IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re: Dissolution of DOEHLER DRY	:	
INGREDIENT SOLUTIONS, LLC, a	:	C.A. No. 2022-0354 LWW
Delaware limited liability company	:	**PUBLIC VERSION**
		Filed as of June 29, 2022

PETITIONER'S ANSWERING BRIEF IN OPPOSITION TO MOTION TO DISMISS OF DOEHLER NORTH AMERICA INC., STUART MCCARROLL, AND ANDREAS KLEIN

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INTRODUCTION

After months of unsuccessful efforts to resolve the dysfunction among the members of Doehler Dry Ingredient Solutions, LLC ("DDIS" or "LLC"), Petitioner Crosskeys Associates Limited ("CKAL"), through its controller Russell Davis ("Davis" and collectively "Petitioner"), sought this Court's intervention with a petition to dissolve the LLC ("Petition"). Contrary to the assertions of Respondents[1], the Petition is not a mere means to circumvent regretted agreements.

While the parties' relationship has always been fraught, the irreconcilable differences became more apparent starting in January 2022, when two of the three members, DNA and Garry Beckett ("Beckett"), each made offers to purchase the interests of all the other LLC members. In March, Davis was removed as a manager and barred from seeking compensation for tasks he is required to perform by the LLC's operating agreement. Moreover, Davis' email inbox was hacked by Beckett, an action that was supported by both former manager Stuart McCarroll and Andreas Klein, chair of the parent company of member DNA.

Aware that Petitioner intended to seek judicial resolution of these disputes, DNA raced to the U.S. District Court for the District of Delaware and filed a suit for

[1] "Respondents" collectively refer to Doehler North America Inc. ("DNA"), Stuart McCarroll ("McCarroll"), and Andreas Klein ("Klein").

breach of contract[2] against Davis and CKAL, hours before Petitioner filed this action. However, despite attempts to achieve a "first-filed" designation over the disputes between the LLC's members, well-settled authority treats the Federal Action as contemporaneously filed this dissolution action.

In a further try to thwart Petitioner's attempt to resolve the dysfunction among the members, Respondents have filed a motion to dismiss alleging that the Petition has not satisfied the pleading standards of Delaware Court of Chancery Rules 12(b)(1), 12(b)(2), and 12(b)(6). This Answering Brief explains why Respondents' arguments in their motion have no merit.

[2] The suit filed by DNA is styled *Doehler North America Inc v. Davis & Crosskeys Associates Ltd.*, C.A. No. 22-0501-RGA (the "Federal Action") and includes a motion for temporary restraining order ("TRO") against Petitioner -- which has not yet been scheduled for a hearing or ruled on. Nor is a case scheduling order of any type in place.

NATURE AND STAGE OF THE PROCEEDINGS

On April 21, 2022, Petitioner filed this dissolution action and a Motion for Expedited Proceedings. The Federal Action was filed hours earlier.

On April 22, 2022, Petitioner filed a Motion to Stay the Federal Action and on April 25, 2022, filed an answering brief in opposition to the TRO which included arguments why the federal court lacks diversity jurisdiction.[3] Both are pending in that federal case, in which the federal court has neither scheduled a hearing nor made any ruling on DNA's request for a TRO as of the date of this Opening Brief—nor has that court imposed any overall case scheduling order.

On May 19, 2022, DDIS filed a response to the Petition, taking no position on the pending request seeking its dissolution.

On May 20, 2022, Respondents, Doehler North America Inc., Stuart McCarroll, and Andreas Klein filed a motion to dismiss or stay this action in favor of the Federal Action, and their Opening Brief in Support of their Motion to Dismiss was filed on May 27, 2022.

Petitioner filed it Motion for Partial Summary Judgment on May 28, 2022.

On June 10, 2022, Garry Beckett responded to the Petition.

[3] *See* Petitioner's Opening Brief in support of its Motion for Partial Summary Judgment in this Chancery case ("Op. Br. to SJ"), Exh. Q.

This Court entered a Stipulated Scheduling Order required all Answering Briefs by June 22, 2022; Reply Briefs by June 30, 2022, and oral argument on July 8, 2022, at 11:00 a.m.

This is Petitioner's Answering Brief in opposition to the Motion to Dismiss filed by DNA, McCarroll, and Klein.

A two-day trial is scheduled for October 3-4, 2022.

CONCISE STATEMENT OF RELEVANT FACTS

Doehler Dry Ingredient Solutions, LLC (previously abbreviated as the LLC or DDIS) was formed in October 2017, as a Delaware limited liability company. Petition ¶1. The three members still include CKAL, DNA, and Beckett ("the Members"). *Id.* ¶10. Klein, while not a manager of DDIS, played a significant role in the business decisions of the LLC through his role as the head of DNA's parent company. *Id.* ¶13 McCarroll, was a manager of DDIS during the relevant times at issue in this suit. *Id*. ¶ 14.

The Petition describes a variety of irreconcilable differences and a deadlock that support dissolution. These include:

- A deadlock exists as the members do not have the unanimous approval required by the Operating Agreement for nine specific business decisions, including distribution of profit;
- The three members that constitute the joint venture demonstrate in many ways that they have a dysfunctional relationship;
- The members cannot agree if their operating agreement alone -- or some other agreement controls their joint venture;
- Two of the three members voted to refuse to pay the controller of the third member, Davis, to oversee day-to-day operations -- work that the LLC agreement requires him to do;
- One member, DNA, has attempted to buy-out the other two members;
- Beckett, another member, has sought to buy-out DNA and CKAL, leaving Beckett as the sole member;

- Now that each of the two members, DNA and Beckett, have attempted to buy-out the other member, and the third member, CKAL, wants to dissolve DDIS, it should be self-evident that the three members no longer desire to carry on the business of DDIS together;

- Two of the three members each allege that the other competes against or interferes with customers of the joint venture;

- One member hacked another's emails;

- The members are faithless to each other;

- The LLC is refusing to provide advancement rights required by the Operating Agreement.

As described in the introduction, all three members of the LLC have expressed their explicit intent and desire not to continue to carry on the business of DDIS together. *See* Op. Br. to SJ, Exh. D and Exh. G.

Davis was removed as manager and his email was hacked by Beckett. *See* Petition ¶16; *see also* Op. Br. to SJ, Exh. I and Exh. J.

Despite both Petitioner and Beckett rejecting DNA's inadequate offer, and Davis merely taking steps to protect the LLC and himself from hacking and transmittal of private business communications, DNA chose to file suit only against Davis and CKAL, alleging interference with customers of DDIS based on Davis' defensive reactions to hacking of Davis' emails by Beckett. *See* Op. Br. to SJ, Exh. M. Dissolution of the LLC was not mentioned in the Federal Action.

Further, there has been no objection by DNA to Beckett's competitive activity relative to DDIS, and no criticism of his hacking of Davis, and no problem expressed by DNA with Beckett's refusal to accept the DNA buy-out offer. This double-standard used by DNA for its conduct towards Beckett and CKAL also supports dissolution so that these dysfunctional members are not forced to endure being in business with each other for the foreseeable future.

CKAL filed this action for dissolution to allow the parties to equitably exit this dysfunctional business relationship.

The pending Petition by CKAL to dissolve the LLC is the result, in part, of the rare unanimity of all the Members to the extent that the actions of all three members indicate they do *not* want to continue to carry on the DDIS business together. This supports dissolution.

In addition to DNA and Beckett each wanting to be sole members of DDIS, and CKAL wanting to disassociate itself from DDIS, the parties' Operating Agreement requires member unanimity on nine enumerated business decisions such as distributing profits, which Davis opposes. How can a business function practicably with no ability to distribute profits?

Among the many violations of the Operating Agreement, [redacted] DNA has refused to provide advancement rights to Davis and CKAL required by Section 8(c) of the Operating Agreement to defend the Federal Action. *See* Op.

Br. to SJ, Exh. N.

DDIS has also refused to provide the somewhat *sui generis* reimbursement right that CKAL is entitled to, based on Section 5(f) of the Operating Agreement, for expenses incurred by CKAL to seek dissolution in connection with this Petition. *See id.*, Exh. O.

Andreas Klein chairs the parent company of DNA, [redacted] and through DNA he controls DDIS based on DNA's role as the source of necessary financing and the appointment of two of the three managers of DDIS. Klein insists on weekly updates on DDIS and is involved in all key decisions – such as removing Davis as a manager.

Klein and Beckett were involved in a civil conspiracy to hack into the emails of Davis. This is evidenced by:

(i) emails showing that Klein was sent proof of the hacking - - and to the extent Klein neither investigated it, nor took action to penalize it, nor disclaimed any benefit from it, he collaborated and conspired with Beckett, who upon information and belief, forwarded to himself emails directed to Davis at the email address used by Davis. *See id.,* Exh. J. Moreover, Klein verbally abused Davis for disclosing the hacking – instead of taking action against Beckett, the hacker.

(ii) The emails attached as Exh. "C" to the Petition, demonstrate that Klein was given proof of the hacking, but declined to condemn it, indicating participation

by inaction in Klein's role as the ultimate boss of Beckett.

(iii) Beckett all relevant times was acting as a manager of the LLC, and pursuant to the Delaware LLC Act, agreed that his actions subjected him to personal jurisdiction in Delaware. Hacking emails used by Davis -- at the time, a manager of DDIS--causing harm to DDIS, a Delaware entity, can be considered a substantial act in furtherance of the conspiracy to hack into the emails of Davis.

