

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM - PART 43

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4 PERELLA WEINBERG PARTNERS, LLC; PWP MC, LP; Index No.
5 PWP EQUITY I LP; AND PERELLA WEINBERG PARTNERS 653488/15
6 GROUP, LP;

7 Plaintiffs,

8 -against-

9 MICHAEL A. KRAMER, DERRON S. SLONECKER,
10 JOSHUA S. SCHERER, ADAM W. VEROST, AND DUCERA
11 PARTNERS, LLC,

12 Defendants.

13 -----X

14 PROCEEDINGS 60 Centre Street
15 New York, New York
16 May 27, 2021

17 B E F O R E:

18 HONORABLE ROBERT REED,

19 JUSTICE

20 A P P E A R A N C E S:

21 GIBSON DUNN & CRUTCHER
22 ATTORNEYS FOR THE PLAINTIFF
23 200 Park Avenue
24 New York, New York 10166

25 BY: CHRISTOPHER BELELIEU, ESQ.

BY: KARIN PORTLOCK, ESQ.

(Appearances continued...)

1 A P P E A R A N C E S :

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BY: LISA SOLBAKKEN, ESQ.

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BY: DEAN DAVIDIAN, ESQ.

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BY: YURIKO TADA, ESQ.

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LISA M. DE CRESCENZO,
OFFICIAL COURT REPORTER

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1 THE COURT: Good morning, all.

2 ALL: Good morning, your Honor

3 MR. BELELIEU: Christopher Belelieu on behalf of
4 PWP plaintiffs. I'm here with my partner, Ms. Portlock. I
5 don't know if you can see Ms. Portlock on the screen.

6 THE COURT: I can't.

7 MS. PORTLOCK: Good morning.

8 THE COURT: I guess I really only need to see those
9 who plan to be speaking.

10 MS. SOLBAKKEN: Lisa Solbakken. I'm on Ms.
11 Davidian's computer. Sorry. She has the best computer, so
12 that is what we use.

13 THE COURT: The best computer, okay. Who am I
14 going to need for the argument? I see a lot of names and
15 only a couple of faces.

16 MR. BELELIEU: Your Honor -- go ahead, Ms.
17 Portlock.

18 MS. PORTLOCK: Your Honor, it will just be myself
19 and Mr. Belelieu for the plaintiffs. We have some other
20 associates from our firm who are just observing today.

21 MS. SOLBAKKEN: Your Honor, it will just be me on
22 behalf of counterclaim plaintiff/defendants and I have
23 colleagues in the room with me, and I believe the general
24 counsel of Ducera has signed on, as has Mr. Ruros with their
25 camera off.

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1 THE COURT: Okay, all right.

2 So, let me have appearances. Plaintiff's first.

3 MS. PORTLOCK: Good morning. Karin Portlock of
4 Gibson Dunn & Crutcher on behalf of plaintiffs. I'm joined
5 by my colleague, Christopher Bellevue.

6 MS. SOLBAKKEN: Good morning. Lisa Solbakken of
7 Arkin-Solbakken from the defendants and I have at the table
8 Deana Davidian and Yuriko Tada.

9 THE COURT: We're dealing with motion sequences 9
10 and 10 and, I believe, motion sequence 9 is the defendant's
11 motion. Is that correct?

12 MS. SOLBAKKEN: That's correct, your Honor.

13 THE COURT: So, why don't you go ahead and begin.

14 MS. SOLBAKKEN: Sure. Thank you, your Honor.

15 Your Honor, PWP's entire case is framed around a
16 lift out dead in the night narrative that is totally false
17 and belied by its own witnesses and its own testimony in
18 this case. It clings to it any way to mask the unlawful
19 seizure of \$50 million in invested equity and over \$10
20 million in earned compensation, and in order to justify is
21 the defamation campaign commenced by PWP upon defendant's
22 termination.

23 Your Honor, it's undisputed that in October of 2014
24 Peter Weinberg informed Michael Kramer that he was being
25 removed from all management and all leadership roles at the

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1 firm. He was further informed he was not liked or entrusted
2 by his partners, and Mr. Weinberg knew that this would cause
3 Mr. Kramer to consider leaving the firm, which is something
4 that the two sort of openly discussed in the months that
5 followed.

