstrate

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[34] *See* Dolan Aff. ¶ 37; *Id.* Exs. 8-11, 15, 18-20.

[35] *Id.* ¶ 38.

[36] Compl. ¶ 54.

[37] DAB 13.

that it is entitled to judgment as a matter of law on the issue of whether the managers breached their fiduciary duties to ECI by entering into the 2001 Transaction. Alternatively, ECI requests leave to take discovery regarding K&K LLC's "alleged need for the declaratory judgments it seeks" or entry of a stay of this action pending resolution of the contemporaneous arbitration between Emerick and certain of K&K LLC's members.

II. ANALYSIS

A. Defendant's motion to dismiss for lack of subject matter jurisdiction

Because the issue of subject matter jurisdiction is a potentially dispositive threshold issue,[38] I **[*19]** consider first whether the Complaint pleads a justiciable case or controversy. Having determined that it does, I then turn to whether Plaintiff is entitled to summary judgment.

1. The applicable standard under Rule 12(b)(1)

ECI argues that the Complaint should be dismissed pursuant to Court of Chancery Rule 12(b)(1) because the Court lacks subject matter jurisdiction to grant the declaratory relief K&K LLC seeks. *HN1*[↑] This Court will dismiss an action under Rule 12(b)(1) if the record, which may include evidence outside of the pleadings, indicates that the Court does not have subject matter jurisdiction over the plaintiff's claim.[39] The plaintiff bears the burden of establishing subject matter jurisdiction, and "where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to the pleadings, he must support those allegations with competent proof."[40]

2. [*20] Plaintiff has plead an actual case or controversy ripe for determination by the Court

K&K LLC argues that there is an active and ongoing controversy relating to the 2001 Transaction ripe for adjudication between it and ECI. Specifically, it contends that ECI, and its sole stockholder, Emerick, continue to harbor claims against K&K LLC regarding the propriety of the 2001 Transaction with CIVC LP. It cites the fact that, in 2001, ECI sued K&K LLC in the First Illinois Action to try to enjoin that Transaction from closing. Although that action terminated in 2002, it only was dismissed without prejudice. Plaintiff further asserts that the arbitration Emerick instituted in 2010 against members of the Company similarly pertains to claims related to the propriety of the 2001 Transaction.[41] K&K LLC also alleges that disputes exist over conflicting claims of right with respect to the Seller's Note, the 2001 Transaction, and the parties' resulting rights and obligations. It contends that these disputes are ripe for adjudication in this Court because there is a real possibility that K&K LLC will pay off the Senior Loans imminently, at which time both the Seller's Note and the CIVC LP Loan will **[*21]** come due, thereby forcing the parties to confront the issue of the propriety of the 2001 Transaction in the context of determining which subordinated creditor gets priority.

ECI, on the other hand, argues that the issues on which K&K LLC seeks declaratory judgment are not ripe for adjudication and that its complaint, therefore, seeks an impermissible advisory opinion from the Court. For support, ECI contends that

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[38] *See* Gen. Elec. Co. v. Star Techs., Inc., 1996 Del. Ch. LEXIS 78, 1996 WL 377028, at *1 (Del. Ch. July 1, 1996).

[39] *See* Pitts v. City of Wilm., 2009 Del. Ch. LEXIS 68, 2009 WL 1204492, at *5 (Del. Ch. Apr. 27, 2009); Sloan v. Segal, 2008 Del. Ch. LEXIS 3, 2008 WL 81513, at *6 (Del. Ch. Jan. 3, 2008).

[40] Pitts, 2009 Del. Ch. LEXIS 68, 2009 WL 1204492, at *5 (internal quotation marks omitted).

[41] POB 14. K&K LLC also points to the Second Illinois Action as further evidence that ECI maintains an adverse legal interest to K&K LLC with respect to claims relating to the 2001 Transaction. *Id.*

neither it nor Emerick has ever claimed or threatened to claim that K&K LLC breached the Seller's Note or the Subordination Agreement, or that the 2001 Transaction was the product of fraud or a fraudulent conveyance on the part of the Company. Similarly, ECI asserts that while it accused K&K LLC and its managers in the First Illinois Action of breaching their fiduciary duties to ECI by entering into the 2001 Transaction, it voluntarily dismissed these claims in 2002 and has not reasserted or threatened to reassert them since. Based on these facts, ECI avers that K&K LLC has not "proven **[*22]** that ECI or even Emerick is currently asserting [or has a 'present intention' to assert] any of the claims about which K&K LLC seeks declaratory relief."[42] As such, ECI contends that to the extent there is any live, ripe controversy between the parties, it is grounded in the claims relating to the Operating Agreement asserted in the arbitration, and does not involve the declarations sought in this action.

a. The case or controversy requirement

HN2[] Pursuant to Delaware's Declaratory Judgment Act, *10 Del. C. § 6501*, Delaware courts have the power "to declare rights, status and other legal relations whether or not further relief is or could be claimed."[43] The purpose of the statute is to provide parties whose legitimate interests are cast into doubt by the assertion or threat of assertion of adverse claims with an opportunity to obtain judicial resolution before their adversaries bring suit against them.[44] The Act, therefore, is a practical timing device that permits courts to adjudicate **[*23]** controversies earlier than "the stage at which a matter is traditionally justiciable."[45]

HN3[] The Act's timing innovation, however, is subject to the limitation under Delaware law that declaratory relief is only available if an actual case or controversy between the parties exists.[46] As such, the Supreme Court has explained that the claims put forth by the plaintiff still must meet the "prerequisites" of a live controversy. That is, the plaintiff's claims must:

> (1) . . . involv[e] the rights or other legal relations of the party seeking declaratory relief; (2) . . . in which the claim of right or other legal interest is asserted **[*24]** against one who has an interest in contesting the claim; (3) . . . between parties whose interests are real and adverse; [and] (4) [that involves an] issue . . . ripe for judicial determination.[47]

If one of these elements is not satisfied, the Court risks rendering an advisory opinion, which is

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[42] DAB 11; DRB 3-5 (noting that ECI's motion to dismiss is based on its allegation that "ECI has not asserted, has not threatened to assert and does not intend to assert any of the claims raised in the Complaint.").

[43] *10 Del. C. § 6501*.

[44] *See Schick Inc. v. Amalgamated Clothing & Textile Workers Union, 533 A.2d 1235, 1237-38 (Del. Ch. 1987)*; *see also KLM Royal Dutch Airlines v. Checchi, 698 A.2d 380, 382 (Del. Ch. 1997)* ("[T]he objective of [a declaratory] action is to advance the stage of litigation between the parties in order to address the practical effects of present acts of the parties on their future relations. In this way the declaratory judgment serves to 'promote preventive justice.'").

[45] *See Rollins Int'l, Inc. v. Int'l Hydronics Corp., 303 A.2d 660, 662 (Del. 1973)*.

[46] *See, e.g., Stroud v. Milliken Ents., Inc., 552 A.2d 476, 479-80 (Del. 1989)*; *Ackerman v. Stemerman, 41 Del. Ch. 585, 201 A.2d 173, 175 (Del. 1964)*; *Certain Underwriters at Lloyd's London v. Nat'l Installment Ins. Servs., Inc., 2007 Del. Ch. LEXIS 190, 2007 WL 4554453, at *6-7 (Del. Ch. Dec. 21, 2007)* ("For a dispute to be settled by a court of law, the issue must be justiciable, meaning that courts have limited their powers of judicial review to 'cases and controversies.'"), *aff'd, **962 A.2d 916 (Del. 2008)***; *Energy P'rs, Ltd. v. Stone Energy Corp., 2006 Del. Ch. LEXIS 182, 2006 WL 2947483, at *6 (Del. Ch. Oct. 11, 2006)* ("An actual controversy must exist for declaratory judgment jurisdiction."); *Mulford v. Dep't of Natural Res. & Envtl. Control, 2007 Del. Super. LEXIS 366, 2007 WL 4576616, at *2 (Del. Super. Nov. 5, 2007)* ("[F]or a declaratory judgment to be issued, an actual controversy must exist.").

[47] *See, e.g., Stroud, 552 A.2d at 479-80* (citing *Rollins Int'l, Inc., 303 A.2d at 662- 63*); **[*25]** *Sprint Nextel Corp. v. iPCS, Inc., 2008 Del. Ch. LEXIS 90, 2008 WL 2737409, at *12-13 (Del. Ch. July 14, 2008)*; *Nat'l Installment Ins. Servs., Inc., 2007 Del. Ch. LEXIS 190, 2007 WL 4554453, at *6-7*; *Schick, 533 A.2d at 1238*.

impermissible under Delaware law.[48]

It is not clear from ECI's briefs precisely which of the above elements it believes is not satisfied here. ECI essentially couches its argument for a lack of justiciable controversy in its allegations that it has no present intent to assert any of the claims against K&K LLC identified in the Complaint and that the real controversy between the parties is in the arbitration.[49] As such, ECI's position implicates considerations of ripeness in element four and, arguably, considerations concerning whether the parties have interests in this suit that are real and adverse, as required in element three. Beginning with the latter, I discuss each controverted element in turn.

b. The parties have interests that are real and adverse

For purposes of *10 Del. C. § 6501*, in order to avoid the risk of issuing an advisory opinion, ECI must have a real and adverse interest as to the substance of the declarations K&K LLC seeks. **[*26]** Indeed, ***HN4***[⬆] "there is no basis for invoking declaratory relief against one who has no role in contesting a claim."[50] If a defendant has no interest that would be affected by a declaration, the defendant properly cannot be said to have a real and adverse interest to the Plaintiff.[51]

In *Kirkwood Fitness & Racquetball Clubs, Inc. v. Mullaney*, a health club in Delaware shuttered its doors at its Kirkwood Highway location. Thereafter, a number of its members filed claims with the Delaware Division of Consumer Protection ("DCP") on the ground that the club did not offer alternative facilities within fifteen miles driving distance of the old location as is required by Delaware's Health Spa Regulation, *6 Del. C. § 4201*.[52] The club argued that the statute should be interpreted to mean a fifteen mile radius, not driving distance. The director of the DPC held a quasi judicial hearing to determine whether the claimants were entitled to their refunds and held for the claimants. The club then brought suit in the Superior Court, seeking **[*27]** a declaration that, among other things, its interpretation of the statute was correct and naming the DPC director and the director of the Fraud Division of Delaware's Department of Justice as defendants. The court dismissed the club's suit, in part, because it found an absence of a controversy between parties whose interests were real and adverse.[53] In particular, the court explained that under Delaware law, a judicial officer has no cognizable interest in seeking to have his rulings sustained, so the director, who acted in a quasi judicial role at the hearing, had no interest that would have been affected by the requested declaration.[54]

Unlike the director in *Kirkwood*, ECI has an interest real and adverse to K&K LLC in contesting this action because the declarations K&K LLC seeks would affect ECI. For one thing, K&K LLC's declarations pertain to rights and obligations arising out of certain contracts related to the 2001 Transaction, including some to which ECI is a party, like the Seller's Note and the Subordination Agreement. Therefore, as a party to these contracts, ECI's interests potentially would be affected by declarations of this Court limiting **[*28]** its right to bring suit regarding certain issues arising from such contracts.[55]

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[48] *See* *Stroud, 552 A.2d at 479-80*; *Energy P'rs, Ltd., 2006 Del. Ch. LEXIS 182, 2006 WL 2947483, at *6*.

[49] *See* DRB 3; Def.'s Ans. ¶ 53.

[50] *Wilm. Trust Co. v. Barron, 470 A.2d 257, 262 (Del. 1983)*.

[51] *See* *Kirkwood Fitness & Racquetball Clubs, Inc. v. Mullaney, 2011 Del. Super. LEXIS 280, 2011 WL 2623949, at *2 (Del. Super. June 29, 2011)*.

[52] *2011 Del. Super. LEXIS 280, [WL] at *1*.

[53] *See* *2011 Del. Super. LEXIS 280, [WL] at *2*.

[54] *Id.*

[55] *See* *Mt. Hawley Ins. Co. v. Jenny Craig, Inc., 668 A.2d 763, 766 (Del. Super. 1995)* ("It is undisputed that the first three criteria [for a

Moreover, the record suggests that ECI's interests with respect to the Transaction and the above-mentioned contracts are adverse to K&K LLC's interests. ECI's Answer in this action, for example, indicates that it believes it has valid claims against K&K LLC arising out of the 2001 Transaction.[56] Similarly, ECI indicated to K&K LLC as recently **[*29]** as 2008 that it has "numerous claims" against the Company and "reserves all rights" to assert them against it.[57] In fact, ECI made clear at the Argument that it has not and would not waive its right to "pursue claims [relating to the 2001 Transaction against K&K LLC] at a later point in time if circumstances justify it."[58] That ECI contends it has no present intention to assert such claims against K&K LLC and that the real controversy is in the arbitration does not change the fact that it has real and adverse interests *vis-á-vis* K&K LLC based on its efforts to reserve all of its potential challenges to the validity of the 2001 Transaction. Thus, to the extent ECI argues that K&K LLC failed to establish the third prong of the declaratory judgment test, I hold that its position lacks merit.

c. This dispute is ripe

HN5[⬆] Ripeness refers to whether a suit has been brought at the correct time. It is essential for a controversy to be justiciable and, therefore, for the Court to have subject matter jurisdiction over it.[59] To determine whether a controversy is ripe, a court **[*30]** must make a practical judgment as to whether the "interest in postponing review until the question arises in a more concrete and final form is outweighed by the immediate and practical impact on the party seeking relief."[60] In general, an action is not ripe when it is contingent, meaning that it is dependent on the occurrence of some future event(s) before its factual predicate is complete.[61] Indeed, the Supreme Court has cautioned trial courts not to declare the rights of parties before they are convinced that, among other things, the material facts of the relevant dispute are static and the rights of the parties are "presently defined rather than future or contingent."[62] Thus, declaratory relief is appropriate with respect to claims based on facts that already have occurred

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declaratory judgment] exist. Mt. Hawley had an insurance contract with JCI. This action, if it proceeds, will determine whether the obligations of that contract will be fulfilled. As such, it involves a right and a legal relation to JCI. As the other party to the D & O insurance contract, JCI has a direct interest in contesting this action. JCI might be liable if Mt. Hawley does not have to pay coverage. Whether or not the obligation of a multi-million dollar contract ought or need to be fulfilled between the parties to that contract, that obligation represents interests that are real and adverse.") (internal citations omitted).

[56] *See* Def.'s Ans. ¶ 54.

[57] D.I. 34 Ex. 1 (response from Emerick to K&K LLC's Mark O. Ollinger dated February 8, 2008).

[58] *See* Tr. 6.

[59] *See, e.g.*, *Bebchuk v. CA, Inc., 902 A.2d 737, 740 (Del. Ch. 2006)*; *Am. Ins. Ass'n v. Del. Dep't of Ins., 2006 Del. Super. LEXIS 474, 2006 WL 3457623, at *2 (Del. Super. Nov. 29, 2006)*.

[60] *See, e.g.*, *Energy P'rs, Ltd. v. Stone Energy Corp., 2006 Del. Ch. LEXIS 182, 2006 WL 2947483, at *7 (Del. Ch. Oct. 11, 2006)*; *Am. Ins. Ass'n, 2006 Del. Super. LEXIS 474, 2006 WL 3457623, at *2*; *Schick Inc. v. Amalgamated Clothing & Textile Workers Union, 533 A.2d 1235, 1239 (Del. Ch. 1987)*; **[*31]** *see also* *Stroud v. Milliken Ents., Inc., 552 A.2d 476, 480 (Del. 1989)* (citing ***Continental Air Lines, Inc. v. C.A.B., 522 F.2d 107, 124-25, 173 U.S. App. D.C. 1 (D.C. Cir. 1975)***).

[61] *Multi-Fineline Electronix, Inc. v. WBL Corp., 2007 Del. Ch. LEXIS 21, 2007 WL 431050, at *8 (Del. Ch. Feb. 2, 2007)*; *Energy P'rs, Ltd., 2006 Del. Ch. LEXIS 182, 2006 WL 2947483, at *7*.

[62] *Stroud, 552 A.2d at 481*; *see also* *KLM Royal Dutch Airlines v. Checchi, 698 A.2d 380, 382 (Del. Ch. 1997)* ("Determining whether the parties' dispute is ready for decision requires consideration of, *inter alia*, the present effects of the challenged conduct versus the future harm to be suffered by the plaintiff if resolution is delayed, the likelihood of a change in the factual circumstances, and the legal issues involved."). The Court also has explained that another relevant consideration is the degree to which the trial court believes future litigation appears "unavoidable." *Id.*; *Ackerman v. Stemerman, 41 Del. Ch. 585, 201 A.2d 173, 175 (Del. 1964)* ("There must be in existence a factual situation giving rise to immediate, or about to become immediate, controversy between the parties. The court to entertain jurisdiction of the cause must be convinced that the 'actual controversy' in all probability would result **[*32]** in litigation sooner or later.").

and which do not depend on the occurrence of a future, contingent event.

The premise of ECI's argument against the existence of a ripe controversy is that neither it nor Emerick has asserted or threatened imminently to assert or reassert claims relating to the declarations K&K seeks. ECI misapprehends the ripeness standard, however, because whether or not an adverse party will choose to bring suit against a declaratory plaintiff at some future juncture does not make a controversy between the parties contingent and, thus, disqualified for declaratory relief. Indeed, ***HN6***[⬆] under Delaware law, the "willingness of the parties to litigate is immaterial" in determining whether a controversy is ripe.[63] Thus, the fact that ECI has not asserted or threatened to assert or reassert the various claims it might have against K&K LLC does not render K&K LLC's application for declaratory relief a contingent, speculative venture that would require the Court to issue an advisory opinion.

Furthermore, the record does not support ECI's position that it has no "present intention" to assert or reassert at any point any of the claims arising from the 2001 Transaction that **[*33]** K&K LLC identified in the Complaint. First, ECI filed the Second Illinois Action as recently as 2010. Although it did not name K&K LLC as a defendant in that action, ECI's claims involved the propriety of the 2001 Transaction. Second, as discussed above, ECI's Answer suggests that it believes it has valid claims against K&K LLC arising out of the Transaction.[64] In fact, ECI made clear at the Argument, like it did in out-of-court correspondence as recently as 2008,[65] that it has not and would not waive its right to "pursue claims [relating to the 2001 Transaction against K&K LLC] at a later point in time if circumstances justify it."[66] While ECI claims to have no present intention to pursue such claims, the record reflects that it has not released those claims or stipulated that it would not pursue them.

As to the requirements for a ripe dispute, I find that all material facts giving rise to ECI's potential claims regarding the propriety of the 2001 Transaction have occurred and are static. The Company entered into the Transaction in 2001 and the documents governing **[*34]** and related to that transaction have been in place for almost a decade. Other than the question of whether ECI will sue K&K LLC on its claims, the only contingent fact that arguably remains is whether the Company will repay fully its Senior Loans. The record indicates, however, that K&K LLC is forecasting that this contingency will occur "imminently."[67] Assuming the Company pays off its Senior Loans, it then must determine which of at least two obligations to pay next: ECI's Seller's Note or the junior secured CIVC LP Loan. The record demonstrates that this question is highly controverted based on ECI's complaints about the 2001 Transaction. Under these circumstances, the Court reasonably can infer that litigation on this issue likely is inevitable.

Finally, I note that the record supports a reasonable inference that K&K LLC is suffering current harm due to the prospect of a future suit by ECI against it based on this very issue. For example, the uncertainty of creditor priority and other issues created by the aspersions ECI has cast on the 2001 Transaction appears to have contributed to K&K LLC's inability to obtain a new senior lender and more favorable **[*35]** loan terms.[68] Until it can find a new lender or pay off the Senior Loans, K&K LLC will continue to be subject to onerous

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[63] *See, e.g.*, *Stroud, 552 A.2d at 480*; *Energy P'rs, Ltd., 2006 Del. Ch. LEXIS 182, 2006 WL 2947483, at *7*.

[64] *See* Def.'s Ans. ¶ 54.

[65] D.I. 34 Ex. 1 (response from Emerick to K&K LLC's Mark O. Ollinger dated February 8, 2008).

[66] *See* Tr. 6.

[67] *See* Tr. 53; Def.'s Ans. ¶ 46.

[68] *See* Dolan Aff. ¶ 39 ("Each financial institution with whom [Dolan has] had discussions has reacted negatively to ECI's allegations and claims regarding the ECI's Seller's Note.").

conditions and additional fees and obligations in order to stave off a foreclosure on the Company's assets securing the Senior Loans.[69]

As a practical matter, therefore, I find no reason to delay review of K&K LLC's claims, especially in light of the immediate and practical impact the uncertainty created by ECI's potential claims has had on K&K LLC's ability to refinance its existing Senior Loans. Thus, K&K LLC has met its burden to demonstrate an actual controversy that is ripe for adjudication by this Court and, accordingly, I deny ECI's motion to dismiss under Rule 12(b)(1).

B. Defendant's Request to Stay this [*36] Action

ECI further asserts that if the Court determines that the Complaint should not be dismissed under Rule 12(b)(1), it should stay this action in favor of the pending arbitration between Emerick and certain of K&K LLC's members. In support of this position, ECI argues that the "real" controversy between the parties is whether the members of K&K LLC, other than Emerick, breached the Operating Agreement by causing the Company to enter into the 2001 Transaction without Emerick's consent. Moreover, it contends that staying this action would avoid the risk of inconsistent rulings about the propriety of the 2001 Transaction and the wasteful adjudication of duplicative issues. According to ECI, a stay also would comport with Delaware's public policy favoring arbitration because, as mentioned above, the "real" controversy currently is being litigated in the arbitration proceeding.

HN7[↑] The Court of Chancery possesses the inherent power to manage its docket, including the discretion to stay a case pending the resolution of an arbitration on the basis of "comity, efficiency, or common sense."[70] Moreover, when determining whether to stay a case whose claims are not subject to arbitration, this Court **[*37]** may take into consideration the potential that a ruling in the arbitration will preclude further litigation in the case before the Court and vice versa, as well as the burden attendant to litigating two similar actions in different forums.[71] Ultimately, the Court must make a practical judgment as to whether a stay is warranted under the circumstances of each case.

Having considered the nature and extent of the arbitration, I find that staying the action in this Court is unwarranted under the circumstances. First, while both proceedings deal with actions taken concerning the results of the 2001 Transaction, there is little chance that resolution of the claims in the arbitration will obviate the need for or preclude further litigation in this case. To begin with, the two proceedings involve different parties. The arbitration is between **[*38]** Emerick and various other K&K LLC members.[72] In contrast, the parties to this action are K&K LLC itself and ECI; Emerick is not a party. In addition, the claims in the two proceedings involve different contracts. While the K&K LLC Operating Agreement is at the heart of the arbitration, this action centers on the Seller's Note, the Subordination Agreement, and the CIVC Subordination Agreement. Finally, and most importantly, although the claims in the two proceedings depend to a degree on some of the

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[69] *See id.* ¶ 37 & Ex. 20 (noting that, for example, the Thirteenth Amendment and Forbearance Agreement dated June 30, 2010 increased the interest rate on the Senior Loans and required the Company to pay an additional $25,000 per month to secure a forbearance until January 31, 2011).

[70] *See, e.g.*, *SRG Global, Inc. v. Robert Family Hldgs., Inc., 2010 Del. Ch. LEXIS 236, 2010 WL 4880654, at *10 (Del. Ch. Nov. 30, 2010)*; *Nutzz.com, LLC v. Vertrue Inc., 2006 Del. Ch. LEXIS 137, 2006 WL 2220971, at *11 (Del. Ch. July 25, 2006)*; *Salzman v. Canaan Capital P'rs, L.P., 1996 Del. Ch. LEXIS 88, 1996 WL 422341, at *5 (Del. Ch. July 23, 1996)*.

[71] *SRG Global, Inc., 2010 Del. Ch. LEXIS 236, 2010 WL 4880654, at *10-11*; *Salzman, 1996 Del. Ch. LEXIS 88, 1996 WL 422341, at *4-5*.

[72] *See* Dolan Aff. Exs. 32-33. The members who are parties to the arbitration are CIVC Partners Fund, LLC, Bruce C. Stevens, **[*39]** Leonard G. Friedel, Andrew J. Bahfleth, David F. Dolan, Michael Newell, and Tangram Partners, Inc. *See id.*

same operative facts regarding the circumstances and details of the 2001 Transaction, they involve fundamentally different disputes. In the arbitration, Emerick accuses the opposing K&K LLC members of, among other things, breaching the Operating Agreement by failing to obtain Emerick's consent to proceed with the 2001 Transaction.[73] In this action, on the other hand, K&K LLC seeks various declarations regarding the propriety of the 2001 Transaction as it relates to the rights, duties, and obligations of K&K LLC and ECI under the Seller's Note and Subordination Agreements.

I consider these differences material and conclude that proceeding with both actions simultaneously would not be duplicative or waste judicial resources. The differences noted also serve to mitigate the risk of subjecting the parties to this action to inconsistent rulings regarding the 2001 Transaction.[74] Indeed, ECI effectively concedes that resolution of one proceeding would not necessarily have any preclusive effect regarding the 2001 Transaction in the other proceeding.[75]

Finally, Delaware's public policy favoring arbitration of claims[76] does not justify staying this case. Here, unlike the Operating Agreement at issue in the arbitration, neither the Seller's Note nor the Subordination Agreement underlying K&K LLC's Complaint contains an arbitration clause. As such, neither party can require the other to submit claims arising out of or related to these contracts to arbitration.[77]

Because ECI cannot require K&K LLC to submit the claims at issue in this proceeding to arbitration and because the arbitration and this action involve different parties, contracts, and disputes, I find there is little practical reason to stay this action in favor of the pending arbitration. Therefore, I deny ECI's request for a stay and turn, instead, to the merits of K&K LLC's motion for summary judgment.

C. Plaintiff's Motion for Summary Judgment

Having found that the Complaint pleads an actual live controversy that is **[*41]** ripe for adjudication by this Court, I now turn to the merits of K&K LLC's motion for summary judgment.

1. The applicable standard for summary judgment

HN8[↑] K&K LLC is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[78] When considering a motion for summary judgment, the Court must view the evidence and the inferences drawn from the evidence in the light most favorable to the nonmoving party.[79] Moreover, summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a

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[73] *See id.* Ex. 33 at 5.

[74] For example, a finding by this Court that K&K LLC did not breach any contractual or fiduciary duty to ECI regarding the 2001 Transaction would not necessarily be inconsistent with a potential finding by the arbitration panel that the K&K LLC members in that proceeding violated the Operating Agreement by failing to obtain Emerick's consent before entering into that same Transaction.

[75] *See, e.g.*, DRB 6 ("The Claims in the arbitration will not be resolved in this proceeding, nor should they be."); *id.* at 7 (acknowledging that the arbitration "does not address the supposed claims raised in **[*40]** the Complaint").

[76] *See* *Salzman v. Canaan Capital P'rs, L.P., 1996 Del. Ch. LEXIS 88, 1996 WL 422341, at *4 (Del. Ch. July 23, 1996)*.

[77] *See id.* ("[S]ince arbitration is a consensual proceeding, absent a contract to arbitrate, the Court may not require a party to submit to arbitration.").

[78] *Twin Bridges Ltd. P'ship v. Draper, 2007 Del. Ch. LEXIS 136, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007)* (citing Ct. Ch. R. 56(c)).

[79] *Judah v. Del. Trust Co., 378 A.2d 624, 632 (Del. 1977)*.

trial."[80] The Court, thus, "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[81]

2. Plaintiff's requested declarations

The Complaint claims that K&K LLC is entitled to a declaratory judgment that ECI has no legally valid or viable claim against it based on the 2001 Transaction.[82] In its opening brief, K&K LLC provided a more specific list of ten declarations that it seeks in this action (the "Declarations"). They are that:

> 1. K&K LLC did not breach ECI's Seller's Note by entering into the 2001 [Transaction];
> 2. K&K LLC did not breach ECI's Subordination Agreement by entering into the 2001 [Transaction];
> 3. ECI is an unsecured creditor of K&K LLC and, as such, K&K LLC did not owe and did not breach any fiduciary duty to ECI under Delaware law by entering into the 2001 [Transaction];
> 4. ECI is an unsecured creditor of K&K LLC and, as such, K&K LLC did not owe and did not breach any fiduciary duty to ECI under Illinois law by entering into the 2001 [Transaction];
>
> 5. ECI is an unsecured creditor of K&K LLC and, as such, K&K LLC's Managers did not owe and did not breach any **[*43]** fiduciary duty to ECI under Delaware law by entering into the 2001 [Transaction];
> 6. ECI is an unsecured creditor of K&K LLC and, as such, ECI does not have standing to assert a direct claim for breach of fiduciary duty against K&K LLC's Managers under Delaware law based on the 2001 [Transaction] and [its] alleged effect on ECI's Seller's Note;
> 7. Any breach of fiduciary duty claim that ECI might assert against K&K LLC and/or its Managers arising out of the 2001 [Transaction] is barred by the statute of limitations and/or the doctrine of laches under Illinois and Delaware law;
> 8. ECI's Seller's Note and Subordination Agreement are governed by Illinois law, and ECI cannot assert a claim against K&K LLC for breach of the implied covenant of good faith and fair dealing under Illinois law based on the 2001 [Transaction] and [its] alleged effect on ECI's Seller's Note; []
> 9. Any fraudulent transfer or fraudulent conveyance claim that ECI might assert against K&K LLC based on the 2001 [Transaction] is barred by the applicable statute of limitations and/or the doctrine of laches under Illinois and Delaware law[;] [and,]
>
> 10. Any fraud [or] fraudulent inducement claim that ECI might assert against **[*44]** K&K LLC based on ECI's Seller's Note, ECI's Subordination Agreement, or the 2001 [Transaction] is barred by the applicable statute of limitations and/or the doctrine of laches under Illinois and Delaware law.[83]

For ease of analysis, I have divided these Declarations into four groups as follows: Group 1—Declarations 1 and 2 regarding breaches of contract; Group 2—Declarations 3- 7 regarding breaches of fiduciary duties; Group 3—Declaration 8 regarding breach of the implied covenant of good faith and fair dealing; and Group 4—Declarations 9 and 10 regarding various forms of fraud. I address Plaintiffs' motion for summary judgment as to each of these groups seriatim.

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[80] *Schick Inc. v. Amalgamated Clothing & Textile Workers Union, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987)* **[*42]** (citing *Kennedy v. Silas Mason Co., 334 U.S. 249, 257, 68 S. Ct. 1031, 92 L. Ed. 1347 (1948))*.

[81] *Tunnell v. Stokley, 2006 Del. Ch. LEXIS 37, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006)* (quoting *Cooke v. Oolie, 2000 Del. Ch. LEXIS 89, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000))*.

[82] Compl. ¶ 54.

[83] POB 23-24.

3. Application of the standard to the facts of this case

a. Group 1: Declarations 1 and 2 regarding alleged breaches of the Seller's Note and the Subordination Agreement

K&K LLC argues that its relationship with ECI was, at all times, contractual and the scope of that relationship was defined by the Seller's Note and the Subordination Agreement.[84] It contends that "[n]othing in either [agreement] prevented K&K LLC from incurring further debt—including secured debt senior to ECI's unsecured Seller's Note, **[*45]** like the loan from CIVC LP"—and that the agreements did not "otherwise restrict the terms on which K&K LLC might incur any such debt."[85] Therefore, according to the Company, the 2001 Transaction did not breach the Seller's Note or the Subordination Agreement under Illinois law. Having considered the express and unambiguous language of both contracts, I find that K&K LLC is correct that neither contract prevented or restricted the Company from incurring additional, senior secured debt or otherwise impairing the priority of the Seller's Note.

ECI's only response on this issue was that, because it has never asserted or threatened to assert claims that K&K LLC breached either the Seller's Note or the Subordination Agreement, K&K LLC's requested declarations in Group 1 "raise a hypothetical issue, not an actual controversy."[86] In other words, ECI couched its response entirely in terms of its failed justiciability **[*46]** argument. Indeed, ECI did not otherwise respond to the merits of K&K LLC's contentions on this issue either in its briefs or at the Argument.

Based on the express language of the contracts at issue, K&K LLC has met its burden as the party moving for summary judgment to show that it is entitled to judgment as a matter of law that it did not breach the Seller's Note or the Subordination Agreement by entering into the 2001 Transaction. *HN9*[] "In the face of a properly supported motion for summary judgment, the non-moving party must produce evidence that creates a triable issue of fact or suffer the entry of judgment against it."[87] ECI has not done so here. Furthermore, because "[i]ssues not briefed are deemed waived,"[88] I find that ECI has failed to carry its burden to rebut K&K LLC's prima facie showing on the breach of contract issues in Group 1 and has waived its right to attempt to do so.

Therefore, I find that K&K LLC is entitled to the declaratory relief it seeks as to Declarations 1 and 2 and hold that K&K LLC did not breach **[*47]** the Seller's Note or the Subordination Agreement by entering into the 2001 Transaction.

b. Group 2: Declarations 3-7 regarding alleged breaches of fiduciary duties to ECI by K&K LLC and its managers

K&K LLC also seeks various declarations relating to claims ECI might make regarding alleged breaches of fiduciary duties allegedly owed to ECI by K&K LLC and its managers. Specifically, K&K LLC seeks declarations that it did not owe fiduciary duties to ECI as an unsecured creditor of the Company, under either Delaware or Illinois law, and that, if it did owe such duties, it did not breach them by entering into the 2001 Transaction. K&K LLC also seeks declarations that its managers did

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[84] Pursuant to § 6(b) of the Seller's Note and § 17 of the Subordination Agreement, each contract is governed by the laws of Illinois.

[85] *Id.* at 16. K&K LLC further avers that neither agreement addresses what K&K LLC may or may not do with respect to issuing additional debt or equity. *Id.*

[86] DAB 11.

[87] *In re Nantucket Is. Assocs. Ltd. P'ship Unitholders Litig., 810 A.2d 351, 360 (Del. Ch. 2002)*.

[88] *Emerald P'rs v. Berlin, 726 A.2d 1215, 1224 (Del. 1999)*.

not owe fiduciary duties to ECI and that, to the extent they did, ECI does not have standing to assert a direct claim for breach of fiduciary duty against them under Delaware law. Finally, K&K LLC argues that, to the extent ECI was owed fiduciary duties by K&K LLC or its managers and was damaged by a breach of those duties, ECI is barred by the doctrine of laches or the analogous statutes of limitations under Delaware and Illinois law from pursuing those claims.

I begin with K&K LLC's time-bar argument. As a **[*48]** court of equity, this Court generally analyzes questions of time bars under the equitable doctrine of laches. ***HN10***[] Laches bars a plaintiff from pursuing a claim if she waited an unreasonable length of time before asserting her claim and the delay unfairly prejudiced the defendant.[89] While statutes of limitations are not automatically controlling in actions in equity, "[a]bsent a tolling of the limitations period, a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches."[90]

Here, because the declaratory judgments requested by K&K LLC pertain to breaches of fiduciary duty, I consider the relevant limitations period for this type of claim.[91] As I explained in *Petroplast Petrofisa Plasticos S.A. v. Ameron International Corp.*, ***HN11***[] "where a cause of action at law arises outside of Delaware but litigation is brought in Delaware, our courts look to Delaware's 'borrowing statute' to determine the applicable limitations period."[92] The borrowing statute provides that:

> Where a cause of action arises outside of [Delaware], an action cannot be brought in a court of [Delaware] to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of [Delaware], or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.[93]

HN12[] The limitations period for breaches of fiduciary duty is three years under Delaware law[94] and five years under Illinois law.[95] Therefore, pursuant to Delaware's borrowing statute, **[*50]** Delaware's shorter limitations period of three years arguably is the analogous statute of limitations for purposes of laches.

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[89] *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp., 2011 Del. Ch. LEXIS 95, 2011 WL 2623991, at *14 (Del. Ch. July 1, 2011)*; *CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC, 2011 Del. Ch. LEXIS 25, 2011 WL 353529, at *5 (Del. Ch. Jan. 28, 2011)*. To prevail on a laches defense, a defendant must prove that: (1) the plaintiff had knowledge of his claim; (2) he delayed unreasonably in bringing that claim; and (3) the defendant suffered resulting prejudice. *Whittington v. Dragon Gp., L.L.C., 991 A.2d 1, 8 (Del. 2009)*.

[90] *Whittington, 991 A.2d at 9*; *In re Am. Int'l Gp., Inc., 965 A.2d 763, 811-12 (Del. Ch. 2009)* ("Even though this is a court of equity, equity follows the law, **[*49]** and this court will apply statutes of limitations by analogy."), *aff'd sub nom.* ***Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP, 11 A.3d 228, 2011 WL 13545 (Del. Jan 3, 2011)***.

[91] *See Petroplast, 2011 Del. Ch. LEXIS 95, 2011 WL 2623991, at *15* (noting that because the plaintiff's claim sounded in breach of contract, the Court would consider the relevant limitations period for that type of claim in its laches analysis).

[92] *Id.; see also 10 Del. C. § 8121*; *VLIW Tech., LLC v. Hewlett-Packard Co., 2005 Del. Ch. LEXIS 59, 2005 WL 1089027, at *12 (Del. Ch. May 4, 2005)*. In the context of this declaratory judgment action, ECI has not reasserted its claims from the First Illinois Action or brought new claims asserting breaches of fiduciary duties against K&K LLC or its managers. But, because ECI potentially might argue that its cause of action for such breaches accrued in Illinois, where the Seller's Note was made and where K&K LLC's principal place of business is located, Illinois law would be relevant under the borrowing statute. *See* Seller's Note § 6(b) ("This Note has been delivered at and shall be deemed to have been made in Chicago, Illinois . . . ."). As discussed below, however, whether a potential claim accrued in Illinois or Delaware is immaterial for purposes of this case.

[93] *10 Del. C. § 8121*.

[94] *10 Del. C. § 8106*; **[*51]** *Fike v. Ruger, 754 A.2d 254, 260 (Del. Ch. 1999), aff'd, 752 A.2d 112 (Del. 2000)*.

[95] *735 Ill. Comp. Stat. 5/13-205*; *Fuller Family Hldgs., LLC v. N. Trust Co., 371 Ill. App. 3d 605, 863 N.E.2d 743, 756, 309 Ill. Dec. 111 (Ill. App. Ct. 2007)*.

I say "arguably" since ECI really did not address the laches or statute of limitations issues in any detail in its brief. Because Plaintiff's claim here seeks a declaratory judgment, rather than attempting affirmatively to enforce a cause of action in Delaware that arose in Illinois, a cogent argument could be made that Delaware's borrowing statute does not apply.[96] In the circumstances of this case, however, it is immaterial whether Delaware's three year or Illinois's five year limitations period applies. In either case, the result is the same: ECI's claims are untimely. Thus, although I have analyzed the issue below under Delaware law, I would reach the same conclusion under Illinois law.

In Delaware, the statute of limitations begins to run when the cause of action first accrues.[97] According to ECI's claims in the First and Second Illinois Actions, and as suggested in its briefs in this action, the actions that gave rise to ECI's potential claims for breach of fiduciary duties involved K&K LLC's conduct in entering into the 2001 Transaction and incurring the additional junior secured loan from CIVC LP. Thus, ECI would be time-barred from pursuing claims relating to breaches of fiduciary duty against either K&K LLC or its managers as of the end of 2004, or three years after the Company entered into the 2001 Transaction.[98] Absent some basis to toll the running of that limitations period, the analogous statute of limitations barred these actions long ago.[99]

ECI has offered no basis for tolling the limitations period nor any other argument as to why it should not be time-barred from bringing a fiduciary duty claim against K&K LLC or its managers.[100] As with its response to K&K LLC's Declarations dealing with breach of contract, ECI did not address the merits of the Company's time-bar argument, choosing instead to rely almost exclusively on its argument that there is no justiciable case or controversy here.[101] As discussed above, that argument is without merit. Hence, ECI has not adduced any evidence that would create a triable issue of fact as to the time- bar issue or

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[96] *See* Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., 866 A.2d 1, 16- 18 (Del. 2005) (noting that in certain situations, Delaware courts do not apply the borrowing statute, even though its literal requirements may be satisfied, where such application would "subvert" its overriding purpose, **[*52]** which is to prevent a plaintiff from shopping for a favorable limitations period under Delaware law as compared to the law of the state where the cause of action arose).