(iv) Klein, an experienced international businessman, who chairs a parent company that controls several Delaware entities, had reason to know that his collaboration with the manager of a Delaware LLC would have an impact on that Delaware LLC, and

(v) The harmful impact on DDIS, as a Delaware LLC, was a direct and foreseeable result of the hacking that Beckett and Klein collaborated on in furtherance of their conspiracy.

In sum, if Section 18-802 of the Delaware LLC Act has any useful meaning, it should be applied to free the three members of DDIS from the shackles of their loveless and self-destructive business marriage.

SUMMARY OF THE ARGUMENTS

Respondents seek dismissal of this action on the grounds the Petition fails to satisfy Delaware Court of Chancery Rules 12(b)(1); 12(b)(2); and 12(b)(6). But the Petition has satisfied these pleading standards.

First, Respondents attack the Petition by alleging that this Court lacks subject matter jurisdiction. This is wrong. Respondents argue that the Federal Action was "first filed" and that the federal court exercises exclusive jurisdiction over CKAL's membership units. However, authority does not support this assertion. Having been filed hours apart, the essentially contemporaneously filed actions are not functionally similar; one alleges breach of contract and the other requests dissolution. So long as this Court has the statutory authority to exercise jurisdiction, which it does, Petitioner has satisfied the pleading standard for subject matter jurisdiction.

Further, Respondents allege that the Petition should be dismissed because it fails to set forth a basis for including Klein and McCarroll as parties in addition to generally failing to state a claim for dissolution. Again, Respondents' contentions are unsupported by applicable authority. As alleged in the Petition, Klein and McCarroll have been added to this action because they both conspired with DDIS member and manager Beckett to breach Beckett's fiduciary duties to the LLC, and McCarroll was a manager of the LLC at the relevant times. While Respondents

challenge the existence of a conspiracy, at this stage of the litigation Petitioner is not required to prove anything. CKAL's petition must simply put Respondents on notice of the claims alleged which satisfy the statutory standard for dissolution. The Petition does just that.

Finally, in accordance with Delaware's notice pleading standard, Petitioner has alleged a myriad of irreconcilable differences to support dissolution. While the Petition may not have used "magic words" to allege deadlock, paragraph 23 of the Petition clearly describes the circumstances of deadlock. The Petition also presents evidence of the dysfunction among the LLC's members. In sum, detailed facts in the Petition provide more than sufficient notice that it is not reasonably practicable to carry out the business of DDIS therefore, dissolution is warranted.

Since the Petition satisfies Delaware Court of Chancery Rules 12(b)(1); 12(b)(2); and 12(b)(6), this Court should deny Respondents' motion to dismiss.

STATEMENT OF THE QUESTIONS INVOLVED

1. Does the Petition satisfy the pleading stage review standards of Rules 12(b)(1); 12(b)(2); and 12(b)(6)?
2. Should this action be stayed or dismissed in favor of the Federal Action?
3. Does his role as co-conspirator in the conspiracy to breach Beckett's fiduciary duties convey personal jurisdiction over Klein?
4. Does the Petition sufficiently allege the prerequisites of dissolution pursuant to Section 18-802 of the Delaware LLC Act?

ARGUMENT

I. PLEADING STAGE STANDARDS OF REVIEW

A. Delaware Court of Chancery Rule 12(b)(1)

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), "the court must address the nature of the wrong alleged and the remedy sought to determine whether a legal, as opposed to an equitable, remedy is available and adequate." *AffiniPay, LLC v. West*, 2021 Del. Ch. LEXIS 210, at *11 (Del. Ch. Sep. 17, 2021). The court confines the review in the context of Rule 12(b)(1) motions to the allegations of the complaint and attached exhibits. *See Fortis Advisors LLC v. Johnson & Johnson*, 2021 Del. Ch. LEXIS 290, at *3 n.1 (Del. Ch. Dec. 13, 2021) (citing *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999)) (The court is "confine[d] . . . to the allegations of the complaint and exhibits thereto, which must be accepted as true for purposes of the motion to dismiss."). This Petition meets this standard.

B. Delaware Court of Chancery Rule 12(b)(2)

On a motion to dismiss under Court of Chancery Rule 12(b)(2), the plaintiff bears the burden to show the basis for this Court's exercise of personal jurisdiction over the defendant. *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003). To do so, the plaintiff must demonstrate: "(1) a statutory basis for service of process; and (2) the requisite 'minimum contacts' with the forum to satisfy

constitutional due process." *Fisk Ventures, LLC v. Segal*, 2008 Del. Ch. LEXIS 158, at *19 (Del. Ch. May 7, 2008). When considering such motions, "the Court is not limited to the pleadings; rather, it may consider the pleadings, affidavits, and any discovery of record." *Hospitalists of Del., LLC v. Lutz*, 2012 Del. Ch. LEXIS 207, at *13 (Del. Ch. Aug. 28, 2012) (internal quotations and citations omitted). If, as here, no evidentiary hearing has been held, plaintiffs need only make a *prima facie* showing of personal jurisdiction and 'the record is construed in the light most favorable to the plaintiff. *Id.* (internal quotations omitted). Petitioner has satisfied this standard.

C. Delaware Court of Chancery Rule 12(b)(6)

Similarly, Delaware's pleading standard under Rule 12(b)(6) is a plaintiff-friendly and lenient one. Indeed, the Delaware Supreme Court has characterized the standard as "minimal." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). In particular:

> When considering a defendant's motion to dismiss, a trial court should accept allegations in the Complaint as true, accept even vague allegations in the Complaint as "well pleaded" if they provide the defendant notice of the claim, 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.

Id. The core inquiry under the reasonable conceivability standard is whether there is a "possibility" of recovery. *Id.* at 537 n.13. This is distinguishable from the more

onerous federal pleading standard that inquires "whether a complaint states a plausible claim for relief" and gives the court leaves to "draw on … judicial experience and common sense." *Id.* at 537 (internal quotations omitted). Because Petitioner has pleaded a comprehensive set of facts that, when proven, will demonstrate that it is entitled to dissolution, Respondents' motion to dismiss should be denied.

As discussed below, Petitioner has alleged sufficient facts to satisfy the pleading standard for Respondents' motion to dismiss the Petition pursuant Rules 12(b)(1); 12(b)(2); and 12(b)(6).

II. THIS ACTION SHOULD NOT BE DISMISSED OR STAYED IN FAVOR OF THE FEDERAL COURT ACTION

Respondents argue that this Court does not have subject matter jurisdiction because the Federal Action, in their view, was first filed and that both courts are considering the same property, specifically CKAL's membership units. As explained, these assertions are incorrect because: (1) the two actions were essentially filed contemporaneously; and (2) this litigation and the Federal Action are not functionally similar.

A. Neither a Dismissal nor Stay Are Justified Under *McWane* or *CryoMaid*

This Court has jurisdiction over this dissolution proceeding. The Court of Chancery can acquire subject matter jurisdiction over a cause in only three ways: (1)

if one or more of the plaintiff's claims for relief is equitable in character, (2) the plaintiff requests relief that is equitable in nature, or (3) subject matter jurisdiction is conferred by statute. *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

Section 18-802 of the Delaware LLC Act provides as follows: "On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the operating agreement." This language provides a standard of review and grants subject matter jurisdiction to this Court to hear and determine petitions for judicial dissolution. *See Elf Atochem N. Am., Inc.*, 727 A.2d at 292 (explaining that similar references to the Court of Chancery elsewhere in the Delaware LLC Act are grants of subject matter jurisdiction).

Petitioner seeks dissolution pursuant to Section 18-802. A plain reading of the statute confers subject matter jurisdiction on this Court. *See In re TGM Enters., L.L.C.*, 2008 Del. Ch. LEXIS 130, at *4 (Del. Ch. Sep. 12, 2008) ("jurisdiction rests solely with the Court of Chancery where a party moves for dissolution of a company"); *Casella Waste Sys., Inc., FCR, LLC v. GR Tech., Inc.*, 2009 Vt. Super. LEXIS 14, *7 (Del. Ch. Feb. 6, 2009) (When analyzing 6 *Del. C.* § 18-802, the Court states "Section 18-802 does not grant subject matter jurisdiction to any other court. It does not identify any other court by name, and it does not use permissive or generic

terms suggesting that subject matter jurisdiction would be appropriate in any court where personal jurisdiction can be maintained.").

As the Delaware Supreme Court stated in *McWane*, dismissal or stay in favor of another case is only proper if there is some "prior action pending in another jurisdiction involving the same parties and the same issues." *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970). The *McWane* analysis includes four factors: (1) a prior action that involves (2) the same parties and (3) the same issues and that can (4) afford prompt and complete justice. *Id*. If any one of these factors are not met--as is the case here--this Court will not dismiss or stay a Delaware action merely because another action is pending somewhere else. *See McWane*, 263 A.2d at 283; *see also AlixPartners, LLP v. Benichou*, 2019 Del. Ch. LEXIS 1231, at *2 (Del. Ch. Feb. 7, 2019) ("Defendant's *McWane* Motion fails because the French proceedings do not address the same issues addressed in this case, as required by *McWane*'s second element.").