6 Mr. Weinberg was also aware of the fact that those
7 who worked with Mr. Kramer would be concerned about his
8 potential departure and heightened their individual reasons
9 or their individual concerns with PWP at the time.

10 Ultimately, after several months of uncertainty,
11 Mr. Kramer requested that PWP consent to the retention of
12 Proskauer Rose to represent him in connection with
13 discussions regarding either the terms of continued
14 employment with PWP or an amicable separation from PWP.

15 Unfortunately, unbeknownst to both Mr. Kramer and
16 Proskauer Rose, Mr. Weinberg had different plans. That same
17 day that they consented to the retention of Proskauer Rose,
18 Mr. Weinberg approached Mr. Kevin Cofsky and promised him
19 \$500,000 in additional compensation for the next year and to
20 move the needle in connection with Mr. Cofsky's partnership
21 ambition and then Mr. Cofsky was subsequently asked to
22 provide facts on how the defendants quote/unquote violated
23 their agreements.

24 Within 24 hours of that conversation, defendants
25 were terminated without notice and without cause. As set

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1 forth in our briefs, this matter is contrary to PWP's
2 obligations. At the outset, your Honor, the employee
3 non-solicitation provision that is at issue is
4 unenforceable. In this respect DTI is instructive. In DTI,
5 the Court, Judge Rakoff was dealing with an essentially
6 identical provision to the one before the Court today and
7 assessed that the words including encourage or entice or
8 induce one employee to leave an employer was just far too
9 vague and potentially overbroad and inconcise and indefinite
10 to be enforced.

11 Put differently, Judge Rakof's view was that an
12 employer could use virtually any conversation had amongst
13 employees to verify the employee and find some manner or
14 some basis to terminate them, which is contrary to the
15 public interest which strongly supports the free flow of
16 information concerning alternative employment.

17 So, as a matter of law, Judge Rakof struck the
18 provision that is, again, virtually identical to the one in
19 front of the Court today and deemed it unenforceable. Just
20 so that the Court is aware, it's not in our brief, but
21 Justice Masley recently followed the precedent set forth in
22 DTI in a case decided in March of this year called National
23 Tax and Financial Services and that's at 2021 Westlaw 860179
24 and in that case, Justice Masley --

25 THE COURT: Say that one more time.

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1 MS. SOLBAKKEN: Sure. 2021 Westlaw 860179. The
2 name of that case is National Tax and Financial Services and
3 in that case, Justice Masley applied the same analysis that
4 Judge Rakof applied in DTI to hold an employee non-solicit
5 clause to be unenforceable as a matter of law.

6 We also contend, your Honor, that PWP fails to
7 justify its non-solicitation provisions here with any
8 legitimate interest. As in both New York and Delaware,
9 legitimate interests are pretty well defined. It's the
10 misappropriation of an employer's trade secrets or
11 confidential information or competition by former employee
12 whose services are unique or extraordinary.

13 In PWP's opening papers, they don't allege any of
14 this. They have alleged they have some matter of protection
15 from en masse resignations. Leaving aside the fact that
16 there were no resignations here and that defendants were
17 indisputably, on-the-record evidence terminated but leaving
18 that aside, that is not something that New York recognizes
19 as an enforceable or quote/unquote legitimate interest.

20 PWP, in its reply, looks to sort of resuscitate its
21 claim and say, well, Kramer was, in some manner, unique but
22 it made absolutely no reference to any other defendant here,
23 your Honor. Doesn't say why Mr. Slonecker is unique or why
24 Mr. Verost is unique or why Mr. Scherer is unique.

25 To the extent they claim Kramer is unique, it fails

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1 as well because the courts are pretty clear that just being
2 a client or revenue-generating individual is not what the
3 Court is really talking about when they're talking about
4 whether or not an employee is unique.

5 In fact, the Court of Appeals sort of recently
6 visited this issue in Brown & Brown and the Court-- and it
7 is an issue actually that came up in BDO itself where the
8 Court said this is the type of thing we held within Gelder &
9 Kiplinger where it's very, very specific in those instances,
10 it was medical/surgical practices in rural areas which, if
11 engaged by one of the employees, would ipso facto pull the
12 clientele from the other place.

13 In fact, in BDO the Court of Appeals says we're not
14 even going to apply this sort of unique analysis to BDO
15 which is a national accounting firm that works in a huge
16 metropolis where employees, good or not good, are, you know,
17 it's a competitive environment, and that's further to the
18 public interest of the free flow of information and
19 employment opportunities.