[97] *In re Tyson Foods, Inc., 919 A.2d 563, 584 (Del. Ch. 2007)*.

[98] As noted *supra*, even if I applied Illinois's five-year limitations period, ECI's cause of action still would be barred, absent some basis to toll it.

[99] *See id.* Indeed, these claims also are **[*53]** barred under Illinois's longer five-year limitations period.

[100] As the proponent of a fiduciary duty claim against K&K LLC, ECI would have the burden to show a basis for tolling the statute. *See Merck & Co. v. SmithKline Beecham Pharms. Co., 1999 Del. Ch. LEXIS 242, 1999 WL 669354, at *42 (Del. Ch. Aug. 5, 1999), aff'd, 766 A.2d 442 (Del. 2000)*. "Under Delaware law, tolling applies only in very limited circumstances—where the injuries were inherently unknowable . . . or where there has been fraudulent concealment . . . . Even **[*54]** when tolled, the statute of limitations is suspended only until a plaintiff discovers his rights or, by exercising reasonable diligence, should have discovered such rights." *Id.* (internal citations omitted).

[101] *See* DAB 11. ECI responded to the merits of K&K LLC's claim only to the limited extent it argues that there is a genuine issue of material fact as to whether K&K LLC owed fiduciary duties to ECI and whether it breached them by entering into the 2001 Transaction. *See id.* at 15-16. ECI assumes that "as one of K&K LLC's creditors, [it] would be permitted [to] bring a *derivative* claim for breach of fiduciary duties." *See id.* Thus, it asserts that "whether or not ECI can pursue a 'direct' claim for a breach of fiduciary duty is not dispositive of whether Members actually breached a duty to ECI or even whether ECI has standing to bring a claim." ECI's arguments are unconvincing for several reasons. First, K&K LLC does not seek a declaration regarding the propriety of any action taken or not taken by its *members*. Thus, I express no opinion as to whether K&K LLC's other members breached any duty they might have owed to ECI or Emerick, an issue which evidently is at the center of the contemporaneous **[*55]** arbitration. Second, the issue of whether ECI has creditor standing to pursue derivative claims against K&K LLC's managers on behalf of K&K LLC, a proposition K&K LLC denies, is separate and distinct from whether K&K LLC's managers owed ECI any duties. In fact, recent Delaware case law indicates the answer is no. *See generally CML V, LLC v. Bax, 6 A.3d 238, 2010 WL 4517795, at *245-46 (Del. Ch. 2010)*. Rather, derivative claims are asserted on behalf of the corporation based on claims of the corporation, not those of the derivative plaintiff. Third, and most importantly, none of ECI's arguments addresses whether, if K&K LLC or its managers actually did breach fiduciary duties, any claims by ECI regarding such conduct still would be time-barred.

provide an appropriate basis for tolling the analogous limitations period.

Therefore, pursuant to K&K LLC's Declaration 7, I hold that any breach of fiduciary duty claim that ECI might assert against K&K LLC or its managers arising out of the 2001 Transaction is barred under the doctrine of laches and the analogous limitations periods under Delaware and Illinois law.[102]

c. Group 3: Declaration 8 regarding claims involving alleged breaches of the implied covenant of good faith and fair dealing

K&K LLC also seeks a declaration that ECI cannot assert a claim for breach of the implied covenant of good faith and fair dealing with regard to the Company's having entered the 2001 Transaction and its alleged effect on the Seller's Note and Subordination Agreement. As discussed *supra*, both of those contracts are governed by Illinois law.[103] Consequently, K&K LLC asserts that it is entitled to declaratory relief on this issue because Illinois does not recognize an independent cause of action for an alleged breach of the implied covenant of good faith and fair dealing under a contract.

HN13[⬆] Under Illinois law, while an implied covenant of good faith and fair dealing inheres in every contract unless the parties expressly disavow it, the implied covenant is not an independent source of duties for the parties to a contract.[104] Indeed, the Illinois Supreme Court held in *Voyles v. Sandia Mortgage Corp.*[105] **[*57]** that there is no independent cause of action for a breach of the implied covenant except in the narrow context of cases involving an insurance company's obligation to settle with a third-party who sued the company's policy-holder.[106]

Instead, ***HN14***[⬆] the implied covenant is used as a tool of construction.[107] In particular, "[w]here a contract specifically vests one of the parties with broad discretion in performing a term of the contract, the [implied covenant] requires that the discretion be exercised reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties."[108] Because the implied covenant does **[*58]** not support an independent cause of action, a violation of it is remediable only through a breach of contract action.[109] Thus, in order to state a claim for breach of the implied covenant under Illinois law, a plaintiff must plead the existence of a contract that vests one party with discretion in the performance of its obligations and a breach of that contract.[110]

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[102] Because I find that these claims are time-barred, I need not reach the issues of whether K&K LLC or its managers owed fiduciary duties to ECI or, if they **[*56]** did, whether they breached them. Therefore, I do not reach the issues regarding the merits of potential claims addressed in K&K LLC's Declarations 3-6.

[103] *See supra* note 84.

[104] *See* *Fox v. Heimann, 375 Ill. App. 3d 35, 872 N.E.2d 126, 134, 313 Ill. Dec. 366 (Ill. App. Ct. 2007)*; *see also* *Brenner v. Greenberg, 2009 U.S. Dist. LEXIS 51865, 2009 WL 1759596, at *5 (N.D. Ill. June 18, 2009)*.

[105] *196 Ill. 2d 288, 751 N.E.2d 1126, 256 Ill. Dec. 289 (Ill. 2001)*.

[106] *Id. at 1130-32*; *7-Eleven, Inc. v. Dar, 325 Ill. App. 3d 399, 757 N.E.2d 515, 523, 258 Ill. Dec. 826 (Ill. App. Ct. 2001)*; *see also* *Trading Techs., Inc. v. REFCO Gp. Ltd., 2006 U.S. Dist. LEXIS 14068, 2006 WL 794766, at *3 (N.D. Ill. Mar. 23, 2006)* ("The Illinois Supreme Court recently reiterated that the covenant of good faith and fair dealing is a guide to construction, not an independent cause of action.").

[107] *See, e.g.*, *Fox, 872 N.E.2d at 134*; *Brenner, 2009 U.S. Dist. LEXIS 51865, 2009 WL 1759596, at *6*.

[108] *See id.* (internal quotation marks omitted); *Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc., 352 Ill. App. 3d 160, 815 N.E.2d 911, 916, 287 Ill. Dec. 267 (Ill. App. Ct. 2004)* ("Illinois courts have recognized that a party who does not properly exercise contractual discretion breaches the implied covenant of good faith and fair dealing that is in every contract.").

[109] *See* *Citadel Gp. Ltd. v. Wash. Reg'l Med. Ctr., 2011 U.S. Dist. LEXIS 50894, 2011 WL 1811396, at *4 (N.D. Ill. May 12, 2011)*.

[110] *See* *Mid-W. Energy Consultants, Inc., 815 N.E.2d at 916* ("In **[*59]** order to plead a breach of the covenant of good faith and fair

As discussed *supra*, K&K LLC is entitled to a declaration that it did not breach the Seller's Note or the Subordination Agreement. Because ECI has not offered any argument as to how K&K LLC was vested with broad discretion in performing any of its part of the bargain under either of those two agreements, let alone that it exercised such discretion unreasonably, Illinois law would bar ECI from asserting an independent claim for breach of the implied covenant.

Indeed, like its handling of K&K LLC's other requested Declarations, ECI did not respond to the merits of K&K LLC's challenge to its implied covenant claim, choosing instead to frame its argument in terms of a lack of justiciable controversy. As a result, because its brief did not even attempt to rebut K&K LLC's showing that Illinois law would not provide a basis for an independent cause of action for a breach of the implied covenant, **[*60]** ECI has waived its ability to do so.[111] Therefore, I find that K&K LLC is entitled to summary judgment regarding Declaration 8 and hold that, under Illinois law, ECI may not assert against K&K LLC an independent cause of action for breach of the implied covenant of good faith and fair dealing as to either the Seller's Note or the Subordination Agreement based on the Company's participation in the 2001 Transaction.

d. Group 4: Declarations 9-10 regarding claims involving alleged fraud or fraudulent conveyance

K&K LLC also seeks declarations that ECI is time-barred from asserting any claim sounding in fraud, fraudulent inducement, fraudulent transfer, or fraudulent conveyance based on the Company's having entered into the 2001 Transaction.***HN15***[↑] The limitations period for fraud actions is three years in Delaware[112] and five years in Illinois.[113] In addition, as both Delaware and Illinois have adopted the Uniform Fraudulent Transfer Act ("UFTA"), the limitations period for claims sounding in fraudulent transfer or conveyance would run for no later than four years after accrual.[114] Therefore, under the Delaware borrowing statute, discussed **[*61]** *supra*, I apply Delaware's shorter three-year limitations period for actions relating to fraud and a four-year period for actions relating to fraudulent conveyance.

HN16[↑] Under Delaware law, a cause of action generally accrues at the time of the alleged harmful act.[115] To the extent ECI might argue that K&K LLC fraudulently induced it to enter into the Seller's Note or the Subordination Agreement, those causes of action would have accrued in 1999 when ECI entered into those agreements, and, in no event later than 2001, when K&K LLC entered into the 2001 Transaction and ECI brought the First Illinois Action to enjoin it. To the extent ECI might argue that K&K LLC committed a fraudulent "transfer" under the UFTA, the relevant "transfer" took place when K&K LLC granted CIVC LP a lien on the Company's assets as part of the 2001 Transaction.[116] Thus, ECI would have had to sue K&K LLC for actions in fraud by the end of 2004, or three years after the **[*62]** 2001 Transaction closed, and for actions for fraudulent transfers by the end of 2005, or four years after K&K LLC granted a lien in the form of the CIVC LP Loan to CIVC LP. Also as discussed *supra*, absent a basis

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dealing, a plaintiff must plead existence of contractual discretion. . . . Nevertheless, the good-faith duty to exercise contractual discretion reasonably does not apply where no contractual discretion exists.") (internal citation omitted).

[111] *See* *Emerald P'rs v. Berlin, 726 A.2d 1215, 1224 (Del. 1999)*.

[112] *See* *10 Del. C. § 8106*; *In re Am. Int'l Gp., Inc., 965 A.2d 763, 811-12 (Del. Ch. 2009)*.

[113] *735 Ill. Comp. Stat. 5/13-205*; *Fitton v. Barrington Realty Co., 273 Ill. App. 3d 1017, 653 N.E.2d 1276, 1278, 210 Ill. Dec. 814 (Ill. App. Ct. 1995)*.

[114] *See* *6 Del. C. § 1309*; *740 Ill. Comp. Stat. 160/10*.

[115] *See* *In re Am. Int'l Gp., 965 A.2d at 811-12*.

[116] *See* *6 Del. C. § 1301(12)* ("transfer" includes the "creation of a lien"); *accord* *740 Ill. Comp. Stat. § 160/2(l)*.

to toll those limitations periods, laches and the analogous statutes of limitations barred such causes of action long ago.[117]

As with the Declarations involving potential claims for breach of contract and fiduciary duties, ECI did not address the merits of the Company's time-bar arguments and chose instead to argue that there was no actual controversy regarding issues of fraud or fraudulent conveyance ripe for adjudication. ECI failed to present any evidence that would justify tolling the applicable limitations periods here or any other basis on which to deny summary judgment on these issues.

Therefore, K&K LLC **[*63]** is entitled to summary judgment in its favor as to Declarations 9 and 10. That is, I hold that any fraudulent transfer or conveyance claim that ECI might assert against K&K LLC based on the 2001 Transaction is barred by the doctrine of laches and the analogous limitations periods under Delaware and Illinois law. Similarly, I reach the same conclusion for any fraud or fraudulent inducement claims that ECI might assert against K&K LLC based on the 2001 Transaction.

4. Defendant's request for leave to take discovery

ECI, acknowledging that neither party has taken discovery in this case, requests that if the Court finds that an actual controversy exists, it be allowed under Rule 56(f)[118] to take discovery to respond to the Company's motion.[119] It argues that it cannot present by affidavit evidence sufficient to oppose K&K LLC's motion for summary judgment because "much of the information relevant to plaintiff's claim is exclusively within plaintiff's control."[120] ECI asserts, for example, that before it adequately could rebut the Company's arguments, it needs discovery pertaining to "Plaintiff's alleged need for the declaratory judgment it seeks," including information pertaining to

> (a) the **[*64]** Existing Events of Default under the Senior Loan Agreement, forbearance agreements and amendments that have allegedly been required to prevent the Senior Lenders from exercising their default rights as described in the [Dolan Affidavit]; (b) attempts by Plaintiff to reach agreements with new Senior Lenders to assume the current Senior Loans and renegotiate their terms as noted in the Dolan Affidavit; and (c) discussions that Plaintiff has had with financial institutions regarding any unresolved disputes with ECI and . . . Emerick that have allegedly affected Plaintiff's ability to secure additional financing.[121]

According to ECI, K&K LLC's Dolan Affidavit does not demonstrate a lack of a genuine issue of material fact regarding its motion and, in any case, ECI has the right to conduct discovery on this issue before responding to K&K LLC's motion.

Preliminarily, I doubt that the discovery ECI purportedly needs to respond to K&K LLC's motion is material.***HN18***[↑] "A fact is material if it 'might affect the outcome of the suit under the governing law.'"[122] As discussed *supra*, K&K LLC

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[117] *See* *Fike v. Ruger, 754 A.2d 254, 260-61 (Del. Ch. 1999)*. I note that my conclusion that ECI's claims relating to fraud are time-barred would not change if I applied Illinois's five-year limitations period.

[118] Rule 56(f) states: ***HN17***[↑] "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken **[*65]** or discovery to be had or may make such other order as is just." Ct. Ch. R. 56(f).

[119] DAB 3 n.1; Aff. of Amy G. Doehring ("Doehring Aff.") ¶¶ 4-5.

[120] Doehring Aff. ¶ 4.

[121] *Id.* ¶ 5.

[122] *Deloitte LLP v. Flanagan, 2009 Del. Ch. LEXIS 220, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*).

has demonstrated that the evidence of record entitles it to summary judgment on its motion for declaratory relief. Reasons *why* it sought this relief, for example, are not likely to be relevant to a determination as to whether K&K LLC should succeed on its motion as a matter of law.

In any event, even if the discovery ECI seeks is material, I find that it has not carried its burden under Rule 56(f) to show that it could not present facts essential to oppose the Company's motion for summary judgment. This action has been pending since July 14, 2010 and K&K LLC's motion was filed on November 2, 2010. Nevertheless, ECI has not even attempted to **[*66]** take any discovery in this litigation.[123] Equally important, this Court never stayed discovery in this action nor did either party ever ask it to do so. In addition, all of the events giving rise to the potential causes of action that ECI might assert against K&K LLC as identified in the Company's requested Declarations occurred in 1999 and 2001. It is reasonable to infer that ECI could have obtained at least some of the information it now claims to need from its sole stockholder, Emerick, who was personally involved, or through the various law suits it or Emerick has instituted since the 2001 Transaction.

Moreover, much of the material ECI seeks appears to have been available to it through nonlitigation means. Emerick, for example, is a member of K&K LLC and, pursuant to its Operating Agreement, could have had access to certain of the Company's books and records, which presumably would have included at least some of the information ECI now seeks under Rule 56(f).[124] Furthermore, K&K LLC's requested Declarations pertain largely to issues of law based on the explicit language of several contracts that it included as attachments to its opening brief.[125]

Finally, much of the information and evidence that ECI would need to develop and present to the Court in order to rebut K&K LLC's argument that ECI's alleged breach of fiduciary duty or fraud claims are time-barred should be within ECI's own control. If ECI believed, for example, that there was a justifiable basis for tolling the applicable statutes of limitations after the 2001 Transaction, the facts underlying that basis would have been within ECI's possession, custody, or control.

Possibly, ECI took a calculated gamble that it could prevail in this action on its argument that there was no justiciable case or controversy between the parties when it elected not to respond substantively on the merits to Plaintiff's motion. It lost that gamble and must live with the consequences. **[*68]** Thus, as discussed *supra,* I find that K&K LLC is entitled to the declaratory relief sought in its Complaint to the extent outlined in this Opinion. This Opinion, however, does not address the claims at issue in the on-going arbitration, and I express no opinion as to the validity of those claims. My rulings here pertain only to the declarations I have granted in favor of K&K LLC.

III. CONCLUSION

For the reasons stated in this Opinion, I deny ECI's motion to dismiss the Complaint under Rule 12(b)(1), its request to stay this action in favor of the pending Arbitration, and its request to take discovery under Rule 56(f). I grant Plaintiff's motion for summary judgment as to its requested declaratory relief to the extent stated herein. I am entering concurrently with this Opinion an Order and Final Judgment reflecting these rulings.

End of Document

[123] *See* Doehring Aff. ¶ 4.

[124] *See* **[*67]** Def.'s Ans. ¶¶ 1, 11; Operating Agreement § 12.2 ("Each Member shall have the right to review all Company records, agreements, . . . and financial projections of the Company which may be prepared from time to time . . . ."). Emerick also was a manager of K&K LLC. Def.'s Ans. ¶¶ 20, 22. In that capacity, he probably had even greater access to the information ECI now seeks.

[125] *See generally* Dolan Aff. & exhibits.

In re K-Sea Transp. Partners L.P. Unitholders Litig.

Court of Chancery of Delaware

June 3, 2011, Submitted; June 10, 2011, Decided

C.A. No. 6301-VCP

Reporter
2011 Del. Ch. LEXIS 90 *; 2011 WL 2520209

IN RE K-SEA TRANSPORTATION PARTNERS L.P. UNITHOLDERS LITIGATION

Notice: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Subsequent History: Complaint dismissed at *In re K-sea Transp. Partners L.P. Unitholders Litig., 2012 Del. Ch. LEXIS 67 (Del. Ch., Apr. 4, 2012)*

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Civil Procedure, Discovery & Disclosure**

A Delaware chancery court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause. Nevertheless, the court traditionally acts with a certain solicitude for plaintiffs in this procedural setting and thus follows the practice of erring on the side of more hearings rather than fewer. In deciding whether to expedite proceedings, the court must, in the context of the circumstances of the case, determine whether the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding. In doing so, the court accepts the well-pled allegations in the complaint as true and recognizes that establishing a colorable claim is not an onerous burden for a plaintiff to meet.

Business & Corporate Compliance > ... > Business & Corporate Law > Limited Partnerships > Formation

HN2[] **Limited Partnerships, Formation**

Consistent with the underlying policy of freedom of contract espoused by the Delaware Legislature, limited partnership agreements are to be construed in accordance with their literal terms. The operative document is the limited partnership agreement and

Del. Code Ann. tit. 6, § 17-1101 merely provides the "fall-back" or default provisions where the partnership agreement is silent. Only if the partners have not expressly made provisions in their partnership agreement or if the agreement is inconsistent with mandatory statutory provisions will a court look for guidance from the statutory default rules in *Del. Code Ann. tit. 6, § 17-1101*, traditional notions of fiduciary duties, or other extrinsic evidence. By focusing on the partnership agreement, the courts give maximum effect to the principle of freedom of contract, *Del. Code Ann. tit. 6, § 17-1101(c)*, and maintain the preeminence of the intent of the parties to the contract. A limited partnership agreement can establish a contractual standard of review that supplants fiduciary duty analysis.

Civil Procedure > Remedies > Damages > General Overview

Mergers & Acquisitions Law > Mergers > General Overview

HN3 **Remedies, Damages**

Money damages are sufficient to remedy a claim that a merger transaction price is inadequate. Indeed, money damages have been held to be sufficient even in circumstances in which a transaction seemed unlikely to withstand entire fairness review.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4 **Civil Procedure, Discovery & Disclosure**

Irreparable harm sufficient to warrant expedition of a preliminary injunction hearing and discovery may be shown if a plaintiff demonstrates that he will be unable to collect on a judgment or if there is a substantial likelihood that he will not be able to do so.

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John L. Reed, Esq., K. Tyler O'Connell, Esq., DLA PIPER LLP, Wilmington, Delaware; Timothy E. Hoeffner, Esq., DLA PIPER LLP, Philadelphia, Pennsylvania; Attorneys for Defendants Anthony S. Abbate, Barry J. Alperin and Frank Salerno.

S. Mark Hurd, Esq., Shannon E. German, Esq., MORRIS NICHOLS ARSHT & TUNNELL LLP, Wilmington, Delaware; Attorneys for Kirby Corp. and KSP Holding Sub LLC.

Judges: PARSONS, Vice Chancellor.

Opinion by: PARSONS

Opinion

MEMORANDUM OPINION

PARSONS, Vice Chancellor.

This action is before the Court on a motion to expedite regarding a transaction in which a Delaware limited partnership is to be acquired for either cash or a combination of cash and the acquirer's stock. The merger agreement, which governs the transaction, also calls for an additional payment to the general partner of the target to purchase the general partner's interest and incentive distribution rights ("IDRs"). The agreement was negotiated by representatives of the target's board, including affiliates of the general partner. To resolve any conflict of interest, the board submitted the transaction to a conflicts committee comprised of independent directors to consider whether the **[*3]** transaction was fair and reasonable. The conflicts committee ultimately concluded that the transaction was fair.

Plaintiff-unitholders of the target claim that the process undertaken by the conflicts committee was deficient and, therefore, legally ineffective because: (1) it failed to consider the fairness of payments made to certain conflicted parties; and (2) the independence of the conflicts committee members was tainted by a grant of unvested phantom units they received shortly before merger discussions began. In addition, Plaintiffs contend that the directors failed to provide adequate disclosures to enable the unitholders to make an informed decision as to whether to vote for the transaction. Plaintiffs also assert that they will suffer irreparable harm if prompt equitable relief is not granted because the general partner of the target is controlled by three allegedly single-purpose entities whose sole assets are their interests in the general partner. As a result, plaintiffs assert that these entities will become empty shells unless they are prevented from distributing the consideration they receive in the transaction.

I have carefully considered the parties' submissions and their **[*4]** various arguments. For the reasons stated in this Memorandum Opinion, I deny plaintiffs' motion to expedite.

I. BACKGROUND

A. The Parties

Plaintiffs are common unitholders in Defendant K-Sea Transportation Partners L.P. ("K-Sea").

K-Sea is a Delaware limited partnership and provider of marine transportation, distribution, and logistics services for refined petroleum products in the United States. Other Defendants include the following entities: K-Sea General Partner L.P. ("K-Sea GP"), which is the general partner of K-Sea; K-Sea General Partner GP LLC ("KSGP"), which is the general partner of K-Sea GP; K-Sea IDR

Holdings LLC; and KA First Reserve ("KAFR"), which is a Delaware LLC that is a joint venture between private equity firms Kayne Anderson and First Reserve. The complaint also names these individual directors of K-Sea GP as defendants: Anthony S. Abbate, Barry J. Alperin, James C. Baker, Timothy J. Casey, James J. Dowling, Brian P. Friedman, Kevin S. McCarthy, Gary D. Reaves, and Frank Salerno. Alperin, Abbate, and Salerno collectively comprised the K-Sea Conflicts Committee (the "Committee").

B. Facts

In December 2010, months after KAFR made an equity investment in K-Sea, McCarthy, **[*5]** a Kayne Anderson executive and director designee of KAFR, exchanged phone calls and e-mail messages with Joseph H. Pyne, the CEO of the proposed acquirer, Kirby Corporation ("Kirby"). In January 2011, McCarthy, Pyne, and other representatives of Kayne Anderson and First Reserve met. Among other things, they discussed a strategic transaction between Kirby and K-Sea. [1]

On February 2, 2011, McCarthy informed Dowling, the Chairman of the K-Sea Board, of the discussions with Kirby. Two days later, K-Sea and Kirby agreed to extend a confidentiality agreement they previously entered into in connection with strategic discussions in 2008. The same day, K-Sea provided Kirby with confidential financial projections. While due diligence was ongoing, Pyne relayed to McCarthy an offer to purchase K-Sea's common and preferred units for $306 million. This offer was rejected and McCarthy advised Pyne that subsequent offers should account for K-Sea GP's controlling interest and the **[*6]** IDRs. The following day, Kirby increased its offer to $316 million for all of the Partnership's equity interests. This offer was again rejected as inadequate. On February 15, Kirby submitted a revised offer of $329 million, which allocated $18 million for the IDRs.

The next day, the K-Sea Board met and acknowledged "the possible conflict of interest created by the allocation of $18.0 million for the general partner interest and the incentive distribution rights to K-Sea." [2] It adopted resolutions to "(i) reaffirm the membership of the existing K-Sea Conflicts Committee (composed of Messrs. Alperin, Abbate and Salerno), (ii) reaffirm the powers and authority of the K-Sea Conflicts Committee, including the ability to hire independent legal and financial advisors, and (iii) empower the K-Sea Conflicts Committee to make a recommendation to the K-Sea Board of Directors regarding what action should be taken by the K-Sea Board of Directors with respect to the proposed transaction." [3] K-Sea continued to negotiate with Kirby and, on February 28, Kirby offered $8 per common unit with a break-up fee of $30 million to be paid by K-Sea in the event that a superior proposal emerged. Between March **[*7]** 3 and March 10, 2011, K-Sea negotiated further concessions from Kirby such as increasing the offer to common unitholders from $8 to $8.15 per unit, reducing the termination fee from $30 million to $12 million plus up to $3 million in expense reimbursements, and limiting the circumstances under which Kirby could declare a "Material Adverse Effect."

On March 13, 2011, the parties entered into a definitive merger agreement (the "Merger Agreement") under which Kirby would acquire K-Sea for either $8.15 per unit in cash or $4.075 in cash plus .0734 of a share of Kirby per unit. This contemplated transaction (the "Proposed Transaction") represented a 26% premium to the closing price of the Partnership's common units on March 11, 2011. In sum, the offer valued the total

[1] Defs.' Ans. Br. ("DAB") Ex. D, Kirby Corporation Form S-4 Registration Statement ("Registration Statement"), 44. Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Registration Statement.

[2] *Id.* at 45.

[3] *Id.*

equity of K-Sea at $332.1 million and attributed $19.65 million to the general partner units and IDRs owned by Jefferies Capital Partners ("Jefferies"), a private equity fund that is the manager of Furman Selz Investors II L.P. and its affiliated entities, the principal owners of K-Sea Management GP and K-Sea GP.

The members of the Committee, Abbate, Alperin, and Salerno, were independent, non-employee directors. **[*8]** In December 2010, shortly before merger discussions began, the K-Sea Board approved a grant of 15,000 phantom common units to each of the independent directors. Upon vesting, a K-Sea phantom unit entitles the grantee to receive a K-Sea common unit or, in the discretion of the compensation committee, the cash equivalent to the fair market value of a K-Sea common unit. Each phantom unit award vests over five years in equal installments, but vests immediately upon a change in control. Previously, Abbate, Alperin, and Salerno had owned, respectively, 28,500, 13,500, and 7,800 common units. There is no allegation, however, that any of these individuals is related to KAFR or will receive any benefit from the $18 million in consideration to be paid for the K-Sea IDRs.

The Committee first met to consider Kirby's proposal on February 18, 2011. Around this time, it hired Stifel Nicolaus & Company ("Stifel") and DLA Piper LLP as financial and legal advisors, respectively. On March 12, the Committee met with DLA Piper and Stifel to consider the Proposed Transaction. At this meeting, Stifel rendered its oral opinion that, from a financial point of view, the merger consideration was fair in terms **[*9]** of (i) the amount to be paid by Kirby to the holders of K-Sea common units (other than Jefferies, KAFR, and their respective affiliates) in connection with the merger pursuant to the Merger Agreement and (ii) for those holders of K-Sea common units (other than Jefferies, KAFR, and their respective affiliates) who will receive Kirby common stock as a part of such consideration, the exchange ratio used in determining the number of shares of Kirby common stock, in each case, to be received by such holders of K-Sea common units. The Committee then resolved unanimously (i) that the Merger Agreement and the merger are fair and reasonable to K-Sea and its limited partners, (ii) that the Merger Agreement and the merger are approved, which approval constitutes "Special Approval" as defined in K-Sea's partnership agreement, and (iii) that the Committee recommends that the K-Sea Board approve the merger.

Later on March 12, the entire K-Sea Board convened and the Committee unanimously recommended the Proposed Transaction to the full Board. After additional discussion, the K-Sea Board unanimously resolved that the Merger Agreement and the transactions contemplated under it are advisable, fair, and **[*10]** reasonable to and in the best interests of K-Sea, K-Sea GP, and the limited partners of K-Sea. The K-Sea Board further recommended that the unitholders of K-Sea vote to adopt the Merger Agreement and approve the merger.

On March 13, KAFR, EW Transportation LLC, EW Transportation Corp., and EW Holdings Corp.—which collectively represented a majority of K-Sea's unitholders— each entered into support agreements with Kirby, KSP LP Sub, LLC, KSP Merger Sub, LLC, and KSP Holding Sub LLC, pursuant to which they agreed to vote their preferred units and common units in favor of the merger and against any alternative transaction.

C. Procedural History

Plaintiffs filed their original complaint on March 21, 2011. On April 13, I granted an order of consolidation. On May 18, Plaintiffs filed their Verified Consolidated Class Action Complaint along with their Motion to Expedite. On May 23, the K-Sea Defendants filed their Joint Brief in Opposition to Plaintiffs' Motion for Expedited Discovery, to which Plaintiffs replied on June 1. On June 3, I heard argument on Plaintiffs' Motion.

D. Parties' Contentions

In their Motion to Expedite, Plaintiffs make three primary arguments. First, they assert that the **[*11]** Committee had a duty to consider the fairness of the $18 million allocated to pay for the IDRs in isolation, rather than just evaluating the fairness of the Proposed Transaction as a whole to the Partnership. Second, they contend that Special Approval was not obtained in accordance with the K-Sea Limited Partnership Agreement (the "LPA") because the Committee members' independence was compromised by their receipt of the phantom units, thereby negating the effect of the purported Special Approval. And third, they allege that Defendants' disclosures regarding the Proposed Transaction were misleading. Plaintiffs further assert that they will suffer irreparable harm if expedition is not granted because the entities that own the limited partnership which owns the IDRs essentially are just pass-through entities. Accordingly, Plaintiffs allege that once the General Partner distributes the proceeds of the merger they probably would be unable to collect on any judgment they might obtain in this litigation.

Defendants respond that the Committee's only obligation was to consider the fairness of the transaction to the partnership as a whole, and that they were not required to consider separately **[*12]** the propriety of the $18 million IDR payment. They also contend that rather than creating an improper incentive for the Committee members and compromising their independence, the unvested phantom units actually served to align their incentives more closely with those of the common unitholders. Third, Defendants assert that the only disclosure necessary under the LPA in the event of a merger is one that provides the unitholders with notice of the meeting to vote on the merger and a copy of the Merger Agreement, which they provided. Finally, Defendants argue that no irreparable harm exists because money damages would adequately compensate Plaintiffs, even if the Court finds that Plaintiffs have shown a colorable claim. In that regard, Defendants reject as mere speculation Plaintiffs' professed fear that they will be unable to collect on any judgment they might obtain.

II. ANALYSIS

A. Standard for Expedition

HN1[↑] This Court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause. [4] Nevertheless, the Court "traditionally has acted with a certain solicitude for plaintiffs in this procedural setting and thus has followed the practice of **[*13]** erring on the side of more hearings rather than fewer." [5]

In deciding whether to expedite proceedings, the Court must, in the context of the circumstances of the case, determine "whether . . . the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding." [6] In doing so, the Court accepts the well-pleaded allegations in the Complaint as true [7] and recognizes that establishing a colorable claim is not an onerous burden for a plaintiff to meet. [8]

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[4] *Raymond Revocable Trust v. MAT Five LLC, 2008 Del. Ch. LEXIS 77, 2008 WL 2673341, at *2 (Del. Ch. June 26, 2008)* (quoting *In re SunGard Data Sys., Inc. S'holders Litig., 2005 Del. Ch. LEXIS 105, 2005 WL 1653975 (Del. Ch. July 8, 2005)*).

[5] *Giammargo v. Snapple Beverage Corp., 1994 Del. Ch. LEXIS 199, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994)*.

[6] *Id.*

[7] *TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc., 2000 Del. Ch. LEXIS 147, 2000 WL 1478537, at *2 (Del. Ch. Oct. 2, 2000)*.

[8] *See id.* (noting that the "colorable claim" standard is lower than the "reasonable probability of success" standard applicable in the preliminary injunction **[*14]** context); *see also In re 3Com S'holders*

B. Have Plaintiffs Asserted a Colorable Claim?

1. Did the Committee have a duty to review the fairness of the $18 million IDR payment?

Plaintiffs contend that the Committee had a duty to consider separately the fairness of the $18 million payment to K-Sea GP in exchange for the IDRs. Defendants, by contrast, assert that the Committee was under no duty to analyze this payment separately and, rather, only had to consider whether the transaction as a whole was fair and reasonable to the common unitholders.

The affairs of K-Sea are governed by the LPA, which acknowledges that inherent conflicts of interest may arise because of the potentially divergent interests of K-Sea GP and the limited partners. Section 7.9(a) details the process for resolving such conflicts of interest:

> [W]henever a potential conflict of interest exists or arises between the General **[*15]** Partner or any of its Affiliates, on the one hand, and the Partnership, the Operating Partnership, any other Group Member, any Partner or Assignee, on the other, any resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement, of the Operating Partnership Agreement, of any agreement contemplated herein or therein, or of any duty stated or implied by law or equity, *if the resolution or the course of action is, or by operation of this Agreement is deemed to be, fair and reasonable to the Partnership.* [9]

The LPA further provides three ways in which a conflict of interest or the resolution of such conflict "shall be conclusively deemed fair and reasonable to the Partnership." [10] One of those ways is if the "conflict of interest or resolution is (i) approved by Special Approval (as long as the material facts known to the General Partner or any of its Affiliates regarding any proposed transaction were disclosed to the Conflicts Committee at the time it gave its approval) . . . ." [11] The LPA defines "Special Approval" as approval by **[*16]** a majority of the members of the Conflicts Committee. [12]

Plaintiffs have failed to allege facts sufficient to state a colorable claim that the process followed by the Committee does not comply with the requirements of § 7.9(a). First, Plaintiffs have not alleged any specific facts indicating that material facts known to K-Sea GP or its affiliates regarding the Proposed Transaction were not disclosed to the Committee. Moreover, the actions taken by the Committee to vet the Proposed Transaction went above and beyond what the LPA required. For example, the Committee obtained a fairness opinion from Stifel relating to the merger consideration to be received by the common unitholders.

Second, after the Stifel presentation, the Committee approved resolutions that, among other things, stated its conclusions "(i) that the merger agreement and the merger are fair and reasonable to K-Sea and its limited partners, [and] (ii) that the agreement and the merger are approved, which constitutes "Special Approval" as defined in K-Sea's partnership agreement." [13] Therefore, the Committee also took the necessary step of

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*Litig., 2009 Del. Ch. LEXIS 215, 2009 WL 5173804, at *2 n.10 (Del. Ch. Dec. 18, 2009)* (acknowledging that the standard for obtaining expedited proceedings is low); *Reserves Dev. Corp. v. Wilm. Trust Co., 2008 Del. Ch. LEXIS 234, 2008 WL 4951057, at *2 (Del. Ch. Nov. 7, 2008)* (noting that a colorable claim is essentially a non-frivolous cause of action).

[9] DAB Ex. A, LPA, § 7.9(a) (emphasis added).

[10] *Id.*

[11] *Id.*

[12] *Id.* § 1.1.

[13] Registration Statement 49.

determining that the **[*17]** Proposed Transaction was fair and reasonable to K-Sea. Plaintiffs have not alleged any facts or articulated any persuasive argument to suggest that the LPA required any further consideration. Accordingly, Plaintiffs' allegations that the Committee breached its duties by not separately considering the $18 million payment to the General Partner fail to state a colorable claim.

2. Did the phantom unit grant compromise the Committee members' independence and thereby negate its Special Approval?

Plaintiffs next contend that the December 2010 grant of phantom units impermissibly compromised the independence of the members of the Committee because, in the absence of a change of control transaction, these units would not fully vest for five years. Under the LPA, members of the Committee are required to be independent. [14] Based on the accelerated vesting of the phantom units attendant to the Proposed Transaction, Plaintiffs argue that the Committee was not properly constituted under the LPA and, therefore, was unable to grant Special Approval deeming the transaction to be fair and reasonable. Because Defendants do not allege that the conflict of interest was otherwise **[*18]** conclusively resolved in accordance with the LPA, Plaintiffs argue that the Proposed Transaction is susceptible to attack on the ground that it is not fair and reasonable. Defendants counter that the grant of phantom units occurred before any merger discussions had begun and, in any event, aligned the interests of the Committee members with those of the common unitholders.

For purposes of Plaintiffs' Motion to Expedite, Defendants concede that whether the Committee properly **[*19]** resolved the conflict of interest depends on whether the procedure followed comports with the Special Approval process outlined in the LPA. That is, Defendants admit that the other two paths outlined in § 7.9(a) for conclusively resolving the conflict were not followed, and I note that, for purposes of the pending preliminary motion, they have not attempted to prove that the Proposed Transaction otherwise was fair and reasonable to the Partnership. Special Approval requires ratification by a Conflicts Committee composed of independent directors. [15] Therefore, if the Defendant Committee members' independence arguably was compromised, Plaintiffs would have asserted a colorable claim that its Special Approval of the Proposed Transaction as fair and reasonable to the Partnership is ineffective. In the absence of a safe-harbor Special Approval, Plaintiffs would have asserted at least a colorable claim that the transaction was vulnerable to an argument that it was not fair and reasonable.

In support of their argument that the phantom units properly align the incentives of Directors with the common unitholders when considering the terms of a merger, Defendants cite to *Globis* ***[*20]*** *Partners, L.P. v. Plumtree Software.* [16] In that case, the Court held that "[t]he accelerated vesting of options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price." [17] Importantly in *Globis*, however, the value of the directors' unvested options in the target, Plumtree Software, was greatly outweighed by the

[14] LPA § 1.1. Conflicts Committee is defined as a "committee of the Board of Directors of the General Partner composed entirely of two or more directors who are not (a) security holders, officers or employees of the General Partner, (b) officers, directors or employees of any Affiliate of the General Partner or (c) holders of any ownership interest in the Partnership Group other than Common Units and who also meet the independence standards required of directors who serve on an audit committee of a board of directors by the Securities Exchange Act of 1934, as amended, or the rules and regulations of the Commission thereunder and by the National Securities Exchange on which the Common Units are listed for trading."

[15] LPA §§ 1.1, 7.9(a).

[16] *2007 Del. Ch. LEXIS 169, 2007 WL 4292024 (Del. Ch. Nov. 30, 2007)*.

[17] *2007 Del. Ch. LEXIS 169, [WL] at *9*.

value of their unrestricted holdings. Accordingly, the Court found that it was unlikely that the defendant directors' decision-making would be skewed by the relatively small benefit they would receive from having a small portion of their holdings vest immediately in comparison to the potentially negative impact of selling their much larger unrestricted holdings at an unreasonably low price. Moreover, the timing of the grants in *Globis* appeared to be unrelated to consideration of the transaction at issue.