Based on well-settled case law, because the Federal Action and this litigation were filed within hours of each other, this Court should not apply *McWane* or give the Federal Action any deference.

B. The Federal Action is a Contemporaneously Filed Action, and DDIS Must Prove Overwhelming Hardship to Defeat Petitioner's Choice of Forum

Where, as here, two separate actions were filed within the same general time frame, this Court considers the actions contemporaneously filed so as to avoid a "race to the courthouse." *Azurix Corp. v. Synagro Techs., Inc.*, 2000 Del. Ch. LEXIS 25, at *11 (Del. Ch. Feb. 3, 2000) (finding actions filed on a Friday and the following Monday were contemporaneously filed); *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 Del. Ch. LEXIS 90, at *63 n.123 (Del. Ch. July 14, 2008) (actions filed as far as three business days apart should be treated as contemporaneous because they were "filed within the same general time frame").

Based on the foregoing cases, this action and the Federal Action should be considered contemporaneously filed. On April 20, 2022, DNA, a member of DDIS, filed a lawsuit in federal court (the "Federal Action"), seeking a TRO, and named only CKAL and Davis as Defendants. *See* Op. Br. to SJ, Exh. M. This Complaint was not formally or correctly served upon CKAL or Davis, who agreed to accept service on May 19, 2022, as an accommodation.

On April 21, 2022, CKAL filed the Petition in this action. Dkt. No. 1. This was only about 24 hours or so after the Federal Action. Case law cited earlier treats both cases as being contemporaneously filed for purposed of *McWane*.

Rather than applying *McWane*, "[w]hen … actions are filed in different courts contemporaneously, this Court instead undertakes a traditional *forum non conveniens* analysis." *Wilmington Sav. Fund Soc'y, FSB v. Caesars Entm't Corp.*,

2015 Del. Ch. LEXIS 62, at *23 (Del. Ch. Mar. 18, 2015); *see also Phillips v. Phillips*, 2020 Del. Ch. LEXIS 396, at *6 (Del. Ch. Mar. 1, 2021) ("When actions were filed contemporaneously, "this Court evaluates a motion to dismiss or stay under the established *forum non conveniens* framework, without applying *McWane's* preference for one action over the other."); *AG Res. Hldgs., LLC v. Terral*, 2021 Del. Ch. LEXIS 24, at *5-7 (Del. Ch. Feb. 10, 2021) ("in the case of simultaneous filings, the court may place less emphasis on filing priority and determine by a preponderance of the evidence whether litigating in one forum or the other would be easier, more expeditious, and less expensive.") (internal quotations omitted).

Explaining the deference given to the plaintiff's choice of forum when cases are contemporaneously filed, this Court has said:

> The doctrine of *forum non conveniens*, properly applied, involves a wholesome balancing between the strong interest of a plaintiff in choosing the appropriate forum in which to bring her action, and the interest of the other litigants and the court in an efficient and just resolution of the issues, together with principals of comity. Courts in this State have traditionally applied the doctrine sparingly, with due regard for the [Respondent]'s right to choose.

Wilmington Sav. Fund Soc'y, FSB, 2015 Del. Ch. LEXIS 62 at *25.

When addressing a *forum non conveniens* analysis between two contemporaneously filed actions, this Court considers the following factors: (1) the relative ease of access to proof; (2) the availability of a compulsory process for

witnesses; (3) the possibility to view the premises, if appropriate; (4) all other practical problems that would make the trial easy, expeditious, and inexpensive; (5) whether the controversy is dependent upon Delaware law, which the courts of this State should decide rather than those of another jurisdiction; and (6) the pendency or non-pendency of a similar action in another jurisdiction. *Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245, 1251 (Del. 2018); *see also GXP Capital, Ltd. Liab. Co. v. Argonaut Mfg. Servs.*, 253 A.3d 93, 100-01 (Del. 2021) (detailing the various scenarios in which the same *forum non conveniens* factors apply). Applying this standard to cases where a stay or dismissal would ultimately have the same effect, "the movant must demonstrate that litigating in Delaware would cause overwhelming hardship and inconvenience." *Lincoln Ben. Life Co. v. Wilm. Tr., N.A.*, 2019 Del. Super. LEXIS 139, at *5 (Del. Super. Ct. Mar. 21, 2019) (citing *BP Oil Supply Co. v. ConocoPhillips Co.*, 2010 Del. Super. LEXIS 72, at *13 (Del. Super. Ct. Feb. 25, 2010) (citing *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 117 (Del. Ch. 2009)); *see also AR Capital, LLC v. XL Specialty Ins. Co.*, 2019 Del. Super. LEXIS 216, at *8 (Del. Super. Ct. Apr. 25, 2019) (when an action is contemporaneously filed, "the movant seeking dismissal has the burden to prove that litigating in Delaware would cause overwhelming hardship."). While not impossible to meet, this standard is "properly perceived as requiring a finding that, on balance, litigation in Delaware would represent a manifest hardship to the

defendants, 'a stringent standard that holds defendants who seek to deprive a plaintiff of her chosen forum to an appropriately high burden.'" *Wilmington Sav. Fund Soc'y, FSB*, 2015 Del. Ch. LEXIS 62 at *28 (quoting *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1105 (Del. 2014)). Not surprisingly "[g]iven this rather formidable standard, it is rare for this Court to dismiss or stay an action on the grounds of forum *non conveniens*." *Id.*

This Court should apply the *forum non conveniens* framework to determine if this matter should be stayed or dismissed, as the two cases were contemporaneously filed. When analyzing Respondents' motion based on this standard, they have failed to satisfy their burden of evidencing that litigating the matter in the Court of Chancery would cause the Respondents an overwhelming hardship. However, regardless of whether this Court analyzes the competing actions under *McWane* or the *Cryo-Maid* factors, this Action should be permitted to proceed.

C. This Litigation and the Federal Action Are Not Functionally Similar

Even if this Court finds that the Federal Action was the first-filed action -- which it was not - - the Federal Action does not address the same claims as those brought in this action. They are far from mirror images of one another.

This case is a narrow, summary action that seeks:

1. Dissolution of DDIS because "it is not reasonably practicable to carry on the business in conformity with a Limited Liability Company Agreement." Petition ¶¶ 25-26; and
2. A declaration pursuant to Section 18-803 that a liquidating trustee should be appointed to wind up the affairs of the LLC. *Id.* at ¶¶ 27-29.

The facts relating to dissolution involve whether the purpose of DDIS has been frustrated, the existence of a deadlock, and the dysfunction among the members.

By comparison, the Federal Action focuses on the following alleged misconduct by Davis and CKAL:

1. Breach of the Membership Agreement. *See* Op. Br. to SJ, Exh. M ¶¶ 50- 57; and
2. Breach of the Operating Agreement. *Id.* at ¶¶ 58-66.

Significantly, none of the claims in the Petition are included in the allegedly "first-filed" Federal Complaint. Most importantly, the allegedly "first-filed" Federal Complaint failed to raise any claim relating to dissolution. By comparison, the Petition only seeks dissolution and related relief. *See generally* Petition. No other complaint on these issues has been filed anywhere.

Since the matters are functionally dissimilar, the federal court does not have exclusive jurisdiction over the membership units, even if relief in one court may affect that intangible property. For this reason, Respondents' reliance on *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939) ("*Princess Lida*"), is misplaced. *Princess Lida* only applies when: (1) the litigation in both the first and second fora are *in rem* or *quasi in rem* in nature, and (2) the relief sought requires that the second court exercise control over the property in dispute and such property is already under the control of the first court. *Princess Lida*, 305 U.S. at 466.

As to the first requirement, Petitioners will concede that this action is an *in rem* action. *See Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2017 Del. Ch. LEXIS 152, at *29 n.80 (Del. Ch. Aug. 18, 2017) (quoting *In Re Rehabilitation of Nat'l Heritage Life Ins. Co.*, 656 A.2d 252, 260 (Del. Ch. 1994)) ("A dissolution proceeding is an *in rem* action"). But that alone does foreclose this Court from exercising jurisdiction over the issue of membership units. *See Feeley v. NHAOCG, Ltd. Liab. Co.*, 2012 Del. Ch. LEXIS 63, at *11-15, 21 (Del.

Ch. Mar. 20, 2012) (Similar to a Section 18-110 proceeding, because Section 18-802 affects the Delaware LLC and the office of the managing member, it is not necessary for all claimants to the office to be subject to this Court's *in personam* jurisdiction in order for this Court to make an authoritative determination. The caselaw allows the imposition of jurisdiction over those who have "personally participated in the choice to invoke the laws of the state that govern the internal affairs of the disputed entities and the contractual duties running among the members.")

Moreover, Respondents have not satisfied *Princess Lida*'s second requirement. As discussed above, The Federal Action cannot be assigned the "first-filed" designation because, based on authorities cited, the matters were deemed to be filed contemporaneously. Moreover, the same relief is not being sought. There is certainly no mirror image on the issues alleged in both matters that risk inconsistent judgments. Petitioner acknowledges that facts regarding the calculation to determine the value of CKAL's membership units are referenced in both actions. But contrary to Respondents' allegations, these units are not the type of property that supports deferral to the Federal Action because CKAL's membership units do not encompass the *entire* property of the LLC, and the claims regarding the units are dissimilar. Therefore, this matter should not be stayed or dismissed.