20 Finally, this Court should decline PWP's suggestion
21 that this provision could be blue penciled. Blue pencilling
22 in BDO-- blue pencilling is something that the employer
23 needs to establish the burden on. PWP doesn't even endeavor
24 to suggest in this case that there is some sort of good
25 faith or lack of overreaching that would warrant any manner

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1 of blue pencil to the statute and instead, just as many
2 courts said in Delaware and New York, in this instance, any
3 manner of blue pencilling would simply serve to give PWP
4 another bite at the apple and award them for using a
5 provision in an anticompetitive way.

6 As your Honor is probably aware, in our papers we
7 sort of articulate there's many other people at PWP who
8 engaged in conduct that is virtually identical to that
9 alleged as to the defendants who were never accused of
10 solicitation.

11 In terms of the claims that the defendants engaged
12 in, improper employee solicitation, as a matter of fact,
13 your Honor, we obviously dispute that. PWP looks to group
14 plead all of the defendants and when sort of listed out,
15 there's very meager, if any, allegations as to each of them.

16 So, for example, the spread sheets with the
17 purported equity splits. That, indisputably, was never
18 read, seen, or requested by anyone of the partner defendants
19 which is Kramer, Slonecker, and Scherer. Likewise, Verost
20 and others didn't feed the business plan considerations,
21 which was a document drafted not by one of the defendants,
22 but by somebody who PWP did not terminate for cause,
23 Mr. Bradley Meyer, who testified under oath that this was a
24 document he put together on his own in an effort to pitch
25 Mr. Kramer to start his own firm.

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1 THE COURT: Right.

2 MS. SOLBAKKEN: So, then in respect to the
3 January 11th meeting, again, there is -- Mr. Cofsky himself,
4 which is their primary fact witness, came out of that
5 meeting saying if you want to terminate, if you want to
6 terminate Mr. Scherer for cause, I just don't see the reason
7 you have to do it.

8 So, Mr. Verost is said to have asked some
9 questions. Slonecker is said to have spoken to some manner
10 of transparency and Kramer himself was responding to various
11 inquiries that were put to him by the MD's who were the ones
12 who requested the meeting at the outset.

13 There has been some hay made out of the fact that
14 this meeting took place at Mr. Kramer's residence.
15 Mr. Kramer testified that is because that was what was most
16 convenient to him. He knew it would be a complaining
17 session amongst all of the MDs. It was not unusual for
18 people to go to other peoples' houses, including Weinberg
19 and Kramer, who both lived in Connecticut. A bunch of these
20 folks did. There is nothing nefarious to be drawn.

21 If that meeting, I suggest, occurred on PWP
22 premises, we would be here arguing if that was a misuse of
23 PWP's resources. So, for that reason as well, we think that
24 PWP's effort to obtain summary judgment should fail.

25 We also set forth in our brief, your Honor, the

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1 various ways in which we think PWP breached its contracts.
2 The first and most obvious is Mr. Kramer was a member of
3 PWP, LLC. It's a member managed LLC which vests all of the
4 members with the same right to manage the company and,
5 without a doubt, by Mr. Weinberg's own admission, Mr. Kramer
6 was eliminated from all management responsibilities, and the
7 record is replete with evidence where Mr. Weinberg says he
8 doesn't want him in charge of anything. He doesn't want him
9 leading anything and, in fact, in his review call said
10 Mr. Kramer wreaked havoc on the firm.

11 So, you know, it is abundantly clear that
12 Mr. Weinberg divested Mr. Kramer of the management rights he
13 was entitled to under the LLC agreement. With respect to
14 Scherer and Slonecker and Kramer as well, the LLC agreement
15 requires written consent or approval by the super majority
16 in assessing whether or not an act or omission of cause
17 actually occurred; and, during discovery, your Honor, we
18 questioned the members of the super majority who were the
19 purported approvers or voters in connection with that and
20 uniformly they all said they had no idea what any one of the
21 defendants may or may not have done.

22 I'm going to quote from the record Mr. Kourakos who
23 testified he could not tell you who did what, who said what
24 to who, and didn't recall any action of any one of the
25 individuals. This is a complete abrogation of the

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1 protection afforded to the LP's under that contract which
2 require the super majority to actually assess this.