In contrast to the relatively modest size of the Plumtree directors' unvested options, the phantom common units granted to Committee members here constituted a significant portion of their total holdings in K-Sea. Before the December 2010 grant **[*21]** of 15,000 phantom common units, Abbate, Alperin, and Salerno owned, respectively, 28,500, 13,500, and 7,800 common units of K-Sea. Therefore, the award approximately doubled their collective interest in K-Sea. Based on the limited record available at this preliminary stage of the litigation, I cannot rule out the possibility that the prospect of the immediate vesting of the phantom units may have biased the Committee members' judgment in favor of the Proposed Transaction. Furthermore, the grant occurred just days or weeks before negotiations began in late December 2010 or early January 2011 between representatives of K-Sea and Kirby. The closely correlated timing of the grant supports an inference that it might have been made with an intent to influence the Committee members' consideration of a potential transaction. Therefore, Plaintiffs have articulated at least a colorable claim that the Proposed Transaction was not fair and reasonable because Defendants' receipt of the phantom common units may have tainted the Committee's independence, thereby nullifying the effect of their Special Approval.

3. Were the disclosures provided by Defendants materially misleading?

Plaintiffs also allege **[*22]** that the disclosures provided to common unitholders in the Registration Statement were materially misleading. In that regard, they argue that the LPA did not alter the traditional fiduciary duties of Defendants with regard to necessary disclosures. Specifically, Plaintiffs claim that Defendants' disclosures were misleading because they stated that the Company negotiated a 9.7% increase in consideration between Kirby's initial and final offers, when common unitholders, in fact, received only a 2.1% increase. Second, Plaintiffs assert that the disclosures were misleading because they stated that "the members of the K-Sea Conflicts Committee will not personally benefit from the completion of the merger in a manner different from the K-Sea unitholders" without disclosing that the Proposed Transaction would cause the phantom units they recently received to vest immediately. In response, Defendants contend that the LPA expressly limits their duties of disclosure and that, in the event of a merger, they only were required to provide a copy of the merger agreement and notice of the meeting to vote on the merger.

HN2[↑] Consistent with the underlying policy of freedom of contract espoused by the Delaware **[*23]** Legislature, limited partnership agreements are to be construed in accordance with their literal terms. [18] "The operative document is the limited partnership agreement and the statute merely provides the 'fall-back' or default provisions where the partnership agreement is silent." [19] Only "if the partners have not expressly made provisions in their partnership agreement or if the agreement is inconsistent with mandatory statutory provisions, . . . will [a court] look for guidance from the statutory default rules, traditional notions of fiduciary duties,

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[18] *In re Nantucket Island Assocs. P'ship Unitholders Litig., 810 A.2d 351, 361 (Del. Ch. 2002)*.

[19] *Cantor Fitzgerald, L.P. v. Cantor, 2001 Del. Ch. LEXIS 137, 2001 WL 1456494, at *5 (Del. Ch. Nov. 5, 2001)* (quoting *Cantor Fitzgerald, L.P. v. Cantor, 2000 Del. Ch. LEXIS 43, 2000 WL 307370, at *21 (Del. Ch. Mar. 13, 2000)*).

or other extrinsic evidence." [20] By focusing on the partnership agreement, the courts give "maximum effect to the principle of freedom of contract" [21] and maintain the preeminence of the intent of the parties to the contract. [22]

As recently confirmed in *Lonergan v. EPE Holdings, LLC*, a limited partnership agreement can "establish[] a contractual standard of review that supplants fiduciary duty analysis." [23] In support of their argument that the LPA did not modify Defendants' duty of disclosure and that they therefore owed traditional fiduciary duties, Plaintiffs cite to Section 2.1 of the LPA, which states:

> Except as expressly provided to the contrary in this Agreement, the rights, duties (including fiduciary duties), liabilities and obligations of the Partners and the administration, dissolution and termination of the Partnership shall be governed by [the Delaware Revised Uniform Limited Partnership Act ("DRULPA")]. [24]

According to Plaintiffs, no other provision in the LPA modifies the K-Sea directors' **[*25]** traditional duties of disclosure.

Defendants correctly point out, however, that certain other provisions of the LPA tightly circumscribe the duties of K-Sea GP and its directors. First, § 7.9(a) provides that:

> In the absence of bad faith by the General Partner, the resolution, action or terms so made, taken or provided by the General Partner with respect to [a potential conflict of interest] shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or, to the extent permitted by law, under the Delaware Act or any other law, rule or regulation. [25]

This section can be read to eliminate traditional fiduciary duties so long as the persons involved comply with the prescribed process or requirements for resolving conflicts of interest. Second, § 14.3 details the procedure that must be followed to gain approval of the limited partners of a merger or consolidation. The only information K-Sea is required to provide in that situation is "[a] copy or a summary of the Merger Agreement . . . with the notice of a special meeting or **[*26]** the written consent." Given the significant weight afforded to parties' freedom to contract, I read this provision as reflecting the parties' intent to preempt fundamental fiduciary duties of disclosure, limiting the requirements to those detailed in the LPA. Under the plain language of the LPA, therefore, Defendants were required to provide only a copy of the Merger Agreement along with a notice of the shareholder meeting. K-Sea satisfied each of these requirements. Therefore, because the LPA appears to have eliminated traditional fiduciary duties and Defendants complied with the disclosure requirements under § 14.3, I conclude that Plaintiffs have failed to assert a colorable claim that Defendants failed to comply with their duty of disclosure.

Moreover, even if Defendants had a higher duty of disclosure, Plaintiffs have not shown that either of the disclosures about which they complain was misleading. K-Sea's Registration Statement fairly can be read to indicate that the entire consideration being paid for K-Sea—and not just that being received by common unitholders—represented a

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[20] *In re LJM2 Co-Inv., L.P., 866 A.2d 762, 777 (Del. Ch. 2004)* (citing *Sonet v. Timber Co., 722 A.2d 319, 323 (Del. Ch. 1998)*).

[21] *6 Del. C. § 17-1101(c)*.

[22] *See* **[*24]** Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 Del. J. of Corp. L. 1 (2007); *see also Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 291 (Del. 1999)* ("The basic approach of the Delaware Act is to provide members with broad discretion in drafting the Agreement and to furnish default provisions when the members' agreement is silent").

[23] *5 A.3d 1008, 1020 (Del. Ch. 2010)*.

[24] *6 Del. C. §§ 17-101 to -1111*.

[25] LPA § 7.9(a).

9.7% increase over Kirby's initial offer. Indeed, the Registration Statement contains **[*27]** all of the information necessary for shareholders to calculate the actual increase represented by the price in the Merger Agreement over Kirby's initial offer. I also am not persuaded that Defendants misled K-Sea unitholders by saying that "Conflict Committee members [would] not personally benefit in a manner different from K-Sea unitholders . . . ." This statement implies that the interests of the Committee members are aligned with those of the common unitholders. Generally, this is true because the Committee members' holdings in K-Sea consisted only of common units and phantom units, whose value was derived from that of common units. Therefore, a higher merger price would increase the value of the holdings of Committee members and K-Sea unitholders by the same percentage. Finally, K-Sea's Registration Statement explicitly discloses that Defendants' phantom unit holdings would be accelerated if the merger was effected. [26] Therefore, Plaintiffs have not articulated a colorable claim that the disclosures made by Defendants were misleading.

C. Have Plaintiffs Shown Irreparable Harm?

1. Are money damages sufficient?

Having shown that at least one of their claims **[*28]** is colorable, Plaintiffs also must demonstrate that they will suffer irreparable harm if expedition is not granted. Plaintiffs have failed, however, to refute Defendants' argument that money damages will provide an adequate remedy for any harm suffered by K-Sea's unitholders. Defendants assert that money damages are sufficient for two reasons. First, they contend that the relief sought by Plaintiffs—an injunction that would require the $18 million payment to K-Sea GP for the IDRs essentially to be held in escrow until the conclusion of this action—essentially is a claim for money damages. [27] Second, they cite a number of Delaware cases that have held money damages to be an adequate remedy for allegations that a transaction price is not fair, which is what Plaintiffs argue in this instance.

This Court is reluctant to enjoin a premium transaction where **[*29]** there is no superior bid on the table and repeatedly has held that ***HN3***[↑] money damages are sufficient to remedy a claim that a transaction price is inadequate. [28] Indeed, money damages have been held to be sufficient even in circumstances in which a transaction seemed unlikely to withstand entire fairness review. [29] Therefore, because no other offer was reasonably available to K-Sea unitholders and Plaintiffs focused their request for relief on the $18 million General Partner payment, I am convinced that money damages are an adequate remedy for Plaintiffs' claims.

2. Does Plaintiffs' speculation that they will be unable to collect constitute [*30] irreparable harm?

While only half-heartedly contesting the adequacy of money damages, Plaintiffs rely heavily on their speculation that they will have a difficult time collecting on any judgment they might be awarded.

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[26] Registration Statement 84.

[27] Plaintiffs say that "[t]he remedy [they] seek for the substantive wrong here at issue — a limited injunction that would allow the deal to close, subject to the wrongful $18 million side-payment being withheld from the General Partner — is closely comparable to the remedy routinely granted for disclosure violations." Pls.' Rep. Br. ¶ 15.

[28] *In re Cogent Inc. S'holders Litig., 7 A.3d 487, 515 (Del. Ch. 2010)*; *Giammargo v. Snapple Beverage Corp., 1994 Del. Ch. LEXIS 199, 1994 WL 672 698, at *3 (Del. Ch. Nov. 15, 1994)* ("there is no plausible reason why a money award would not be fully sufficient" to satisfy plaintiff's claims that the directors failed to obtain the highest price for the company).

[29] *See In re CNX Gas Corp. S'holders Litig., 4 A.3d 397, 420 (Del. Ch. 2010)* (refusing to enjoin a tender offer where plaintiff was likely to succeed in demonstrating merger was unfair because money damages were adequate).

Plaintiffs predict that collection will be difficult, if not impossible, because 90% of the economic interest in K-Sea GP and the IDRs is owned by single-purpose limited partnerships whose sole asset is their indirect ownership interest in K-Sea. Therefore, under Plaintiffs' theory, by the time they seek to collect on any judgment, these entities likely will be mere shells and essentially judgment proof. Defendants counter that Plaintiffs bear the burden of proof on their collectability argument and have not met that burden.

In support of their argument, Plaintiffs rely on three cases, which all indicate that ***HN4***[↑] irreparable harm *may* be shown if a plaintiff demonstrates that he will be unable to collect on a judgment or if there is a substantial likelihood that he will not be able to do so. [30] In *County of York*, the court found that the possibility of irreparable harm sufficient to warrant expedition existed "[w]here, as here, damages that may be available are difficult to **[*31]** calculate and other uncertainties, such as collectibility exist . . . ." [31] Unlike that case, however, the damages at issue here do not appear to be uncertain or difficult to calculate. Rather, the damages may well be limited to all or part of the contested $18 million payment that is to be made to the General Partner. Even if that is not true, however, Plaintiffs' damages also might include an additional component related to an adjudicated valuation of K-Sea above the transaction price. Such a valuation would not be unduly difficult to determine.

Moreover, the plaintiff in *County of York* had made some showing that collecting on a judgment would be difficult because of the defendant's rapidly diminishing share price. In contrast, the Plaintiffs here have not shown that collection is likely to be difficult. Instead, their doubts in that regard are based on mere speculation. In both *Gradient* **[*32]** and *CNX Gas*, the court found irreparable harm to be lacking because the plaintiffs made no showing that the defendant was insolvent or otherwise unlikely to be able to satisfy any judgment. [32] The same is true in this case. While Plaintiffs question whether they will be able to collect on a judgment, they have not alleged facts sufficient to support a reasonable inference that none of the named Defendants or those closely associated with them in regard to the Proposed Transaction could satisfy a judgment. In addition, if Plaintiffs prove their claims on the merits, they likely may be able, if necessary, to enforce a judgment against the individual limited partners holding stakes in the limited partnerships which own about 90% of K-Sea GP. On the record presented, Plaintiffs' allegations are simply too speculative to support the required showing of irreparable harm.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I deny Plaintiffs' Motion to Expedite.

IT IS SO ORDERED.

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[30] *See* *Cty. of York Empls. Ret. Plan v. Merrill Lynch & Co., 2008 Del. Ch. LEXIS 162, 2008 WL 4824053, at *8 (Del. Ch. Oct. 28, 2008)*; *Gradient OC Master, Ltd. v. NBC Universal, Inc., 930 A.2d 104, 134 (Del. Ch. 2007)*; *In re CNX Gas Corp. S'holder Litig., 4 A.3d 397, 420 (Del. Ch. 2010)*.

[31] *Cty. of York, 2008 Del. Ch. LEXIS 162, 2008 WL 4824053, at *8*.

[32] *See* *Gradient, 930 A.2d at 134* (no irreparable harm where "[t]he Plaintiffs have not presented any credible evidence that ION is insolvent, is likely imminently to become insolvent, or would otherwise be unable to compensate Plaintiffs for any monetary harm they might suffer if the Exchange Offer is consummated."); *In re CNX Gas Corp., 4 A.3d 397 at 420* **[*33]** (injunction not granted where "[n]o question has been raised, much less evidence presented, to cast doubt on CONSOL's solvency or ability to satisfy a damages award").

Mergenthaler v. M & K Bus Serv.

Superior Court of Delaware, New Castle

November 1, 1994, Submitted ; February 22, 1995, Decided

C.A. No. 90C-12-85

Reporter
1995 Del. Super. LEXIS 41 *; 1995 WL 108883

LAWRENCE E. MERGENTHALER and AUDREY M. MERGENTHALER, Plaintiffs, v. M & K BUS SERVICE, INC., Defendant, v. CARL KING, INC., Third-Party Defendant, v. HOLLINGSWORTH OIL CO. INC., and E. J. HOLLINGSWORTH CO., Third-Party Defendants.

Notice: [*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Disposition: DENIED

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > Motions in Limine > General Overview

HN1[] **Pretrial Matters, Motions in Limine**

A motion in limine may be used to determine the admissibility of evidence, and may be used to determine elements of damage in a case.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Entitlement as Matter of Law, Materiality of Facts**

On a motion for summary judgment, a movant will prevail only when he/she establishes that there is no material fact that is in dispute and that he/she is entitled to judgment as a matter of law. Del. Super. Ct. Civ. R. 56. The facts must be considered in the light most favorable to the non-moving party.

Civil Procedure > Remedies > Damages > Special Damages

Torts > ... > Types of Damages > Property Damages > Loss of Use

Torts > Remedies > Damages > General Overview

HN3[] **Damages, Special Damages**

Del. Super. Ct. Civ. R. 9(g) requires that damages be plead generally.

Real Property Law > Landlord & Tenant > General Overview

HN4[] **Real Property Law, Landlord & Tenant**

A landlord must give lessee a minimum of 60 days' prior written notice which specifies the amount of the rent increase and its effective date. *Del. Code Ann. tit. 25 § 5501(e)*.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

HN5[] **Contract Conditions & Provisions, Waivers**

Waiver is a voluntary and intentional relinquishment of a known right. Waiver implies knowledge and an intent to waive, and the facts relied on to prove waiver must be unequivocal.

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John M. Bader, Esquire, Simonoff, Adourian & O'Brien, 919 Market Street, Wilmington, Delaware 19801. Attorney for Defendant M & K Bus Service.

Anthony Flynn, Esquire, Young, Conaway, Stargatt and Taylor, P.O. Box 391, Wilmington, Delaware 19899-0391. Attorney for Third-Party Defendant Carl King, Inc.

Judges: Haile Alford, J.

Opinion by: Haile Alford

Opinion

ORDER

UPON PLAINTIFF'S MOTION IN LIMINE

ALFORD, J.

This 22nd day of February, 1995, upon consideration of Lawrence E. and Audrey M. Mergenthaler's (hereinafter "Plaintiffs") Motion In Limine, it appears that:

1. On December 11, 1990, Plaintiffs filed a complaint alleging breach of a commercial lease contract ["Lease"] against M & K Bus Service (hereinafter "Defendant"). On April 21, 1992 Carl King, Inc., E.J. Hollingsworth Company, and Hollingsworth Oil Company, Inc. were joined as Third-Party Defendants.

2. On May 31, 1994, Plaintiffs filed the instant motion, requesting the Court to determine, **[*2]** as a matter of law, that Plaintiffs are entitled to recover (i) back rent pursuant to Paragraph 2 of the Lease which provides for rent increases tied to the Consumer Price Index for the Philadelphia area (C.P.I.); and (ii) damages for loss of use of the leased premises, based on its fair rental value, resulting from an alleged toxic spill.

3. *HN1*[] A motion in limine may be used to determine the admissibility of evidence, and may be used to determine elements of damage in a case. *Battistini v. Hickman & Willey, Inc.*, C.A. No. 88 C-JL3, *1989 WL 89692*, Lee, J (July 13, 1989). Plaintiffs' request for an order establishing the measure of damages from the alleged toxic spill is treated as a motion in limine; while Plaintiff's request for back rent allegedly due, the motion is treated as a motion for partial summary judgment.

State ex rel. Mitchell v. Wolcott, Del. Supr., 46 Del. 362, 83 A.2d 759, 761 (1951); *Kuhn Constr. Co. v. State, Del. Super., 248 A.2d 612, 614 (1968)*.

4. ***HN2***[⬆] On a motion for summary judgment, a movant will prevail only when he/she establishes that there is no material fact that is in dispute and that **[*3]** he/she is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56; *Moore v. Sizemore, Del. Supr., 405 A.2d 679, 680-681 (1979)*. The facts must be considered in the light most favorable to the non-moving party. *Merril v. Crothall-American, Inc., Del. Supr., 606 A.2d 96, 99 (1992)*.

5. Plaintiffs allege that a gasoline spill took place on the leased premises in May or June, 1990. The complaint set forth, in relevant part:

> All amounts necessary to reimburse Plaintiffs for any expenses involved in cleaning up the premises due to any environmental hazards located on the premises.

Plaintiffs' Complaint at 7.

HN3[⬆] Superior Court Civil Rule 9(g) requires that damages be plead generally. In the instant case, Plaintiffs' have not averred in the complaint any damages relating to the alleged loss of use of the leased premises. Therefore, the Court is not at liberty to decide this issue. However, pursuant to Superior Court Civil Rule 15(a), the Court hereby grants Plaintiff leave to amend the complaint with respect to this aspect of damages.

6. Plaintiffs next argue they are entitled, as a matter of law, to back rent for **[*4]** the period of July 1, 1986 - August 29, 1990, in the amount of $ 12,722.00. The basis for this claim is a C.P.I. rental increase due pursuant to Paragraph 2 of the Lease. The Lease provides, in relevant part:

> On and after the second anniversary of the original term, the said rental of $ 3,300.00 per month shall be increased to the extent that, and proportionately to any increase in the Consumer Price Index for the Philadelphia area which may exist as of the beginning of such second year of the term, over the C.P.I. level at the inception hereof. At the beginning of each year thereafter when there shall be an increase in said C.P.I., the said rental shall likewise be increased accordingly for the next ensuring year, and so on during the remainder of the term, to the extent that there shall be such increases in the C.P.I.

Plaintiffs' Motion in Limine, Exhibit "A".

Defendant claims that Plaintiff never submitted a statement requesting increased rent based upon the alleged C.P.I. calculation until December 15, 1989. Defendant vacated the premises in the summer of 1990. ***HN4***[⬆] A landlord must give Lessee a minimum of 60 days' prior written notice which specifies the amount of the increase **[*5]** and its effective date. *25 Del.C. § 5501(e)*; *Pike Creek Limited Partnership Associates v. Medlab, Inc.*, Del. Super., C.A. No. 89C-JA-17, Babiarz, J. (June 1, 1989). Paragraph 2 of the Lease does not specify a date certain nor does it provide for a specific amount so as to satisfy the requirements of the statute. The C.P.I. increase clause, as a result, failed to provide the requisite notice to Defendant. Therefore, Plaintiffs' claim for additional rent, as a matter of law, is without merit.

7. Plaintiffs never requested increased rent based on the C.P.I. until December 15, 1989. Thus, there may be an issue of material fact regarding whether Plaintiffs waived the right to collect additional rent. "***HN5***[⬆] Waiver is a voluntary and intentional relinquishment of a known right." *Delmar News, Inc. v. Jacobs Oil Co., Del. Super., 584 A.2d 531, 535 (1990)*. Waiver implies knowledge and an intent to waive, and the facts relied on to prove waiver must be unequivocal. *Id.* The question of waiver is normally a jury question, unless the facts are undisputed and give rise to only one reasonable inference. *George v. Frank A. Robino, Inc., Del. Supr., 334 A.2d 223, 224 (1975)*; **[*6]** *G.M.S. Realty Corp. v. Girard Fire & Marine Ins. Co., Del. Super., 47 Del. 216, 89 A.2d 857, 860 (1952)*. A non-waiver clause in a contract may itself be waived through knowledge, coupled with silence and conduct inconsistent with the terms of the contract. *Id. at 858-860*; *M.J.G. Properties, Inc. v.*

Hurley, 27 Mass. App. Ct. 250, 537 N.E. 2d 165 (Mass. App. Ct. 1989); *Bettelheim v. Hagstrom Food Stores, 113 Cal. App. 2d 873, 249 P.2d 301, 304 (Cal. Dist. Ct. App. 1952)*; 3A Corbin on Contracts 531, § 763 (rev. ed. 1960).

Plaintiffs do not allege lack of knowledge of the C.P.I. provisions in the Lease. Plaintiffs regularly collected the lease rent of $ 3,300 from Defendant. Plaintiffs failure to demand the C.P.I. increase until December 15, 1989, some five years after the parties entered into the lease agreement may lead a trier of fact to conclude that Plaintiffs waived their right to collect said increase. Therefore, Plaintiffs request for back rent due is denied.

For the reasons set forth above, Plaintiffs' motion in limine is DENIED.

IT IS **[*7]** SO ORDERED.

Haile Alford J.

End of Document

Nelson v. Alliance Hospitality Mgmt., LLC

Court of Appeals of North Carolina

April 8, 2014, Heard in the Court of Appeals; May 20, 2014, Filed

NO. COA13-1325

Reporter
2014 N.C. App. LEXIS 521 *; 234 N.C. App. 116; 761 S.E.2d 755

KENNETH E. NELSON, Plaintiff, v. ALLIANCE HOSPITALITY MANAGEMENT, LLC, a Georgia limited liability company, ROLF A. TWEETEN, and AXIS HOSPITALITY, INC., an Illinois corporation, Defendants.

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

Subsequent History: Counsel Amended May 27, 2014.

Prior History: [*1] Wake County. No. 11 CVS 3217. James L. Gale, Judge.

Nelson v. Alliance Hospitality Mgmt., 2013 NCBC LEXIS 39 (2013)

Disposition: DISMISSED.

Counsel: Meynardie & Nanney, PLLC, Raleigh, NC by Mr. Joseph H. Nanney, Jr., Primary Attorney, Attorney at Law for Plaintiff-Appellant - Nelson, Kenneth E.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, Raleigh, NC by Mr. Michael W. Mitchell and Mr. Jackson Wyatt Moore, Jr., Primary Attorneys, Attorneys at Law; and Leader, Bulso & Nolan, PLC, Nashville, TN by Mr. Eugene N. Bulso, Jr., Primary Attorney, Attorney at Law for Appellee - Alliance Hospitality Management, LLC, et al.

Judges: Robert C. HUNTER, Judge. Judges BRYANT and STEELMAN concur.

Opinion by: Robert C. HUNTER

Opinion

Appeal by plaintiff from order entered 20 August 2013 by Special Superior Court Judge for Complex

Business Cases James L. Gale in Wake County Superior Court. Heard in the Court of Appeals 8 April 2014.

HUNTER, Robert C., Judge.

Plaintiff Kenneth Nelson ("plaintiff" or "Nelson") appeals the order granting defendants' motion for summary judgment as to plaintiff's claims for damages. On appeal, plaintiff argues that the trial court erred as a matter of law by ruling that: (1) plaintiff's damages were too remote; (2) certain damages are recoverable only in a derivative action; and (3) plaintiff was not entitled to punitive damages.

After careful review, we dismiss plaintiff's appeal because the trial court's order is interlocutory and does not affect a substantial right.

Background

Defendant Alliance **[*2]** Hospitality ("Alliance") is a Georgia LLC that provides hotel management services. Defendant Axis Hospitality ("Axis") is an Illinois corporation, with its principal place of business in Wake County. Axis is owned solely by defendant Rolf Tweeten ("Tweeten") (collectively, Alliance, Axis, and Tweeten are referred to as "defendants"). Sometime in 2007, Axis purchased a 51% interest in Alliance; Tweeten had hired plaintiff as a consultant to help him investigate and acquire the majority interest in Alliance. Later, Axis acquired the rest of Alliance. Nelson and Tweeten allegedly reached an oral agreement that Nelson would receive a ten percent interest in Alliance; Nelson became an Alliance Director and later became CFO of Alliance. Nelson remained CFO and on the Board of Alliance until January 2011.

In a separate, yet related, series of events, Nelson had several judgments entered against him in other jurisdictions. Specifically, a Tennessee state-court judgment had been entered against Nelson in favor of Orlando Residence ("Orlando"), an unrelated third-party ("the Tennessee judgment"). In addition, on 11 September 2012, Orlando obtained a second judgment in South Carolina against plaintiff **[*3]** in the amount of $4,000,000 ("the South Carolina judgment"). To satisfy the Tennessee judgment, Orlando enforced the judgment in Wisconsin and caused two houses belonging to Mrs. Nelson, plaintiff's wife, to be sold. After entry of the Tennessee judgment and sale of the Wisconsin houses, Nelson was removed from the Alliance board and his CFO position was eliminated. Alliance entered into an agreement to sell certain contracts to Interstate Hotels & Resorts ("Interstate"); the sale closed on 1 April 2011. The sale proceeds from this transaction are central to plaintiff's claims.

Orlando sought to enforce the Tennessee and the South Carolina judgments in North Carolina. Judge Michael J. O'Foghludha in Wake County Superior Court entered charging orders against Nelson's interest in Alliance, requiring Alliance to pay the distributions of the Interstate sale proceeds to Orlando instead of to Nelson ("the charging orders"). Although Nelson appealed the enforcement of the Tennessee judgment in Wisconsin, it was affirmed by the Wisconsin Court of Appeals. An order was issued by Wake County Court in February 2013 confirming the continued applicability of the 2011 charging order against Nelson.

On **[*4]** 25 February 2011, Nelson filed suit against defendants, bringing claims for: (1) breach of fiduciary duty; (2) constructive fraud; (3) judicial dissolution of Alliance; (4) a declaratory judgment that Nelson owns ten of Alliance's sixty-one outstanding membership interest units; and (5) wrongful termination. Plaintiff's complaint is not included in the record on appeal. Defendants filed counterclaims against plaintiff, but these counterclaims were eventually dismissed by defendants. On 22 March 2011, the matter was designated a complex business case. On 22 November 2011, the wrongful termination claim (claim no. 5) was dismissed by the trial court.

Defendants filed two summary judgment motions. The first motion for summary judgment was in regards to plaintiff's claim for a declaratory judgment that he is a member of Alliance and the extent of his ownership interest in Alliance (claim no. 4). The actual motion is not included in the record on appeal; however, the trial court's order is included. The trial court denied the motion, concluding that there was a material issue of fact that precluded determining the issues as a matter of law. In other words, the trial court concluded that **[*5]** whether Nelson was a member of Alliance and what his ownership interest was should be decided by a jury.

In the second motion, the subject of this appeal, defendants moved for summary judgment with regard to all of plaintiff's claims for consequential, punitive, and other damages. The grounds for Nelson's claims are premised on his contention that had defendants properly distributed the sales proceeds from the sale of Alliance to Interstate, he would not have had to sell his property in Wisconsin to satisfy the Tennessee judgment. Furthermore, Nelson claims that had Tweeten timely distributed the sale proceeds, Nelson could have paid Orlando on time, and Orlando would not have been forced to obtain the South Carolina judgment against him nor enforce it in North Carolina. After concluding that Georgia law governs Nelson's damage claims, the trial court held that defendants acts were not the proximate cause of Nelson's alleged losses; instead, Nelson's own failure to pay his debts caused his Wisconsin property to be sold at a loss and for Orlando to obtain a judgment against him in South Carolina. Since Nelson was not entitled to compensatory damages, the trial court also concluded that **[*6]** he was not entitled to punitive damages. By granting summary judgment, the trial court dismissed plaintiff's claims for breach of fiduciary duty and constructive fraud (claim nos. 1 and 2). However, plaintiff's claims for judicial dissolution of Alliance and for a declaratory judgment (claim nos. 3 and 4) were not disposed of by the trial court's order. Plaintiff appeals from this order.

Discussion

Initially, we must first consider whether plaintiff may appeal from the trial court's interlocutory order. It is undisputed that the trial court's order is interlocutory because plaintiff's claims for judicial resolution and a declaratory judgment were not disposed of and are still pending. *See* *Liggett Group v. Sunas, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)* ("A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal"). Defendants contend that plaintiff's appeal is interlocutory and should be dismissed because the order does not affect a substantial right. In contrast, plaintiff, citing *Tinch v. Video Industries Services, 347 N.C. 380, 493 S.E.2d 426 (1997)*, claims that the legal **[*7]** interdependence of his dismissed claims and the remaining claims increases the risk of inconsistent verdicts and affects a substantial right; therefore, the interlocutory order is immediately appealable.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp., 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)*.

> There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to *N.C.R. Civ. P. 54(b)* or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Turner v. Norfolk S. Corp., 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (internal quotation marks omitted). The burden is on the moving party to show that the "affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially

injure the moving party." *Flitt v. Flitt, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002)*. Because the trial court's order does not include **[*8]** a *Rule 54(b)* certification, we must determine whether it affects a substantial right.

"A substantial right . . . is considered affected if there are overlapping factual issues between the claim determined and any claims which have not yet been determined because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Sunas, 113 N.C. App. at 24, 437 S.E.2d at 677* (internal quotation marks omitted). This Court has repeatedly held that the moving party must show that "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995)*.

Here, plaintiff has failed to meet his burden of showing that the same factual issues would be present in both trials or that the possibility of inconsistent verdicts in the two proceedings exists. *See id.* Plaintiff's claims for damages arise from his contention that because defendants did not make sufficient distributions from the Interstate sale proceeds, he suffered damages from the sale of his Wisconsin properties and the entry and enforcement **[*9]** of the South Carolina judgment against him. In contrast, the issues regarding the nature and extent of his alleged interest in Alliance and whether Alliance should be judicially dissolved are predicated on various agreements between the parties and operating agreements. The facts at issue with regard to claim nos. 3 and 4 have no bearing on the trial court's determination that defendants' failure to make distributions did not cause his injury. Thus, there is no risk of inconsistent verdicts because whether Nelson has an interest in and, relatedly, how much interest he has in Alliance has no factual relationship with his claims for damages. Furthermore, plaintiff's reliance on *Tinch* is misplaced. *Tinch* does not stand for the proposition that a dismissal of damage claims automatically constitutes a substantial right; in contrast, *Tinch* requires the Court determine whether there is a risk of inconsistent verdicts in determining whether an interlocutory order affects a substantial right. *Id. at 382, 493 S.E.2d at 428*. As discussed, since the factual bases for plaintiff's claims are not intertwined, there is no risk of inconsistent verdicts. Therefore, we conclude that no substantial right **[*10]** would be lost in denying plaintiff an immediate appeal; accordingly, we dismiss this appeal as interlocutory.

Conclusion

Because plaintiff has failed to establish that the trial court's partial grant of summary judgment affects a substantial right, we dismiss plaintiff's appeal.

DISMISSED.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).

Neutral
As of: March 30, 2021 7:09 PM Z

Simon-Mills II, LLC v. Kan Am United States XVI Ltd. P'ship

Court of Chancery of Delaware

December 16, 2016, Submitted; March 30, 2017, Decided

C.A. No. 8520-VCG

Reporter
2017 Del. Ch. LEXIS 50 *

SIMON-MILLS II, LLC, ARUNDEL MILLS MEZZANINE GP, L.L.C., GRAPEVINE MILLS OPERATING COMPANY, L.L.C., CONCORD MILLS MALL GP, L.L.C., KATY MILLS MALL GP, L.L.C., COLORADO RETAIL DEVELOPMENT COMPANY, L.L.C., and DENVER WEST DEVELOPMENT COMPANY, LLC, Plaintiffs / Counterclaim Defendants, v. KAN AM USA XVI LIMITED PARTNERSHIP, KAN AM USA XII LIMITED PARTNERSHIP, KAN AM USA XIV LIMITED PARTNERSHIP, KAN AM USA XIX LIMITED PARTNERSHIP, KAN AM USA XVIII LIMITED PARTNERSHIP, KAN AM USA TIER II LIMITED PARTNERSHIP, KAN AM USA XV LIMITED PARTNERSHIP, KAN AM USA XX LIMITED PARTNERSHIP, and KAN AM USA XVII LIMITED PARTNERSHIP, Defendants / Counterclaim Plaintiffs.

Prior History: *Simon-Mills II, LLC v. Kan Am USA XVI L.P., 2014 Del. Ch. LEXIS 191 (Del. Ch., Sept. 30, 2014)*

LexisNexis® Headnotes

Evidence > Burdens of Proof > Preponderance of Evidence

HN1[] **Burdens of Proof, Preponderance of Evidence**

Proof by a preponderance of the evidence means proof that something is more likely than not.

Contracts Law > Remedies > Specific Performance

Evidence > Burdens of Proof > Clear & Convincing Proof

HN2[] **Remedies, Specific Performance**

The burden with respect to the remedy of specific performance of a contract is that a plaintiff must make a showing by clear and convincing evidence.

Contracts Law > Contract Interpretation

HN3[] **Contracts Law, Contract Interpretation**

Delaware follows the objective theory of contracts.

Because Delaware adheres to the objective theory of contract interpretation, the court looks to the most objective indicia of that intent: the words found in the written instrument. Therefore, a contract's express terms provide the starting point in approaching a contract dispute. Further, Delaware law requires that contracts are to be read as a whole.

Contracts Law > Contract Interpretation

HN4 **Contracts Law, Contract Interpretation**

Where a contract is silent on an issue, the court may resort to extrinsic evidence to ascertain the parties' intent. Even when reviewing extrinsic evidence, the text remains important. A court will enforce contracts to effectuate the intent of the parties as demonstrated through the text, that is, the introduction of extrinsic, parol evidence does not alter or deviate from Delaware's adherence to the objective theory of contracts. When reviewing the extrinsic evidence submitted, it should be reconciled, to the extent possible, with the text of the contract. Generally, the parties' undisclosed and private views of a contract's meaning are irrelevant and unhelpful to the court's consideration of a contract's meaning, because the meaning of a properly formed contract must be shared or common. Similarly, when considering extrinsic evidence, the court should uphold, to the extent possible, the reasonable shared expectations of the parties at the time of contracting. Further, in giving effect to the parties' intentions, it is generally accepted that the parties' conduct before any controversy has arisen is given great weight.

Contracts Law > Contract Interpretation

HN5 **Contracts Law, Contract Interpretation**

Where there is an ambiguity or contractual silence on an issue a court will examine the extrinsic evidence presented by the parties which may include statements and conduct of the parties, business circumstances surrounding the execution of the contract, any course of dealing between the parties, and any usage of trade or industry custom. Finally, the court should, where possible, avoid an interpretation that would render any provision illusory or meaningless.

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

HN6 **Breach, Material Breach**

Generally, under Delaware law, a breach will be deemed material if touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract. If a breach is not material, performance by the injured party is generally not excused and refusal to perform by the injured party may itself constitute a breach. That is, a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract. The question of whether a breach is material sufficient to justify non-performance entails a fact-specific weighing analysis.

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN7 **Breach, Material Breach**

To determine whether a breach is material, Delaware courts have looked to the following factors: (a) the extent to which the injured party will be deprived of the benefit which he reasonably

expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Option Contracts

HN8 **Breach, Material Breach**

The doctrine of non-material breach (or substantial compliance) is generally inapplicable to option contracts because a true forfeiture is not involved—each party retains its original interest—and the one—sided nature of such contracts, if not strictly construed, could allow, in effect, unilateral modification. When the optionee decides to exercise its option, it must act unconditionally and according to the terms of the option. Nothing less than an unconditional and precise acceptance will suffice unless the optionor waives one or more of the terms of the option. Because the option itself affords the offeree protection against the offeror's inconsistent action, the general attitude of the courts is to construe the attempt to accept the terms offered under the option strictly. The problem of a potential forfeiture does not enter into the matter.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Contracts Law > Remedies > Specific Performance

Evidence > Burdens of Proof > Clear & Convincing Proof

HN9 **Judges, Discretionary Powers**

Delaware courts will specifically enforce a contract only if the party seeking relief establishes that (1) a valid, enforceable, agreement exists between the parties; (2) the party seeking specific performance was ready, willing, and able to perform under the terms of the agreement; and (3) a balancing of the equities favors an order of specific performance. Further, the decision as to the availability of specific performance rests within the sound discretion of the court. Additionally, specific performance is an extraordinary remedy, not to be awarded lightly, and a party seeking specific performance must prove by clear and convincing evidence that she is entitled to specific performance and that she has no adequate remedy at law.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN10 **Contract Interpretation, Good Faith & Fair Dealing**

The implied covenant of good faith and fair dealing is a limited and extraordinary legal remedy. Generally, the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain. The implied covenant, however, is limited to a gap filling role. The implied covenant of good faith and fair dealing involves inferring contractual terms to handle developments or contractual gaps that neither party anticipated. However, it does not apply when the contract addresses the conduct at issue. In the same vein, the implied covenant only applies to developments that could not be anticipated, not

developments that the parties simply failed to consider. Additionally, the covenant is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract. Finally, a party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party.

Business & Corporate
Compliance > ... > Contracts Law > Contract Conditions & Provisions > Waivers

HN11[] **Contract Conditions & Provisions, Waivers**

It is well-settled that a party may waive her contractual rights; waiver is the voluntary and intentional relinquishment of a known right. Delaware Courts will find a waiver upon a showing (1) that there is a requirement or condition capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition. Waiver involves knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights. The standard for demonstrating waiver is quite exacting; because waiver is redolent of forfeiture, the facts relied upon to demonstrate waiver must be unequivocal.

Contracts Law > Defenses > Affirmative Defenses > Estoppel

HN12[] **Affirmative Defenses, Estoppel**

Generally, quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken. Importantly, unlike traditional estoppel, a party does not need to show reliance for quasi-estoppel to apply. However, the standard remains high, as the doctrine of quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. Further, quasi-estoppel requires a showing that the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another.

Business & Corporate
Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Evidence > Burdens of Proof > Preponderance of Evidence

HN13[] **Breach of Contract Actions, Elements of Contract Claims**

A party bears the burden of proving every element of its breach of contract claim, including damages, by a preponderance of the evidence.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

HN14[] **Basis of Recovery, American Rule**

Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs. An exception to this rule is found in contract litigation that involves a fee shifting provision. In these cases, a trial judge may award the prevailing party all of the costs it incurred during litigation. Delaware law dictates that, in fee shifting cases, a judge determine whether the fees requested are reasonable.

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Jon E. Abramczyk, Matthew R. Clark, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: L. Joseph Loveland, Letitia A. McDonald, Emily Shoemaker Newton, J. Andrew Pratt, of KING & SPALDING LLP, Atlanta, Georgia, Attorneys for Defendants.