D. District Court Cannot Provide Full and Prompt Relief

While Respondents rely heavily on the assertion that the Federal Action "will completely defeat Petitioner's standing in this dissolution action" if the Chancery matter is dismissed or stayed, Resp. Op. Br. at 11, this is not the standard this Court uses to analyze the relief requested. This Court's discretion to stay should only be exercised if the federal court is "capable of doing prompt and complete justice." *Lay v. Ram Telecom Int'l, Inc.*, 2021 Del. Ch. LEXIS 230, at *2 (Del. Ch. Oct. 4, 2021) (Even where a summary proceeding was filed four months after the first filed action, the court declined to stay the matter). The Federal Action cannot provide prompt and complete justice for the parties.[4]

1. ***The Plaintiff in the Federal Action, DNA, is unable to satisfy the jurisdictional requirements for federal court***

Because federal courts are courts of limited jurisdiction, "[i]t is presumed that a cause lies outside [such] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182(1936) ("It is incumbent upon the plaintiff to properly allege the jurisdictional facts, according to the nature of the case."). DNA, the Plaintiff in the

[4] Notably, DNA filed the federal court action on April 21, 2022. To date, no scheduling order has been filed, the federal court has not scheduled a hearing for the TRO motion or issued a ruling on the papers. Nor has any case scheduling order been imposed. Moreover, Davis and CKAL filed a motion to stay the Federal Action, and the court has not issued a ruling on that motion.

Federal Action, cannot meet this burden. Specifically, (1) DDIS is a necessary and indispensable party to the Federal Action. By failing to join DDIS, DNA cannot satisfy Fed. R. Civ. P. 19(b); and (2) even if DNA had joined DDIS to the Federal Action, complete diversity cannot be secured.

(a) *Joining DDIS, an indispensable party, would destroy diversity*

In its Complaint, DNA seeks specific performance and injunctive relief on behalf of itself *and* DDIS. *See* DNA's TRO Motion, Opening Brief, and proposed form of Order request relief on behalf of DDIS.[5] *See* TRO form of Order, attached as Exh. "A". Pursuant to Rule 19(a) and (b), DDIS is a necessary and indispensable party for DNA's claim seeking relief on behalf of DDIS. Specifically, Fed. R. Civ. P. 19(a)(1) requires a court to join an absentee party that is necessary or indispensable to the litigation to "accord complete relief among existing parties." Where joinder of an indispensable party would defeat diversity jurisdiction, however, the case must be dismissed. *See General Refractories Co. v. First State Ins. Co.*, 500 F. 3d 306, 312 (3d Cir. 2007) (citing *Janney Montgomery Scott, Inc. v.*

[5] *See In re Pittsburgh & L.E.R. Co. Securities and Antitrust Litig.,* 543 F. 2d 1058, 1068 (3d Cir. 1976) ((parentheses removed; emphasis added) ("[T]he corporation [or LLC] is a necessary party to the derivative action; without it, the case cannot proceed."); *see also Sternberg v. O'Neill,* 532 A. 2d 993, 998-99 (Del. Ch. 1987) ("It is axiomatic that in a normal single derivative suit the corporation is a necessary party. . . Its presence is required so that it can receive the fruit of any recovery.").

Shepard Niles, Inc., 11 F. 3d 399, 404 (3d Cir. 1993)) ("we first must determine whether [parties] should be joined as "necessary" parties . . . If they should be joined, but their joinder is not feasible inasmuch as it would defeat diversity of citizenship . . . we next must determine whether the absent parties are "indispensable" . . .. Should we answer this question in the affirmative, the action cannot go forward.").

However, when DDIS's citizenship is considered, diversity is destroyed in the Federal Action. Specifically, DDIS is the "real party in interest," and its citizenship cannot be ignored when determining whether the Federal Court has diversity jurisdiction over the federal case. *See 2009 Caiola Family Tr. v. PWA, Ltd. Liab. Co.*, 2013 U.S. Dist. LEXIS 101144, at *2 n.2 (D. Del. 2013) (citing *Khoury v. Oppenheimer*, 540 F. Supp. 737, 738-39 (D. Del. 1982) (concluding that a corporate defendant was not a "nominal party" where the nature of the suit was a derivative action)); *Nomura Asset Capital v. Overland Co.*, 2003 U.S. Dist. LEXIS 28574, at *9 (D. Del. 2003) ("Due to the derivative nature of the plaintiff's claims, the court finds that the Partnership is more than a nominal party.").

In order to have complete diversity, none of the defendants can be a citizen of the same state as any of the plaintiffs. *See Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F. 3d 99, 105 (3d Cir. 2015) (For complete diversity to exist, all of the LLC's members "must be diverse from all parties on the opposing side."); *see also Collingwood v. Milner*, 2010 U.S. Dist. LEXIS 155613, at *3 (W.D. Pa. Mar. 18,

2010) *(*quoting *Mennen Co.* v. *Atlantic Mut. Ins. Co.,* 147 F. 3d 287, 290 (3d Cir. 1998) ("Section 1332(a)(l) of the diversity statute requires complete diversity between the parties -- that is, jurisdiction is lacking if any plaintiff and any defendant are citizens of the same state.")). DDIS, a Delaware LLC, whose members include DNA, a Delaware corporation, makes it impossible to satisfy Section 1332(a)(l) of the diversity statute. Therefore, the federal court lacks jurisdiction over the Federal Action.

(b) *DNA failed to satisfy Fed. R. Civ. P. 23.1(b)(3)(A) and (B)*

DNA's claim against Davis is that he is harming DDIS' business relationships. DNA seeks to enjoin Davis from harming DDIS. That claim is derivative; therefore, it must comply with Federal Rule of Civil Procedure 23.1. Namely, Fed. R. Civ. P. 23.1(b)(3)(A) and (B)—like its Chancery counterpart—requires the plaintiff to state with particularity "pre-suit demand futility"; that is, DNA must demonstrate the reasons for not seeking the desired action from the managers of the company before filing suit. *See Taylor v. Kissner,* 893 F. Supp. 2d 659, 665 (D. Del. 2012) (Rule 23.1 "requires a plaintiff to 'allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors . . . and the reasons for the plaintiff's failure to obtain the action or for not making the effort.") (citation omitted); *see also United Food & Commer. Workers Union v. Zuckerberg*, 262 A. 3d 1034, 1047 (Del. 2021) ("In a derivative

suit, a stockholder seeks to displace the board's [decision-making] authority over a litigation asset and assert the corporation's claim." Thus, [b]y its very nature[,] the derivative action" encroaches "on the managerial freedom of directors" by seeking to deprive the board of control over a corporation's litigation asset. In order for a stockholder to divest the directors of their authority to control the litigation asset and bring a derivative action on behalf of the corporation, the stockholder must (1) make a demand on the company's board of directors or (2) show that demand would be futile.") (internal citation and quotations omitted).

DNA did not make, nor has it alleged that it made, a demand upon the managers of DDIS as required by Fed. R. Civ. P. 23.1(b)(3)(A). If no demand was made, DNA must establish that a demand to pursue each of its claims would have been futile. "[D]emand futility must be determined on a claim-by-claim basis." *Taylor v. Kissner,* 893 F. Supp. 2d at 666. "[T]he bar is high, the standards are stringent, and the situations where demand will be excused are rare." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines,* 534 F. 3d 779, 782-83 (D.C. Cir. 2008) (applying Delaware law). DNA has not alleged any particularized facts to establish such a demand would have been futile. Therefore, the Federal Court does not have jurisdiction over DNA's claim against Davis for relief on behalf of, or for the benefit of, DDIS because it failed to comply with Rule 23.1(b)(3)(A) and (B). *See* D.I. 5-1 at ¶ 1 (proposed form of Order).

2. ***The Plaintiff in the Federal Action is unable to satisfy the requirements for a temporary restraining order pursuant to Federal Rule of Civil Procedure 65***

Beyond failing to satisfy the jurisdictional requirements to maintain the Federal Court Action, DNA has not alleged facts that would permit the relief requested. Specifically, a party requesting a TRO must show that: (1) there is a reasonable likelihood of success on the merits; (2) it is more likely than not to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tip in its favor; and (4) an injunction is in the public interest.[6] *See* Fed. R. Civ. P. 65; *see also Fulton v. City of Philadelphia*, 922 F. 3d 140, 152 (3d Cir. 2019). DNA has not met the burden to satisfy the first two factors, therefore, it cannot "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In order for the federal court to grant DNA's TRO, it must sufficiently state a claim for breach of contract.[7] *See Jones v. Sec'y Pennsylvania Dep't of Corr.*, 589 F. App'x 591, 594 (3d Cir. 2014) ("preliminary injunctions should not be granted

[6] For a full analysis of the four preliminary injunction factors refer to Defendant's Answering Brief in Opposition to the DNA's TRO attached to Op. Br. to SJ, Exh. Q.

[7] To state a claim for breach of contract, DNA must allege facts plausibly demonstrating: (1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) a resulting damage to the plaintiff. *H—M Wexford LLC v. Encorp, Inc.*, 832 A. 2d 129, 140 (Del. Ch. 2003; *Hydrogen Master Rights, Ltd. v. Weston*, 228 F. Supp. 3d 320, 333 (D. Del. 2017).

when they . . . seek intermediate relief of a different character than the relief ultimately sought."). DNA has not alleged facts sufficient to prove that Davis or CKAL have breached any contract.