Judges: GLASSCOCK, Vice Chancellor.

Opinion by: GLASSCOCK

Opinion

MEMORANDUM OPINION

GLASSCOCK, Vice Chancellor

This post-trial Memorandum Opinion involves interpretation of a series of contracts. The case presents a cautionary tale of strategic silence, or more charitably incomplete contractual terms, in structuring and negotiating complex economic relationships among sophisticated investors. This litigation arises from a series of Joint Venture Agreements (the "JV Agreements"), the parties to which include the Plaintiffs (collectively "Simon" or the "Simon Entities") and the Defendants (collectively "KanAm" or the "KanAm Entities"). The JV Agreements permit Simon to purchase KanAm's interests, at a time and for a price **[*2]** set out in the Agreements. The parties dispute the consideration that must be tendered in order for the Plaintiffs to exercise this call provision. The contract requires that consideration be paid in units of a specific partnership, Mills Partnership, but Mills Partnership, and its units ("Mills Units"), are defunct. The issue is whether the Plaintiffs' inability to tender Mills Units gives the Defendants an effective veto power over the contractual call provision. That is, can the Defendants insist on receiving non-existent units under the contractual language, and thus frustrate exercise of the call? Or, in the alternative, can the Plaintiffs pursuant to the contracts and Delaware law effectively tender units *similar* to Mills Units, and thereby compel the Defendants to sell under terms to which it did not agree?

The parties could have, but failed to, address this situation in the contractual language. My task, now, is to apply the contracts the parties did agree to, consistent with their intent as expressed in those contracts. The difficulty with this task is exacerbated in that the obligations seeking to be enforced under the JV Agreements arise out of several different contracts, **[*3]** negotiated at various times going back to the 1990's, with several different contractual parties involved.

At first blush, this situation seems to call for an application of the implied covenant of good faith and fair dealing, which is inherent in every contact. The implied covenant is inapplicable here, however. Instead, it is my view, developed through the trial record, that the parties engaged in a strategic game of musical chairs, dancing around the contractual silence in the hope that the music would stop at a period of time advantageous to their own purposes. The music has stopped.

I examined this matter on cross motions for summary judgment, and reached the conclusion in *Simon I*[1] that a full record was necessary to answer the questions presented here. The contractual language is clear; under the conditions here, the Plaintiffs had the right to call the Defendants' interest in the joint ventures, but unless the Defendants chose to accept cash, the Plaintiffs

[1] *Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship, 2014 Del. Ch. LEXIS 191, 2014 WL 4840443 (Del. Ch. Sept. 30, 2014)*.

could only complete the transactions by tendering contractually-compliant consideration, which here (with a single exception) meant Mills Units. Those units were unavailable to the Plaintiffs from the time it acquired the joint **[*4]** ventures. Thus, although the contract was not ambiguous, I required a record to examine whether the parties had a meeting of the minds that some other consideration could be tendered, or, conversely, as to whether the call right would be rendered nugatory. The parties have created such a plenary record.

The Plaintiffs seek relief on several grounds. First, they argue that a contractual agreement was reached, as demonstrated by the record, that units of the Plaintiffs' entity ("Simon Units") replaced Mills Units as tender. I read the record otherwise. The record makes it abundantly clear that both the Plaintiffs and the Defendants were aware that, once the Plaintiffs absorbed and dissolved the Mills Partnership, contractually-compliant Mills Units would become permanently unavailable. Rather than solve this issue by negotiation, however, both sides, for what must have been strategic reasons, elected to take their chances with the contracts as written rather than solve the obvious problem through negotiation. Having made that choice, the Plaintiffs are stuck with the contractual language, as it exists.

Next, the Plaintiffs argue that Simon Units are similar to Mills Units, and thus, in **[*5]** tendering Simon Units, they have not "materially breached" the contracts. But such an analysis itself is inapt. Under the contracts, the notice of exercise of the call right is conditioned on an ability to tender the appropriate consideration.[2] Since the Plaintiffs are unable to do so, their notices are voidable under the contracts at issue, and KanAm has no obligation to perform. In other words, failure to tender Mills Units is not a "breach," it simply renders the call ineffective. In any event, while the Simon Units have many characteristics identical to compliant Mills Units, they have differences as well. The extent of these differences, and the consequences thereof to the Defendants, should have been the subject of the negotiation that the parties eschewed.

Finally, as already briefly discussed, the Plaintiffs ask me to supply a term to the contract—substituting Simon Units for Mills Units—under the implied covenant of good faith and fair dealing. But the implied covenant exists to supply terms that were not anticipated and not considered by the parties, to avoid frustration **[*6]** of the intent of those parties. As I have stated, the parties were well aware of the issue, but declined to address it; the implied covenant is therefore inapplicable.

For all these reasons, the Plaintiffs' request to enforce its call right is denied.

The Defendants, via counterclaim, seek damages. They note that the Plaintiffs, through attempting these calls, triggered contractual duties on the part of the Defendants, which were expensive to comply with. They seek to recover these expenses, and allege that the unsuccessful call notices breached the parties' agreements. In giving contractual notice of the exercise of the call, the Plaintiffs did not breach the Agreements. The Plaintiffs had the right to call, the Defendants had the right to elect cash or Mills Units. The Defendants elected units; the Plaintiffs are unable to tender, but this does not itself amount to a breach.

I have found that the call rights in the JV Agreements require tender of Mills Units. One JV Agreement in particular tends to prove the rule. In the Orange City Mills Agreement (but no other JV Agreement), the parties defined "Mills" in such a way as to include its successor, Simon, and Simon Units are eligible **[*7]** to be contractually-compliant consideration. With respect to Orange City Mills, the Plaintiffs may have effectively called the Defendants' interest. The Plaintiffs argue that this fact shows the parties must have intended

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[2] *See, e.g.*, JX0152 § 11.6(e)(iv) (providing that "if at the time of Closing, either party *fails to perform as required*, then and in such event the non-breaching party *shall have the right to void the Buy/Sell Notice attributable thereto* ***or*** to pursue any rights at law or in equity (including without limitation, instituting a suit for specific performance)") (emphasis added).

their units to be acceptable tender in the other agreements as well; to me, in light of the fact that the parties to the Orange City Mills venture provided for Mills' successor units to function as tender, the lack of such a provision in all other joint ventures demonstrates the opposite.

I note that construing the contracts as written does not work a forfeiture of a primary interest or destroy value here. The Plaintiffs cannot force the Defendants to sell their interests for appraised value, but they may negotiate for a sale, or proceed as they have as joint venturers.

My reasoning follows.

I. FACTUAL BACKGROUND

The following are the facts as I find them following a seven-day trial spanning over nine hundred exhibits. Below I first describe the necessary background information underlying this dispute, including importantly the evolution of the parties' relationship, before turning to my findings regarding what the extrinsic evidence at trial showed.

*A. The Parties and **[*8]** Relevant Non-parties*[3]

The Plaintiffs (and Counterclaim Defendants), the Simon Entities, are a series of Delaware limited liability companies focused on retail shopping developments. They are Simon-Mills II, LLC, Arundel Mills Mezzanine GP, L.L.C., Grapevine Mills Operating Company, L.L.C., Concord Mills Mall GP, L.L.C., Katy Mills Mall GP, L.L.C., Colorado Retail Development Company, L.L.C., and Denver West Development Company, LLC. Each Plaintiff is wholly owned, either directly or indirectly, by Simon Property Group, L.P. (the "Simon Partnership").[4] The Simon Partnership "owns, develops, and manages retail real estate properties."[5]

The sole general partner of the Simon Partnership is a real estate investment trust ("REIT"), structured as an umbrella partnership real estate investment trust ("UPREIT"), the Simon Property Group, Inc. ("Simon Corp").[6] In addition to being the sole general partner of the Simon Partnership, all of Simon Corp's "assets are owned, directly or indirectly, by its operating partnership, Simon Partnership."[7] Simon Corp, however, owns a majority interest in Simon Partnership.[8] Common stock of Simon Corp trades on the New York Stock Exchange ("NYSE").[9]

The Defendants **[*9]** (and Counterclaim Plaintiffs), the KanAm Entities, are a series of nine "closed-end funds, structured as Delaware limited partnerships, with German investors as limited partners."[10] They are, Kan Am USA XVI Limited Partnership, Kan Am USA XII Limited Partnership, Kan Am USA XIV Limited Partnership, Kan Am USA XIX Limited Partnership, Kan Am USA XVIII Limited Partnership, Kan Am USA Tier II Limited Partnership, Kan Am USA XV Limited Partnership, Kan Am USA XX Limited Partnership, and Kan Am USA XVII Limited Partnership.[11] The Defendants are an investment vehicle for German investors to deploy capital in American-based retail-store development

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[3] Unless the context requires a more specific designation, the Plaintiffs will be referred to as Simon, and the Defendants as KanAm.

[4] Pretrial Stip. 2, 6 (May 4, 2016).

[5] *Id.* at 6.

[6] *Id.* at 7.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 2.

projects.[12] The KanAm Entities' investments in America have been managed by James Braithwaite and Kent Hammond since the 1980's.[13]

The parties have stipulated that Simon and KanAm hold interests in the following projects at issue here: Orange City Mills Mezzanine II Limited Partnership ("Orange City Mills"), Arundel Mills Mezzanine Limited Partnership ("Arundel Mills"), Grapevine Mills Limited Partnership ("Grapevine Mills"), Concord Mills Mall Limited Partnership ("Concord Mills"), Katy Mills Mall Limited Partnership ("Katy Mills"), Mills-Kan **[*10]** Am Colorado Limited Partnership ("Colorado Mills"), and Mills-Kan Am Denver West, L.P. ("Denver West") (collectively the "JV Limited Partnerships").[14] All of the JV Limited Partnerships are "a limited partnership organized under the laws of the state of Delaware. Each of the JV Limited Partnerships is governed by a limited partnership agreement" (the "JV Agreements").[15]

Non-party The Mills Limited Partnership (the "Mills Partnership")[16] and the Mills Corporation ("Mills Corp" and together with "Mills Partnership," "Mills") were also real estate investment vehicles.[17] Mills Corp was a REIT "based in Chevy Chase, Maryland, which developed, owned, and managed retail real estate properties."[18] Mills Corp, like Simon Corp, was structured as an UPREIT.[19] Mills Partnership served as the operating partnership and "directly or indirectly owned all of Mills" Corp's assets.[20] Mills Corp served as the general partner to, and the majority owner of Mills Partnership.[21] Mills Corp's "stock formerly traded on the NYSE."[22] As discussed below, Mills was acquired and ultimately dissolved by a joint venture of Simon and an unrelated third-party in 2007.

B. The Evolution of the Parties' Relationship

1. Mills **[*11]** Corp's IPO

In the mid-1980's KanAm together with the Western Development Corporation ("Western") started developing four "Mills" complexes (not at issue here) which were envisioned and marketed as a new shopping experience.[23] This shopping "experience" has been referred to as the "Mills Concept" which consisted of "race track" style retail spaces where pedestrians would come and shop "like walking down a street."[24] The Mills Concept shopping experience was styled to include a variety of price points for shoppers and a "larger entertainment component than you would typically find in a mall."[25] "Between 1983 and 1991, certain Kan Am limited partnerships provided [Western] with more than $210 million in equity to finance projects, including the first four 'Mills' shopping centers. . . ."[26]

The four "Mills Concept" properties that KanAm

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[12] *See* Trial Tr. 845:6-846:8 (Braithwaite).

[13] *See id.* at 649:16-650:12 (Braithwaite); *id.* at 938:10-939:21 (Hammond).

[14] Pretrial Stip. 9.

[15] *Id.*

[16] Sometimes referred to in the original text of documents as "TMLP."

[17] Unless context requires a more specific designation Mills Partnership and Mills Corp will simply be referred to as "Mills."

[18] Pretrial Stip. 8.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See* Trial Tr. 839:7-839:22 (Braithwaite); JX0004 at 5, 8, 13 (advertising certain "Mills" as "The Next Generation of Retailing").

[24] *See* Trial Tr. 842:20-843:20 (Braithwaite); *id.* at 844:1-844:10 (Braithwaite).

[25] *See id.* at 467:18-468:17 (Sokolov).

[26] Pretrial Stip. 7. The four original "Mills" shopping centers, none of which are at issue in this litigation are Potomac Mills, Franklin Mills, Sawgrass Mills, and Gurnee Mills. *See id.*

and Western developed were contributed to the Mills Partnership at the time of Mills Corp's 1994 IPO.[27] KanAm held approximately 41% of the outstanding partnership units of the Mills Partnership at the time of the Mills Corp IPO.[28] Mills Corp held a 51.3% interest in the Mills Partnership at the time of the IPO.[29] Additionally, three principals of **[*12]** KanAm served as directors of Mills Corp from its inception through its financial problems in the mid-2000's, and ultimate dissolution: James Braithwaite, Franz von Perfall, and Dietrich von Boetticher.[30] Following the 1994 IPO, the Mills Corp Board and its shareholders approved a proposal in early 1995 that set out a framework whereby KanAm could contribute equity to certain projects going forward as joint ventures with Mills Corp (the "Shareholder Resolution").[31] Mills Corp Chairman and CEO, Herbert Miller, indicated that KanAm "was a likely party to supply some of the required capital" due to the then "17-year relationship" between Mills Corp and its predecessors, and KanAm.[32]

2. The Early JV Agreements

The February 16, 1995 Shareholder Resolution of Mills Corp, discussed above, provided the "general terms" governing the future Joint Ventures ("JVs") between Mills affiliates and KanAm.[33] Among various other provisions,[34] the "general terms" provided certain exit mechanisms including that each partner would have "a right of first refusal to purchase the other's interest."[35] Importantly, the solicitation for the Shareholder Resolution provided the consideration for the put and call rights **[*13]** would include units of the Mills Partnership and stated that:

> either partner will have the right to require the purchase by [Mills Partnership] of [KanAm's] interest in the Partnership after the end of the fifth anniversary of the substantial completion of the Project . . . at a price to be determined by the amount [KanAm] would receive if the Project were sold at its appraised value. . . . The purchase price for [KanAm's] interest may be paid for in any combination of cash or [Mills Units] *as agreed to by the parties*.[36]

The solicitation indicated that KanAm would "have significant consent rights . . . which could, in certain cases, prevent [the Mills Partnership] from selling a project when it wished or operating a project exactly as it desired . . . ."[37] Mills Corp explained that the consents were acceptable because they were not greater than what similar investors would require, that the parties' interests were "generally" aligned, and that if the consent rights became a problem, KanAm could be bought out for "appraised value once the project is mature."[38]

The consideration required for the put/call of KanAm's interest was to "be paid for in any combination of cash or [Mills Units] **[*14]** *as agreed to by the parties*."[39] Mills Corp was structured as an UPREIT, and the limited partnership units of the operating partnership, Mills Partnership, were redeemable and could be

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[27] Trial Tr. 839:19-840:14 (Braithwaite); JX0004 at 8-9. *See* Pretrial Stip. 7-8 ("In 1994, Western Development and certain Kan Am limited partnerships jointly contributed the four Mills centers and other projects to The Mills Limited Partnership . . . in conjunction with the creation and formation of the Mills Corporation . . . , which went public in an IPO.").

[28] JX0004 at 21.

[29] *Id.*

[30] Trial Tr. 854:6-16 (Braithwaite).

[31] *See* JX0011 at 10-11; Pretrial Stip. 9.

[32] *See* JX0011 at 1-2.

[33] Pretrial Stip. 9.

[34] Not discussed in detail here as they are less relevant to this litigation.

[35] JX0011 at 12.

[36] *Id.* (emphasis added).

[37] *Id.* at 13.

[38] *Id.*

[39] *Id.* at 12 (emphasis added).

converted into publicly traded stock of Mills Corp.[40] This consideration structure had benefits in addition to liquidity; it would permit KanAm to secure non-recognition tax treatment pursuant to *Internal Revenue Code Section 721*.[41]

In September 1995, KanAm and Mills signed a JV Agreement for Ontario Mills (not at issue here).[42] Prior to execution of that JV Agreement, Simon and Mills executed an agreement on August 16, 1995, providing the "principal terms and conditions" for "proposed joint venture" arrangements regarding certain future projects.[43] This marked the beginning of Simon's involvement in Mills projects. KanAm and Mills added Simon as a partner to the Ontario Mills JV in December 1995 following the execution of the original agreement between Mills and KanAm.[44] This was the first JV including Simon, Mills, *and* KanAm.[45]

The September 1995 Ontario Mills agreement between Mills and KanAm provided a buy/sell provision consistent with the February 1995 Mills' Shareholder Resolution. Section 11.3 of the Ontario Mills JV Agreement, **[*15]** titled "Buy/Sell Arrangements of KanAm Partnership Interests" provided that after the project has been open for five years,[46] Mills or KanAm could trigger the buy/sell provisions.[47] If Mills exercised the call, KanAm "shall be paid in full in units of limited partnership in [the Mills Partnership] *unless* KanAm elects to receive cash."[48] If KanAm exercised its put the consideration was to be paid in cash, unless Mills elected to pay in Mills Units.[49] Further, the original agreement provided that if KanAm were to receive Mills Units, those units "shall have the same rights (including redemption, conversion, registration and anti-dilution protection) as attached to Units issued in connection with the formation transactions of [the Mills Partnership]."[50] Among other things, this provides that the units would be liquid and convey tax benefits.

The Ontario Mills agreement was amended on December 29, 1995, to add Simon as a partner.[51] Upon Simon joining Ontario Mills, the ownership break down was as follows: 50% by Mills, 25% by Simon, and 25% by KanAm.[52] The amendment changed the buy/sell provision's consideration clause to provide that if Mills exercised the call, "unless KanAm[] elects to **[*16]** receive cash, the Buy/Sell Price shall be paid in full as follow: two-thirds (2/3) in units of limited partnership in [the Mills Partnership] and one-third (1/3) in units of limited partnership in Simon."[53] The amendment added a provision to protect KanAm regarding Simon Units, similar to that regarding Mills Units in the original agreement. Any Simon Units tendered to KanAm were required to have "the same rights" as units issued in connection with the formation of Simon.[54] Additionally, the provision governing the buy/sell requirements was amended to add that any such exchange of units was "intended to be a tax-free transaction" under *Section 721*.[55]

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[40] *See* Trial Tr. 15:8-17:12 (Simon).

[41] *See, e.g., id.* at 941:3-9 (Hammond).

[42] *See* JX0017.

[43] *See* JX0014 at 1; Pretrial Stip. 9.

[44] *See* JX0025.

[45] *See* Trial Tr. 163:23-164:3 (Barkley).

[46] JX0017 § 11.3(a).

[47] *Id.* at §§ 11.3(b), 11.3(c).

[48] *Id.* at § 11.3(d) (emphasis added).

[49] *Id.*

[50] *Id.* at § 11.3(f).

[51] *See* JX0025.

[52] *See* Trial Tr. 374:3-19 (Foxworthy).

[53] JX0025 § 11.3(d).

[54] *Id.* at § 11.3(f).

[55] *Id.* at § 11.3(d).

From the late 1990's to early 2000's Simon reviewed each investment opportunity and elected *not* to participate in the development of three of the other projects at issue in this litigation: Katy Mills, Colorado Mills, and Orange City Mills.[56] That is, Mills and certain KanAm parties formed Orange City Mills in 1996, Katy Mills in 1998, and Colorado Mills in 2001.[57] Simon eschewed initial investment; as discussed below, Simon's interests in these three projects arose later, in 2007, as a result of its acquisition of Mills. The buy/sell provisions **[*17]** of these projects—Orange City Mills, Katy Mills, and Colorado Mills—never referenced Simon Units.

Simon did, however, together with Mills and KanAm, participate in three other JVs at issue here from their inception: Grapevine Mills, Concord Mills, and Arundel Mills.[58] Each of these projects consisted of two separate agreements; first, an LLC agreement between the Mills Partnership and the Simon Partnership governing their relationship (a "Simon-Mills LLC"),[59] and second, a JV Agreement where a Simon-Mills LLC was the managing general partner, and the applicable KanAm party was a general and limited partner, while the Mills Partnership and the Simon Partnership were also limited partners.[60]

Generally, the JV Agreements in Concord Mills, Grapevine Mills, and Arundel Mills tracked the amended JV Agreement for Ontario Mills providing KanAm call-right consideration in both Simon and Mills Units.[61] There were, however, certain differences regarding the buy/sell provisions. Specifically, the three later agreements provided a ten-year lock-out period instead of the five-year period provided for in Ontario Mills.[62] Additionally, the buy/sell consideration provisions were somewhat different **[*18]** from that in Ontario Mills. First, rather than the specified two-thirds, one-third unit consideration set out in the Ontario Mills JV, the new agreements provided that unit consideration would be paid "ratably in proportion to the ownership interests" based on Simon and the Mills Partnership's respective ownership interest.[63] Consideration paid in Units remained the default in the event of a call, but KanAm continued to have the option to elect to be paid in cash.[64] Additionally, KanAm contracted for the right to receive consideration partially in cash, and partially in units.[65] Thus, implicitly, at the time these deals were struck, in case Mills was bought out by Simon, and then Simon called the KanAm interest, KanAm had bargained to accept, in that case, only Simon Units as non-cash consideration.

If the buy/sell consideration for KanAm's interest in Concord, Arundel or Grapevine Mills was to be paid in units, those Simon Units and Mills Units were required to meet specific requirements.[66] As with the agreement governing Ontario Mills, Mills Units were required to have "substantially the same rights (including redemption, conversion, registration and anti-dilution **[*19]** protection) as" units issued by the Mills Partnership at its initial formation.[67] Simon Units had to meet a similar requirement but had the additional condition that "[i]f there exists more than one class of Simon

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[56] *See* JX0041; JX0050; JX0089.

[57] Pretrial Stip. 10.

[58] *See* JX0027; JX0058; JX0071.

[59] *See, e.g.*, JX0082; JX0063.

[60] *See* JX0027; JX0058; JX0071.

[61] *See, e.g.*, Trial Tr. 680:5-11 (Braithwaite); *id.* at 942:24-943:7 (Hammond).

[62] JX0027 § 11.3(a); JX0058 § 11.3(a); JX0074 § 11.3(a).

[63] JX0027 § 11.3(d); JX0058 § 11.3(d); JX0074 § 11.3(d). I note there is evidence in the record that the parties had at one time planned to amend the Ontario Mills JV to change the fixed percentage provision to a proportional buy/sell consideration like those in Concord, Grapevine and Arundel Mills. *See* JX0024 at 3.

[64] *See* JX0027 § 11.3(d); JX0058 § 11.3(d); JX0074 § 11.3(d).

[65] *See id.*

[66] JX0027 § 11.3(f); JX0058 § 11.3(f); JX0074 § 11.3(f).

[67] *See, e.g.*, JX0027 § 11.3(f).

Units, then any Simon Units received by [KanAm] pursuant to this Section 11.3 *shall have the most favorable rights* (including redemption, conversion, registration and anti-dilution protection) as are attached, as of the date of this Agreement, to the various classes of Simon Units issued to other limited partners of Simon . . . ."[68] I note that the JV Agreements were later amended to allow KanAm to accelerate its put rights, that is, exercise them prior to the ten-year lockout, in the event of a change-in-control transaction involving Mills.[69] A similar change for the call right was made in the Grapevine Mills agreement, but *not* in the agreements covering the other JVs.[70]

Simon points to prospectuses KanAm disseminated during this time period to German investors from whom KanAm sought to raise capital for each of these JVs.[71] Those prospectuses do not disclose any particular distinction between Mills Units and Simon Units, such as tax risks.[72] Additionally, two **[*20]** prospectuses in the record make no mention of the currency to be used in the buy/sell transactions,[73] and the two that do mention the buy/sell currency do not mention Simon Units.[74]

3. The 2002 "Shotgun" Exit

By 2002, disputes arose between Simon and Mills regarding the management of their JVs.[75] The applicable LLC Agreements that governed Mills' and Simon's relationship in Ontario, Grapevine, Concord, and Arundel Mills contained a "shotgun" buy/sell mechanism which could be invoked to cure deadlocks.[76] Pursuant to the shotgun buy/sell provision, the party that triggered the shotgun was required to make an offer to the counterparty—the counterparty then either had a choice to buy at that price or sell at that price.[77] Simon triggered the shotgun buy/sell provision, and Mills ultimately elected to purchase Simon's interests.[78]

However, before Mills bought Simon's interest, Braithwaite of KanAm wrote a letter to Simon's CEO, David Simon, on March 4, 2002 inquiring about the Ontario Mills buy/sell provision in Section 11.3 of the JV Agreement.[79] Specifically, Braithwaite indicated KanAm "would be interested in discussing with [Simon] how Section 11.3 of the Ontario Mills Agreement might **[*21]** be implemented if there has been a buy/sell between Mills and Simon of your interests in Ontario Mills, L.L.C."[80] David Simon responded via letter on March 5, 2002, stating that following the removal of either Simon or Mills, KanAm's rights under the Ontario Mills agreement would be to receive the appropriate units "of whichever of Mills or Simon [remained] your partner."[81] There was no direct objection by Braithwaite or KanAm to Simon's explanation of what Section 11.3 would mean following the shotgun buy/sell.[82] Braithwaite testified that even though he disagreed with Mr. Simon's position in the letter at the time, he did not respond.[83] According to Braithwaite, there was "no point" in taking issue with Simon's statement

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[68] *See, e.g., id.* (emphasis added).

[69] *Compare* JX0071 §§ 1.13, 11.3(a) *with* JX0058 § 11.3(a). *See* Trial Tr. 873:6-874:8 (Braithwaite).

[70] *See* JX0109.

[71] *See* Simon's Post-Trial Opening Br. 17 (citing JX0031; JX0037; JX0060; JX0070).

[72] *See* JX0031; JX0037; JX0060; JX0070. *See also* Trial Tr. 726:22-727:13 (Braithwaite).

[73] *See* JX0031; JX0037.

[74] *See* JX0060 at 32; JX0070 at 44.

[75] Trial Tr. 386:1-387:11 (Foxworthy).

[76] *See id.*

[77] *See id.* at 387:12-388:11 (Foxworthy).

[78] *See id.* at 17:20-18:22 (Simon).

[79] *See* JX0099 at 2.

[80] *Id.*

[81] JX0100 at 1.

[82] *See* Trial Tr. 23:20-24:13 (Simon).

[83] *See id.* at 732:22-737:13 (Braithwaite).

because he 'knew' that Simon would be bought out.[84] The record tends to support Braithwaite's position that the response was unnecessary, as the general consensus at the time was that Mills would buy out Simon.[85]

On April 29, 2002, affiliates of Simon executed an agreement to sell their interests in Ontario, Grapevine, Concord, and Arundel Mills to affiliates of Mills.[86] Shortly thereafter in 2002, certain KanAm entities acquired part of Simon's former **[*22]** interests in Ontario, Grapevine, Concord, and Arundel Mills from Mills following its successful purchase of Simon's interests.[87]

Following Simon's exit from the four JVs, Mills and KanAm amended the governing documents, to remove references to Simon.[88] On May 31, 2002, the operative Ontario Mills JV agreement, a project not at issue here, was amended to delete references to Simon.[89] Also on May 31, 2002, the Grapevine Mills JV Agreement was amended to delete references to Simon.[90] On November 22, 2002, KanAm and Mills entered a new partnership agreement for Concord Mills.[91] In the resulting agreement for Concord Mills, Section 11.3's buy/sell provision only references Mills Units, and provides that they are the default consideration if Mills exercised its call right, unless KanAm elected to receive cash or a mix of cash and units.[92] Additionally, the Arundel Mills JV underwent similar changes. On May 31, 2002, the JV Agreement was amended to remove references to Simon.[93] A new partnership document was executed for Arundel Mills on August 4, 2004, and like the new partnership agreement in Concord Mills, provided that Mills Units were the default buy/sell consideration, and contained no reference to Simon Units. **[*23]** [94] Thus, either through deletion of references to Simon, or via new partnership agreements which do not provide for Simon Units, the default consideration for the buy/sell provisions under each JV was modified to provide that consideration be paid in Mills Units meeting certain specifications. While Simon admits Mills and KanAm acted to delete references to it from the JV Agreements from which it exited, Simon argues the amendments were "ministerial."[95] As described below, Simon eschewed such amendments, ministerial or otherwise, when it acquired Mills' interests a few years later.

From 2003 to 2004 certain KanAm entities "distributed approximately 11 million Mills Units to German investors in the respective KanAm limited partnerships."[96] These distributions presented certain logistical challenges, such as the language barrier between German-speaking investors and Mills as well as redemption and tax compliance challenges.[97] In an attempt to streamline the administrative issues,[98] KanAm and

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[84] *See id.*

[85] *See, e.g., id.* at 389:4-23 (Foxworthy) (testifying that while Simon was willing to buy, and that it was possible they might have to be the buyer, "[w]e expected—I would have to say we expected to be the seller because for them to have lost the four assets that we were dealing with would have been a terrible infringement of their franchise"); JX0101 (indicating in a March 7, 2002, internal Mills Memorandum, which Braithwaite received, that Mills would continue negotiating in pursuing the acquisition and that the "benefits of such a transaction are numerous").

[86] JX0104; Pretrial Stip. 10.

[87] Pretrial Stip. 10. *See* JX0111.

[88] *See, e.g.*, JX0111 § 9(f).

[89] *See* JX0108 §§ 2(e), 10.

[90] *See* JX0109 §§ 2(e), 13.

[91] *See* JX0120.

[92] *Compare* JX0120 §§ 11.3(d), 11.3(f) *with* JX0058 §§ 11.3(d), 11.3(f).

[93] *See* JX0106 §§ 2(e), 15.

[94] *See* JX0152 §§ 11.6(d), 11.6(f).

[95] Simon's Post-Trial Opening Br. 20.

[96] Pretrial Stip. 10.

[97] *See, e.g.*, Trial Tr. 1004:22-1007:15 (Hammond).

[98] *See id.*

the Mills Partnership executed a services agreement on December 1, 2004.[99] Under the services agreement KanAm provided certain administrative functions such as managing cash **[*24]** distributions, redemptions, and tax withholdings on behalf of investors, in exchange for a nominal fee.[100] Additionally, KanAm orchestrated a multi-step process that effectively allowed German investors to redeem Mills Units for Mills stock, a taxable event, and streamlined a rather winding process in order to meet all the regulatory and tax burdens.[101] The redemption process alone required that over nineteen steps be taken on behalf of the investor.[102] KanAm did not have a similar services agreement with Simon during Simon's participation in the JVs.

4. Mills Faces Trouble

While KanAm originally held 41.1% ownership in the Mills Partnership at the time of the 1994 IPO of Mills Corp, by March 2004 KanAm's ownership had dropped to 2.17%.[103] In February 2005, Mills Corp disclosed it would "would restate financial results for 2002 through 2004 to correct accounting errors primarily relating to its treatment of equity in earnings from joint ventures, the capitalization of interest and certain other costs, and the timing of gains on sales of partnership interests."[104] Following the February 2005 disclosure, Mills Corp announced in January 2006 that additional accounting **[*25]** problems were uncovered, and that it would restate its financial results from 2000 through 2004.[105] By March 2006, the SEC informed Mills Corp "that it had commenced a formal investigation."[106]

Due to these accounting issues, Mills Corp "never filed its 2005 annual report on Form 10-K or any subsequent annual report, and it never filed a quarterly report after its Form 10-Q for the third quarter of 2005."[107] The failure to file required SEC reports had the additional consequences of preventing Mills Corp from registering its common stock, and preventing holders of Mills Partnership Units from seeking conversion of their units into Mills Corp stock.[108] This development was disclosed to certain KanAm investors by April 2006.[109] Thus, because the units could not convert during this period if the buy/sell provisions were triggered, Mills would not have been able to provide Mills Units that were convertible into publicly-traded stock, a necessary quality of units to exercise the call. In other words, contractually-compliant Mills Units were unavailable for exercise of any call right.

By August 2006, Mills Corp "announced that the accounting errors were expected to reduce stockholders' equity **[*26]** . . . by $296 million and reduce . . . net income for 2003, 2004, and the first three quarters of 2005 by $210 million."[110] The price of Mills Corp stock declined significantly,[111] almost 75% from February 2005 to January 2007.[112] During this time period it was unclear whether Mills Corp could continue operating as a going concern.[113] Also in August 2006, Mills Corp "announced that its auditor believed that there was 'substantial doubt' that Mills Corp could stay in

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[99] JX0171.

[100] *See id.* at §§ 2, 5.

[101] *See* Trial Tr. 1009:13-1013:3 (Hammond).

[102] *See id.*; JX0162.

[103] Pretrial Stip. 10.

[104] *Id.*

[105] *Id.* at 11.

[106] *Id.*

[107] *Id.*

[108] *See* Trial Tr. 765:16-766:8 (Braithwaite).

[109] *See* JX0220 at 4.

[110] Pretrial Stip. 11.

[111] *See* Trial Tr. 764:14-765:3 (Braithwaite).

[112] JX0615 ¶ 49. *See id.* at Ex. 7.

[113] Pretrial Stip. 11. *See* JX0237.

business because of looming deadlines for repayment of approximately $2 billion in debt."[114]

5. Mills Markets Itself

Due to the accounting scandal and the financial difficulty it was facing, Mills announced in February 2006, "that its board had decided to explore strategic alternatives and had retained financial and legal advisors to assist in that process."[115] Mills would sell either the entire company or carve out portions of its assets.[116] In the interim, before any sale occurred, Mills secured a "rescue loan of about $2 billion" from Goldman Sachs, which Mills would likely not have the ability to repay.[117] In addition to obtaining the rescue loan, Mills continued to consider its strategic options.[118] Mills ultimately divested several **[*27]** "problem" assets including the Meadowlands Project in New Jersey, its international properties, and certain other investments.[119]

KanAm was involved in the sales process of Mills via its directors on the Mills Board along with the advisors KanAm retained. KanAm retained its own financial advisor, and also considered selling its interests in the JVs.[120] KanAm's advisors spoke directly with certain potential purchasers, including Simon.[121] Ultimately, the three KanAm representatives on the Mills Corp board, Messrs. Braithwaite, von Boetticher, and von Perfall, were asked to recuse themselves from the Mills sales process due to alleged conflicts of interest.[122] The KanAm representatives resisted the request.[123] KanAm's representatives on Mills' board did step out of the room when they believed it appropriate, and abstained from voting on the ultimate transaction, however they remained involved in the strategic process.[124]

Early in the sales process, in April 2006, Mills Corp, together with Goldman Sachs and J.P. Morgan, assembled a "Descriptive Memorandum" which was transmitted to "a limited number of parties who have expressed an interest in submitting **[*28]** proposals" to enter a deal with Mills Corp.[125] Simon received the Descriptive Memorandum, and it was circulated by certain Simon employees, including senior legal officers.[126] Under the heading "KanAm joint venture key terms and rights summary," the Memorandum described that the "Put-call rights enable . . . Mills to require KanAm to sell its interests to Mills for cash or partnership units of *Mills LP, the choice of consideration to be made in KanAm's sole discretion . . . .*"[127]

Along with other potential buyers, Mills entered discussions with Brookfield Asset Management Inc. ("Brookfield") regarding a potential purchase.[128] This discussion led to an (ultimately-unconsummated) merger agreement. "Brookfield was not a publicly traded REIT."[129] Because of its entity structure, Brookfield clearly did not have partnership units which would be convertible into publicly tradable stock. Brookfield recognized the

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[114] Pretrial Stip. 11.

[115] *Id.*

[116] *See, e.g.*, Trial Tr. 602:5-603:1 (Ordan) (testifying that from Mills' perspective, the "goal of the [strategic] process was to sell the company, either to one buyer or to multiple buyers").

[117] *Id.* at 593:19-594:18 (Ordan).

[118] *See, e.g.*, JX0256.

[119] *See* Trial Tr. 436:14-437:1 (Sokolov).

[120] *See id.* at 767:12-768:3 (Braithwaite).

[121] *See id.* at 894:11-896:2 (Braithwaite).

[122] JX0222 at 3.

[123] *See* JX0226. *See also* Trial Tr. 590:7-592:15 (Ordan).

[124] *See* Trial Tr. 615:4-17 (Ordan).

[125] *See* JX0293 at 1, 3.

[126] *See id.*

[127] *Id.* at 88.

[128] Pretrial Stip. 12.

[129] *Id.*

specified currency in the buy/sell provisions would not work.[130] Braithwaite, on behalf of KanAm, agreed with Brookfield to negotiate in good faith the means to effectuate the put-call currency were Brookfield to acquire Mills.[131] Even though Braithwaite was on Mills Corp's Board, the agreement **[*29]** to further negotiate that he reached with Brookfield on behalf of KanAm was never disclosed to Mills Corp.[132] This is in spite of the fact that Mills and Brookfield had executed a merger agreement.[133] Simon also negotiated to acquire, and ultimately, as described below, did (with a partner) acquire, Mills. Despite this issue of consideration of call right currency having been the subject of a discussion between Braithwaite and Brookfield, it was *not* raised by Braithwaite in his discussions with Simon, allegedly because "Simon chose to have very limited discussions with [KanAm] before the merger."[134] There are no contemporaneous documents from this 2007 sales period by KanAm evincing a specific concern about receiving Simon Units.

Mills Corp's outside counsel, Willkie Farr & Gallagher, recognized that the unavailability of Mills Units could present a challenge for future acquirers trying to exercise a call of KanAm's interest.[135] Mills Corp's outside counsel indicated, in a memorandum to Mills, that "[o]f note, the joint venture agreements *strictly call for the OP Units to be those of* [*the Mills Partnership*], and do not contain language authorizing the use of similar OP-type **[*30]** securities in the event [the Mills Partnership] no longer issues Units or ceases to exist as the result of a Mills corporate restructuring or corporate-level transaction."[136] Mills Corp's outside counsel recognized the risk that KanAm may insist that it must receive the Mills Units it bargained for, and thus the call right would be frustrated.[137] Mills' counsel presented alternatives to deal with this situation. One was to make Mills' successors agree that they may not exercise the call due to the unavailability of Mills Units, "however, deletion of this ability to buy-out KanAm presumably will be unattractive to potential buyers and will negatively impact pricing for Mills' interests."[138]

Similarly, Simon's general counsel testified that its due diligence process recognized that Mills and KanAm had deleted references to Simon from the JV Agreements, and had included that the only non-cash consideration for the call was Mills Units.[139] Both the internal legal team at Simon, and its outside counsel were aware that the specified (default) consideration was Mills Units, but the general counsel testified that they were not concerned because KanAm had accepted call provisions which included Simon **[*31]** Units in the past.[140] Simon's general counsel directly discussed the issue with Mr. Simon during due diligence, but Simon decided not to raise and discuss the issue with KanAm at the time.[141]

6. Simon-Farallon Joint Venture Buys Mills

Mills received several offers from potential acquirers. On January 15, 2007, Farallon Capital Management ("Farallon"), who like Brookfield was

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[130] *See* Trial Tr. at 776:7-18 (Braithwaite). I note that Mr. Braithwaite also testified that they "had been questioned by a number of other potential buyers about the subject." *Id.* at 782:9-23 (Braithwaite).

[131] *Id.* at 773:18-776:18 (Braithwaite).

[132] *Id.* at 777:13-778:23 (Braithwaite).

[133] *See id.*

[134] *Id.* at 778:6-780:20 (Braithwaite).

[135] JX0193 at 2; JX0241 at 3-4.

[136] JX0241 at 4 (emphasis added).

[137] *Id. See* JX0192 at 2.

[138] JX0241 at 4.

[139] Trial Tr. 291:7-292:18 (Barkley).