Because the Operating Agreement contains an integration clause, the parties are not bound by the restrictive covenants in their previous document referred to as the Initial Agreement. Specifically, Section 15(c) of the Operating Agreement provides: "This Agreement, including the schedules attached to this Agreement and incorporated herein, contains the entire agreement of the parties, and supersedes all prior oral and written agreements . . ." Op. Br. to SJ, Exh. B. The Initial Agreement, which was signed on or about October 25, 2017, is considered a "prior agreement" as contemplated by the integration clause in the later Operating Agreement. *See id.*, Exh. B; *see also id.*, Exh. T. Moreover, DNA could not rely on the Amendment to revive the obligations of the Initial Agreement, because that Amendment and the Operating Agreement address different subject matter.

Even if the restrictive covenants contained in the Initial Agreement did apply to Davis, DNA has failed to sufficiently allege facts to determine that these covenants were breached. While DNA contends that the March 25, 2022 Email sent by Davis breached his contractual obligations, it did not rebut evidence presented by Davis that: (i) The Davis DDIS email in-box was hacked; and (ii) Davis' response to that hacking by changing his email address was a reasonable response. DNA

ignores that Davis' actions were reasonable in light of an actual data breach. *See* Op. Br. to SJ, Exh. I; *see also id.*, Exh. J. This reasonable response to hacking cannot be fairly described as either interference or an attempt to interfere with the relations of DDIS or DNA, thus there was no breach.

Further, CKAL and Davis were not required to perform under Section 9(f)(ii) because the term "Company's Net Debt" as set forth in 9(h) is not defined, and Davis disputes its meaning. "When the [contract] provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity." *In re Pharmacy Corp. of Am./Askari Consol. Litig.*, 2020 U.S. Dist. LEXIS 162930, at *11 (D. Del. 2020) (quoting *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc*., 702 A.2d 1228, 1232 (Del. 1997)). That ambiguity bars the discretionary remedy of specific performance based on the disputed facts of this case.

Section 9(h) provides a formula that determines the Cross-Transfer price. That section provides the following formula: [redacted] Op. Br. to SJ, Exh. B. [redacted] however. Instead, DNA cavalierly and tendentiously asserts that [redacted] Not so.

DNA bears the burden of proving the meaning of "Company's Net Debt". *See Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.*, 247 F. 3d 79, 102 (3d Cir. 2001) ("the party alleging a breach of contract bears the burden of proving the elements of a breach of contract. The burden of proving the meaning of ambiguous terms in the contract is on the party alleging the breach.") (substantially cleaned up). DNA did not satisfy its burden of proving this ambiguous term; therefore, it cannot prove that CKAL and Davis breached the Operating Agreement for failing to accept a purchase price that is still disputed based on undefined terms in a contract.[8] The Operating Agreement also requires "normalization" which DNA did not include in its offer to purchase Davis' interest.

Since DNA could not prove that CKAL and Davis breached any contract, the Federal action fails to state a claim. Therefore, the Federal Action would not afford full and prompt relief.

III. CONSPIRACY TO BREACH FIDUCIARY DUTIES IS SUFFICIENTLY PLEAD; THUS, THIS COURT HAS PERSONAL JURISDICTION OVER KLEIN AND MCCARROLL.

[8] In conjunction with challenging DNA's use of undefined terms used in arriving at the Cross-Transfer Price it offered, CKAL and Davis will supply evidence that DNA artificially depressed the Company's price, then sent the Notice at a time that would permit it to make the purchase at the lowest price possible. Such an action is a breach of DNA's fiduciary duties.

Respondents allege that this Court lacks personal jurisdiction over Klein and subject matter jurisdiction over Klein and McCarroll. They are wrong.

Respondents have alleged that Petitioner's claim of civil conspiracy has not been adequately plead. *See* Resp. Op. Br. at 14 ("Davis fails to set forth a sufficient basis for the exercise of personal jurisdiction over Klein . . . The Petition's sole purported basis for this Court to exercise jurisdiction over Klein is the "civil conspiracy theory of personal jurisdiction"); *id.* at 17 ("the Petition does not seek any relief that can be awarded as against [Klein or McCarroll].")

The relevant standard to determine the sufficiency of a claim plead in Delaware is notice pleading. Del. Ct. Ch. 8(a) (Rule 8(a) provides, in part: "A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . .."). Under a notice pleading standard, Petitioner need not plead every fact supporting their case, nor must they plead a legal theory *per se*. *OptimisCorp v. Waite*, 2015 Del. Ch. LEXIS 20, at *16 (Del. Ch. Jan. 28, 2015).

Despite Respondents' contention to the contrary, Petitioner has sufficiently plead conspiracy theory jurisdiction. Respondents acknowledge Petitioner's recitation of the elements for imposing jurisdiction based on the conspiracy theory and facts that correspond to those elements, but Respondents' argument insists that the Petition fails to demonstrate "meaningful activity on behalf of the conspiracy

which occurred and caused effects in Delaware." Not so. *See id.* at 15-16 (quoting *Computer People, Inc. v. Best Int'l Grp.*, Inc., 1999 Del. Ch. LEXIS 96, at *20 (Del. Ch. Apr. 27, 1999)).

Specifically, Beckett and Klein are obviously "two or more people." *See* Petition ¶ 9 n.2 ("both Klein and Beckett participated in the conspiracy"). The Petition alleges sufficient facts to support an allegation for a meeting of the minds. *Id.* ("Beckett and Klein were conspiring and collaborating to hack into the email inbox of Davis in a manner not in the best interests of Davis or the LLC" and "Klein as an experienced international businessman, had reason to know that his collaboration with the manager of a Delaware LLC would have an impact on the Delaware LLC"). Again, Respondents do not dispute this fact. The Petition also sufficiently alleges that the hack was unlawful. *Id.* ("both Klein and Beckett participated in the conspiracy'). Finally, Petitioner alleged facts that support the contention that the damages proximately caused the breach. *Id.* ("the effect on the Delaware LLC was a direct and foreseeable result of the hacking they collaborated on in furtherance of the conspiracy").

Overarchingly, Respondents do not dispute the existence of the emails that the allegations are based on. Rather, Respondents contend that under their interpretation, the email does not demonstrate "Klein's involvement in the alleged changes to the auto-forwarding rules for he [sic] email accounts. . . much less

'hacking' Davis's account." Resp. Op. Br. at 15. However, that is not the standard by which sufficiency of a pleading is reviewed at this early stage of the case.

At this early phase of the case, Petitioner is not required to prove anything or provide evidence of a conspiracy. As alleged, Petitioner has adequately plead conspiracy as a basis for personal jurisdiction consistent with Rule 8(a).

A. This Court Has Personal Jurisdiction Over Klein

Respondent recites two-parts to an analysis whether to permit this Court to exercise personal jurisdiction over Klein: first, determine whether the Delaware's Long-Arm Statute is applicable and, second, evaluate whether the exercise of personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 12-13 (citing *Onescreen Inc. v. Hudgens*, 2010 Del. Ch. LEXIS 62, at *10-13 (Del. Ch. Mar. 30, 2010)).

Klein is subject to personal jurisdiction in this matter. *Metro Storage Int'l Ltd. Liab. Co. v. Harron*, 2019 Del. Ch. LEXIS 272, at *51-52 (Del. Ch. July 19, 2019), is particularly instructive to this point. Specifically, in *Metro Storage*, defendant, a president of Metro Storage, was served pursuant to 6 *Del. C.* § 18-109(a), which establishes a mechanism for serving process on a manager of an LLC.[9]

[9] For purposes of service, Section 18-109(a) defines the term "manager" as encompassing two categories of persons: first, a person formally named as a manager pursuant to the governing LLC agreement; and second, a person not formally named as a manager pursuant to the governing LLC agreement but who

The Defendant contends that because he was not designated as a formal manager of the LLC, the plaintiff could not exercise personal jurisdiction. The court was not persuaded by such an argument. Particularly, the court explained that even though an LLC agreement vests authority in formal managers, *Metro Storage Int'l Ltd. Liab. Co.*, 2019 Del. Ch. LEXIS 272 at *2, "the plaintiff could serve those members who had participated materially in the events giving rise to the claim." *Id.* at *52.

Moreover, while not designated as a formal manager, Klein participated materially in the events giving rise to the claim. *Id.* at 21-24. Specifically, emails show that Klein was sent proof of the hacking--and to the extent Klein neither investigated it, nor took action to penalize it, nor disclaimed any benefit from it, he collaborated and conspired with Beckett, who upon information and belief, caused to be forwarded to himself emails directed to Davis at the email address used by Davis. *See* Op. Br. to SJ, Exh. J. Further, Exh. "C" to the Petition demonstrates that Klein was given proof of the hacking, but declined to condemn it, indicating participation by inaction from the ultimate boss of Beckett.[10] Klein was also involved in managing the LLC. For these reasons, the court can exercise personal

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nevertheless "participates materially in the management of the limited liability company." 6 *Del. C.* § 18-109(a).

[10] Klein regularly took part in DDIS's day-to-day business. *See* May 24, 2021 Email from Klein offering Davis assistance with a deal, attached as Exhibit B.

jurisdiction over Klein.

B. This Petition Seeks Relief Against Klein and McCarroll

Respondents also contend that the Petition does not state a claim for which relief can be granted with respect to Klein and McCarroll. *See* Resp. Br. at 17. While Respondent offers two separate bases for the request of dismissal, the outcome is the same for both. *See id*. at 17-18 ("McCarroll lacks any authority to carry out any order of dissolution and winding up, even if he were enjoined to do so . . ." and "Klein is not alleged to be a current or former manager of DDIS.").

Respondents' assertion that Klein and McCarroll "are not real parties in interest" is unsupported by authority. Resp. Op. Br. at 17. Further, while Respondents cite both *Voterlabs, Inc. v. Ethos Gp. Consulting Servs., LLC*, 2021 U.S. Dist. LEXIS 145787 (D. Del. Aug. 4, 2021) and *N. River Ins. Co. v. Mine Safety Appliances Co.*, 2013 Del. Ch. LEXIS 307, at *25 (Del. Ch. Dec. 20, 2013), to support their request for dismissal, both cases are not helpful to them.

First, *Voterlabs*, explained that personal jurisdiction applies to LLC managers in instances where the claims "focus centrally on his rights, duties and obligations as a manager of a Delaware [limited liability company]." *Voterlabs, Inc. v. Ethos Gp. Consulting Servs., LLC*, 2021 U.S. Dist. LEXIS 145787, at *24 (D. Del. Aug. 4, 2021). This court in accordance with Section 18-109 of the Delaware LLC Act, will extend personal jurisdiction to "ordinary tort or contract claims." *Id.* While

Voterlabs does offer a discussion regarding dismissal for failure to state a claim, Respondents do not cite to this section. Presumably, because the court's discussion is unhelpful to their prayer for relief. Specifically, in *Voterlabs*, the civil conspiracy claim was dismissed because the underlying tort was not cognizable in Delaware. *Id.* at *38. Here, the underlying tort of breach of fiduciary duty is a cognizable action.

And, *N. River Ins. Co.*, is inapplicable to the facts of this case. The matter at issue in *N. River Ins. Co.*, was a request for a permanent injunction to prevent the defendant from prosecuting its later-filed claims in a different jurisdiction. 2013 Del. Ch. LEXIS 307, at *3. The court offers no discussion of "real parties in interest" or the merits of dissolution. Even the quoted sentence, "[I]n line with the well-established principle that '[e]quity will not do a useless thing,' an injunction will 'not be granted where it would be ineffective to achieve its desired result,'" is part of a broader discussion of the requirements for a permanent injunction. Resp. Op. Br. at 18 (quoting *N. River Ins. Co.*, 2013 Del. Ch. LEXIS 307, at *25).

As discussed, the Petition has adequately alleged civil conspiracy as a basis for jurisdiction.

VI. THE PETITION SUFFICIENTLY ALLEGES DISSOLUTION PURSUANT TO SECTION 18-802 OF THE DELAWARE LLC ACT

A. Respondents Misapply the Pleading Standard

Respondents fail to apply the applicable pleading standard when assessing this petition for a motion to dismiss. *See OptimisCorp v. Waite*, 2015 Del. Ch. LEXIS 20, at *16 (Del. Ch. Jan. 28, 2015) (Under a notice pleading standard, Petitioner need not plead every fact supporting their case, nor must they plead a legal theory *per se*).

Here, the Petition need only allege facts supporting that Petitioner is (i) a member or manager[11], and (ii) that it is "not reasonably practicable to carry on the business in conformity with a limited liability company agreement." *Vila v. BVWebTies Ltd. Liab. Co.*, 2010 Del. Ch. LEXIS 202, at *18 (Del. Ch. Oct. 1, 2010) (quoting *Haley v. Talcott*, 864 A.2d 86, 93 (Del. Ch. 2004)). The Petition has done that. *See generally* Petition at ¶¶ 16- 26.

Instead of providing arguments that Petitioner had not satisfied the rules of notice pleading, Respondents seek to convince the court that Petitioner has fallen

[11] Respondents contend that this Petition fails to satisfy the standard for dissolution because CKAL was removed as a member of DDIS. *See* Resp. Op. Br. 20-21. However, this contention is unsupported by Respondents' actions. First, Respondents treat Beckett as an existing member of the LLC. *See id.* at 3 ("Respondent Garry Beckett ("Beckett") is a current manager of DDIS and owns 25% of DDIS."). However, if the Cross-Purchase had actually removed CKAL as a member, Beckett would have been similarly removed. Beckett is also claiming to be a member. *See* Beckett's Answer to the Petition, Dkt. No. 3. Further, if this purported buy-out had been consummated, CKAL would have received the payment, however, inadequate. To date, no payment for its membership interest, has been received by CKAL, and Davis is still receiving information that members are regularly provided, including financial statements. *See* Exh. C (Email of April 22, 2022 from Shelly Alicz detailing DDIS's financial report.)

"far short of satisfying" the standard for dissolution, simply because the Petition does not reference Section 10(b) of the Operating Agreement or prove "deadlock". *See* Resp. Op. Br. at 20-21. However, as will be discussed below, even absent a voting deadlock, this Court may exercise its discretion to dissolve a limited liability company where one can make a "'convincing showing' that the entity's continued existence would be 'obviously futile and would not result in business success.'" *Homer C. Gutchess 1998 Irrevocable Trust v. Gutchess Companies, LLC*, 2010 Del. Ch. LEXIS 91, at *3 (Del. Ch. Feb. 22, 2010) (quoting *In re Arrow Inv. Advisors, LLC*, 2009 Del. Ch. LEXIS 66, at *14 (Del. Ch. Apr. 23, 2009)).

Moreover, Respondents' reliance on *BET FRX LLC v. Myers*, 2022 Del. Ch. LEXIS 93, at *13 (Del. Ch. Apr. 27, 2022), with its inapposite facts regarding an alleged deadlock, is misplaced. Even if magic words were required under the notice pleading standard, Respondents' reliance on *BET FRX,* is not helpful to Respondents. Specifically, *BET FRX,* does not support the contention that the only means of satisfying the dissolution standard is evidencing deadlock. In that case, this Court held that "judicial dissolution is limited to 'situations in which the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in . . . a voting deadlock or where the defined purpose of the entity has become impossible to fulfill.'" *Id.* (quoting *In re Arrow Inv. Advisors, LLC*, 2009 Del. Ch. LEXIS 66 at *9).

The Petition asserts facts regarding the deadlock of the members. *See* Petition ¶ 23. It also asserts that the defined primary purpose of the entity has become impossible to fulfill. *Id.* at ¶ 16- 22.

Finally, Respondents attempt to frame Petitioner's request for dissolution as a mere souring of the business relationship, or that the corporate dysfunction does not warrant dissolution of DDIS. *See* Resp. Op. Br. at 20, As discussed below, DDIS is facing far more than a failure to achieve its business plan or a conflict of personalities. The actions of Respondents have made it well beyond "not practicable" to continue the business of DDIS—it is impossible. Petitioner's action should survive a motion to dismiss. Moreover, Section 10(b) does not provide an equitable exit for a deadlock. Given these facts, Petitioner has adequately stated a claim for dissolution pursuant to § 18-802 of the Delaware LLC Act.

Section 18-802 expressly authorizes the Court of Chancery to decree dissolution of a limited liability company whenever it is "not reasonably practicable to carry on the business in conformity with a limited liability company agreement." Despite Respondents' arguments to the contrary, the Petition adequately alleges that (1) the purpose of DDIS has been frustrated; (2) the members are deadlocked, and (3) dysfunction among members makes it no longer reasonably practicable to carry on the business of the LLC.

The Petition has adequately alleged a claim for dissolution; therefore, it must survive a motion to dismiss.

B. The Purpose of The LLC Is Frustrated

Respondents argue that Petitioner did not state in the Petition that the purpose of DDIS's business has been frustrated. Respondents wholly place their support for this contention on *BET FRX.* *See* Resp. Op. Br. at 20 (citing *BET FRX*, 2022 Del. Ch. LEXIS 93 at *13). However, the facts of *BET FRX,* are unlike this case. In that case, parties had a disagreement over money. The transaction at dispute was not one that the governing agreement specified how to address.

By contrast, dissolution has been sought here based on well detailed irreconcilable differences that make it impracticable to continue the business of DDIS. *See In re Silver Leaf, L.L.C.,* 2005 Del. Ch. LEXIS 119, *40-41 (Del. Ch. Aug. 18, 2005) (This Court has underscored that the statutory standard does not require that it be impossible to carry on the business, rather only that it is not "*reasonably practicable*.") (emphasis added). Petitioner's request for dissolution is not a mere "knee jerk reaction" to being removed as DDIS's manager, as asserted by Respondents. *See* Resp. Op. Br. at 20.

While not using the terms "frustrated purpose," the facts alleged in the Petition amount to just that. *See* Petition at ¶¶ 16-24, 26. The actions of the other members have destroyed all trust, and made it impossible to continue doing business together,

along with the presentation of a deadlock. This situation was not considered in *BET FRX*.