[140] *Id.* at 292:16-293:7 (Barkley); *id.* at 302:22-306:17 (Barkley) (testifying that "we weren't concerned so much about the legal point because we knew KanAm had accepted a call provision with our units in the past. Our units had not changed.").

[141] *Id.* at 311:16-312:14 (Barkley).

not a publicly traded REIT, submitted a proposal for a recapitalization transaction whereby Farallon would buy $499 million in additional Mills Corp shares at $20.00 per share.[142] At the time, Farallon owned 10.9% of Mills Corp's outstanding shares.[143] Shortly thereafter, on January 17, 2007, Mills Corp announced that a merger agreement with Brookfield had been reached "pursuant to which Brookfield would acquire Mills Corp. and the Mills Partnership for cash at a price of $21.00 per share."[144] A joint venture of Simon Corp and Farallon then submitted an unsolicited topping proposal to acquire Mills Corp for $24.00 cash per share.[145] Brookfield countered, but Simon/Farallon ultimately submitted a successful bid of $25.25 per share.[146]

SPG-FCM Ventures LLC (the "Simon-Farallon JV"), a 50/50 joint venture between a Simon **[*32]** Corp subsidiary and certain Farallon funds, executed a merger agreement with Mills Corp on February 16, 2007.[147] A subsidiary of the Simon-Farallon JV merged into the Mills Partnership, with the Mills Partnership being the surviving entity and the Simon-Farallon JV indirectly owning the Mills Partnership.[148] Mills did not merge into Simon, but, due to the structure of the transaction, following the merger Mills Units convertible into common publicly tradable stock—that is, Mills Units suitable as consideration for a call on KanAm—remained unavailable, as they had been since trading was suspended on Mills Corp's stock.[149] The transaction closed on April 3, 2007.[150] I note that pursuant to the merger agreement, "180 German KanAm investors holding approximately 3.4 million Mills Units were eligible to exchange their Mills Units for either cash or Simon Units" in this transaction.[151] Of these, however, only "[f]ive investors holding approximately 53,000 Mills Units, which represented approximately 1.6 percent of the 3.4 million eligible units, chose to convert to Simon Units."[152] Mills Corp was later dissolved in August 2007.[153] The Mills Corp liquidation had been provided for in the merger deal structure,[154] and Mills **[*33]** Partnership Units convertible into Mill Corp common stock were permanently unavailable, thereafter.

At the time of the transaction with the Simon-Farallon JV, KanAm executives, including Braithwaite, did not voice a concern about the transaction with Simon.[155] Similarly, prior to the Simon-Farallon JV transaction, KanAm insiders, such as Mr. Hammond, were not able to identify any instance of KanAm suggesting to Simon or Farallon the need to amend the buy/sell consideration provisions in the JV Agreements.[156] KanAm did not notify Mills' CEO, Mark Ordan, either; Ordan does not specifically recall the buy/sell consideration being raised by KanAm, but testified that if it were raised he "would have alerted [Mills'] attorneys" and taken it "very seriously" and would have "absolutely" disclosed such information to the SEC.[157] However, as described above, Simon along with its outside

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[142] Pretrial Stip. 12.

[143] *Id.*

[144] *Id.* at 13.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 13-14.

[148] *Id.* at 14.

[149] *See, e.g.*, Trial Tr. 832:11-18 (Braithwaite).

[150] Pretrial Stip. 14-15.

[151] *Id.* at 14.

[152] *Id.*

[153] *Id.* at 14-15.

[154] *See* JX0275.

[155] Trial Tr. 781:7-23 (Braithwaite); *id.* at 973:15-19 (Hammond).

[156] *Id.* at 974:6-14 (Hammond).

[157] *See id.* at 611:20-614:22 (Ordan).

counsel, was already aware of the consideration issue. They independently identified the issue and raised it to Mr. Simon. Simon decided not to raise or discuss it with KanAm, however.[158] This is despite the fact that the Simon-Farallon JV Agreement went as far as to address the situation in which either Simon **[*34]** or Farallon sought to exercise call rights in a project against the wishes of the other.[159]

KanAm represented to investors during this time that as a result of the Mills sale "[n]othing has changed either for the economic or the legal situation" of the KanAm funds.[160] KanAm representatives, including Braithwaite, met with Simon to confirm that each side would honor the obligations under the contracts and "live by the contracts."[161] According to Mr. Simon, the Simon-Farallon JV at the time believed that despite the language of the contracts, the call right continued to be viable.[162] Braithwaite, for his part, testified that KanAm chose not to inform Simon of its understanding that the call right was subject to KanAm's discretion to elect Mills Units, because the lockout periods had not run, and thus the discussion was not yet "ripe."[163]

Between Simon's exit in 2002 until the Simon-Farallon JV's acquisition of Mills in 2007 the Simon Entities were not involved in the joint ventures subject to the present dispute. The 2007 acquisition, however, caused the Simon-Farallon JV to become counter-parties to KanAm in three of the original JVs which the Simon Entities had invested in with **[*35]** KanAm, and then exited: Grapevine, Concord and Arundel Mills. Additionally, with the acquisition of Mills, the Simon-Farallon JV became parties to JVs in which Simon had never before had an interest, that is, those developed by Mills and KanAm without Simon's involvement, but acquired by the Simon-Farallon JV as a result of the sale of Mills. Those projects, at issue here, are Orange City, Katy, and Colorado Mills. The buy/sell consideration provisions were not renegotiated even though Mills Units meeting the specifications set out in the JV Agreements were no longer available, as all parties were aware. Similarly, the JV Agreements were not updated to reflect, in any way, the unavailability of Mills Units.

7. Denver West

In October 2007 the Simon-Farallon JV, following its acquisition of Mills, and a KanAm entity entered into a new JV known as Denver West.[164] Denver West, like the other projects at issue in this litigation, was a retail development project. It was located adjacent to a property covered by a separate JV Agreement at issue here, Colorado Mills. Denver West was the only JV entered between KanAm and Simon *following* the Simon-Farallon JV's acquisition of Mills.[165] Additionally, **[*36]** it was the first new JV entered since Mills Units became unavailable.[166]

The starting point for the negotiations of the Denver West JV Agreement was the Colorado Mills JV Agreement; the Denver West JV Agreement initial drafts were red-lines of the Colorado Mills document.[167] An early draft of the agreement circulated by Simon Senior Staff Attorney, Melissa Breeden, changed various terms of the contract, but kept in place Mills Units as the default buy/sell consideration in the event the call was exercised, despite the fact that compliant Mills

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[158] *Id.* at 311:23-312:14 (Barkley).

[159] *See* JX0297 §§ 5.12, 1.6.

[160] JX0311 at 2.

[161] *See* Trial Tr. 795:10-23 (Braithwaite).

[162] *See id.* at 36:22-38:20 (Simon).

[163] *Id.* at 792:9-793:4 (Braithwaite).

[164] Pretrial Stip. 15. The KanAm participant was KanAm USA XX Limited Partnership. *Id.*

[165] *See* Trial Tr. 190:2-11 (Barkley).

[166] *Id.*

[167] *See* JX0324.

Units were unavailable.[168] Breeden later circulated a revised draft of the Denver West agreement and included a comment from Brian Warnock, Simon's Senior Vice President for Acquisitions regarding Section 11.3's buy/sell provision, stating that "Simon and Farallon would like the Buy/Sell Price to be paid in cash only, since upon the dissolution of Mills Corp. payment in [Mills Partnership] units *no longer works*."[169] Thus, Simon initially took the position that the buy/sell consideration should only be paid in cash, and, implicitly, that the consideration prescribed, Mills Units, could not be tendered.[170]

The negotiations continued, involving a number **[*37]** of issues. Eventually, Rick Zeckel, Simon's Vice President of Property Management, intervened due to delays in the negotiation process and reached out to Braithwaite at KanAm on October 2, 2007.[171] Zeckel expressed his opinion that the attorney reviewing the agreement for KanAm was holding up the deal through the "attorney's desire to put his fingerprints on all the documents . . . ."[172] Zeckel also shared his "understanding that [KanAm has] agreed that there is no need to retain the concept of Mills Units in the buy-sell provisions, yet [the KanAm attorney] has insisted this remains."[173] The same day, Braithwaite responded that while "Denver West is a relatively simple transaction[, it] has raised some broader issues between Kan[A]m and Simon/Farallon that have not previously been addressed."[174] Braithwaite continued that he had:

> two or three conversations with Brian Warnock about these issues and we are trying to keep these *much broader and significant issues* from complicating this simpler trans[ac]tion. The Simon attorneys did not seem to understand these issues and drafted the documents in an unacceptable manner. We are . . . trying to draft documents around these issues in a manner that will be acceptable to **[*38]** both sides that will leave the issues open without compromising either side['s] position. Therefore it is not as simple as it would initial[ly] seem.[175]

Braithwaite added that "[i]t might be helpful if someone on your side could explain to your attorneys that these are not insignificant issues and that it would be helpful if they could understand what we are trying to achieve for all parties."[176] The next day, October 3, 2007, Melissa Breeden of Simon circulated a revised draft agreement that again included the reference to Mills Units as the consideration for the buy/sell provision.[177] KanAm's position was that it wanted the language to track that of other partnership agreements, specifically Colorado Mills.[178]

Due to time pressures and an impending deadline, the parties executed a JV Agreement for Denver West effective as of October 10, 2007, which provided that *cash* would be the *sole currency* for payment of the buy/sell consideration in the event the call was triggered.[179] On October 9, 2007, a draft of a "side letter" was circulated by Hammond of KanAm to Warnock of Simon.[180] The side letter was directly targeted at Section 11.3's required buy/sell consideration.[181] This initial draft proposed that KanAm's rights **[*39]** would be the same as

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[168] *See id.* at 53.

[169] JX0328 at 1 (emphasis added).

[170] *See id.*

[171] *See* JX0330 at 1-2.

[172] *Id.* at 1.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] JX0333 at 1, 52.

[178] Trial Tr. 800:17-801:11 (Braithwaite).

[179] *See* JX0342 § 11.3(d).

[180] JX0340.

[181] *Id.* at 2-3.

they were in the Colorado Mills JV Agreement, which provided for Mills Units as the default consideration.[182] The initial draft side letter indicated that the acquisition of Mills by Simon created "a disagreement as to the form of the non-cash consideration under Section 11.3" including "whether the units are to be units of [the Simon Partnership] instead of units of [the Mills Partnership] . . . ."[183] Additionally, it sought to affirm that KanAm, by entering the Denver West Agreement, would be deemed "not [to have] waived any of its rights or claims as to the form of non-cash consideration under Section 11.3 of any of the Limited Partnership Agreements or the Denver West Agreement."[184] The draft concluded that "[t]he parties hereby agree to engage in good faith negotiations to resolve the disagreement as to the form of non-cash consideration."[185]

The parties continued to revise the side letter, and a revised draft was circulated by Breeden of Simon on October 11, 2007,[186] followed by subsequent negotiations and revisions by KanAm individuals.[187] The final version of the side letter was executed on October 17, 2007, and removed the reference that the parties would "agree to engage in good faith negotiations **[*40]** to resolve the disagreement as to the form of non-cash consideration" which was in the earlier circulated draft.[188] The executed version provided that "*if* the parties agree, or it is later determined, that non-cash consideration may be paid under the payment provision" of the Colorado Mills agreement, then that same consideration would be applied to the Denver West agreement.[189] In other words, the parties identified the non-cash consideration issue, negotiated over it, but ultimately avoided reaching a resolution of it in entering the Denver West JV. They punted.

As discussed further in the extrinsic evidence analysis section below, the parties heavily disputed at trial the meaning and relevance of the Denver West negotiations and the side letter, along with certain non-contractual statements made by KanAm representatives to investors.

8. Grapevine Mills

A refinancing was required in the Grapevine Mills project, a JV at issue here, in 2008. In connection with that refinancing Breeden of Simon prepared and had circulated a draft of an amendment to the Grapevine Mills JV.[190] Simon's September 9, 2008 draft amendment deleted references to Mills Units in the buy/sell provisions.[191] **[*41]** Breeden indicated that Simon's position was "[w]e want to have all cash here as well" like in Denver West.[192] The parties successfully amended the Grapevine Mills agreement in light of the refinancing, but the buy/sell consideration of Mills Units was not changed.[193] There appears to be no documentary evidence at the time of the Grapevine refinancing and amendment that Simon offered to, or sought to, change the non-cash consideration in Grapevine to Simon Units.[194]

9. Simon-Farallon Break-up

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[182] *Id.*

[183] *Id.* at 2.

[184] *Id.* at 2-3.

[185] *Id.* at 3.

[186] *See* JX0344.

[187] *See* JX0345.

[188] *Compare* JX0348 *with* JX0340.

[189] JX0348 at 5 (emphasis added).

[190] *See* JX0366.

[191] *See id.* at 66-70.

[192] JX0367.

[193] *See* JX0369.

[194] *See, e.g.*, Trial Tr. 258:1-20 (Barkley). I note one potential difficulty Simon faced at the time with agreeing to provide Simon Units is that they were involved in these properties with KanAm in conjunction with their JV Partner, Farallon, who could not clearly offer units with the characteristics of Mills Units. *See id.* 258:21-263:1 (Barkley); *id.* at 38:17-39:9 (Simon).

In March of 2012, Simon acquired Farallon's interests in the Mills Partnership.[195] Following the transactions, the JV "interests that were previously directly or indirectly owned by the Mills Partnership were indirectly owned by Simon Partnership."[196] In connection with the acquisition, Simon and KanAm executed the "Agreement and Indemnity."[197] The Agreement and Indemnity (the "2012 Agreement") was initially presented to KanAm by Mr. Barkley, Simon's General Counsel, with the representation that "[t]here would be no changes required to existing venture agreements at property level companies . . . ."[198]

Shortly thereafter the parties executed the 2012 Agreement.[199] The 2012 Agreement affirmed that Simon had stepped into the shoes of the Mills Partnership together with all rights the Mills Partnership had.[200] The Agreement also confirmed that it "shall not be construed as a modification of such organizational documents, nor be construed to diminish, enlarge or in any way affect such rights, if any, which . . . shall remain in full force and effect in accordance with their terms."[201] Once again, the parties **[*42]** failed to raise the issue of call consideration during the 2012 Agreement negotiations—that is, KanAm did not affirmatively disclose its position that despite Simon stepping into the shoes of Mills Partnership, Simon would not be able to exercise the call provision due to the unavailability of contractually-compliant Mills Units.[202] Simon, for its part, recognized that the 2012 Agreement did not change any of the rights or obligations that the Mills Partnership owed KanAm.[203] Similarly, prior to the commencement of this litigation, Simon admits that it did not discuss with KanAm its position, advanced in this litigation, that an intended purpose or effect of the 2012 Agreement was to modify the buy/sell currency in the JV Agreements or permit the substitution of Simon Units.[204]

C. Simon Triggers the Call

In April 2012 Braithwaite and Hammond of KanAm visited Simon's headquarters to meet with several high-level Simon officials.[205] At the April meeting, the possibility of Simon exercising its call right in certain JVs at issue in this litigation was raised.[206] KanAm purportedly was "surprised" by this discussion, but did not inform Simon at that time of its view **[*43]** that KanAm could thwart Simon's ability to consummate the call by the election of Mills Units.[207]

Pursuant to the buy/sell provisions of the JV Agreements there was a ten-day buy/sell notice period which would open on May 1, 2012.[208] The parties negotiated and executed two letter agreements extending the window for 2012.[209] The first agreement executed on May 3, 2012, extended the start of the ten day period until June 1, 2012 and the second agreement dated June 4, 2012 extended the ten-day window until June 19, 2012.[210] During these initial extension negotiations, KanAm did not raise its ability to defeat the call provisions by

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[195] *See* JX0440.

[196] Pretrial Stip. 16.

[197] *Id.*

[198] JX0430 at 1; Trial Tr. 216:4-23 (Barkley); *id.* at 225:1-5 (Barkley).

[199] JX0450.

[200] *See id.* at §§ 1(b), 1(d). *See also* Trial Tr. 210:13-211:7 (Barkley).

[201] JX0450 § 1(d).

[202] Trial Tr. 211:8-20 (Barkley).

[203] *See, e.g., id.* at 220:16-221:21 (Barkley).

[204] *See, e.g.*, JX0684 at Resp. Nos. 2, 3.

[205] *See* Trial Tr. 40:21-41:15 (Simon); Pretrial Stip. 16.

[206] *See* Trial Tr. 813:6-814:16 (Braithwaite).

[207] *See id.* at 990:11-991:4 (Hammond).

[208] *See* JX0456 at 1.

[209] *Id.*; JX0462.

[210] JX0456 at 1; JX0462 at 1-2.

electing Mills Units.[211] Simon ultimately agreed to not trigger the buy/sell provisions in 2012.[212]

The record reflects that on June 21, 2012, Braithwaite of KanAm sent von Perfall and other KanAm principals a legal memorandum, prepared by KanAm's litigation counsel, regarding the put/call consideration issue.[213] A later memo distributed internally at KanAm on June 27, 2012, from KanAm's litigation counsel indicates that Simon "must offer us Mills Units and that they cannot substitute" Simon Units.[214] The remaining substance of these memoranda was redacted to **[*44]** protect attorney-client privilege.[215]

On June 27, 2012, Braithwaite circulated an email to Simon, which advised Simon that, in exercising the call, it "is required to deliver" Mills Units in accordance with the JV Agreements.[216] Braithwaite opined in the email that KanAm "does not believe that Simon can perform such obligation and deliver the specified and required" Mills Units.[217] Braithwaite communicated KanAm's willingness to negotiate with Simon acceptable non-cash consideration; Simon indicated that it would get back to KanAm regarding renegotiation.[218] It appears this was the first documented notice from KanAm to Simon that it was taking this position regarding the contractual language.[219] During the time this disclosure was made by Braithwaite, the parties were attempting to negotiate a letter agreement to resolve several administrative disputes arising under the JVs.[220] Part of the consideration for the executed letter agreement in late June was that Simon would not trigger the buy/sell provisions that year.[221] In delivering the executed copy of the June 28, 2012 letter agreement, KanAm indicated in its cover letter that the buy/sell consideration issues had not been resolved.[222]

Later that year, in October 2012, KanAm and Simon amended the Concord Mills JV Agreement.[223] This amendment did not change the buy/sell consideration under Section 11.3 of the JV Agreement.[224] Additionally, the amendment ratified and affirmed all the pre-existing agreements except as modified—thus it ratified and affirmed the unchanged consideration portion of Section 11.3.[225]

In 2013, Braithwaite of KanAm again communicated with Simon, this time directly to Mr. Simon at an in-person meeting on April 15, 2013, regarding KanAm's willingness to negotiate non-cash consideration.[226] Similarly, Braithwaite sent a follow-up letter to Mr. Simon reflecting the same position.[227] This April 16, 2013 letter states that KanAm had a "long history, familiarity and special relationship" with Mills and that Mills Units were "a material reason" that KanAm entered the JV Agreements and agreed to the put/call consideration.[228] The letter concluded that KanAm remained open to negotiate amendments to the

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[211] *See* Trial Tr. 45:2-7 (Simon).

[212] *Id.* at 45:8-14 (Simon).

[213] *See* JX0469 at 1.

[214] JX0470.

[215] *See* JX0469; JX0470.

[216] JX0471 at 1.

[217] *Id.*

[218] *See* Trial Tr. 834:15-23 (Braithwaite).

[219] *See id.* ***[*45]*** at 822:3-824:3 (Braithwaite).

[220] *See* JX0474.

[221] *See id.* at 5.

[222] *See id.* at 2.

[223] JX0488.

[224] *See id.*; Trial Tr. 346:21-347:11 (Barkley).

[225] *See* JX0488 at ¶ 40; Trial Tr. 346:21-347:11 (Barkley).

[226] Trial Tr. 835:7-836:10 (Braithwaite).

[227] JX0500.

[228] *Id.* at 1.

put/call consideration.[229] Mr. Simon indicated that he would follow up, but after two extensions rather than negotiating, Simon initiated this action.[230] The same day this action was filed, Simon sent notices that it was triggering **[*46]** the call for four of the JVs on May 2, 2013.[231] KanAm in response insisted on the specified default consideration, Mills Units, and refused to close.[232] In 2014, Simon sent KanAm notices with respect to the three remaining JVs at issue here.[233] KanAm again insisted on Mills Units and declined to close.[234] The pleadings were amended to add these three additional JVs to the present action.

II. PROCEDURAL HISTORY

Simon initiated this action on May 3, 2013. Shortly thereafter, KanAm moved for judgment on the pleadings. Significant motion practice ensued, which is discussed elsewhere. The parties subsequently cross-moved for summary judgment on March 28, 2014. Those motions were then briefed and, following oral argument, I denied both motions by Memorandum Opinion of September 30, 2014 for reasons I briefly revisit in the analysis section below. This first period of litigation involved only four JVs for which notice was given in 2013—Orange City Mills, Arundel Mills, Grapevine Mills, and Concord Mills.

Following the summary judgment decision, the Plaintiffs filed a Second Amended Complaint (the "Amended Complaint").[235] The Amended Complaint added three additional JVs—Katy Mills, Colorado Mills, and Denver **[*47]** West—for which Simon attempted to exercise its call rights on in May 2014. The Amended Complaint pleads four counts. First, through Count I, the Plaintiffs seek declaratory judgments on a number of issues regarding the JV Agreements and the Defendants purported breaches. Second, through Count II, the Plaintiffs assert a breach of contract claim alleging that by failing to close on the transactions after Simon provided notice and offered Simon Units, KanAm breached the JV Agreements. Next, through Count III, the Plaintiffs assert a claim that KanAm breached the implied covenant of good faith and fair dealing through its conduct in refusing to accept Simon Units and insisting on delivery of the call consideration in Mills Units. Finally, Count IV seeks specific performance of the applicable JV Agreements. Along with the remedy of specific performance, the Plaintiffs seek damages for the Defendants alleged breaches including the purported improper distributions paid to the Defendants after the call was triggered. Additionally, the Plaintiffs seek costs, expenses and attorneys' fees pursuant to the JV Agreements, along with an award of interest.

The Defendants, through their Supplemental **[*48]** Verified Counterclaim (the "Counterclaim") assert two counts.[236] Count I asserts a breach of contract by Simon for triggering the call with knowledge that the default consideration was not available, and that by failing to provide valid buy/sell notices Simon breached the JV Agreements. Count II seeks a declaratory judgment that the required consideration in the applicable JV Agreements is Mills Units, and that Simon cannot force KanAm to accept Simon Units. KanAm seeks damages arising from Simon's alleged breaches, litigation costs including attorneys' fees pursuant to the JV Agreements, and interest.

I tried this matter over seven days, with the first five days occurring on May 16 through May 20, 2016, and the remaining two days on August 16, and August 17, 2016. The parties engaged in post-

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[229] *Id.* at 2.

[230] Trial Tr. 835:7-836:10 (Braithwaite).

[231] JX0504; JX0508.

[232] JX0811.

[233] *See* JX0557; JX0558; JX0559.

[234] JX0813.

[235] *See* Dkt. No. 119.

[236] *See* Dkt. No. 110.

trial briefing, and a post-trial oral argument was held on December 16, 2016. What follows is my analysis of the merits of the parties' claims in light of the proof shown at trial.

III. ANALYSIS

Several issues remain to be decided in this post-trial decision. This is a contract action. Therefore, the threshold inquiry is what are the terms of the applicable contracts—the parties' JV Agreements? Specifically, **[*49]** what are the terms of the buy/sell provisions?

These terms have previously been reviewed in this case. When ruling on the parties' cross-motions for summary judgment I found that:

> [t]he JV Agreements *unambiguously provide* that the default consideration when exercising the call is Mills Units meeting certain criteria. However, these Agreements do not address the unavailability of Mills Units due to a change in control or restructuring transaction. Accordingly, I cannot conclude from this *unambiguous language* whether the parties intended the call right to lapse if and when Mills Units satisfying the contractual criteria became unavailable. Instead, I must resort to extrinsic evidence to determine how the parties intended to proceed in the circumstances in which they now find themselves.[237]

I denied summary judgment because there was some evidence in the record that KanAm considered Simon Units as contractually-compliant. Thus, I was not able to "conclude that the Defendants intended only to accept Mills Units, and, accordingly, that the call right was meant to lapse when those Units became unavailable."[238] I found that this, and other issues raised by the parties' cross-motions for summary judgment **[*50]** "require[d] further factual development to ascertain the parties' intent."[239] I explained that "where the contract does not address the matter in dispute, the Court may resort to extrinsic evidence to ascertain the parties' intent, such as the overt statements and acts of the parties, the business context, prior dealings between the parties, and other business customs and usage in the industry."[240] Similarly, the summary judgment decision in this matter left open Simon's claim for breach of the implied covenant of good faith and fair dealing for further factual development.[241]

The parties have created a full record at trial. The determinative question here is whether there was ever a meeting of the minds between the parties about whether Simon Units were a contractual substitute for Mills Units in the present circumstances.

This Memorandum Opinion first reviews the relevant extrinsic evidence in an attempt to derive the parties' intent and determine whether there was a meeting of the minds regarding the unavailability of Mills Units. Next, I examine the arguments raised under the substantial performance doctrine before turning to the equitable issues raised by the parties. Finally, I address **[*51]** KanAm's Counterclaims and the appropriate relief under the circumstances present here.

A. The Contractually Required Buy/Sell Consideration

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[237] *Simon I, 2014 Del. Ch. LEXIS 191, 2014 WL 4840443, at *14* (citations omitted).

[238] *Id.*

[239] *Id.* Those other issues included, at the time, whether KanAm demonstrated a contractual indifference to the type of units it would receive, whether there was a special relationship between KanAm and Mills such that Mills Units are unique and whether Mills and Simon Units are materially different in terms of tax treatment and other risks. *See id.*

[240] *2014 Del. Ch. LEXIS 191, [WL] at *15* (internal quotations omitted).

[241] *2014 Del. Ch. LEXIS 191, [WL] at *14*.

1. General Principles

I first examine the general legal principles applicable here. Plaintiffs (and, with respect to the Counterclaim, Defendants/Counterclaim Plaintiffs) bear the burden of proof, to demonstrate entitlement to relief by a preponderance of the evidence.[242] Thus, "Plaintiffs, as well as Counterclaim-Plaintiffs, have the burden of proving each element, including damages, of each of their causes of action against each Defendant or Counterclaim-Defendant, as the case may be, by a preponderance of the evidence."[243] *HN1*[↑] "Proof by a preponderance of the evidence means proof that something is more likely than not."[244] *HN2*[↑] The burden with respect to the remedy of specific performance of a contract is that a plaintiff must make a showing by clear and convincing evidence.[245]

HN3[↑] Delaware follows the objective theory of contracts. "Because Delaware adheres to the objective theory of contract interpretation, the court looks to the most objective indicia of that intent: the words found in the written instrument."[246] Therefore, "[a] contract's express **[*52]** terms provide the starting point in approaching a contract dispute."[247] Further, Delaware law requires that contracts are to be read as a whole.[248]

I have already determined that the JVs unambiguously provide that Mills Units—defined as Units of Mills Partnership with certain characteristics—are the contractually required default consideration.[249] However, *HN4*[↑] where a contract is silent on an issue, such as what was to happen upon the unavailability of Mills Units, the Court "may resort to extrinsic evidence to ascertain the parties' intent."[250] Even when reviewing extrinsic evidence, the text remains important. This Court will enforce contracts to effectuate the intent of the parties as demonstrated through the text, that is, "the introduction of extrinsic, parol evidence does not alter or deviate from Delaware's adherence to the objective theory of contracts."[251] When reviewing the extrinsic evidence submitted, it should be reconciled, to the extent possible, with the text of the contract. Generally, the parties' undisclosed and private views of a contract's meaning "are irrelevant and unhelpful to the Court's consideration of a contract's meaning, because the meaning of a properly formed contract must **[*53]** be shared or common."[252] Similarly, when "considering extrinsic evidence, the Court should uphold, to the extent possible, the reasonable shared expectations of the parties at the time of contracting."[253] Further, "[i]n giving effect to the

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[242] *See, e.g., In re Mobilactive Media, LLC, 2013 Del. Ch. LEXIS 26, 2013 WL 297950, at *9 (Del. Ch. Jan. 25, 2013)*.

[243] *inTEAM Assocs., LLC v. Heartland Payment Sys., Inc., 2016 Del. Ch. LEXIS 151, 2016 WL 5660282, at *13 (Del. Ch. Sept. 30, 2016)* (citation omitted).

[244] *Id.* (citation omitted).

[245] *See* ***In re IBP, Inc. Shareholders Litig., 789 A.2d 14, 52 (Del. Ch. 2001)*** (observing Delaware law "requires that a plaintiff demonstrate its entitlement to specific performance by clear and convincing evidence").

[246] *Sassano v. CIBC World Markets Corp., 948 A.2d 453, 462 (Del. Ch. 2008)* (citations omitted).

[247] *Ostroff v. Quality Servs. Labs., Inc., 2007 Del. Ch. LEXIS 2, 2007 WL 121404, at *11 (Del. Ch. Jan. 5, 2007)*.

[248] *Salamone v. Gorman, 106 A.3d 354, 368 (Del. 2014)* ("When interpreting a contract, this Court 'will give priority to the parties' intentions as reflected in the four corners of the agreement,' construing the agreement as a whole and giving effect to all its provisions.") (quoting *GMG Capital Invs., LLC. v. Athenian Venture Partners I, L.P., 36 A.3d 776, 779 (Del. 2012)*).

[249] *Simon I, 2014 Del. Ch. LEXIS 191, 2014 WL 4840443, at *14*.

[250] *2014 Del. Ch. LEXIS 191, [WL] at *15* (citing *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC, 2013 Del. Ch. LEXIS 123, 2013 WL 1955012, at *41 (Del. Ch. May 13, 2013)*).

[251] *United Rentals, Inc. v. RAM Holdings, Inc., 937 A.2d 810, 835 (Del. Ch. 2007)* (citation omitted).

[252] *Id.* (citations omitted).

[253] *Shareholder Representative Services LLC v. Gilead Sciences,*

parties' intentions, it is generally accepted that the parties' conduct before any controversy has arisen is given great weight."[254]

HN5[↑] Where there is an ambiguity or contractual silence on an issue the Court will examine the extrinsic evidence presented by the parties "which may include statements and conduct of the parties, business circumstances surrounding the execution of the contract, any course of dealing between the parties, and any usage of trade or industry custom."[255] Finally, the Court should, "where possible, avoid an interpretation that would render any provision illusory or meaningless."[256]

2. The Parties' Contentions

Simon's position, based on the evidence developed at trial, is that evidence extrinsic to the JV Agreements demonstrates that by "Mills Units" the contracts really mean "Mills Units or similar, including Simon Units." Further, Simon argues that its ability to call KanAm's interest is a "fundamental right" that the parties did not intend **[*54]** to lapse.[257] Simon observes that qualifying Mills Units became unavailable due to Mills' own financial difficulties,[258] and questions why KanAm waited five years to "first communicate its current position."[259] Simon argues that "KanAm's interpretation effectively nullifies Simon's call right, a result no party to the JV Agreements intended."[260] Further, Simon argues that there is no evidence that the call right, and buy/sell provisions which are a "fundamental aspect of the JV Agreements," were intended to "simply lapse if Mills Units became unavailable."[261]

KanAm relies heavily on the plain and unambiguous provisions in the JVs specifying that Mill Units meeting certain requirements are the default currency. KanAm attempts to focus the scope of extrinsic evidence by pointing to the "operative JV Agreements" and pointing out that only one of such "operative" agreements ever included a reference to Simon Units.[262] KanAm officials have testified that their position is that Simon could exercise the call right but could not "consummate the transaction" if KanAm chooses to receive Mills Units.[263] That is, it is KanAm's position that the call right has not entirely lapsed; their position, however, leads to the **[*55]** conclusion that the "call right" is no right, but only an opportunity to seek KanAm's agreement to sell its interest for cash. KanAm contends that the parties are free to renegotiate the applicable buy/sell consideration, and that the sole reason there has been no agreement as to "substitute non-cash consideration [is] because Simon refused to address the issue."[264]

Ultimately, KanAm asserts that the factual record developed at trial demonstrates that "these sophisticated parties never mutually agreed to substitute Simon Units for Mills Units."[265] For the reasons below, I agree.

3. The Extrinsic Evidence

I now turn to an examination of the most relevant extrinsic evidence presented by the parties. I find it

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*Inc., et al., 2017 Del. Ch. LEXIS 44, 2017 WL 1015621, at *16 (Del. Ch. Mar. 15, 2017)* (internal quotations omitted).

[254] *Ostroff, 2007 Del. Ch. LEXIS 2, 2007 WL 121404, at *11* (internal quotations omitted).

[255] *Delaware Exp. Shuttle, Inc. v. Older, 2002 Del. Ch. LEXIS 124, 2002 WL 31458243, at *6 (Del. Ch. Oct. 23, 2002)* (citations omitted).

[256] *Id.* (citations omitted).

[257] Simon's Post-Trial Opening Br. 55.

[258] *Id.* at 57 n.20.

[259] *Id.* at 61.

[260] *Id.* at 62.

[261] *Id.* at 63.

[262] *See* KanAm's Post-Trial Sur Reply Br. 8-11.

[263] *See* Trial Tr. 822:3-19 (Braithwaite).

[264] KanAm's Post-Trial Sur Reply Br. 2 (emphasis removed).

[265] *Id.* at 6.

helpful to group the extrinsic evidence presented in this litigation into four general time periods: first, the 1990's and the initial agreements; second, the events surrounding Simon's exit in 2002; third, the events surrounding Mills' financial trouble and Simon's return via its JV with Farallon in 2007; and finally Farallon's exit from the JV in 2012. Each will be reviewed in turn. When reviewed as a whole the extrinsic evidence shows that the Plaintiffs have failed to establish **[*56]** by a preponderance of the evidence that the parties mutually agreed to the substitution of Simon Units for Mills Units—that is, they have failed to show there was ever a meeting of the minds.[266]

a. The 1990's through 2002

As discussed in the factual background section, Ontario Mills, while not at issue in this litigation, was the original template for certain of the JV Agreements at issue here, including the original three JV Agreements where Simon and KanAm were counter-parties: Arundel Mills, Concord Mills, and Grapevine Mills. Additionally, three other JVs at issue in this litigation were formed during this period between Mills and KanAm, in which Simon did not participate: Orange City Mills in 1996, Katy Mills in 1998 and Colorado Mills in 2001.[267]

KanAm initially entered the Ontario Mills agreement with Mills as a counter-party; when Simon was later added to the Ontario Mills JV, the JV Agreement was amended to reflect that circumstance.[268] The amendment revised the buy/sell consideration section to provide that the default consideration was to be two-thirds Mills Units, and one-third Simon Units in the event the call was exercised.[269] Additionally, the amendment added the description **[*57]** that such an exchange of units was intended to be tax free under *Section 721*. The reason for the amendment to the buy/sell consideration to include Simon Units was made clear by trial testimony: Simon Units were required consideration in order for the *Section 721* tax deferral feature to function.[270] Braithwaite and Hammond, KanAm's principal negotiators, testified that at the time of these negotiations the only real tax concern about receiving Simon Units was to ensure that the transaction "would get the same sort of tax deferral."[271] Nonetheless, the fact of the amendment demonstrates that, at this stage at least, the parties did not intend the term "Mills Units" to mean "partnership units similar to Mills, including Simon Units."

While the Ontario Mills JV Agreement contained a fixed percentage of Simon to Mills Units as the call consideration, the subsequent agreements in Concord Mills, Grapevine Mills, and Arundel Mills provided that unit consideration would be paid "ratably in proportion to the ownership interests."[272] The three agreements at issue during this time period, however, did draw certain distinctions between Simon and Mills Units, including the extra requirement that contractually-compliant **[*58]** Simon Units must "have the most favorable rights (including redemption, conversion, registration and anti-dilution protection) . . ." of any units of Simon.[273] However, KanAm negotiators do not recall expressing any particular concern about receiving Simon Units at that time.[274] Similarly, no

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[266] While certain portions of the record are analyzed in more detail below, I also rely in this determination on the factual background that I have laid out previously in this Memorandum Opinion.

[267] I note Simon admits the buy/sell provision in the agreements governing these three JV Agreements generally mirror those in Grapevine, Arundel and Concord Mills and only reference Mills Units. *See, e.g.*, Simon's Post-Trial Presentation Slide 36. *See also* JX0041 § 11.3(d); JX0050 § 11.3(d); JX0089 § 11.3(d).

[268] *See* JX0025.

[269] *See id.* at § 11.3(d).

[270] Trial Tr. 945:19-946:14 (Hammond). *See id.* at 693:7-694:8 (Braithwaite).

[271] *Id.* at 949:9-18 (Hammond). *See id.* at 679:13-23 (Braithwaite).

[272] *See* JX0027 § 11.3(d); JX0058 § 11.3(d); JX0074 § 11.3(d).

[273] *See, e.g.*, JX0027 §§ 11.3(d), (f).

[274] *See* Trial Tr. 694:11-14 (Braithwaite).

convincing evidence exists about why the "most favorable rights" provision was inserted only for Simon Units and not for Mills Units. In other words, the inclusion of the most favorable rights provision for Simon Units only indicates that the parties considered that Simon and Mills Units were not necessarily equivalent, but does not explain why. The evidence also shows that KanAm was willing to take solely the "best" Simon Units if Simon bought out Mills.

Simon makes much of the fact that KanAm, at the time, impliedly agreed to potentially accept *only* Simon Units; if Simon had bought out Mills, Simon Units would have been the operative consideration. Additionally, Simon points to prospectuses distributed by KanAm to investors during this time that either do not mention the buy/sell currency at all,[275] or, when they do so, do not draw a particular distinction between Simon and Mills Units. **[*59]** [276] KanAm asserts that any early evidence of relative contractual indifference towards Simon Units is less relevant as it was at the "infancy" of the REIT industry.[277] Similarly, KanAm observes that the contracts themselves show KanAm took care to specify only certain units of Simon or Mills with specific qualities "would pass muster."[278]

I find that the parties' course of conduct and other extrinsic evidence from this period is largely unpersuasive. Simon has shown that there was, early on and at a general level, contractual indifference by KanAm to receiving either Simon or Mills Units. However, KanAm has also shown that when it agreed to accept Simon Units during this time period, the parties modified the contracts to expressly so state, and to provide what qualities the Simon Units had to have, including the most favorable rights provisions. That is, the record from this period does not support the idea that KanAm agreed to automatic substitution of any successor operating partner units, or that the parties meant "Mills Units or similar" when they specified Mills Units.

b. Simon's 2002 Exit and the Subsequent Amendments

As discussed in the factual background section, in 2002 Simon exited three JVs at issue here, Grapevine Mills, Concord **[*60]** Mills and Arundel Mills, after it reached an impasse with Mills. These were the only KanAm/Mills JVs in which Simon had an interest at the time. The exit was achieved via a "shotgun" exit mechanism. When Simon triggered the exit, it was not contractually clear who would remain in the JVs—that is, Simon named the price at which it would either buys Mills out *or* sell its interest to Mills, at Mills' option.[279]

In the interim, before it became clear who would remain in the JVs, Braithwaite of KanAm sent Simon's CEO, David Simon, a letter on March 4, 2002, to inquire about the buy/sell consideration in the Ontario Mills JV Agreement.[280] Braithwaite indicated KanAm "would be interested in *discussing* with [Simon] how Section 11.3 of the Ontario Mills Agreement *might* be implemented if there has been a buy/sell between Mills and Simon of your interests in Ontario Mills, L.L.C."[281] The Ontario Mills agreement, unlike the other JVs actually at issue here, provided for a fixed consideration ratio of one-third Simon Units and two-thirds Mills Units upon exercise of the call. David Simon responded on March 5, 2002, stating that following the exit of Simon or Mills, KanAm's right under the Ontario Mills agreement **[*61]** was to receive the appropriate units "of whichever of Mills or Simon [remained] partner."[282] Neither

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[275] *See* JX0031; JX0037.