In *Decco U.S. Post-Harvest, Inc. v. MirTech, Inc.,* 2018 Del. Ch. LEXIS 545, *1*,* (Del. Ch. Nov. 28, 2018), the court granted a request for judicial dissolution of a limited liability company that was formed to commercialize products based on certain technology licensed to the joint venture. The court concluded that it was not reasonably practicable to continue the company because of a consent judgment that interfered with the use of the technology, and there was no evidence presented at trial that there were other viable business lines. As in the instant case, the petitioner in *Decco* did not trust the other member of the joint venture, nor did the petitioner want to continue doing business with the other joint venture member. *Decco*, 2018 Del. Ch. LEXIS 545 at *14.

While the parties in the instant matter do not have a consent judgment to support the grant for dissolution, the other key facts are identical to the *Decco* case. Davis does not trust the remaining members. They have been faithless, breached the Operating Agreement, hacked his email, and failed to provide the mandatory advancement for a case that a fellow member, DNA, brought in federal court. *See, e.g.,* Op. Br. to SJ, Exhs. I, J, N and O (the refusal of advancement; hacking email exchange). The business relationship is irrevocably destroyed, and CKAL, through Davis, no longer wishes to do business with the other members.

Moreover, *Meyers Natural Foods LLC v. Duff,* 2015 Del. Ch. LEXIS 162, *11-12 (Del. Ch. Jun. 4, 2015), also addressed an instance where a frustrated purposed supported a grant for dissolution. The *Meyers* court reviewed the purpose clause in the limited liability company agreement and a supply agreement executed in connection with the limited liability company agreement and determined the purpose of the business was to market and distribute beef products pursuant to the supply agreement. The *Meyers* court reasoned that: "a sensible interpretation of precedent is that the purpose clause [of a limited liability company agreement] is of primary importance, but other evidence of purpose may be helpful as long as the Court is not asked to engage in speculation." *Id*. at *12. Because the supply agreement had terminated, the court found that the purpose of the business was frustrated and therefore granted the application for judicial dissolution. *Id*. at *20.

Despite a "catch-all safety clause", the parties described in great detail the purpose of their business in the LLC clause to engage in a specific type of food business.

The Petition describes why the business purpose of DDIS has been frustrated. The three members of the LLC have a dysfunctional relationship and have each expressed a desire to no longer do business together through DDIS, which naturally frustrates their ability to carry out a very specifically described purpose of the LLC. *See* Op. Br. to SJ, Ex, B at § 1(b)(i). Their dysfunction also makes it impossible to

achieve a unanimous vote required to carry out the business purpose on the nine enumerated business decisions in the Operating Agreement. *See id.* § 6(b).

Two of the three members separately have offered to purchase the interests of the others, which would have left one sole member if their intent were carried out. *See* Op. Br. to SJ, Exhs. G and Q.

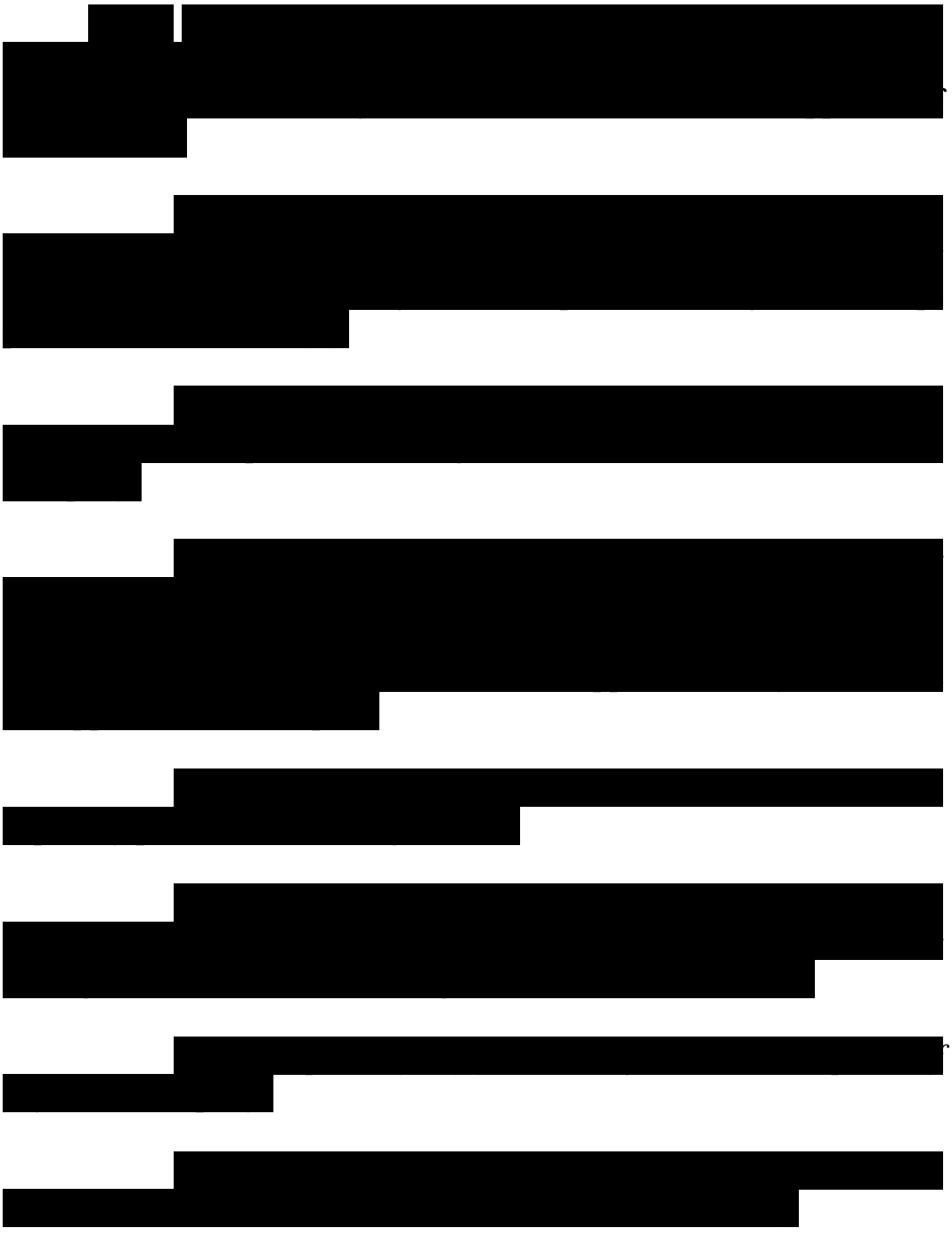
Self-evident dysfunction renders the LLC incapable of serving its business purpose and leaves it without the means to continue in a reasonably practicable manner. As in *Meyers* and *Decco*, this Court should grant Petitioner's request for dissolution.

C. Deadlock Among the Members

Second, Respondents contend that the standard for dissolution had not been satisfied because Petitioner did not prove that the parties are deadlocked. Not so. The Petition did supply sufficient facts to support the contention that DDIS is deadlocked. *See, e.g.,* Petition at ¶ 23 ("The members and managers of the LLC have violated the Operating Agreement by incurring more than $25,000 of debt without the unanimous agreement of all members . . .").

As discussed above *BET FRX*, is inapplicable to this case because the transaction at issue in that case did not require a unanimous vote. *See BET FRX*, 2022 Del. Ch. LEXIS 93 at *14. Instead, in the instant case, the inability to satisfy the unanimous member consent provision has created a deadlock. Specifically, the

Operating Agreement lists nine actions critical to the LLC, which require the *unanimous* approval of members, but for which CKAL, as a member, does not approve:



[redacted]

(ix) [redacted][12]

Op. Br. to SJ, Ex, B at § 6(b) (emphasis added).

Section 6(b)(vii) does not allow the distribution of profits without the approval of all the members, and CKAL will not approve any distribution of profits. Section 6(b)(vi) requires all the members to adopt a business plan or future budgets, but CKAL will not agree.

This is situation is more akin to the following cases.

In *BVWebTies Ltd. Liab. Co.*, the court entered a decree for dissolution when the members were deadlocked over serious managerial issues and the uncontradicted evidence established that members were unable to agree on the strategic vision for

[12] On April 22, 2022, Shelly Alicz, Chief Financial Officer of DNA, emailed all DDIS members stating, [redacted] *See* Op. Br. to SJ, Exh. CC. This email suggests that DNA interpreted §6(b)(viii) to require the consent of all members to a loan (that will ultimately be funded from a financial institution). In light of the remaining members keeping Davis in the dark regarding the business of the LLC, Davis cannot and does not approve of any additional loans, including the loan currently proposed, [redacted] *See id.*, Exh. BB (Email of April 22, 2022 from Shelly Alicz requesting member approval for [redacted] with attached proposed Promissory Note.)

LLC. 2010 Del. Ch. LEXIS 202 at *22. Further, this Court rejected the argument that it was reasonably practicable to continue the business merely because the LLC was making a profit. *Id.*

In order for the court to grant the petition for dissolution, there is no need for a party to demonstrate that it is *impossible* for DDIS to carry on the purpose of the business. *PC Tower Center, Inc. v. Tower Center Dev. Associates Ltd. Partnership*, 1989 Del. Ch. LEXIS 72, at *16 (Del. Ch. June 8, 1989) ("The standard set forth by the Legislature is one of reasonable practicability, not impossibility."); *see also In re Silver Leaf*, 2005 Del. Ch. LEXIS 119 at *40-41. While the text of Section 18-802 does not delineate what a court must (or must not) consider when evaluating whether it is "reasonably practicable" for a company to continue, one factor warranting dissolution is a deadlock.