[276] *See* JX0060 at 31; JX0070 at 44.

[277] KanAm's Post-Trial Answering Br. 30.

[278] KanAm's Post-Trial Sur Reply Br. 14.

[279] *See* Trial Tr. 387:18-388:11 (Foxworthy).

[280] *See* JX0099.

[281] *Id.* at 2 (emphasis added).

[282] JX0100 at 1.

Braithwaite nor anyone else at KanAm responded to Simon's explanation of what Section 11.3 would mean for Ontario Mills following the shotgun buy/sell, nor was there further discussion.[283]

KanAm argues it did not respond because the issue, to Braithwaite's mind, was mooted shortly after the letter exchange when he learned that Mills' management had recommended Mills acquire Simon's interests.[284] KanAm also points out that, had the parties had a pre-existing understanding that Simon Units would be automatically substituted for Mills Units, Braithwaite's letter to Simon would have been unnecessary, and the question would never have been asked.[285] Simon points to the exchange regarding Ontario Mills, and KanAm's silence in response to Mr. Simon's assertion that Simon Units would serve as currency, as strong evidence that KanAm was indifferent to the units it received so long as they provided for non-recognition tax treatment.[286] I find this exchange less helpful than Simon does with respect to showing a meeting of the minds regarding the present issues before me. First, Ontario Mills features a unique JV Agreement, **[*62]** with a fixed exchange ratio not at issue in the JV Agreements here. I note that, with respect to the JV Agreements in issue, all references to Simon Units were subsequently removed, as discussed below. Second, with respect to Simon's argument that KanAm's silence—in response to Simon's written assertion that Simon Units would substitute for Mills Units—connotes KanAm's agreement with or indifference to the assertion, I am unpersuaded. The record tends to support KanAm's mootness point—that no response was necessary in light of Braithwaite's awareness that Mills would acquire Simon's interest.

Instructive to the issue before me—whether there was a meeting of the minds regarding the effect of the unavailability of Mills Units—is what happened once Simon *exited* the JVs. Mills and KanAm amended the governing documents to remove references to Simon.[287] On May 31, 2002, the Ontario Mills JV Agreement, a project not at issue here, and the Grapevine Mills JV Agreement were amended to delete references to Simon.[288] Similarly, later in 2002, KanAm and Mills formed a new partnership for Concord Mills.[289] The Concord Mills JV Agreement, thereafter, only makes reference to Mills Units, and provides **[*63]** that they are the default consideration except if KanAm elected to receive cash or a mix of cash and units.[290] The Arundel Mills JV Agreement underwent similar changes: first, the JV Agreement was amended to remove references to Simon,[291] second a new partnership document was executed for Arundel Mills in August 2004, and as with Concord Mills, explicitly provided that Mills Units were the default buy/sell consideration, and contained no reference to Simon Units.[292]

In sum, Simon was written out of all JV Agreements to which they were previously counter-parties to KanAm, either through deletion of references to Simon, or by new partnership agreements which do not provide for Simon Units. The default consideration for each JV became Mills Units meeting certain specifications. Unsurprisingly, Simon and KanAm disagree as to the significance of these amendments. Simon admits Mills and KanAm acted to delete references to it from the JV Agreements during this time

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[283] *See* Trial Tr. 23:20-24:13 (Simon).

[284] *See* JX0101; Trial Tr. 735:16-737:18 (Braithwaite).

[285] *See* KanAm's Post-Trial Sur Reply Br. 16.

[286] *See* Simon's Post-Trial Opening Br. 59.

[287] *See, e.g.*, JX0111 § 9(f).

[288] *See* JX0108 §§ 2(e), 10; JX0109 §§ 2(e), 13.

[289] *See* JX0120.

[290] *Compare* JX0120 §§ 11.3(d), 11.3(f) *with* JX0058 §§ 11.3(d), 11.3(f).

[291] *See* JX0106 §§ 2(e), 15.

[292] *See* JX0152 §§ 11.6(d), 11.6(f).

period but asserts that the amendments were simply "ministerial."[293] Simon further argues that "there is no evidence in the record regarding the amendments to the JV Agreements in 2002 other than that they occurred" **[*64]** and that "KanAm is not entitled to a post-trial inference that these amendments were intended to do anything more than remove references to Simon to reflect its recent exit from the JVs."[294] KanAm's view, as stated through the testimony of Braithwaite, is that the amendments took the issue of Simon Units as consideration off "the table."[295] Further, Braithwaite testified that the amendments reflect a decision post-2002 to not accept Simon Units.[296] Similarly, KanAm asserts the amendments and restated JV Agreements were not ministerial changes as they evince a conscious choice to *limit* the appropriate consideration to Mills Units meeting certain qualifications—that is, they address (in KanAm's view) an "essential element" of the contract and "they reflect in the clearest way possible that Mills and KanAm intended to limit the non-cash consideration to Mills Units."[297]

I find that the record tends to support KanAm's position regarding the post-2002 amendments, though not to the extent KanAm contends. To the extent those contractual revisions shed light on the meaning of "Mills Units" as the default contractual consideration, and whether there was a meeting of the minds to accept alternative **[*65]** consideration, the amendments tend to show the unambiguous language means exactly what it says—Mills Units meeting specified requirements are the proper consideration. To the extent these rather stale events are persuasive regarding the JV Agreements in question, they indicate that KanAm thought it important to denote what units could evoke its obligations in the event of a call. I note, in support of this interpretation of the evidence, that in 2006, in negotiating an unrelated project, *Mills* requested that KanAm amend the buy/sell provision to allow for units of any future UPREIT operating partner to substitute for Mills Units, a request which KanAm declined.[298]

c. Simon's 2007 Return

Following Mills' financial struggles, the Simon-Farallon JV acquired Mills. Simon, through its JV with Farallon, returned to the three projects at issue discussed above. The parties failed to renegotiate or alter the buy/sell consideration provisions to account for Simon-Farallon's entry, and Mills' exit. Thus, there are three JVs at issue here—Grapevine, Concord, and Arundel Mills—for which Simon Units were (1) identified as tender for the call right and (2) then removed by amendment as tender in favor **[*66]** solely of Mills Units when Simon exited. Those JVs, however, retained Mills Units as tender when Mills dissolved and Simon, with Farallon, became the counterparty. The Simon-Farallon JV's acquisition of Mills also included three JVs at issue here to which Simon was not an original party,[299] that is, the projects which Simon declined to invest in originally—Colorado, Katy, and Orange City Mills. The buy/sell consideration provisions in these agreements also called for Mills Units and were not revised despite the entry of the Simon-Farallon JV—there was silence regarding this issue. While there is no smoking gun demonstrating why such changes were not made, common sense, commercial realities, and

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[293] Simon's Post-Trial Opening Br. 19-20.

[294] Simon's Post-Trial Reply Br. 13.

[295] Trial Tr. 758:20-759:13 (Braithwaite).

[296] *See id.* at 758:11-19 (Braithwaite) ("QUESTION: Okay. But there was no feeling internally at KanAm that we would no longer accept Simon units post-2002? ANSWER: There certainly was that decision as it applied to these partnerships [Ontario, Arundel, Concord, and Grapevine Mills]. And since it didn't exist in any other circumstance, we didn't think about it. It wasn't something we spent a lot of time thinking about because it wasn't a real-world circumstance.").

[297] KanAm's Post-Trial Answering Br. 34.

[298] *See* Trial Tr. 770:16-772:1 (Braithwaite); JX0206 at 18 (proposing revisions to Section 11.3 of the Meadowlands agreement to state that Mills' successor so long as it was structured as an UPREIT, with publicly traded stock "may deliver its operating partnership units or other available securities instead of TMLP Units as consideration . . .").

[299] *See* JX0170; JX0122; JX0155.

experience tends to support that such a negotiation of these provisions could have been costly, time consuming, and uncertain—therefore, the parties consciously decided to avoid it. If the alterations were merely "ministerial" as Simon argues the 2002 deletions were, they could have been performed by a stroke of a pen with no negotiation necessary; if this is true it is hard to understand why the alterations failed to occur. I find the former proposition—that both parties made strategic decisions **[*67]** to avoid the issue—more plausible.

The parties point to additional facts from this period as persuasive. Simon points to Braithwaite's negotiations with an alternative potential acquirer, Brookfield, as evidence that KanAm was content accepting Simon Units.[300] In support of this argument Simon observes that Braithwaite affirmatively reached out to Brookfield, an entity with which Mills reached a merger agreement before the Simon-Farallon JV submitted a topping bid, and agreed to negotiate the issue of successor consideration for the call right. Braithwaite admits to reaching an "agreement in principle" on behalf of KanAm to negotiate in good faith with Brookfield on this issue.[301] Simon argues the reason for this negotiation was clear: Brookfield, due to its entity structure (not an UPREIT), could not offer partnership units in a tax-deferred way.[302] According to Simon, KanAm's failure to reach out to Simon in a similar way is telling. To me, nothing about KanAm's willingness to *negotiate* with Brookfield indicates an *indifference* to the consideration it would receive, however. Next, in an appeal to equity, Simon points to KanAm's then-silence about what it now maintains was its position—that **[*68]** only Mills Units, and not successor units, would evoke the call right—and Simon asserts that the "multi-billion dollar transaction was priced" on the basis that the purchaser had an operative call right.[303]

Braithwaite and KanAm were not the only parties with knowledge who were silent, however. Mills' outside counsel, Willkie Farr & Gallagher, produced a memorandum during this time period which indicated:

> [o]f note, the joint venture agreements *strictly call for the OP Units to be those of* [*the Mills Partnership*], and do not contain language authorizing the use of similar OP-type securities in the event [the Mills Partnership] no longer issues Units or ceases to exist as the result of a Mills corporate restructuring or corporate-level transaction.[304]

Despite the plain language of the contract which resulted in this analysis, Mills did not raise the issue directly with Simon. However, a Descriptive Memorandum created by Mills, together with Goldman Sachs and J.P. Morgan and distributed to potential acquirers (including Simon), provided that the "Put-call rights enable . . . Mills to require KanAm to sell its interests to Mills for cash or partnership units of Mills LP, *the choice of consideration* ***[*69]*** *to be made in KanAm's sole discretion . . . .*"[305]

Importantly, *Simon's* general counsel also recognized that the JV Agreements did not refer to Simon Units, and provided that the only non-cash consideration was Mills Units.[306] The internal legal team at Simon, and its outside counsel, knew that the specified default consideration was Mills Units. Simon's current explanation for why it chose to proceed without resolution of this issue is, to me, unsatisfying; Simon's general counsel, Mr. Barkley, testified that Simon was not concerned, because KanAm had agreed to accept Simon Units in the

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[300] *See* Simon's Post-Trial Reply Br. 15-16.

[301] *See* Trial Tr. 775:10-776:18 (Braithwaite).

[302] *See* Simon's Post-Trial Reply Br. 15-16.

[303] *Id.* at 15.

[304] JX0241 at 4 (emphasis added).

[305] JX0293 at 1, 88 (emphasis added).

[306] Trial Tr. 291:7-292:18 (Barkley).

past.[307] If true, this was unwise. I also note that Barkley directly discussed the issue with Mr. Simon during the due diligence process surrounding the Simon-Farallon JV, but Simon still decided not to raise and discuss the issue with KanAm at the time.[308] In short, it appears each legal eye which read these contracts identified the issue. The decision to leave the issue open by all involved appears strategic and does not support a finding of a meeting of the minds regarding an automatic substitution of Simon Units.

The negotiation surrounding the Denver West JV Agreement, the only agreement executed *following* ***[*70]*** Simon's re-entry, is instructive. Simon initially insisted that the buy/sell consideration be paid only in cash.[309] A senior staff attorney at Simon, Breeden, circulated an email with comments that cash needed to be paid since "payment in [Mills] units no longer works."[310] This comment appears to have originated from Brian Warnock, Simon's Senior Vice President for Acquisitions.[311] Thus, at this time it is clear that there was no widespread or absolute understanding within Simon itself that a reference to Mills Units in a JV Agreement's buy/sell provision actually meant Simon Units. During the discussion of the JV, KanAm continued to negotiate the terms and seek some form of non-cash consideration, until Rick Zeckel, Simon's Vice President of Property Management, expressed his frustration with delays over the negotiations regarding the buy/sell provisions.[312] Braithwaite responded that these negotiations raised "much broader and significant issues" that the parties were trying to avoid for the "simpler" deal that Denver West represented.[313] Due to time pressures the Denver West agreement was signed with cash as the only currency.

However, the parties ultimately executed a unifying side letter **[*71]** qualifying the cash currency. The executed side letter provides that "*if the parties agree, or it is later determined*" that non-cash consideration would be payable with respect to an existing JV, Colorado Mills, then that same non-cash consideration would apply to Denver West.[314] Prior to execution of the side letter, several drafts were circulated. Early KanAm drafts included the following language: "a disagreement as to the form of the non-cash consideration under Section 11.3" exists including "whether the Units are to be units of [the Simon Partnership] instead of units of [the Mills Partnership] . . . ."[315] Further, the draft provided that by entering the Denver West Agreement KanAm "has not waived any of its rights or claims as to the form of non-cash consideration under Section 11.3 of any of the Limited Partnership Agreements . . . ."[316] Finally, the draft stated that "[t]he parties hereby agree to engage in good faith negotiations to resolve the disagreement as to the form of non-cash consideration."[317] The executed side letter, however, removed the reference that the parties would "agree to engage in good faith negotiations to resolve the disagreement as to the form of non-cash consideration" which was in the earlier **[*72]** circulated draft and, as set forth above, pegged the issue to resolution of the same issue in the Colorado Mills JV.[318]

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[307] *Id.* at 292:16-293:7 (Barkley); *id.* at 302:22-306:17 (Barkley).

[308] *Id.* at 311:16-312:14 (Barkley).

[309] Simon also initially took this position in 2008 during the Grapevine Mills refinancing.

[310] JX0328 at 1.

[311] *See id.*

[312] JX0330 at 1-2.

[313] *Id.* at 1.

[314] JX0348 at 5. The parties do not dispute that this language simply means that if non-cash consideration is payable in Colorado Mills, then that same non-cash consideration applies to Denver West. *See, e.g.*, Simon's Post-Trial Opening Br. 33-34.

[315] JX0340 at 2.

[316] *Id.* at 2-3.

[317] *Id.* at 3.

[318] *Compare* JX0348 at 5 *with* JX0340. *See* JX0170.

The reference in the final side letter to the consideration in the Colorado Mills JV is telling, and the Denver West negotiations indicate strongly that there was not a definitive agreement or common understanding reached between Simon and KanAm regarding a substitute for Mills Units as non-cash consideration.[319] As I noted in the summary judgment opinion in this matter, the side letter suggests that further negotiations were contemplated.[320] There would be nothing to later "agree" upon or "later determine" if the parties understood at that time that the units called for under the Colorado Mills agreement, to which the side letter was pegged, and which, like all of the other JVs here provided for Mills Units, simply meant "successor units" or "units similar to Mills Units." Further supporting the absence of a meeting of the minds during this period, as Simon's General Counsel testified, there are *no* internal Simon communications indicating that Simon would provide its units to KanAm if it exercised a call right under the JV Agreements.[321]

I next **[*73]** briefly address the non-contractual statements by KanAm during this time period to investors and in audited financial statements, upon which Simon relies in an attempt to show the parties intended and understood that Simon Units were automatically substituted as consideration. Simon points to an October 9, 2007, meeting in Dusseldorf, Germany (the "Dusseldorf Meeting") where according to Simon, KanAm communicated to certain investors and sales people that Simon Units were the required non-cash currency following Mills' exit.[322] The deposition testimony of three investors and sales partners at the Dusseldorf Meeting supports Simon's assertion.[323] Each alleges that Mr. von Boetticher, a KanAm principal and former Mills board member, informed those at the Dusseldorf Meeting, essentially, that there would be no changes to the exit mechanisms and that Simon Units would be substituted.[324] At trial, Mr. von Boetticher did not recall making such statements to investors or any specifics of the meeting itself.[325]

Next, Simon points to communications between Juergen Goebel, a KanAm employee, and a KanAm investor, Albert Hoeller.[326] Hoeller contacted Goebel and inquired about the procedure **[*74]** for liquidation in the future in light of Simon's entry.[327] Goebel replied via email explaining, essentially, that nothing had changed, and that if the buy/sell provisions were triggered "the countervalue [would] be paid out in cash or in the form of Simon units."[328] Simon argues this email is strong contemporaneous evidence of KanAm's understanding of the buy/sell provisions.[329]

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[319] *See* Trial Tr. 909:18-910:19 (Braithwaite). It is difficult to see what non-cash consideration KanAm would be seeking at this time other than Simon Units. It is an irony of this case that in this negotiation KanAm appears to have sought a modification to let it elect Simon Units, while Simon sought to modify the call right to specify cash. If in fact KanAm was seeking Simon Units, I find it nonetheless unhelpful to Simon. Simon declined to *agree* to provide Simon Units, rather leaving the issue open by entering a side letter pegged to non-existent Mills Units.

[320] *Simon I, 2014 Del. Ch. LEXIS 191, 2014 WL 4840443, at *16-17*.

[321] Trial Tr. 258:12-258:20 (Barkley) ("QUESTION: And isn't it the case, sir, as we've talked about in your deposition, that you cannot identify a single internal memorandum or e-mail at Simon where Simon people said to each other during this period of time, from 2007 through and including 2012, 'Simon units will be provided to KanAm under the joint venture agreements'? ANSWER: I don't recall there being anything like that, yes."); *id.* at 285:2-9 (Barkley).

[322] *See* Simon's Post-Trial Opening Br. 36-39.

[323] *See id.* (quoting depositions of Norbert Geisen, Reiner Michael Cramer, Jeorg Dudel).

[324] *See id.*

[325] *See* Trial Tr. 532:8-536:8 (von Boetticher).

[326] *See* Simon's Post-Trial Opening Br. 40-41 (citing JX0352).

[327] *See* JX0352 at 3.

[328] *Id.* at 1.

[329] *See* Simon's Post-Trial Opening Br. 60 (citing JX0352); Simon's Post-Trial Reply Br. 21 (arguing "[t]he information conveyed in Mr. Goebel's email reflected KanAm's contemporaneous understanding").

Additionally, Simon points to KanAm's audited financial statements following Simon's return,[330] which indicated that there was no impact on the KanAm partnership and that the JV Agreements "under certain conditions may require the sale of [KanAm's] interests."[331] KanAm made similar disclosures for several years, from 2008 through 2012, before later updating the financial statements.[332] KanAm asserts that the above language simply reflects that Simon could still exercise the call but KanAm retained the discretion to select units, and that it was simply a "conservative position about what might be 'required.'"[333]

The evidence Simon has put forward regarding the Dusseldorf Meeting, the Goebel email, and KanAm's financial filings is some evidence that KanAm expected that Simon could successfully call **[*75]** based on a tender of Simon Units. It does create conflict in the record about whether it was mutually understood that Simon Units were a viable tender in place of Mills Units. KanAm has asserted that these are "random comments gleaned from non-contractual documents" and that "[t]he contracts, at all times, spoke for themselves and should be enforced as written."[334] While "random comments" is an overstatement, the references are not so widespread within KanAm as to convince me that KanAm had a corporate understanding that Simon Units were acceptable tender, in light of the other evidence cited above. Importantly, as KanAm observes, this information does not present a course of dealing between two contractual parties,[335] and there is no evidence in the record that this information was relied on by Simon. Rather, during this time period, there were no internal communications at Simon reflecting their understanding that Simon Units were appropriate,[336] let alone a reliance on the above statements. I find that when viewed as a whole the extrinsic evidence during this time period, in light of the unambiguous contractual terms, is insufficient to demonstrate that there was a mutual intent, or meeting of **[*76]** the minds, between KanAm and Simon regarding the automatic substitution of Simon Units.

d. Farallon's Exit and Simon's Attempt to Call

Following Simon's break up with Farallon, the 2012 Agreement and Indemnity was reached between KanAm and Simon. Simon points to the 2012 Agreement as supportive of its position that Simon Units were substituted as the appropriate buy/sell consideration despite the language of the contracts.[337] KanAm points out this agreement arose when Simon asked for KanAm's consent regarding its acquisition of Farallon, and in exchange agreed to indemnify KanAm against losses. KanAm observes that there is no mention of the buy/sell provisions in the indemnity agreement nor is there any evidence that the parties intended this agreement to work such a change.[338]

I find the record supports KanAm regarding the 2012 Agreement. First, the Agreement was presented initially to KanAm by Simon's General Counsel, who advised that "[t]here would be no changes required to existing venture agreements at property level companies . . . ."[339] Similarly there is

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[330] *See* Simon's Post-Trial Reply Br. 21-22.

[331] *See, e.g.*, JX0392 at 8-9.

[332] *See, e.g.*, JX0370; JX0392; JX0399; JX0419; JX0467; JX0521 at 13.

[333] *See* KanAm's Post-Trial Sur Reply Br. 30.

[334] KanAm's Post-Trial Answering Br. 6.

[335] *See* KanAm's Post-Trial Sur Reply Br. 27-28 (quoting ***Restatement (Second) of Contracts, § 223(1)*** "[a] course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct").

[336] *See, e.g.*, Trial Tr. 258:12-258:20 (Barkley); *id.* at 285:2-9 (Barkley).

[337] *See* Simon's Post-Trial Opening Br. 60-61.

[338] *See* KanAm's Post-Trial Answering Br. 36-37.

[339] JX0430 at 1; Trial Tr. 216:4-23 (Barkley); *id.* 225:1-5 (Barkley).

no testimony in the record that the parties understood or intended for such a substantial change to be worked to the buy/sell **[*77]** consideration by the 2012 Agreement. In other words, the 2012 Agreement preserved existing contract rights, including KanAm's right to insist on a tender of Mills Units. The 2012 Agreement did not create new rights regarding the call.

I next briefly address the circumstances surrounding the agreements under which KanAm agreed to an extension of the buy/sell exercise period, and Simon's eventual attempted call. When Simon first indicated its interest in exercising the call, KanAm did not immediately raise its current position that it could insist on Mills Units, and could thus thwart the call's operation. KanAm did not raise this issue to Simon until *after* it signed two extensions to the buy/sell window in 2012. The call was not triggered that year, and in the fall of 2012 the Concord Mills JV Agreement was amended; however, no change was made to the buy/sell provision. During this period KanAm offered to renegotiate the buy/sell consideration—including at an in-person meeting with Mr. Simon in 2013. Simon declined, and ultimately initiated this suit while triggering the call provisions. I take from these facts that KanAm, like Simon, was unsure of its ability to insist on Mills Units; **[*78]** it does not demonstrate to me that the parties understood that Simon Units were an agreed to substitute, therefore.

e. The Contractual Terms

In sum, the JV Agreements unambiguously provide for Mills Units meeting certain specifications. There is insufficient extrinsic evidence to demonstrate, by a preponderance of the evidence, that Simon and KanAm shared a mutual intent or reached a meeting of the minds that, despite this unambiguous language, Simon Units could satisfy the call right. No doubt, there has been gamesmanship and strategic silence by both sides spanning their long relationship. While Simon Units were initially contractually-compliant in the three original JVs to which KanAm was an original partner with Simon and Mills, those agreements were amended or restated to remove references to Simon Units. The three other JVs to which Simon was not an original investor never mentioned Simon Units. When the Simon-Farallon JV acquired Mills there was contractual silence regarding these provisions. All sides knew consideration for the call was an unresolved issue, but failed to bargain for a substitute tender. Compounding the problem, in the best chance to address and fully settle the **[*79]** issue, Denver West—the only post-Simon-return JV—Simon as well as KanAm punted on the issue. Unfortunately for Simon, I must therefore enforce the Agreements as written. Absent a showing of mutual intent regarding the substitution of Simon Units, I cannot add an additional term to the unambiguous contractual provisions.

Before leaving a discussion on the meaning of the Agreements, I note that one of the JV Agreements at issue here, Orange City, includes what the parties have identified as unique language relating to successor interests and the substitution of successor units as the proper buy/sell consideration.[340] Simon was not an initial party to the Orange City JV,[341] but became a party following its acquisition of Mills. Like the other JVs at issue, Orange City provides that the default consideration in the event of a call is Mills Units meeting certain specifications.[342] However, the definition of "Mills" or "TMLP"[343] in this JV Agreement was not like

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[340] *See* Post-Trial Oral Argument Tr. 96-97 (arguing on behalf of KanAm that "the fact that it's in one and not in the others doesn't mean I take it from this one and read it into all the others. It tells me that they agreed in this one to this provision and affirmatively did not agree in any other agreement to that term. . . . the language that exists in Orange that does not exist in any of the other joint ventures, and Simon never asked to have it included"); Simon's Post-Trial Opening Br. 17 n.9 (identifying the unique language in the Orange City JV Agreement).

[341] *See* JX0155.

[342] *Id.* at §§ 11.3(d), 11.3(f).

[343] The Orange City JV Agreement's short term for The Mills Partnership is "TMLP"—for clarity I have substituted "[Mills]" for

the others. Specifically, Section 11.2 of the Orange City JV Agreement contains a clause that defines Mills as follows: "[Mills] (which term, for purposes of this Section 11.2 *and Section 11.3 shall be deemed* to include Mezz II GP LLC and *any other Mills Partners*)."[344] The JV further **[*80]** defines Mills Partners as follows: "Mills Partner(s): Collectively, [Mills] and Mezz II GP LLC *and* their respective *Affiliates, successors and/or assigns* who or which *become Partners* in accordance with this Agreement."[345] Finally, the buy/sell consideration provision in Section 11.3 provides that: "[i]f [Mills] is the Offeror . . . unless [KanAm] elects to receive cash, the Buy/Sell Price shall be paid in full in [Mills] [U]nits of limited partnership . . . ."[346] Mills Units is not a separately-defined term. In other words, uniquely with respect to the JV Agreements at issue, under this Orange City Agreement, successors of Mills—like Simon—are specifically included in the definition of Mills, and thus "TMLP [Mills] Units" includes units of any successor of Mills (so long as they otherwise possess the requisite characteristics, including liquidity and tax avoidance, required of compliant Mills Units).

Under this contractual language, Simon points out that, as the successor to Mills, and via Section 11.2's modifier of the definition of "[Mills]" for Sections 11.2 and 11.3, its units are eligible to be explicitly contractually-compliant. As a result, Simon attempts to make a universal point; it asserts that, since KanAm appears **[*81]** to have been indifferent to accepting successor operating partnership units in the Orange City Mills JV, it must be indifferent generally, and I should construe all of the JV Agreements consistent with Orange City Mills. I find the opposite. The fact that KanAm and Mills bargained for successor units to be tender in one JV Agreement makes more significant the fact that they omitted the same provision in the other Agreements. Moreover, in another JV negotiation not at issue here, Mills sought a similar provision, which KanAm rejected.[347]

KanAm, for its part, argues that the definition of Mills to include successors "means only that Simon as a successor to [the Mills Partnership] can exercise the rights that [the Mills Partnership] had; it does not change the specified consideration from Mills Units to Simon Units."[348] I disagree. The parties to the Orange City JV could have, but did not, separately define Mills Units. They could have, but did not, provide that, notwithstanding that Mills is defined as Mills and any successors for the purposes of the buy/sell provision, "Mills Units" *excluded* successor units.[349]

I construe the Orange City JV Agreement as follows: Simon as a successor **[*82]** is to be construed as "TMLP" ["Mills"]; and its units, if otherwise contractually-compliant, are effective Mills Units, which are contractual tender for the call for KanAm's interest in this JV. In support of this finding I note the broad modifier to the Mills definition is located directly within the Article of the JV Agreement covering transfers. The only question remaining is whether Simon, once read into the agreement per the definition, can offer compliant units pursuant to Section 11.3(f). Section

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"TMLP" when quoting the JV Agreement.

[344] JX0155 § 11.2(a) (emphasis added).

[345] *Id.* at § 1.39 (emphasis added); *id.* at § 1.2 (defining Affiliate, "[w]ith respect to any Person, a Person who, directly or indirectly, controls, is under common control with, or is controlled by, that Person," with control meaning "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person").

[346] *Id.* at § 11.3(d).

[347] *See* Trial Tr. 770:16-772:1 (Braithwaite); JX0206 at 18.

[348] KanAm's Post-Trial Answering Br. 56 n.204. *See* Post-Trial Oral Argument Tr. 96 (arguing on behalf of KanAm that "the language doesn't track" to a substitution of Simon Units for Mills Units).

[349] I note that certain other JV Agreements without the broader definition present in Orange City provide in their corresponding payment provisions that "[a]ny TMLP Units received . . . ." rather than the "[a]ny Units received . . . ." language present in the Orange City JV. *Compare* JX0155 § 11.3(f) *with* JX0152 § 11.6(f); JX0170 § 11.3(f). That is, unlike with other JVs, the payment provision in Section 11.3(f) of Orange City omits the direct reference to TMLP Units, indicating that successor units were contemplated.

11.3(f) provides that: "[a]ny Units received by [KanAm] pursuant to this Section 11.3 shall have substantially the same rights (including redemption, conversion, registration and anti-dilution protection) as attached to units issued in connection with the formation transactions of [Mills Partnership] and Mills Corp . . . ."[350] The majority of the briefing in this matter did not focus on this narrow issue. The evidence at trial made clear that there are differences, from KanAm's perspective, between Simon and Mills Units. The parties differ as to the materiality of those differences. To be compliant, however, successor units in the Orange City JV need not be identical to any particular Mills Units; they only need to provide substantially **[*83]** the same rights in the four delineated areas.

Simon asserts that both parties agree these narrower requirements are met with respect to Simon Units.[351] While the record as it has been presented tends to support this assertion,[352] in light of the absence of an explicit focus on this issue I will permit the parties to submit supplemental memoranda referencing the record on this issue if a stipulation cannot be reached as to whether compliant successor units have been tendered with respect to the Orange City JV.[353]

B. The Material Breach Doctrine

I next turn to a discussion of the doctrine of material breach. Simon argues that "[e]ven if the Court were to find that the extrinsic evidence does not show that the parties intended for the call right to be operative under the present circumstances, KanAm's effort to escape its obligations independently fails because Simon's willingness to deliver the buy/sell price in cash or Simon Units is not a material breach of the JV Agreements that would excuse KanAm's performance."[354] Simon's argument is perhaps better stated as that it stands ready to substantially perform, and thus I should specifically enforce KanAm's reciprocal obligation to sell. **[*84]** Nonetheless, I will in this discussion refer to Simon's position as one of "non-material breach." KanAm, for its part, asserts that the buy/sell provisions are contractual options to purchase and pursuant to Delaware law are to be strictly construed.[355] Further they assert that specific contractual "default provisions" in the JV Agreements bar the doctrine of substantial performance.[356]

I first note that the call provision operates as an option; Simon has the right to purchase KanAm's interest in each JV at certain contractually-provided times. The price to be paid is pegged to appraised value, and must be paid (absent an election by KanAm to take cash) in the equivalent value of units of the Mills Partnership. In order to trigger its right to purchase, Simon must comply with the conditions set forth in the contract. Specific performance of an option contract requires strict adherence to these conditions. I find Simon's argument that it is not in material breach to be inapposite. Having failed to satisfy the conditions for the call, it cannot enforce the contract, as contractual provisions in option contracts are construed strictly. Moreover, specific contract language reinforces the point—the **[*85]** notice of the call, per the JV Agreements, is voidable absent compliance with the conditions necessary to compel the sale. My reasoning is explained in more detail below.

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[350] JX0155 § 11.3(f).

[351] *See* Simon's Post-Trial Reply Br. 33 (asserting that "[t]he parties agree that Simon Units satisfy [the tax deferral] central purpose and are indistinguishable with respect to redemption, conversion, registration, and anti-dilution — the only other characteristics of units identified in the buy/sell provisions").

[352] *See, e.g.*, Trial Tr. 1168:4-1169:15 (Fick); *id.* at 1275:10-1276:1 (Croker).

[353] I note my commentary here is limited *only* to these particular factors.

[354] Simon Post-Trial Opening Br. 64.

[355] KanAm's Post-Trial Answering Br. 51-52.

[356] *Id.* at 52-53.

Simon's argument that it is not in material breach turns on a doctrine designed to prevent a non-material deviation from the requirements of a contract from depriving a party of its expectations thereunder. Stated simply, it is a doctrine to prevent oppression through fortuity. ***HN6***[⬆] Generally, under Delaware law, a breach will be deemed material if "touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract."[357] If a breach is not material, performance by the injured party is generally not excused and refusal to perform by the injured party may itself constitute a breach.[358] That is, "a slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract."[359] The question of whether a breach is material sufficient to justify non-performance entails a fact-specific weighing analysis.[360] ***HN7***[⬆] To determine whether a breach is material, Delaware courts have looked to the factors provided **[*86]** by *Section 241 of the Restatement (Second) of Contracts*.[361] The Restatement factors are as follows:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[362]

The parties spent much time at trial on this issue, establishing by evidence the similarities and differences between Mills and Simon Units, which I summarize briefly below. As stated above, among the prime concerns of KanAm is that the consideration provide tax benefits as well as liquidity for its members. Simon Units, I note, do provide liquidity and are congruent, but not identical, with respect to tax consequences and risks.

Both Simon and Mills were structured **[*87]** as umbrella partnership real estate investment trusts ("UPREITS"). This entity structure, for both Simon and Mills, facilitated liquidity and tax benefits. As an UPREIT, Simon could provide limited partnership units of the Simon Partnership (Simon Units) that were redeemable for cash or stock. The assets themselves, the interests in the properties, were held at the partnership level. Upon redemption, the distributed Simon Units could convert into either cash or publicly traded stock of the parent REIT—Simon Corp. This process would generally permit a counterparty in a JV to secure non-recognition tax treatment—that is, generally speaking, an exchange of an interest in a JV for such units is not a taxable event under the United States tax code.[363] Mills' entity structure generally mirrored that of Simon, it offered units of Mills Partnership (Mills Units) that were redeemable and upon redemption could convert into publicly traded shares of Mills Corp.[364] Thus, at a general level the operation and purpose of Mills Units and Simon Units was similar.

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[357] *Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc., 2013 Del. Ch. LEXIS 190, 2013 WL 3934992, at *11 (Del. Ch. July 24, 2013)* (citations omitted).

[358] *See BioLife Sols., Inc. v. Endocare, Inc., 838 A.2d 268, 278 (Del. Ch. 2003)*.

[359] *Id.* (citations omitted).

[360] *See id.*

[361] *See, e.g., id.*

[362] ***Restatement (Second) of Contracts § 241*** (1981).

[363] *See* Trial Tr. 154:5-155:3 (Simon).

[364] *See id.*

Simon and Mills as entities, however, were distinct in terms of size, portfolio composition,[365] and their historical relationship to KanAm. **[*88]** The record supports that KanAm investors had a level of familiarity with Mills which they did not possess with Simon. KanAm contributed assets to Mills at Mills' inception. Historically, KanAm had a large ownership stake in Mills—up to 41% at the time of the original Mills IPO; thus, the record supports a finding that when KanAm bargained to receive Mills Units, it had some reasonable expectation that it could influence the actions of Mills. Additionally, for almost two decades KanAm had three representatives on Mills' Board, which evinces a special ability to monitor and participate in Mills that did not exist with Simon. Mills, as a smaller entity, had a higher proportion of projects that were core to its business and unlikely to be sold, which sales themselves could trigger negative tax consequences.[366] Simon, on the other hand, had a strategy of "aggressively recycling capital" which means they were more likely to exit JV projects, an event which could trigger tax consequences.[367] Further, empirically, when given the chance upon Simon's re-entry, only a small minority of KanAm investors elected to exchange their Mills Units for Simon Units.[368] KanAm asserts that its contracts did not reflect **[*89]** an agreement to put its tax and economic destiny in the hands of the larger, and less familiar, Simon Entities. Simon points out, however, that none of this alleged unique relationship was disclosed contemporaneously to KanAm investors when it entered certain JVs that provided for both Mills and Simon Units.[369]

The evidence indicates that payment in Simon Units could result in administrative and tax consequences for KanAm and its investors, beyond those inherent in Mills Units.[370] If so, the injury to KanAm, for the most part, is not calculable *ex ante*, as the tax consequences are in the form of heightened tax risks that would depend on later determinations by regulatory authorities or actions by Simon.[371] For example, German regulators would look to Simon's approximately 600 US based LLCs and apply a multi-factor test to each LLC for "opacity," a finding of which would trigger additional tax consequences.[372] KanAm observes that German tax authorities have already reviewed certain joint tax filings of KanAm and *Mills*, on the other hand, and accepted the classifications of taxation provided.[373] Similarly, KanAm argues that if Simon were to add 6,000 German investors as limited partners **[*90]** further tax risks—arising from potential classification as a publicly-traded-partnership—would be triggered.[374]

In rebuttal, Simon points out that the only relevant tax protection actually contained in the JV Agreements is non-recognition tax treatment pursuant to *Section 721*, and argues that KanAm's professed current concern about these additional tax risks is litigation-driven.[375] Simon observes that

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[365] I note that the investments were generally in specific projects, however, upon conversion the broader portfolio would be relevant because a particular unit or stock's value would be tied to the broader portfolio.

[366] *See* Trial Tr. 389:14-17 (Foxworthy) (testifying that were Mills to lose certain of the JVs at issue here, it would have been "a terrible infringement of their franchise"); JX0613 at 47.

[367] *See* Trial Tr. 107:8-108:14 (Simon).

[368] *See* Pretrial Stip. 14; Trial Tr. at 1016:23-1018:24 (Hammond).

[369] *See* Simon's Post-Trial Reply Br. 34-35. KanAm chalks this up to being a "simple omission" and asserts these "1990s statements do not relate to the operative JV Agreements." KanAm's Post-Trial Sur Reply Br. 38.

[370] I note that there was not a similar services agreement reached between Simon and KanAm, in contrast to the services agreement between KanAm and Mills discussed in the factual background section. *See* Trial Tr. 1018:15-22 (Hammond).

[371] *See generally* JX0614.

[372] *See, e.g.*, Trial Tr. 1358:10-1359:16 (Riha); *id.* at 1366:7-1368:8 (Riha).

[373] *See* JX0614 at 19.

[374] *See* KanAm's Post-Trial Answering Br. 70 (citing JX0613 at 71-80).

[375] *See* Simon's Post-Trial Reply Br. 33 (arguing Simon Units satisfy the tax deferred central purpose and are "indistinguishable" with respect to the other listed characteristics).

none of the tax risks now raised in litigation were communicated to KanAm investors via the prospectuses issued when Simon was a counter-party, and that KanAm did not bargain for the protections they now seek.[376] Simon also observes that its units provide the requisite liquidity, conversion, and redemption qualities specified in the JV Agreements.

Finally, for the reasons laid out in painful detail in the factual background and extrinsic evidence analysis above, the record is unhelpful to Simon with respect to the equitable considerations under the Restatement analysis. Simon will not be deprived of a *reasonable* expectation of a benefit; the problem of the appropriate call-right tender was known by Simon from the time of the Simon-Farallon JV, and it chose to roll the **[*91]** dice rather than negotiate the issue. For similar reasons, KanAm's position is equitably weak.

The foregoing recitation should demonstrate that a determination of the materiality of the difference between Simon and Mills Units, from the point of view of the parties under the factors discussed above, is an issue both fact-intensive and difficult. Here, however, I need not reach a conclusion under the material breach doctrine, as under the terms of the contracts, I find the analysis inapt.[377]

The call right functions as an option. KanAm has contractually agreed to sell its interest in each JV to Simon, at Simon's option, in exchange for a number of Mills Units to be determined by the appraised value of KanAm's interest at the time sold. Regarding option contracts, the treatises indicate that precise compliance with the terms of the option is required before the sale is enforced. ***HN8***[↑] The doctrine of non-material breach (or substantial compliance) is generally inapplicable to option contracts because a true forfeiture is not involved—each party retains its original interest—and the one—sided nature of such contracts, if not strictly construed, could allow, in effect, unilateral modification. **[*92]** As Williston on Contracts states:

> [w]hen the optionee decides to exercise its option, it must act unconditionally and according to the terms of the option . . . . Nothing less than an unconditional and precise acceptance will suffice unless the optionor waives one or more of the terms of the option. . . . Because the option itself affords the offeree protection against the offeror's inconsistent action, the general attitude of the courts is to construe the attempt to accept the terms offered under the option strictly. The problem of a potential forfeiture does not enter into the matter.[378]

The Restatement (Second) of Contracts is similar:

> [d]espite equity's dislike of forfeitures, . . . requirements governing the time and manner of exercise of a power of acceptance under an option contract are applied strictly. It is reasoned that any relaxation of terms would substantively extend the option contract to subject one party to greater obligations than he bargained for.[379]

Here, KanAm bargained for Mills Units. To the extent I treat the call right as an option, deviation from the terms of the offer cannot be excused as a non-material breach. Simon argues strenuously that it would be unfair to treat the **[*93]** call right as a simple option. It rightly points out that I must read contracts as a whole, and that the call right is but a bargained-for portion of a larger contract; it argues that it has already performed under the contract and

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[376] *Id.* at 34. Simon also denies that such tax risks are legitimate.

[377] I note, in any event, were I to invoke the doctrine, it is exceedingly difficult for me to see how providing consideration *not* in the form bargained for under the terms of the applicable contracts, between sophisticated parties, would not be a material breach. With respect to the buy/sell provisions, the nature of the consideration is naturally material; it is the gravamen of the agreement.

[378] 1 WILLISTON ON CONTRACTS § 5:18 (4th ed. 2006) (footnotes omitted).

[379] ***Restatement (Second) of Contracts § 25***, Rpt. Note ***cmt. d*** (2008). *See Liberty Prop. Ltd. P'ship v. 25 Massachusetts Ave. Prop. LLC, 2008 Del. Ch. LEXIS 197, 2008 WL 1746974, at *17 n.75 (Del. Ch. Apr. 7, 2008)* (quoting *id.*).

that it will be denied the full benefit of its bargain if the call can only be consummated with non-existent Mills Units. Treating a call right imbedded in a larger contract with other reciprocal obligations as an option is problematic, as Simon points out. The record indicates that the right to buy out counterparties as the projects mature was an important part of the JVs. Simon's contentions would be more persuasive here, however, if a reasonable expectation of Simon was that *Simon Units would be accepted by KanAm*. The record, however, shows that Simon was aware that at least an issue existed with respect to proper consideration, yet elected to proceed with the JVs regardless.

Treatment of the call under these particular JV Agreements as an option—acceptance of which must be strictly construed—finds support in the provisions of the JV Agreements themselves. The contracts at issue require strict compliance with the buy/sell provisions in order to consummate **[*94]** the call. The "default provision," which is contained in each agreement at issue,[380] provides that "if at the time of Closing, either party *fails to perform as required*, then and in such event the non-breaching party *shall have the right to void the Buy/Sell Notice attributable thereto* ***or*** to pursue any rights at law or in equity (including without limitation, instituting a suit for specific performance)."[381] As I have already found, the Plaintiffs have failed to show by a preponderance of the evidence that there was a meeting of the minds with respect to Simon Units being contractually-compliant substitute units. Rather, the contracts unambiguously require tender of Mills Units meeting certain specifications. The Plaintiffs are trying to perform the contract by offering non-compliant Simon Units. Simon has therefore failed to perform as required under the JV Agreements, and the bargained-for provision that if "at the time of Closing, either party *fails to perform as required*, then and in such event the non-breaching party *shall have the right to void the Buy/Sell Notice attributable thereto* . . ." has been triggered.[382]

KanAm has a contractual right to void non-compliant notices pursuant **[*95]** to the JV Agreements. Enforcement of the call right under the doctrine of non-material breach would render this bargained-for contractual right surplusage. Stated another way, the non-breaching party always has a right to avoid performance in the event of a material breach. If the contractual right to void the buy/sell notice simply meant KanAm may avoid closing only in the event of a material breach, it would do no actual work in the contract. A fair reading of this provision is that in the event a party fails to comply with the requirements to exercise the buy/sell provision, the non-breaching party can void the notice. I find KanAm's assertion that such a provision was put into these contracts, at least in part, to avoid a "close enough" argument persuasive.

Finally, I pause to briefly address Simon's requested relief. The agreements in question were to conduct joint ventures. The call right gives Simon the right to buy out its counterparty for a specific consideration at a specific time. Simon seeks specific performance of that contractual right to purchase the KanAm interests, with Simon Units or cash, thereby forcing KanAm out of the JVs.[383]

In order for equity to force KanAm to sell, **[*96]** Simon must demonstrate that it has complied with

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[380] *See* JX0027 § 11.3(e)(iv); JX0122 § 11.3(e)(iv); JX0120 § 11.3(e)(iv); JX0152 § 11.6(e)(iv); JX0155 § 11.3(e)(iv); JX0170 § 11.3(e)(iv); JX0342 § 11.3(e)(iv).

[381] JX0152 § 11.6(e)(iv) (emphasis added). I note that while Simon asserts that this section alone is insufficient to void the buy/sell notices absent a showing of material breach, it relies on the second clause of this section in support of its argument that this contractual provision "alone is sufficient" to grant specific performance. *See* Simon's Post-Trial Opening Br. 75; Simon's Post-Trial Reply Br. 47.

[382] *See* JX0152 § 11.6(e)(iv) (emphasis added).

[383] While enforcement of the contract specifically is the primary relief requested, I note that Simon has also pursued damages on the theory that Simon Units are contractually-compliant and that by refusing to accept them and exit the JVs, KanAm breached—it seeks restitution for distributions after the attempted exercise of the call.

the contract and is able to perform. HN9[↑] Delaware courts will specifically enforce a contract only if the party seeking relief establishes that "(1) a valid, enforceable, agreement exists between the parties; (2) the party seeking specific performance was ready, willing, and able to perform under the terms of the agreement; and (3) a balancing of the equities favors an order of specific performance."[384] Further, "[t]he decision as to the availability of specific performance rests within the sound discretion of this Court."[385] Additionally, "specific performance [is] an extraordinary remedy, not to be awarded lightly," and a "party seeking specific performance must *prove by clear and convincing evidence* that she is entitled to specific performance and that she has no adequate remedy at law."[386]

As detailed above, Simon was *not* capable of performing *under the terms* of the agreements—it failed to provide the contractually required currency. Further, in light of its knowledge of, but failure to address, the issue of consideration in the JV Agreements, Simon would find difficult its burden to show by clear and convincing evidence that equity would favor **[*97]** specific performance even if I had found that Simon Units were contractually-compliant.

C. The Implied Covenant of Good Faith and Fair Dealing

I next turn to Simon's claim arising under Count III of its Complaint, which asserts that KanAm violated the implied covenant of good faith and fair dealing by demanding non-existent Mills Units. This Court's summary judgment opinion briefly addressed this issue stating that "as the JV Agreements do not address the unavailability of Mills Units, the Plaintiffs' allegation that the Defendants have breached their implied duty of good faith and fair dealing is not precluded by our case law."[387] I now revisit this issue in light of the fully developed factual record from trial.

As our Supreme Court has explained HN10[↑] the implied covenant "is a limited and extraordinary legal remedy."[388] Generally, "the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[389] The implied covenant, however, is limited to a gap filling role. The "implied covenant of good faith and fair dealing involves . . . inferring **[*98]** contractual terms to handle developments or contractual gaps that . . . neither party anticipated."[390] However, "[i]t does not apply when the contract addresses the conduct at issue."[391] In the same vein, "[t]he implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider . . . ."[392] Additionally, the covenant is "not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract."[393] Finally, "[a] party does not act in bad faith by relying on contract provisions for which that party

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[384] *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp., 2009 Del. Ch. LEXIS 17, 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009)* (citations omitted).

[385] *Id.* (citation omitted).

[386] *Halpin v. Riverstone Nat'l, Inc., 2015 Del. Ch. LEXIS 49, 2015 WL 854724, at *5 (Del. Ch. Feb. 26, 2015)* (citations omitted) (emphasis added).

[387] *Simon I, 2014 Del. Ch. LEXIS 191, 2014 WL 4840443, at *14*.

[388] *Nemec v. Shrader, 991 A.2d 1120, 1128 (Del. 2010)*.

[389] *Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 442 (Del. 2005)* (internal quotations omitted).

[390] *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC, 112 A.3d 878, 896 (Del. 2015)* (quoting *Nemec, 991 A.2d at 1125*) (alterations provided by the Supreme Court in *Northpointe Holdings*).

[391] *Id.* (citation omitted).

[392] *Nemec, 991 A.2d at 1126*.

[393] *Id. at 1128*.

bargained where doing so simply limits advantages to another party."[394]

Simon asserts "that KanAm has violated the implied covenant of good faith and fair dealing by attempting to defeat Simon's exercise of the call right by purporting to 'choose' payment in non-existent Mills Units."[395] Simon argues that "KanAm has intentionally frustrated Simon's fundamental rights" to exercise the call by voiding the buy/sell notices arbitrarily and unreasonably.[396] Simon alleges that KanAm's interpretation is "especially unreasonable given **[*99]** KanAm's position that its put right remains fully intact" and that "the parties did not and never would have agreed to such an unfair arrangement had they thought to negotiate with respect to the matter."[397] KanAm counters that there is no gap to be filled here—that the parties expressly were aware that the JV Agreements required tender of Mills Units, and yet there was a decision on both sides to not address a replacement currency.

Simon's position, in my view, is not supported by our law or the facts of this matter. This is not a case where the parties never considered that exercise of an option would be frustrated by an unexpected happenstance. Dispositive, I think, of Simon's claim is the fact that while there was contractual silence on this issue from both sides, the issue was not unknown to the parties—each side independently identified the potential issue, attempts were made to negotiate it, but no agreement was ever reached. That is, the circumstances the parties found themselves in—a call provision that explicitly provides the seller the option to require unavailable units as consideration—was recognized by all, but no agreement was reached. A party, after consciously avoiding **[*100]** an issue, cannot seek rescue through the implied covenant, and I may not provide through equity what the parties failed knowingly to provide for themselves. Further, nothing in the record supports the implication that the parties would have agreed to the automatic substitution that Simon seeks through the implied covenant. Since I cannot know what resolution the parties would have reached through negotiation, relief via the implied covenant is unavailable.

D. Waiver/Estoppel

1. Waiver

Simon asserts that KanAm waived any right it had to insist on Mills Units via its words or conduct over the course of several years, during which, according to Simon, KanAm demonstrated an understanding that Simon Units were acceptable non-cash consideration. KanAm observes that Simon was aware of the JV Agreements' terms and that KanAm "had no duty to tell Simon that the contractual Buy/Sell Provisions meant what they say."[398]

HN11[↑] It is well-settled that a party may waive her contractual rights; as our Supreme Court has explained, "[w]aiver is the voluntary and intentional relinquishment of a known right."[399] Delaware Courts will find a waiver upon a showing "(1) that there is a requirement or condition capable of being waived, **[*101]** (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition."[400] Waiver involves "knowledge of all

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[394] *Id.*

[395] Simon's Post-Trial Opening Br. 69.

[396] *Id.*

[397] *Id.* at 70. I note, in light of my findings, which effectively render the call right unenforceable, it remains to be determined whether KanAm's put right remains operative, and whether, in equity, it could enforce such a right. The put and call were obviously negotiated to be reciprocal, and the continued vitality of the put is problematic.

[398] KanAm's Post-Trial Answering Br. 79.

[399] *Realty Growth Inv'rs v. Council of Unit Owners, 453 A.2d 450, 456 (Del. 1982)* (citations omitted).

[400] *Amirsaleh v. Bd. of Trade of City of N.Y., 27 A.3d 522, 530 (Del. 2011)* (citation omitted).

material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights."[401] The standard for demonstrating waiver is "quite exacting;" because waiver is redolent of forfeiture, "the facts relied upon to demonstrate waiver must be unequivocal."[402]

In support of its waiver claim, Simon points to statements allegedly made at the Dusseldorf Meeting and the Goebel email exchange, as both representing "unequivocal expression of KanAm's intent to waive any right to insist on receiving non-existent Mills Units."[403] Additionally, Simon points to KanAm's dealings with Brookfield, including Braithwaite's undisclosed agreement in principle, to negotiate in good faith the buy/sell consideration, despite his service on the Mills board.[404] Simon asserts that "KanAm had an obligation in good faith to raise" the issue in connection with the Simon-Farallon JV's acquisition of Mills.[405]

Simon has failed to demonstrate KanAm's knowing and unequivocal waiver of the right to insist on receiving **[*102]** Mills Units; that is, the facts relied upon in an attempt to prove waiver are *not* unequivocal in nature. While the allegations surrounding the Dusseldorf Meeting and the Goebel email do indicate that certain individuals at KanAm thought it might be compelled to accept Simon Units, they do not demonstrate an intentional and knowing relinquishment of a right. These statements were not made directly to Simon—there were no such communications by KanAm to Simon. However, during the general time period of the Goebel email and Dusseldorf Meeting, in late 2007,[406] the Denver West negotiations occurred where Simon itself refused to provide Simon Units and insisted on cash consideration for the buy/sell agreement. KanAm informed Simon there were broader issues at play arising under the buy/sell provisions awaiting resolution. Similarly, the executed Denver West side-letter was pegged to resolution of an existing dispute, that is, what the parties might later "agree" or "determine" would apply to the Colorado Mills JV Agreement, which itself provided for Mills Units. The Denver West negotiation clearly reveals that the parties were aware that the consideration issue was unsettled and required "agreement," **[*103]** or judicial "determination," and cuts strongly against a clear and unequivocal waiver. Following Denver West, Simon simply points to several years of silence on the issue. This is insufficient to demonstrate waiver. I note that the condition to be waived—payment in Mills Units—would not arise until the buy/sell was triggered, making KanAm's silence on this issue less persuasive. I find Simon has failed to make a sufficient showing of the required elements of waiver.

2. Quasi-Estoppel

Simon has also asserted that KanAm is estopped from insisting on the contractually required default consideration.[407] Specifically, Simon argues that the doctrine of quasi-estoppel prevents KanAm from asserting a position "inconsistent with a

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[401] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc., 871 A.2d 428, 444 (Del. 2005)* (citation omitted).

[402] *Amirsaleh, 27 A.3d at 529* (internal quotations omitted). *See Kallop v. McAllister, 678 A.2d 526, 532 (Del. 1996)* ("Waiver, however, requires more than mere inaction. To substantiate his waiver defense, [the defendant] needed to show that [the plaintiff] intentionally relinquished his right to rely on the Letter Agreement.") (citations omitted).

[403] Simon's Post-Trial Reply Br. 44-45.

[404] Simon's Post-Trial Opening Br. 71.

[405] *Id.* at 72.

[406] The Goebel email exchange occurred in December 2007. JX0352. The Dusseldorf meeting was held on October 9, 2007. *See* Simon's Post-Trial Opening Br. 36. The Denver West side letter was executed on October 17, 2007. JX0348.

[407] *See* Simon's Post-Trial Opening Br. 73-75; Dkt. No. 115. While the doctrine of equitable estoppel was specifically pled, it was not clearly pursued in post-trial briefing and to the extent it is not deemed waived, the elements have not been proven. Reasonable reliance, an element of equitable estoppel, is lacking under the facts here.

position it has previously taken."HN12[] [408] Generally, quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position it has previously taken."[409] Importantly, unlike traditional estoppel, this Court has explained that a "party does not need to show reliance for quasi-estoppel to apply."[410] However, the standard remains high, as our Supreme Court has explained "the doctrine of quasi-estoppel applies *when it would be unconscionable* ***[*104]*** *to allow* a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit."[411] Further, quasi-estoppel requires a showing that the "party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another."[412]

In support of its quasi-estoppel argument, Simon again points to the Goebel email exchange and the Dusseldorf Meeting.[413] Again, Simon's reliance is not at issue, so the fact that these representations were not made to Simon is of little moment. The record, including the Denver West negotiation, shows, however, that there was a legitimate disagreement at the time, between these parties, regarding non-cash consideration. I decline to find that KanAm's conduct here, via certain statements to investors, rises to the level of unconscionability needed to invoke the doctrine of quasi-estoppel. KanAm, while strategically silent at certain points, has not engaged in a shocking shift in position amounting to unconscionable action; in other words, a decision to stand on the bargained-for language of the contracts does not shock the conscience. I find there is an absence of the type of "self-interested **[*105]** 180 degree turn" which has led to the application of the doctrine in prior cases.[414] Enforcing the contracts as written here would not offend equitable principles.

E. KanAm's Counterclaim

I now turn to KanAm's Counterclaim.[415] The Counterclaim alleges breach of contract by Simon for knowingly providing invalid buy/sell notices in breach of the buy/sell provisions of the JV Agreements and seeks a declaratory judgment.[416] KanAm seeks damages arising from this purported breach, including but not limited to the cost of the appraisal process that was triggered following Simon's delivery of the notices.[417] Finally, in addition to a request for damages, KanAm seeks fees pursuant to the JV Agreements along with pre- and post-judgment interest.[418] Each remaining aspect of the Counterclaim is briefly addressed below.

1. Breach of Contract and Damages

KanAm HN13[] bears the burden of proving every element of its breach of contract claim, including damages, by a preponderance of the evidence. KanAm's theory for breach appears to be as follows: the buy/sell notices were defective because Simon could not tender the default

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[408] Simon's Post-Trial Opening Br. 73.

[409] *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc., 2008 Del. Ch. LEXIS 55, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008)* (internal quotations omitted).

[410] *Barton v. Club Ventures Investments LLC, 2013 Del. Ch. LEXIS 284, 2013 WL 6072249, at *6 (Del. Ch. Nov. 19, 2013)* (citation omitted).

[411] ***RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 872-73 (Del. 2015)*** (internal quotations omitted) (emphasis added).

[412] ***Id. at 873*** (internal quotations omitted).

[413] *See* Simon's Post-Trial Opening Br. 74.

[414] *See Pers. Decisions, Inc., 2008 Del. Ch. LEXIS 55, 2008 WL 1932404, at *7*.

[415] I need not address KanAm's affirmative defenses in light of my findings above.

[416] *See* Dkt. No. 110 ¶¶ 44-54. I note the timeliness of the Concord Mills notice was not pursued in post-trial briefing.

[417] *See id.* at ¶ 50.

[418] *Id.* at Prayer For Relief; Pretrial Stip. 33.

consideration, the notices still triggered the mandatory appraisal process, and **[*106]** KanAm incurred the costs of that appraisal process.[419] But KanAm has not demonstrated breach of the agreement. KanAm acknowledges that Simon had the right to call, which it did. A contractual appraisal of KanAm's interest resulted. At that point, KanAm had the option to accept cash or demand Mills Units. It elected the latter. Simon was unable to perform, triggering KanAm's right to void the call. No breach occurred. Similarly, the costs of the appraisal are not "damages" but rather an expense of the JV triggered pursuant to contract.

While this is a legal, not an equitable, claim, I note that KanAm, like Simon, avoided bringing the consideration issue to a head by its strategic silence; it can hardly complain equitably that Simon sought to tender Simon Units.

Finally, the Counterclaim seeks declaratory relief on two remaining points which were litigated to conclusion:[420] first, that the JV Agreements require Simon to pay in Mills Units unless KanAm elects cash, and second, that Simon cannot enforce its call right by tendering Simon Units.[421] In light of my discussion above, and setting aside the Orange City JV, KanAm's request for declaratory relief is granted.

2. Fees and Interest

Each **[*107]** side has sought fees in connection with this action pursuant to the fee shifting provisions in the JV Agreements.[422] The fee provision both parties rely on provides "[i]n the event the Partnership or any Partner (or its Affiliates) institutes litigation" which asserts a claim arising out of the JV Agreements or relating to the project, or the partnerships, "the parties hereto agree that the prevailing party in such litigation or administrative action shall be entitled to recover its out-of-pocket costs and expenses of defending or maintaining such litigation or administrative action, including without limitation, attorneys' fees."[423]

The JV Agreements thus provide a broad fee-shifting provision to a covered party who is successful in litigating issues arising out of the JV Agreements. Both sides assert that the present litigation is covered by the provision.[424] Our Supreme Court has explained that:

> *HN14*[] [u]nder the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs. An exception to this rule is found in contract litigation that involves a fee shifting provision. In these cases, a trial judge may award the prevailing party all of the costs it **[*108]** incurred during litigation. Delaware law dictates that, in fee shifting cases, a judge determine whether the fees requested are reasonable.[425]

KanAm, as the prevailing party, is entitled to fees with respect to the bulk of Simon's claims. Simon, in turn, prevailed on the Counterclaim and may yet prevail on the Orange City claim. If, after resolution of the Orange City matter, the parties cannot agree on a fee award, they should so inform me, and I will address the issue.

IV. CONCLUSION

For the reasons set forth above, I find that the

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[419] *See* KanAm's Post Trial Sur Reply Br. 51.

[420] *See* Dkt. No. 110 at ¶ 54.

[421] *Id.*

[422] *See* Simon's Post Trial Opening Br. 76-77; KanAm's Post Trial Sur Reply Br. 52-53.

[423] *See* JX0066 § 14.9 (emphasis added). *See also* Simon's Post Trial Opening Br. 77 (citing JX0066 § 14.9). Because the parties have not differentiated the fee provisions in the JV Agreements, I assume they are sufficiently similar to the above cited language by the Plaintiffs.

[424] *See* Simon's Post Trial Opening Br. 76-77; KanAm's Post Trial Sur Reply Br. 52-53.

[425] *Mahani v. Edix Media Grp., Inc., 935 A.2d 242, 245 (Del. 2007)* (citations omitted).

Plaintiffs' request to enforce its call right (setting aside the Orange City JV) is denied; that the Defendants' request for declaratory judgment is granted, and that the Counterclaim is otherwise dismissed. The parties should confer and agree on a method to address the outstanding issues regarding the Orange City JV, as well as fees and costs.

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Techmer Accel Holdings, LLC v. Amer

Court of Chancery of Delaware

November 16, 2010, Submitted; December 29, 2010, Decided

C.A. No. 4905-VCN

Reporter
2010 Del. Ch. LEXIS 252 *; 2010 WL 5564043

TECHMER ACCEL HOLDINGS, LLC and ACCEL CORPORATION, Plaintiffs/Petitioners, v. NANCY AMER, CRESCENT PRIVATE CAPITAL L.P. and CRESCENT GATE PARTNERS L.L.C., Defendants/Respondents.

Subsequent History: Reargument denied by Techmer Accel Holdings, LLC v. Amer, 2011 Del. Ch. LEXIS 20 (Del. Ch., Feb. 8, 2011)

Prior History: Techmer Accel Holdings, LLC v. Amer, 2010 Del. Ch. LEXIS 258 (Del. Ch., July 27, 2010)

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Judges: NOBLE, Vice Chancellor.

Opinion by: NOBLE

Opinion

MEMORANDUM OPINION

NOBLE, Vice Chancellor

I. INTRODUCTION

This memorandum opinion addresses cross-motions for summary judgment as to Count I of the Plaintiffs' Complaint by which they seek nullification of the certificates of cancellation filed on behalf of Defendants Crescent Private Capital, L.P. ("Crescent" or the "Limited Partnership") and Crescent Gate Partners, L.L.C. ("Crescent Gate"). The Plaintiffs, also in Count I, seek appointment of a receiver to manage the affairs of Crescent under 6 *Del. C.* § 17-805.

In essence, the Plaintiffs contend that Defendant Nancy Amer ("Amer") and Crescent Gate caused Crescent to wind up in contravention of the requirements of 6 *Del. C.* § 17-804 by failing to provide for Crescent's contingent liabilities owed to them. The parties, **[*2]** however, fundamentally disagree as to the proper application of that statutory provision. For that reason, each side reaches a result completely contrary to the other as to whether Crescent was properly wound up before its cancellation. Because Count I of the Complaint turns primarily on the operation of § 17-804, the Court must come to an understanding of that statutory provision and then determine its relevance, if any, to the undisputed facts presented to it.

II. BACKGROUND

A. *The Parties*

The Plaintiffs are Techmer Accel Holdings, LLC ("Techmer Accel"), a wholly-owned subsidiary of Techmer PM, and Accel Corporation ("Accel") (collectively, "Techmer"). Techmer Accel is a Delaware limited liability company with the sole purpose of owning 100% of Accel. Accel is a Delaware corporation in the business of compounding plastic color and additives. In March 2008, a wholly-owned subsidiary of Techmer PM merged with and into Accel.

Crescent, a Delaware limited partnership, was the majority stockholder of Accel before the merger. A certificate of cancellation, effective as of April 30, 2009, was filed on behalf of Crescent with the Delaware Secretary of State on April 21, 2009.

Crescent Gate, a **[*3]** Delaware limited liability company, was the general partner of Crescent. A certificate of cancellation was filed on behalf of Crescent Gate with the Delaware Secretary of State on April 21, 2009. Unlike the certificate of cancellation filed for Crescent, the certificate of cancellation for Crescent Gate did not specify an effective date.

Amer was designated as the stockholders' representative for Accel's shareholders under the Agreement and Plan of Merger dated March 20, 2008 (the "Merger Agreement"), through which Techmer Accel acquired Accel.

B. *Factual Background and Procedural History*

Crescent was formed as a Delaware limited partnership under the Delaware Revised Uniform Limited Partnership Act (the "DRULPA") on November 2, 1998.[1] Crescent Gate, of which Amer was a managing member, served as Crescent's general partner.[2] Crescent sought to produce significant returns for its partners primarily "by making, holding and disposing of privately negotiated equity and equity-related investments . . . ."[3]

Crescent's last remaining portfolio company was Accel.[4] Because it was in "the process of winding up its affairs," Crescent wanted to divest its stake in Accel.[5] This objective would be achieved under the Merger Agreement by which Techmer PM agreed to merge its wholly-owned subsidiary with Accel.[6] In return, Crescent received $4,355,235.68 in merger consideration when the merger closed on March 31, 2008.[7]

In the Merger Agreement, "the stockholders of Accel indemnified Techmer for breaches of certain representations and warranties of Accel."[8] The agreement capped such indemnification, however, at 10% of the total merger proceeds.[9] Thus, **[*5]** Crescent's indemnification liability based on the representations and warranties of the Merger Agreement could not exceed $435,524.[10] Moreover, the Merger Agreement provided that, should the parties dispute an indemnification claim, "such dispute shall be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then pertaining."[11]

On April 10, **[*6]** 2008, Crescent distributed $3,314,000 of the merger proceeds to its limited partners; Crescent

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[1] Aff. of Nancy Amer ("Amer Aff. 1") ¶ 3; *see also* Transmittal Aff. of Kevin M. Coen, Esq., filed Dec. 1, 2009 ("Coen Aff. 1"), Ex. 29 ("Crescent Certificate of Limited Partnership").

[2] Amer **[*4]** Aff. 1 ¶ 4.

[3] Transmittal Aff. of Kevin M. Coen, Esq., filed May 28, 2010 ("Coen Aff. 2"), Ex. A (Crescent Consolidated Financials of March 31, 2007) at 4.

[4] Amer Aff. 1 ¶ 11; Coen Aff. 2, Ex. C ("General Partners' Letter, March 2008") (stating that, in March 2008, Crescent Gate was "engaged in the orderly sale or liquidation of all portfolio assets" of Crescent, in particular "a sale of [Crescent's] last portfolio asset, its position in Accel . . . .").

[5] General Partners' Letter, March 2008.

[6] Second Aff. of Nancy Amer ("Amer Aff. 2") ¶¶ 1, 3.

[7] Amer Aff. 1 ¶ 12.

[8] Amer Aff. 2 ¶ 3; *see also* Coen Aff. 1, Ex. 1 ("Merger Agreement") § 5.1(a).

[9] Amer Aff. 2 ¶ 3. A party seeking indemnification as permitted by the Merger Agreement must have claims exceeding the "basket amount"—2% of the cash merger consideration paid upon closing—before being entitled to indemnification. *See* Merger Agreement § 5.4(b). If a claim exceeds that threshold, the agreement provides for full indemnification of any damages in excess of the 2% basket amount. *See id.* However, the indemnified party's entitlement is limited by the "cap," or 12% of the cash merger consideration paid upon closing. *See id.* § 5.4(a). Accordingly, the indemnified party's maximum indemnification entitlement cannot exceed 10% of the cash merger consideration.

[10] Amer Aff. 1 ¶ 15.

[11] Merger Agreement §§ 5.5, 5.7.

Gate received $209,231.[12] Based on Crescent's financial statement dated March 31, 2008—the month before the distribution—Crescent retained approximately $1,134,608 in cash and cash equivalents at the time of the distribution.[13] According to Crescent's financials, the Limited Partnership's total liabilities for that same period equaled $431,698.[14] As of June 30, 2008, Crescent's cash and cash equivalents amounted to $782,456, with total liabilities of $229,424.[15] Although Crescent's liabilities, as set forth in its financial statements, did not specifically encompass the indemnification exposure, Crescent acknowledged that "[i]n connection with the sale of Accel Corporation in March 2008, [Crescent had] agreed to indemnify the buyer against certain damages arising under the [M]erger [A]greement."[16]

As a result of alleged breaches of certain representations and warranties in the Merger Agreement, Techmer purported to give notice—as required by the agreement[17]—of its indemnification claims by letters dated September 4, 2008,[18] and November 4, 2008.[19] In response, Amer informed Techmer that the claims notice was wrongly addressed and that materials referenced in Techmer's notice to Amer were not enclosed.[20]

Techmer later filed a demand for arbitration with the American Arbitration Association ("AAA") on January 27, 2009—as required by Section 5.7 of the Merger Agreement—wherein Techmer asserted claims against Crescent and Amer, in **[*8]** her capacity as Accel's stockholders' representative.[21] Techmer sought a declaration that certain representations and warranties of the Merger Agreement had been breached and that indemnification was owed to Techmer for those alleged breaches in the amount of $1,009,380.[22] In response, by letter dated February 9, 2009, Amer rejected Techmer's claim for indemnification—both in substance and in amount—asserting that the purported grounds for indemnification failed under the terms of the Merger Agreement.[23]

Even though the Merger Agreement required that all indemnification claims arising under that agreement be submitted to arbitration, Crescent and Amer repeatedly refused to pay fees arising out of that proceeding.[24] As a result, the arbitrator suspended the proceedings as of June 16, 2009, and subsequently terminated the arbitration on August 6, 2009 because of Crescent and Amer's failure to comply with AAA's deposit requirements.[25]

While the arbitration was ongoing, certificates of cancellation were filed on behalf of both Crescent[26] and Crescent Gate[27] with the Delaware Secretary of State, effectively terminating their status as separate legal entities.[28] Under the terms of Crescent's limited

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[12] Amer Aff. 1, Ex. E (Crescent Consolidated Financials of March 31, 2008) at 7.

[13] *See id.* at 1. According to Crescent's financial statement, as of March 31, 2008, the Limited Partnership had cash and cash equivalents of $4,448,608. Crescent defined "cash and cash equivalents" to include "all highly **[*7]** liquid investments with original maturities of three months or less at the time of acquisition." *Id.* at 4.

[14] *See id.* at 1 (making provision for liabilities of accounts payable and accrued expenses and management fee payable only).

[15] Coen Aff. 2, Ex. E (Crescent Consolidated Financials of June 30, 2008) at 1.

[16] *Id.* at 7.

[17] Merger Agreement § 5.2(a).

[18] Coen Aff. 1, Ex. 2 (Claims Notice, dated Sept. 4, 2008).

[19] *Id.* Ex. 3 (Claims Notice, dated Nov. 4, 2008).

[20] *See* Decl. of Nancy Amer, Ex. A (Letters of Nancy Amer, dated Oct. 7, 2008; Oct. 21, 2008; Nov. 10, 2008).

[21] Coen Aff. 1, Ex. 4 (Demand for Arbitration and Statement of Claim) ¶ 1.

[22] *Id.* ¶ 23.

[23] Coen Aff. 1, Ex. 5 (Letter of Nancy Amer, dated Feb. 9, 2009).

[24] *See, e.g., id.*, Ex. 22 (Electronic message of Melanie Cabrera, dated May 29, 2009); *Id.* Ex. 25 (Letter of **[*9]** Melanie Cabrera, dated August 6, 2009); *Id.* Ex. 28 (Letter of Melanie Cabrera, dated Nov. 16, 2009).

[25] *Id.* Ex. 27 (Termination Order).

[26] *Id.* Ex. 33 ("Crescent Certificate of Cancellation") (showing that certificate of cancellation for Crescent was filed on April 21, 2009 and became effective on April 30, 2009).

[27] *Id.* Ex. 32 ("Crescent **[*10]** Gate Certificate of Cancellation") (showing that certificate of cancellation for Crescent Gate was filed on April 21, 2009).

[28] *See* 6 *Del. C.* § 17-201(b) ("A limited partnership formed

partnership agreement (the "LPA"), dated November 2, 1998, the Limited Partnership was to exist for a 10-year term measured from the "final closing date"—as defined by the LPA—which was April 30, 1999.[29] Because none of the defined events of dissolution under the LPA caused Crescent to dissolve earlier,[30] and because the term of the Limited Partnership was not extended as allowed by the LPA,[31] Amer believed that Crescent's term would expire as of April 30, 2009 by virtue of the LPA. At that time, Crescent retained total assets of $59,892—equal in amount to its total known liabilities as of that date.[32]

After the failed arbitration, Techmer brought suit in this Court on September 17, 2009, alleging breaches of the representations and warranties in the Merger Agreement,[33] and seeking the nullification **[*11]** of the certificates of cancellation of Crescent and Crescent Gate as well as the appointment of a receiver for Crescent.[34]

Amer subsequently filed a motion to compel arbitration or, alternatively, to dismiss. Amer asserted that, because the claims alleged by Techmer arose out of the indemnification provision of the Merger Agreement, the parties were subject to, and bound by, that agreement's arbitration clause.[35] Alternatively, Amer argued that the Court should stay the action pending the outcome of the arbitration.[36] The Court concluded that, although the parties agreed that the Merger Agreement requires disputes such as the one alleged in the Complaint to be submitted to arbitration,[37] Amer had "frustrated that process [and] . . . cannot now invoke the very process that she frustrated."[38] Thus, the Court denied Amer's motion to compel arbitration or, alternatively, to dismiss because Amer had "waived and relinquished her right to arbitration" through her earlier conduct.[39]

Techmer and Amer now request summary judgment, through cross-motions, as to Count I of the Complaint.

III. ANALYSIS

A. *The Summary Judgment Standard*

Summary judgment is appropriate where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[40] The burden of showing "both the absence of a material fact and entitlement to judgment as a matter of law" falls on the moving party.[41] The Court must view the evidence in the light most favorable to the nonmoving party.[42] Where the moving party satisfies its burden, "the burden shifts to the nonmovant to present some specific, admissible evidence that there is a genuine issue of fact for a trial."[43] The Court will not grant summary judgment "when the record reasonably indicates that a material fact is in dispute or 'if it seems desirable to inquire more thoroughly into the facts in order to clarify the

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under this chapter shall be a separate legal entity, the existence of which . . . shall continue until cancellation of the limited partnership's certificate of limited partnership."); 6 *Del. C.* § 18-201(b) ("A limited liability company formed under this chapter shall be a separate legal entity . . . until cancellation of the limited liability company's certificate of formation.").

[29] *See* Amer Aff. 1 ¶¶ 5-6; *id.* Ex. A (LPA) § 9.1.

[30] *See* LPA §§ 9.2, 9.3.

[31] *See id.* § 9.4.

[32] Coen Aff. 2, Ex. E ("Crescent Consolidated Financials of April 30, 2009") at 1 (showing that, as of April 30, 2009, Crescent had total assets of $59,892—cash and cash equivalents of $59,888 and accrued interest receivable of $4—and total liabilities of $59,892—accounts payable and accrued expenses of $8,000 and management fee payable of $51,892).

[33] Verified Compl. ¶¶ 1-2, 14, 41.

[34] *Id.* ¶ 37.

[35] Def. Amer's Opening Br. in Supp. of Mot. to Compel Arbitration and Alternatively to Dismiss at 3-4.

[36] *Id.* at 4, 10.

[37] Teleconference on Def.'s Mot. to Compel Arbitration **[*12]** or Alternatively to Dismiss, Tr. 9.

[38] *Id.* at 11.

[39] *Id.* at 13.

[40] Ct. Ch. R. 56(c).

[41] *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002) (internal quotation omitted).

[42] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 356 (Del. Ch. 2008).

[43] *Id.*

application of law to the circumstances.'"[44]

Because both Techmer and Amer have moved for summary judgment as to Count I of the Complaint, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[45] In the briefs filed in conjunction with the cross-motions, no party has argued that an issue of material fact exists to preclude the Court from resolving the merits of the dispute framed by Count I of the Complaint. In any event, because the core dispute as to Count I turns on the proper interpretation of a statutory provision, a trial would not produce a more informed analysis of that claim.

B. *Plaintiffs' Allegations Under 6* Del. C. *§ 17-804*

Techmer alleges that, although the Defendants "were aware of Techmer's claims for breaches of the representations and warranties in the Merger Agreement[,] . . . Crescent, under [Amer's] direction, nevertheless failed to reserve sufficient funds to cover the amounts it owes to Techmer . . . as required by Section 17-804."[46] Because that provision, Techmer argues, "imposes an unqualified requirement on limited partnerships that **[*14]** have dissolved to reserve funds to cover known claims or claims that are reasonably likely to arise,"[47] Crescent's failure to do so indicates that "Crescent was not wound up and dissolved in accordance with Section 17-804(b) . . . ."[48] These assertions form the basis of Count I of the Complaint now before the Court on the cross-motions for summary judgment.

Subchapter VIII of the DRULPA sets forth the statutory framework governing the dissolution of a limited partnership. Under 6 *Del. C.* § 17-801, a limited partnership dissolves upon the first to occur of five specified events or the "[e]ntry of a decree of judicial dissolution under § 17-802 . . . ."[49] Because "the four significant events covering the life span of a partnership would appear to be formation, dissolution, winding up and termination[,] . . . dissolution . . . does not terminate the partnership. Rather, the partnership continues **[*15]** until the winding up of partnership affairs is completed."[50]

During the winding up of a dissolved limited partnership, and until the filing of the certificate of cancellation in accordance with the DRULPA, "the persons winding up the limited partnership's affairs may . . . discharge or make reasonable **[*17]** provision for the limited partnership's liabilities . . . ."[51] Because of the possible

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[44] *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1029 (Del. Ch. 2008) **[*13]** (quoting *Ebersole v. Lowengrub*, 54 Del. 463, 180 A.2d 467, 470, 4 Storey 463 (Del. 1962)).

[45] Ct. Ch. R. 56(h).

[46] Verified Compl. ¶¶ 33-34.

[47] Pls.' Answering Br. in Opp'n to Def.'s Mot. for Summ. J. on Count I and Opening Br. in Supp. of Pls.' Cross-Mot. for Summ. J. on Count I of the Verified Compl. ("Pls.' Opp'n") at 7.