A deadlock among members whose unanimous approval is needed provides a "quintessential example of a situation justifying a judicial dissolution." *BVWebTies Ltd. Liab. Co.*, 2010 Del. Ch. LEXIS 202 at *21; *see generally PC Tower Ctr., Inc.*, 1989 Del. Ch. LEXIS 72 at *13-17; *In re Silver Leaf*, 2005 Del. Ch. LEXIS 119 at *45 (dissolving an entity because the "vote of the members is deadlocked" and because the LLC "has no business to operate"); *Haley*, 864 A.2d at 89.

In *Fisk Ventures, LLC,* the court, in connection with determining whether the statutory standard was satisfied, reviewed case law that found the following factual circumstances convincing:

(1) A deadlock at the board level;

(2) The operating agreement provides no method to circumvent the deadlock; and,

(3) Due to the financial condition of the company, there effectively was no business to operate. 2009 Del. Ch. LEXIS 7, *11.

The DDIS Operating Agreement does not permit an equitable exit. Also, the Members of DDIS are required to give unanimous approval for nine enumerated business decisions -- on which they cannot agree. *See* Op. Br. to SJ, Ex, B at § 6(b).

Dissolution was granted also in *GR Burgr, LLC v. Seibel (In re GR Burgr, LLC),* 2017 Del. Ch. LEXIS 156, at *14 (Del. Ch. Aug. 25, 2017). This court considered among other factors that contributed to a finding that the statutory standard was satisfied, two members owning 50% of an LLC who were deadlocked, and the limited liability company agreement required unanimous approval of most matters. *Id.* at *15-16. Further, the court found dysfunction and deadlock that left the LLC "… in a petrified state with no means in the LLC Agreement to break free." *Id.* at 14.

In the case styled *TransPerfect Global, Inc. v. Elting (In re Shawe & Elting LLC),* the court dissolved an LLC where members, each with virtually a 50% interest, were deadlocked. This court concluded "it is not reasonably practicable to carry on the LLC's business." 2015 Del. Ch. LEXIS 211, at *3 (Del. Ch. Aug. 13, 2015). Particularly, the court found that, among other factors, the business purpose of the company was not reasonably likely to be served in the future based on the inability to resolve the deadlock. Therefore, the court ordered the judicial dissolution of the company.

As supported by the case law, without the required unanimous votes to distribute profits, or approve a business plan or budget, it cannot be reasonably practicable to carry on the business of DDIS at all – or in conformity with the operating agreement. Thus, dissolution should be granted as it was in *Fisk Ventures; In re GR Burgr, LLC*; and *In re Shawe & Elting LLC*.

D. CKAL Cannot Equitably Exit the LLC

Third, Respondent contends that even if the Petition had adequately plead deadlock, "Section 10(b) of the Operating Agreement provides a procedure for resolving deadlock . . .." *See* Resp. Op. Br. at 20. However, CKAL is not required to utilize the deadlock provision contained in the operating agreement. *See Fisk Ventures, LLC*, 2009 Del. Ch. LEXIS 7 at *20 ("if that deadlock cannot be remedied through a legal mechanism set forth within the four corners of the operating

agreement, dissolution becomes the only remedy available as a matter of law."); *Haley*, 864 A.2d 86 at 88, 96-98 (if an exit mechanism offered in the LLC agreement was not a reasonable alternative to a continued deadlock, the party is not required to seek relief from the deadlock under its provision).

Lola Cars Int'l Limited v. Krohn Racing, LLC, 2009 Del. Ch. LEXIS 193, *17 (Del. Ch. Nov. 12, 2009), is particularly instructive to this point. The court concluded that the operating agreement did not provide an equitable exit mechanism. Specifically, the deadlock provision in the operating agreement was misleading. *Lola Cars Int'l Limited v. Krohn Racing*, 2010 Del. Ch. LEXIS 176, at *120-22 n.246 (Del. Ch. Aug. 2, 2010). Specifically, the court notes:

> Although § 10.2 is referred to within the Operating Agreement as the "deadlock procedure," this label may be misleading. The provision is triggered upon a "*dispute* relating to the affairs of the Company" arising between the Member Parties that remains unresolved for a period of approximately one month, and not necessarily upon a "deadlock" in the sense of impasse (emphasis added)."

Id.

Section 10 of the DDIS Operating Agreement does not allow the parties to resolve any deadlock equitably. The mechanism of exit does ensure that CKAL may actually exit. Rather, it provides a procedure that requires a member to select a price for his interest in the LLC, but then Section 10(b)(ii) gives the other members the right to sell their interests to the member who wants to exit. Section 10(b) provides:

The DDIS Operating Agreement cannot actually extract the parties fairly. Specifically, the procedure merely creates an unpredictable Russian-roulette situation where CKAL may be forced to buy the interest of other members instead of selling its interest in DDIS. Moreover, like *Lola Cars*, the "deadlock provision" does not provide an equitable solution to a deadlock.

Therefore, CKAL was not required to utilize or reference Section 10(b) of the Operating agreement to adequately state a claim.

E. Dysfunction among members makes it reasonably impracticable to carry on the business of the LLC

Finally, Respondents contend that Davis's removal as manager, his alleged removal as a member, and purported breaches of the Operating Agreement and fiduciary duties, "do not rise to the level of corporate dysfunction required for judicial dissolution." Resp. Op. Br. 20-21. Again, relying on *BET FRX*, Respondents attempt to make the case that their actions are not so substantially dysfunctional to warrant dissolution.

However, in *BET FRX*, the conflict between the parties was a "mere disagreement" about money. 2022 Del. Ch. LEXIS 93 at *5-6, 13-14. This case is far beyond a mere disagreement. The DDIS members have a dysfunctional and fractious relationship. Some of these instances of dysfunction include: (i) a dispute about which agreements govern the LLC;[13] (ii) Davis is expected by DDIS to work for free;[14] (iii) hacking by a manager of the email inbox of Davis;[15] (iv) breaches of

[13] *See* Op. Br. to SJ, Exhs. B and Q.

[14] *See id.*, Exh. H.

[15] *See* Op. Br. to SJ, Exhs. J, T and R.

the Operating Agreement by denying advancement and reimbursement;[16] and (v) breaches of fiduciary duties.[17]

These actions have led Davis to irrevocably distrust the other two members. In other similar Chancery cases, this Court has granted judicial dissolution based on a history of discord. *See McGovern v. General Holdings, Inc.*, Del. Ch. LEXIS 93, at *80 (Del. Ch. May 18, 2006); *Haley*, 864 A.2d at 95-96 (ordering dissolution given the "inability of the parties to function together," due to their "strident disagreement" and "open hostility").

Additionally, in *McGovern*, this Court agreed to dissolve an entity after a general partner that owned 90% of a 3-member limited partnership was removed as a general partner due to the egregious breaches of the general partner's duty of loyalty and the death of another member. Del. Ch. LEXIS 93 at *80. Rather than appointing a substitute manager, the court relied on the "dysfunctional" and "fractious" relationship between the limited partners as the basis for dissolution. *Id*

The court in *Lola* granted dissolution because: (i) there was a potentially irreconcilable conflict between the parties; (ii) it was unreasonable to expect the members to support the money-losing company with loans when there is no clear

[16] *See* Op. Br. to SJ, Exhs. N and O.

[17] *See* Op. Br. to SJ, Exh. S.

indication that such loans would stave off financial failure; and (iii) it would be difficult to imagine that any company could attain commercial success with a careless and disloyal chief executive officer. 2009 Del. Ch. LEXIS 193 *13, 17-19.[18]

Petitioner relies on more than isolated fiduciary duty breaches, and acknowledges that: "Mere disagreement, or even fiduciary breaches standing *alone,* do not support a claim for judicial dissolution." *Id.* at *14. But the Petition alleges many more facts sufficient to support frustrated purpose, deadlock, and a dysfunctional relationship. Therefore, Petitioner has adequately stated a claim for relief to be granted. This motion to dismiss should be denied.

[18] *In re Seneca Investments LLC*, 970 A.2d 259, 263 (Del. Ch. 2008), is inapposite as it involved the statutory prerequisite not being met because the company was being used as a passive instrumentality to hold title to assets, and this was part of the broad lawful activity purpose clause in the organizational documents.

CONCLUSION

In sum: (1) the Petition satisfies the pleading stage of review for Delaware Court of Chancery Rules 12(b)(1); 12(b)(2); and 12(b)(6); (2) the applicable authority does not support staying or dismissing this action in favor of the Federal Action; (3) as the Petition has adequately alleged Klein's role as a co-conspirator in the conspiracy to breach Beckett's fiduciary duty, this Court has jurisdiction over Klein; and (4) the Petition has sufficiently alleged the statutory basis for dissolution pursuant to Section 18-802 of the Delaware LLC Act. This Court should deny Respondents' Motion to Dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2022, I caused copies of Petitioner's Answering Brief In Opposition To Motion To Dismiss Of Doehler North America Inc., Stuart McCarroll, and Andreas Klein were served via *File&ServeXpress* upon the following:

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