[48] Pls.' Reply Br. in Supp. of Cross-Mot. for Summ. J. on Count I of the Verified Compl. at 5.

[49] 6 *Del. C.* § 17-801(6). When a judicial dissolution decree is entered under the DRULPA, dissolution of that limited partnership is effective upon entry of the decree. *See Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 Del. Ch. LEXIS 179, 1999 WL 743479, at *5 (Del. Ch. Sept. 10, 1999); 3 Edward P. Welch et al., *Folk on the Delaware General Corporation Law* (hereinafter "*Folk*") § 17-801.1, at LP-VIII-6 (5th ed. 2010 Supp.) (explaining that where a court enters a decree of dissolution, "dissolution occurs upon the entry of the decree, and does not relate back in time to the occurrence of the events justifying the decree"). For example, dissolution in that context does not relate back to the events that made it "not reasonably practicable to carry on the business in conformity with the partnership agreement." 6 *Del. C.* § 17-802.

[50] *Paciaroni v. Crane*, 408 A.2d 946, 952 (Del. Ch. 1979); *see also Insituform Techs., Inc. v. Insitu, Inc.*, 1999 Del. Ch. LEXIS 73, 1999 WL 240347, at *12 n.9 (Del. Ch. Apr. 19, 1999) ("[T]he termination of a partnership is a three-step process: dissolution, winding up, and then termination."); Martin I. Lubaroff & Paul M. **[*16]** Altman, *Lubaroff & Altman on Delaware Limited Partnerships* § 8.1, at 8-1 (2010 Supp.) ("Once dissolved, the business of a Delaware limited partnership continues only to the extent reasonably necessary to wind up gradually the limited partnership's affairs."); *id.* § 8.3, at 8-16 ("After the dissolution of a limited partnership, for purposes of Delaware law, the limited partnership's existence as a separate legal entity continues until the cancellation of the certificate of limited partnership . . . . After all of the business and affairs of a limited partnership have been wound up, including, without limitation, the payment or making of reasonable provisions for the payment of obligations and liabilities and the distribution of assets to creditors and partners of the limited partnership, the termination of the limited partnership is accomplished by the filing of a certificate of cancellation with the Delaware Secretary of State [under Section 17-203].").

[51] 6 *Del. C.* § 17-803(b).

lengthy duration of the winding up period, the DRULPA "provides that the satisfaction of the liabilities of a limited partnership may be accomplished by payment or *the making of reasonable provision* for payment thereof."[52] More specifically, 6 *Del. C.* § 17-804 mandates that:

> (b) A limited partnership which has dissolved:
>
> (1) Shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited partnership;
>
> (2) Shall make such provision as will be reasonably likely to be sufficient to provide compensation for any claim against the limited partnership which is the subject of a pending action, suit or proceeding to which the limited partnership is a party and
>
> (3) **[*18]** Shall make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the limited partnership or that have not arisen but that, based on facts known to the limited partnership, are likely to arise or to become known to the limited partnership within 10 years after the date of dissolution.

Accordingly, if a claim against a dissolved limited partnership is among those contemplated by § 17-804(b), the limited partnership must make reasonable provision for that claim during the winding up process—the period after dissolution but before termination of the partnership. Stated differently, "a person claiming to be a creditor of a partnership in dissolution is entitled to adequate security" by operation of § 17-804(b), and "where the claim is unliquidated or contingent, what constitutes adequate security is a question of judgment."[53]

If a plaintiff-creditor's claim falls within the scope of § 17-804(b), failure by the defendant-limited partnership "to explain **[*19]** how [it] made, or attempted to make, reasonable provisions to cover" that claim generally warrants the Court's concluding that the limited partnership failed to comply with the requirements of § 17-804(b).[54] In those instances, the Court may grant a request to nullify the limited partnership's certificate of cancellation because of the limited partnership's failure to wind up in accordance with the statutory mandate.[55] Techmer seeks the nullification of Crescent's certificate of cancellation—in addition to the appointment of a receiver under 6 *Del. C.* § 17-805—because it contends that "there is no dispute that Defendants failed to reserve funds to cover Plaintiffs' known claim, and thus, they violated Section 17-804(b)."[56]

C. *Defendant's Construction **[*20]** and Application of 6* Del. C. *§ 17-804*

Amer argues that "[u]nder the express language of the statute, Plaintiffs have no claim based on a violation of 6 *Del. C.* § 17-804"[57]—that statutory provision, according to the Defendant, "does not apply as a matter of law."[58] In support of her construction, Amer asserts that "[b]ecause Crescent made no distributions after the event of its dissolution, there were no distributions that were, or could have[] been[,] made in violation of Section 17-804."[59] Thus, Amer contends, summary judgment in the Defendant's favor is proper as to Count I of the Complaint because "by its plain and unambiguous terms, 6 *Del. C.* § 17-804 does not apply."[60]

To understand Amer's conclusion, the Court summarizes below the analysis described in her briefs and supporting affidavits. Amer argues that, by its literal terms, § 17-804 only applies to a limited partnership which has dissolved and **[*21]** has then entered into the

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[52] Lubaroff & Altman, *supra* note 50, § 8.4, at 8-17 (emphasis added).

[53] *Boesky v. CX Partners, L.P.*, 1988 Del. Ch. LEXIS 60, 1988 WL 42250, at *16 (Del. Ch. Apr. 28, 1988).

[54] *In re CC&F Fox Hill Assocs. Ltd. P'ship*, 1997 Del. Ch. LEXIS 89, 1997 WL 349236, at *4 (Del. Ch. June 13, 1997).

[55] 1997 Del. Ch. LEXIS 89, [WL] at *4-*5 (holding that nullification of a limited partnership's certificate of cancellation was proper, in part, because the Court could not conclude on the record as presented that the limited partnership wound up in accordance with 6 *Del. C.* § 17-804(b), which required the making of reasonable provision for the plaintiffs' claim).

[56] Pls.' Opp'n at 1.

[57] Def. Amer's Mot. for Summ. J. ¶ 5.

[58] Def. Amer's Reply Br. in Supp. of Mot. for Summ. J. on Count I of the Compl. and Answering Br. in Opp'n to Pls.' Mot. for Summ. J. ("Def.'s Reply") at 1.

[59] *Id.*

[60] Mem. of Law in Supp. of Def.'s Mot. for Summ. J. on Claim under 6 *Del. C.* § 17-804 at 4.

process of winding up the partnership's affairs.[61] Accordingly, Amer asserts that there are only two dispositive questions relevant to analyzing the allegations in Count I: when the limited partnership dissolved and whether any distributions were made to the limited partners during the winding up period after dissolution.[62] Otherwise, Amer contends, all distributions made by a not-yet-dissolved limited partnership to its partners are governed by 6 *Del. C.* § 17-607[63]—a provision neither addressed by nor forming the basis for this action.[64]

Because 6 *Del. C.* § 17-801 expressly prescribes the events of dissolution of a limited partnership formed under the DRULPA, an "open-ended concept of dissolution, [according to Amer] . . . flies in the face of Delaware law . . . ."[65] Since Techmer fails to allege that any statutory event caused Crescent's dissolution, Amer argues that "the terms of the partnership agreement control the time of dissolution."[66] Accordingly, Amer concludes that Crescent automatically dissolved on April 30, 2009, because, under the LPA, Crescent's term of existence expired 10 years after April 30, 1999, and the partnership was neither sooner dissolved nor its term extended under the LPA.[67]

Having asserted that Crescent did not dissolve **[*23]** until April 30, 2009, Amer then notes that the $3.314 million April 10, 2008 distribution of the merger proceeds to the partners "preceded the partnership's dissolution by more than one year."[68] Assuming April 30, 2009 as the Limited Partnership's dissolution date, "no distributions to the partners of Crescent [were made] upon or after its dissolution."[69] At the time of the April 2008 distribution, Amer contends that "Crescent reserved over $1 million to provide for current and potential liabilities, including $435,000 to cover the maximum potential indemnification obligation to Techmer."[70] Techmer's demand for indemnification delayed Crescent's planned dissolution, according to Amer, with the consequence that by the time of Crescent's purported dissolution on April 30, 2009, "all of its reserves had been depleted."[71] Because "any obligations under Section 17-804 arose at [the] time" of Crescent's dissolution—which Amer contends occurred on April 30, 2009—Amer argues that "the distribution in April 2008 cannot have been in violation of 17-804" since it occurred before Crescent's dissolution.[72]

D. *Canons of Statutory Interpretation*

Because the cross-motions for summary judgment require the Court to interpret and apply 6 *Del. C.* § 17-804, the Court begins with an overview of certain canons of statutory interpretation. "The rules of statutory construction are designed to ascertain and give effect to the intent of the legislators, as expressed in the statute."[73]

The threshold question is "whether the provision in question is ambiguous."[74] If the statute is clear and unambiguous, the Court "follow[s] the plain meaning

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[61] *Id.* at 4-5.

[62] *See id.* at 3.

[63] The Court notes that 6 *Del. C.* § 17-804(e) directs that "Section 17-607 . . . shall not apply to a distribution to which [Section 17-804] applies." A distribution may violate § 17-607 if "at the time of the distribution, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests and liabilities for which the recourse of creditors is limited to specified property of the limited partnership, exceed the fair value of the assets of the limited partnership, except that the fair value of property that **[*22]** is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited partnership only to the extent that the fair value of that property exceeds that liability." 6 *Del. C.* § 17-607(a).

[64] Def.'s Reply at 7-8.

[65] *Id.* at 4.

[66] *Id.* at 5 (citing *Active Asset Recovery, Inc.*, 1999 Del. Ch. LEXIS 179, 1999 WL 743479, at *5-*8).

[67] *Id.* at 5-6. Under 6 *Del. C.* § 17-801(1), "the time specified in a partnership agreement" is a dissolution event for a limited partnership.

[68] Def.'s Reply at 4.

[69] Amer Aff. 1 ¶ 10.

[70] Amer Aff. 2 ¶ 4.

[71] *Id.* ¶¶ 7, 10.

[72] Def.'s Reply at **[*24]** 6.

[73] *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1151 (Del. 2010); *see also Dambro v. Meyer*, 974 A.2d 121, 137 (Del. 2009) ("The goal of statutory construction is to determine and give effect to legislative intent.") (internal quotation omitted).

[74] *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010).

rule in statutory construction."[75] In such instances, "there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words."[76] When, however, the statute is ambiguous because it is reasonably susceptible to multiple interpretations,[77] "the Court must rely upon its methods of statutory interpretation and construction to arrive **[*25]** at what the legislature meant."[78]

Because the Court must "presum[e] that the Legislature did not intend an unreasonable, absurd or unworkable result,"[79] ambiguity may exist "where a literal interpretation of the words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature."[80] After **[*26]** making such a determination, "the statute must be construed to avoid 'mischievous or absurd results.'"[81] For that reason, "[t]he golden rule of statutory interpretation . . . is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result."[82] Thus, the Court will reject any statutory construction incompatible with the intent of the General Assembly.[83]

E. *Analysis of* 6 Del. C. *§ 17-804*

In accordance with the rules of statutory construction, the Court begins its analysis by determining if any ambiguity exists in the language of 6 *Del. C.* § 17-804. Section 17-804 imposes limitations and requirements only on "[a] limited partnership which has dissolved"[84] and "[u]pon the winding up" of a limited partnership's affairs.[85] To determine when § 17-804 first applies to a limited partnership, the date of dissolution—as informed by 6 *Del. C.* § 17-801—must be established.[86] Under § 17-804, only upon dissolution must a limited partnership "pay or make reasonable provision to pay all claims and obligations" of the partnership before making distributions to its partners.[87] In the event there are insufficient assets to pay or make reasonable provision to pay a limited partnership's obligations at the time of dissolution, § 17-804(b) requires **[*28]** compliance with the priority scheme detailed in § 17-804(a). Under § 17-804(e), distributions made to partners by a dissolved limited partnership are exclusively controlled by § 17-804, while § 17-607 governs distributions at all other times during the limited partnership's existence before

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[75] *Galloway v. State Bd. of Pension Trs.*, 1992 Del. Ch. LEXIS 254, 1992 WL 364625, at *3 (Del. Ch. Dec. 2, 1992).

[76] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985); *see also Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc.*, 2009 Del. Ch. LEXIS 202, 2009 WL 4895120, at *7 (Del. Ch. Dec. 10, 2009) ("[W]hen construing a statute, the Court must give a reasonable and sensible meaning to the words of the statute in light of their intent and purpose. Where the language is clear and unambiguous, the statute must be held to mean that which it plainly states, and no room is felt for construction.") (internal quotations, alteration, and citation omitted).

[77] *Dewey Beach Enters., Inc.*, 1 A.3d at 307.

[78] *Coastal Barge Corp.*, 492 A.2d at 1246.

[79] *E. I. Du Pont De Nemours & Co. v. Clark*, 32 Del. Ch. 527, 88 A.2d 436, 438 (Del. 1952).

[80] *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, 2009 Del. Ch. LEXIS 22, 2009 WL 445611, at *6 (Del. Ch. Feb. 11, 2009) (internal quotation and alteration omitted); *see also CML V, LLC v. Bax*, 6 A.3d 238, 241 (Del. Ch. 2010) (holding that "the literal terms of the LLC Act control" but recognizing that the "Court may depart from the literal reading of a statute where such a reading is so inconsistent with the statutory purpose as to produce an absurd result . . ."); *In re Estate of Nelson*, 447 A.2d 438, 444 (Del. Ch. 1982) ("[I]t is a well accepted principle of our law that unjust, absurd and mischievous consequences flowing from **[*27]** a literal interpretation of statutory language may create an ambiguity calling for construction.").

[81] *Del. Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 652 (Del. 2006) (quoting *Moore v. Wilmington Hous. Auth.*, 619 A.2d 1166, 1173 (Del. 1993)).

[82] *Coastal Barge Corp.*, 492 A.2d at 1247.

[83] *Dambro*, 974 A.2d at 130.

[84] 6 *Del. C.* § 17-804(b).

[85] *Id.* § 17-804(a).

[86] Under 6 *Del. C.* § 17-801, a limited partnership dissolves upon the first to occur of the following: (1) at the time specified in the partnership agreement, (2) after a vote in compliance with the statutory requirements, (3) upon an event of withdrawal of the general partner, (4) if there are no limited partners remaining, (5) upon the occurrence of events specified in the partnership agreement, or (6) upon entry of a decree of judicial dissolution.

[87] *Id.* § 17-804(b)(1).

dissolution.[88] Nothing in § 17-804 is susceptible to alternate interpretations and, as a result, it is not ambiguous.

Because ambiguity may also exist "if the literal reading of the statutory language would result in unjust, absurd or mischievous consequences,"[89] the Court must also consider whether the plain language of the provision produces unreasonable consequences in **[*29]** light of legislative intent. If "giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature,"[90] that "may create an ambiguity calling for construction" by the Court.[91] Where the literal reading of the statute produces absurd consequences and, as a result, causes ambiguity, the Court must determine and effectuate the intent of the General Assembly.[92]

The prevailing policy of the DRULPA is "to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."[93] Nevertheless, the DRULPA contains certain mandatory provisions generally "intended to protect third parties, not necessarily the contracting [partners]."[94] Because "[t]he terms of Section 17-804 are skeletal and starkly so when compared with the elaborate provisions dealing with the analogous [dissolution] **[*30]** problem" in the Delaware General Corporation Law (the "DGCL"),[95] this Court has previously determined that "it is helpful to look to those provisions of our corporation statute for guidance."[96] The DGCL provisions—Sections 280-82—exist "to protect the valid interests of creditors of a dissolved company"[97] and, similar to the requirements of the DRULPA, generally "a corporation must pay or make reasonable provision to pay all claims and obligations of the corporation."[98] Thus, § 17-804 provides mandatory protection to creditors of a limited partnership if the partnership dissolves and winds up its affairs.[99] By enacting § 17-804, therefore, the General Assembly intended to safeguard creditors from events of dissolution and the winding up of a limited partnership.

Because the Court must ensure that it "give[s] effect to the intent of the legislature,"[100] the Court renews its analysis of § 17-804 to determine if a literal reading "yield[s] illogical or absurd results" that are inconsistent

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[88] *Id.* § 17-804(e).

[89] *Galloway*, 1992 Del. Ch. LEXIS 254, 1992 WL 364625, at *4.

[90] *Coastal Barge Corp.*, 492 A.2d at 1246.

[91] *Nelson*, 447 A.2d at 444.

[92] *See Coastal Barge Corp.*, 492 A.2d at 1246 ("To apply a statute the fundamental rule is to ascertain and give effect to the intent of the legislature.").

[93] 6 *Del. C.* § 17-1101(c); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999). In *Elf Atochem*, our Supreme Court analyzed the Delaware Limited Liability Company Act (the "DLLC Act"), which it described as "modeled on the popular Delaware LP Act." *Id.* at 290. Because the two acts contain the same "architecture and much of [their] wording is almost identical," the Supreme Court analyzed the DLLC Act by **[*31]** reference to the DRULPA. *See id.* at 290-91 ("[T]he following observation relating to limited partnerships applies as well to limited liabilities companies."). For that reason, the Court analyzes the DRULPA by citing analysis of analogous DRULPA counterparts in the DLLC Act. *Compare* 6 *Del. C.* §§ 17-804, 17-1101(c), *with* 6 *Del. C.* §§ 18-804, 18-1101(b).

[94] *Elf Atochem*, 727 A.2d at 292 (citation omitted); *see also* Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Delaware Limited Liability Companies* § 16.06[E][1], at 16-38 (2006 Supp.) (noting that "the DLLC Act sets forth rules that must be observed regarding the priority treatment of creditors" in § 18-804 and that that provision is "among the relatively few mandatory rules under the statute").

[95] *Boesky*, 1988 Del. Ch. LEXIS 60, 1988 WL 42250, at *16. *See* 8 *Del. C.* §§ 280-82.

[96] *Boesky*, 1988 Del. Ch. LEXIS 60, 1988 WL 42250, at *16. Within the DGCL, "Sections 273 through 285 . . . regulate the dissolution and winding-up of Delaware corporations." 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 10.10, at 10-35 (3d ed. 2010 Supp.).

[97] *Blue Chip Capital Fund II Ltd. P'Ship v. Tubergen*, 906 A.2d 827, 835 (Del. Ch. 2006).

[98] 2 **[*32]** *Folk, supra* note 49, § 281.1, at GCL-X-120.

[99] *See Follieri Gp., LLC v. Follieri/Yucaipa Invs., LLC*, 2007 Del. Ch. LEXIS 125, 2007 WL 2459226, at *1 (Del. Ch. Aug. 23, 2007) (concluding that § 18-804 of the DLLC Act fully protects creditors of a dissolved limited liability company); *CC&F Fox Hill*, 1997 Del. Ch. LEXIS 111, 1997 WL 525841, at *1 ("Section 17-804 establishes a process by which the rights of parties to which the partnership has an obligation (or may have an obligation) are protected.").

[100] *Coastal Barge Corp.*, 492 A.2d at 1246.

with the intent of the General Assembly.[101] Under a literal reading of the statute, a limited partnership could largely avoid the limitations of § 17-804 by a course of action resembling what Crescent did here. Before dissolution, a limited partnership could make a distribution to its partners. So long as that distribution did not violate § 17-607[102]—applicable to partner distributions before dissolution—the distribution would escape judicial scrutiny and would also fall entirely outside of the scope of § 17-804. **[*33]** Although at the time of the distribution the limited partnership would have to maintain sufficient assets in excess of its liabilities as described by § 17-607, the partnership could later allow its reserves to deplete before dissolution. Depletion could result, for example, from ordinary course liabilities or payment obligations—other than distributions to partners—required by a limited partnership agreement or other contracts. Only upon dissolution does § 17-804 operate to further limit partner distributions and mandate payment of or provision for obligations of the limited partnership and, more importantly, the Court determines compliance with § 17-804 by reference to the limited partnership's assets as of dissolution. With its reserves lacking upon dissolution because of earlier depletion, the limited partnership would then only be required to pay its claims and obligations "ratably to the extent of assets available therefor."[103] If the limited partnership entirely exhausted its reserves before dissolution, it could avoid its obligations so long as it made no additional distributions to its partners when winding up its affairs and demonstrated that it otherwise wound up in accordance **[*34]** with § 17-804.

The foregoing analysis demonstrates the limited protection afforded by a literal reading of § 17-804. Nevertheless, the Court "may not ignore statutory language simply because undesirable consequences could conceivably follow."[104] Section 17-804 "deals with how claims of creditors of a limited partnership are to be satisfied and, in doing so, attempts to balance the rights of creditors with the rights of partners."[105] The DRULPA provides creditor protection before dissolution through the distribution limitations of § 17-607. Upon dissolution, however, only the creditor protections of § 17-804 apply—specifically, the Court determines whether a limited partnership wound up in accordance with that statutory mandate by considering the partnership's assets as of dissolution and whether it, in disposing of those assets, adhered to the priority scheme, distribution limitations, and the making of reasonable provision requirement. The statute makes clear that the General Assembly intended different methods of protecting creditors based on the status of the limited partnership—§ 17-804(e) provides that § 17-607 ceases to apply upon the dissolution **[*36]** of a limited partnership. Ultimately, the DRULPA always provides statutory creditor protection but the methods of protection vary during the lifetime of the limited partnership because different statutory provisions apply depending on the state of existence of the partnership.[106]

Although a literal reading of § 17-804 creates the potential for offensive behavior by those who control

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[101] *Cochran v. Supinski*, 794 A.2d 1239, 1251 n.18 (Del. Ch. 2001) (citing *State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990)).

[102] 6 *Del. C.* § 17-607(a), discussed *supra* note 63, reads as follows:

> A limited partnership shall not make a distribution to a partner to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests and liabilities for which the recourse of creditors is limited to specified property of the limited partnership, exceed the fair value of the assets of the limited partnership, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited partnership only to the extent that the fair value of that property exceeds that liability. For purposes of this subsection (a), the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement **[*35]** plan or other benefits program.

[103] *Id.* § 17-804(b).

[104] *Galloway*, 1992 Del. Ch. LEXIS 254, 1992 WL 364625, at *5.

[105] Lubaroff & Altman, *supra* note 50, § 8.4, at 8-18.

[106] The DRULPA makes a bright-line distinction between a limited partnership that has dissolved and one that has not. Dissolution marks the point where § 17-607 ceases to operate. Only then do the limitations of § 17-804 take effect and subsequently continue until the limited partnership winds up its affairs and terminates its existence. As a result, it is critical to establish the date of dissolution by reference to the events of dissolution described in § 17-801.

limited partnerships, the Court cannot conclude, on that basis alone, that a strict application of that provision produces absurd results;[107] the legislature clearly intended that § 17-804 apply only upon the dissolution of a limited partnership, with dissolution **[*37]** determined by reference to § 17-801. At all other times, creditors concerned with partner distributions must look to § 17-607 for statutory protection under the DRULPA. Because "[c]reditors generally are presumed to be capable of protecting themselves through the contractual agreements that govern their relationships with firms,"[108] creditors may ensure that additional protective measures apply in instances not captured by § 17-607 or § 17-804 by operation of their bargained-for rights.

F. *Application of* 6 Del. C. *§ 17-804*

Having determined that 6 *Del. C.* § 17-804 is unambiguous, the Court's role is limited to applying the literal meaning of the statutory language. That task requires the Court first to establish the date of Crescent's dissolution before it decides whether Crescent wound up in accordance with the requirements of § 17-804.

1. When **[*38]** Did Crescent Dissolve?

Amer contends that Crescent dissolved on April 30, 2009 because the Limited Partnership's term expired on that date under the LPA.[109] That expiration date, Amer argues, was the first of the 6 *Del. C.* § 17-801 dissolution events to occur[110]—none of the other § 17-801 dissolution events applies and the Limited Partnership was not earlier dissolved by any of the specified events of dissolution in the LPA. In response, the Plaintiffs argue that "[a]s early as April 2007, Crescent Gate began the process of winding up and dissolving Crescent's affairs," and "Crescent's own records show that Crescent was in dissolution long before April 2009 when it filed its certificate of cancellation."[111]

In order to establish when Crescent dissolved, the analysis begins with § 17-801. Because that provision mandates that a limited partnership dissolves when the first of the listed dissolution events occurs, the Court must determine which, if any, events occurred and then, if multiple events transpired, which **[*39]** occurred first. Amer correctly points out that Crescent's term would have expired under the LPA on April 30, 2009, a dissolution event under § 17-801(1). An event of withdrawal, however, by the Limited Partnership's general partner occurred before that date causing Crescent to dissolve under § 17-801(3) at the latest by April 21, 2009.

Under the LPA, Crescent Gate served as the general partner of the Limited Partnership.[112] Section 17-801(3) deems a limited partnership dissolved upon "[a]n event of withdrawal of a general partner," unless certain exceptions apply as described in that provision.[113] The DRULPA defines an event of withdrawal of a general partner to be "an event that causes a person to cease to be a general partner as provided in § 17-402 . . . ."[114] Under that provision, a limited liability company ceases to be a general partner of a limited partnership upon the "the dissolution and *commencement* of winding up of the limited liability company."[115]

Crescent Gate, a Delaware limited liability company governed by the DLLC Act, had a certificate of cancellation filed on its behalf on April 21, 2009.[116] The DLLC Act requires a certificate of cancellation to set forth "[t]he future effective date or time . . . of cancellation if it is not to be effective upon the filing of the certificate."[117] Because the certificate of cancellation

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[107] Applying a literal reading of the DLLC Act, this Court recently emphasized the importance of recognizing that "consistent interpretation and stable commercial expectations have particular salience" in the context of uniform acts. *CML V, LLC*, 6 A.3d at 244. That same principle applies to the DRULPA.

[108] *Id.* at 250 (internal quotation omitted).

[109] *See* LPA § 9.1.

[110] Under § 17-801(1), a limited partnership is dissolved and shall wind up "[a]t the time specified in a partnership agreement . . . ."

[111] Pls.' Opp'n at 3, 8.

[112] Crescent Certificate of Limited Partnership ("The name and the business address of the sole general partner of [Crescent] is as follows: Crescent Gate Partners L.L.C.").

[113] 6 *Del. C.* § 17-801(3).

[114] *Id.* § 17-101(3).

[115] *Id.* § 17-402(a)(11) **[*40]** (emphasis added).

[116] Crescent Gate Certificate of Cancellation.

[117] 6 *Del. C.* § 18-203; *see also id.* § 18-206(b) ("Upon the filing of a certificate of cancellation . . . or upon the future effective date or time of a certificate of cancellation . . . the

for Crescent Gate made no reference to a future effective date, the certificate of cancellation became effective as of the filing date, April 21, 2009. As a result, that filing cancelled Crescent Gate's certificate of formation,[118] and caused Crescent Gate no longer to exist as a separate legal entity as of April 21, 2009.[119]

Because the DLLC Act requires that a limited liability company dissolve and complete winding up before filing a certificate of cancellation,[120] Crescent Gate unquestionably ceased to be the general partner of Crescent by April 21, 2009 because of an event of withdrawal. For the event of withdrawal under § 17-402(a)(11) of the DRULPA to occur, Crescent Gate, as the general partner of Crescent, first had to dissolve and *commence* winding up its affairs; by filing a certificate of cancellation on, and effective as of, April 21, 2009, Crescent Gate was required to have already dissolved and *completed* winding up under § 18-203 of the DLLC Act. Accordingly, by at least April 21, 2009, Crescent was dissolved under § 17-801(3) because of an event of withdrawal by its general partner, Crescent Gate. Although there are three exceptions to the general rule that an event of **[*42]** withdrawal by the general partner causes dissolution of the limited partnership, none applies in this action.[121]

The Court cannot decide on the current record whether Crescent Gate had begun winding up before filing its certificate of cancellation on April 21, 2009; had Crescent Gate dissolved and commenced winding up before then, the general partner's event of withdrawal would have occurred even earlier. In any event, Crescent dissolved by April 21, 2009, at the latest—not April 30, 2009 as Amer suggests. Although Crescent's certificate of cancellation was also filed on April 21, 2009, the certificate's effective date was April 30, 2009.[122] Accordingly, Crescent was not cancelled until

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certificate of formation is canceled.").

[118] *See id.* § 18-203 ("A certificate of cancellation shall be filed in the office of the Secretary of State to accomplish the cancellation of a certificate of formation upon the dissolution and the **[*41]** completion of winding up of a limited liability company . . . .").

[119] *See id.* § 18-201(b) ("A limited liability company formed under [the DLLC Act] shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation.").

[120] *See id.* § 18-203 ("A certificate of formation shall be canceled upon the dissolution and the completion of winding up of a limited liability company . . . . A certificate of cancellation shall be filed . . . upon the dissolution and the completion of winding up of a limited liability company . . . .").

[121] "There exists in Section 17-801(3) three express exceptions to the rule that an event of withdrawal of a general partner causes the dissolution of a Delaware limited partnership. The first exception is that, upon an event of withdrawal of a general partner, a Delaware limited partnership is not dissolved if there is at least one other general partner and a partnership agreement permits a remaining general partner to continue the business of the limited partnership and such general partner does so. . . . The second exception . . . is if, within ninety (90) days or such other period as is provided for in a partnership agreement after the withdrawal of a general partner either (A) if provided for in the partnership agreement, the then current percentage or other interest **[*43]** in the profits of the limited partnership specified in the partnership agreement owned by the remaining partners agree in writing or vote to continue the business of the limited partnership and to appoint, effective as of the date of withdrawal, one (1) or more additional general partners if necessary or desired, or (B) if no such right to agree or vote to continue the business of the limited partnership and to appoint one or more additional general partners is provided for in the partnership agreement, then more than fifty percent (50%) of the then current percentage or other interest in the profits of the limited partnership owned by the remaining partners or, if there is more than one class or group of remaining partners, then more than fifty percent (50%) of the then current percentage or other interest in the profits of the limited partnership owned by each class or classes or group or groups of remaining partners, agree in writing or vote to continue the business of the limited partnership and to appoint, effective as of the date of withdrawal, one or more additional general partners if necessary or desired. In such case, a limited partnership will not be deemed to have dissolved. **[*44]** . . . The third exception . . . is if the business of the limited partnership is continued pursuant to a right to continue stated in the partnership agreement and the appointment, effective as of the date of withdrawal, of 1 or more additional general partners if necessary or desired. In such a case, a limited partnership will be deemed not to have dissolved." Lubaroff & Altman, *supra* note 50, § 8.1, at 8-5 to 8-9.

[122] Crescent Certificate of Cancellation. Although filed on the same day as the certificate of cancellation for Crescent Gate, the certificate of cancellation for Crescent provides that "[t]his Certificate of Cancellation shall become effective April 30, 2009." *Id.* As already noted in the context of the DLLC Act, so too here a certificate of cancellation is effective when filed under the DRULPA, unless another future effective date is specified. *See* 6 *Del. C.* § 17-206(b) ("Upon the filing of a certificate of cancellation . . . or upon the future effective date or time of a certificate of cancellation . . . the certificate of limited partnership is canceled.").

April 30, 2009. Upon dissolution, Crescent entered its wind up period which continued until its cancellation.[123] To summarize, Crescent dissolved on April 21, 2009, or earlier, because of an event of **[*45]** withdrawal by its general partner; there was a winding up period between the Limited Partnership's date of dissolution and the effective date of its cancellation; and Crescent's existence as a separate legal entity ceased upon the cancellation of its certificate of limited partnership on April 30, 2009.

2. Did Crescent Properly Wind Up under 6 *Del. C.* § 17-804?

Because Crescent **[*46]** may have dissolved earlier than April 21, 2009, the Court cannot determine at this stage what statutory provision governs the April 10, 2008 distribution of $3,314,000 of the merger proceeds by the Limited Partnership. Had Crescent Gate dissolved *and* commenced winding up by that date, Crescent would have experienced an event of withdrawal by its general partner causing Crescent's dissolution. In that instance, the distribution and all subsequent actions by Crescent would be subject to the requirements of § 17-804. If, however, Crescent Gate had not dissolved and commenced winding up by the date of that distribution, § 17-804 would not apply and any statutory challenge under the DRULPA would have to be based on § 17-607. The Court notes that the Plaintiffs make no allegations under § 17-607.

More important in determining whether Crescent was wound up in accordance with § 17-804, the Court considers the Limited Partnership's actions from April 21, 2009—the date by which Crescent had certainly dissolved—until its cancellation on April 30, 2009.[124] Crescent's financials reflect that as of April 30, 2009, the date its existence as a separate legal entity terminated, the Limited Partnership **[*47]** had total assets of $59,892 and total liabilities in the same amount.[125] Although Amer contends that, by April 30, 2009, all of Crescent's "reserves had been depleted,"[126] and Defendant's counsel represented to the Court that "[b]y April 2009, Crescent had exhausted all of its funds and assets,"[127] Crescent's financial records indicate otherwise. Even though its assets equaled its liabilities according to its financials, Crescent nonetheless retained $59,892 in total assets upon its termination.

Under § 17-203, "[a] certificate of limited partnership shall be canceled upon the dissolution and the *completion* of winding up" of the partnership.[128] Because Crescent's April 30, 2009 financials demonstrate that the Limited Partnership not only retained assets but also had outstanding liabilities as of April 30, 2009, the Court cannot conclude that Crescent settled and closed its business before the effective date of its certificate of cancellation. Moreover, § 17-804 required the Limited Partnership to wind up consistent with the priority structure set forth in that provision. The record contains no evidence that the $59,892 in total assets was distributed to satisfy Crescent's liabilities—the accounts payable and accrued expenses and the management fee payable—in accordance with the pro rata, priority requirements of § 17-804. **[*49]** Thus, the Court cannot conclude that Crescent complied with the requirements of § 17-804 as to the assets retained by the Limited Partnership upon its dissolution. Moreover, Crescent failed to make a final settlement of its unfinished business, as required by § 17-203, before filing its certificate of cancellation. As a result, it did not complete its wind up before cancelling its legal existence.

3. Is the Appointment of a Receiver Warranted?

In Count I, the Plaintiffs contend that "the certificates of cancellation filed by Crescent and Crescent Gate must be nullified and a[] receiver must be appointed pursuant to Section 17-805 to run the affairs of Crescent" in order

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[123] Delaware courts recognize that "winding up logically follows dissolution in an entity's life cycle." *Spellman v. Katz*, 2009 Del. Ch. LEXIS 18, 2009 WL 418302, at *4 (Del. Ch. 2009).

[124] The Plaintiffs question the management fees paid by the Limited Partnership to Crescent Gate—an entity that they contend Amer held a stake in and reaped benefits from—in arguing that Crescent was not wound up in accordance with § 17-804. The Plaintiffs suggest that Crescent lacked sufficient assets to indemnify Techmer in part because the Limited Partnership paid excessive management fees before its dissolution as a result of self-dealing and inequitable conduct by Amer. In response, Amer contests the Plaintiffs' calculation of the management fees paid by Crescent and argues that those fees were contractually required under the LPA. This issue, raised only in the Plaintiffs' briefs as support **[*48]** for their contention that Crescent violated § 17-804 and not alleged in the Complaint, need not be addressed by the Court because the Court concludes that the relief sought by the Plaintiffs as to Count I is warranted.

[125] Crescent Consolidated Financials of April 30, 2009 at 1.

[126] Amer Aff. 2 ¶ 10.

[127] Letter of Thomas P. Preston, Esq., dated Apr. 7, 2010, at 2.

[128] 6 *Del. C.* § 17-203.

for Crescent to defend the Plaintiffs' "claims for breaches of the representations and warranties in the Merger Agreement."[129] The Plaintiffs further assert that "[u]nless the[] certificates of cancellation are nullified and a receiver is appointed . . . Techmer will have no way to recover from Crescent the amounts it is owed . . . ."[130]

Under 6 *Del. C.* § 17-805, the Court may appoint a receiver to act on behalf of a limited partnership "on application of any creditor **[*50]** or partner of the limited partnership, or any other person who shows good cause . . . ."[131] This Court may only appoint a receiver under § 17-805 "[w]hen the certificate of limited partnership of any limited partnership formed under this chapter shall be canceled by the filing of a certificate of cancellation pursuant to § 17-203 . . . ."[132] Section 17-805 grants broad powers to a receiver appointed under the statute.[133] Most relevant to this action, that provision empowers an appointed receiver "to do all other acts which might be done by the limited partnership, if in being, that may be necessary for the final settlement of the unfinished business of the limited partnership."[134]

Because Crescent filed a certificate of cancellation under § 17-203, the Court may appoint a receiver in **[*51]** accordance with § 17-805 upon a showing of good cause. With the conclusion that Crescent failed to settle and close the Limited Partnership's business because it retained assets and had outstanding liabilities when it cancelled its certificate of limited partnership on April 30, 2009, good cause exists for appointment of a receiver to undertake all activities permitted by § 17-805. Specifically, the receiver should engage in all activities "which might be done by [Crescent], if in being, that may be necessary for the final settlement of [its] unfinished business . . . ."[135]

Although grounds may also exist for nullification of Crescent's certificate of cancellation,[136] the appointment of a receiver under § 17-805 provides the necessary relief under the circumstances. If the Court were only to nullify Crescent's certificate of cancellation, the Limited Partnership would have no general partner and no party to act on its behalf—the general partner, Crescent Gate, was cancelled as of April 21, 2009 and there is no evidence before the Court to suggest that Crescent Gate's certificate of cancellation should be nullified. Moreover, § 17-805, by providing broad powers to a receiver appointed **[*52]** under that provision to act on behalf of a cancelled limited partnership, makes it unnecessary for the Court to nullify Crescent's certificate of cancellation.[137]

Thus, the Court will not nullify the certificates of cancellation for Crescent and Crescent Gate. Instead, the Court will appoint a receiver under § 17-805 to settle the unfinished business of Crescent through all of the powers conferred by that provision. The appointment of a receiver provides adequate relief to the Plaintiffs as to Count I of the Complaint.

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[129] Verified Compl. ¶ 37.

[130] *Id.* ¶ 31.

[131] 6 *Del. C.* § 17-805.

[132] *Id.*

[133] The statute permits, for example, an appointed receiver "to take charge of the limited partnership's property, and to collect the debts and property due and belonging to the limited partnership, with the power to prosecute and defend, in the name of the limited partnership, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid . . . ."

[134] *Id.*

[135] *Id.*

[136] For example, Crescent had not made a final settlement of the Limited Partnership's business when it filed its certificate of cancellation under § 17-203.

[137] The Court's authority to appoint a receiver under § 17-805 arises because Crescent filed a certificate of cancellation under § 17-203. *See, e.g., Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2010 Del. Ch. LEXIS 184, 2010 WL 3448227, at *5-*6 (Del. Ch. Sept. 2, 2010) (noting that, in the context of the DLLC Act, the Court must find statutory authority, or act "in accordance with its general equity powers," before appointing a receiver). The appointment of a receiver of a limited partnership on other grounds is not before the Court and, as a result, the Court's analysis here in exercising its discretion to appoint a receiver for Crescent is limited to actions where § 17-805 applies. A question remains as to whether the Court could exercise its discretion to appoint a receiver under § 17-805 because a limited partnership has—or at least colorably has—filed a certificate of cancellation improvidently **[*53]** and simultaneously nullify that certificate of cancellation. Although Techmer requests both forms of relief in Count I, for the reasons stated above, the circumstances here require only that the Court appoint a receiver under § 17-805. Accordingly, the Court need not, and does not, decide that issue.

IV. CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for summary judgment as to Count I is granted in part to the extent described herein. Amer's motion for summary judgment is denied. Counsel are requested to confer and to submit an implementing form of order.