3 They're not allowed to simply say Peter Weinberg
4 said they engaged in cause and we're going to assume that
5 that's true. That's not what the contract provides.

6 THE COURT: Does the contract-- does it require
7 them to make the assessment or the contract simply requires
8 them to have a vote by super majority? I mean, you know, in
9 terms of what the contract actually requires.

10 MS. SOLBAKKEN: Right. The contract --

11 THE COURT: It's always going to be the case that
12 any type of organizational meetings, if they're going to be
13 people who are more invested than others, and I don't know
14 we can impose an obligation that everyone, every one of
15 those voting members be invested.

16 The contract can require that each one of them be
17 willing to raise their hand and say yay or nay but I don't
18 know that but we can say a requirement that there be one of
19 those voting members be fully aware of all the facts, just
20 as a practical matter.

21 MS. SOLBAKKEN: Understood, your Honor, but so
22 we're clear, and this is section 401(b) Romanette nine. It
23 says the super majority must assess whether or not they had
24 discretion, of course, and we'll get to that but they must
25 assess whether an event, act or omission actually occurred

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1 and it is not appropriate to not make any judgment at all
2 with respect to, and assume that Mr. Weinberg has made the
3 correct call because there's limited protection offered to
4 these LP's in connection with the termination decisions and
5 this is one of them, and it specifically requires that the
6 members of the super majority who are voting, that they
7 actually understand the event, act, or omission with which
8 the terminated defendants are being charged.

9 To just-- and this sort of dovetails with the sole
10 discretion point, your Honor, which they've raised. Sole
11 discretion is latitude and judgment. There is not a single
12 case to which they've cited that would allow sole discretion
13 to be a means of engaging in bath faith, a means of ignoring
14 one's contractual obligations or acting in a manner that is
15 arbitrary or capricious in applying the clause to only those
16 with vested entitlements.

17 There's no case law that provides that. That's
18 just not the use of the term sole discretion. In fact,
19 courts have come out and said if you're going to have a
20 contractual standard, which, in this case, is the cause
21 definition, that has to be met. There has to be evidence on
22 the record that that's met. Sole discretion doesn't allow
23 you to avoid the standard and the obligations set forth in
24 your own contract.

25 Moving on to the alleged improper solicitation

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1 which we also think -- client solicitation which we also
2 believe should be dismissed as a matter of law. Once again,
3 with respect to Slonecker, they are-- and Verost, there is
4 literally not a single act of client solicitation that PWP
5 directs this Court to.

6 They tried to do that with Monsanto but they failed
7 because Monsanto was deposed and repeated over and over
8 again that they weren't solicited by Mr. Kramer and that
9 they wouldn't have to be solicited by Mr. Kramer because
10 they had a preexisting relationship with Mr. Kramer and
11 that's something that PWP doesn't dispute.

12 It suggests that they somehow acquired that
13 relationship but we would refer you to the framework
14 agreement which is an asset purchase agreement which makes
15 100 percent clear that PWP did not purchase the Monsanto
16 relationship for a thousand dollars. It is not listed on
17 purchased assets, and it would be for far more than that
18 amount.

19 There was a pending engagement which is
20 Monsanto-Solutia but that had been resolved years before
21 these events. We also allege that PWP's fiduciary claim,
22 unfair competition claim, and tortious interference claim
23 should all be dismissed. They're all duplicative. If PWP's
24 failed breach of contract claims, and we set forth
25 references in our brief to the complaint and the areas of

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1 their brief where they discuss these causes of action, but
2 they also fail on the merits.

3 So, for example, Mr. Weinberg admitted under oath
4 that up until the date of the termination, defendants are
5 working hard and working with clients and expanding PWP's
6 business. So, there is no basis for a fiduciary breach claim
7 to lay there.

8 Similarly, with unfair business competition, there
9 is no allegation of misappropriation of commercial advantage
10 or infringement or dilution of a trademark which is required
11 by New York to support an unfair competition claim.

12 With respect to tortious interference, it's the law
13 of New York you cannot interfere with an employee-at-will
14 arrangement which is what PWP alleges in an effort to
15 support that.

16 With respect to Ducera, Ducera should be entirely
17 dismissed. PWP endeavors to assert against Ducera torts but
18 the law of this department is while an entity who was not
19 created at the time of the wrongful conduct might sometimes
20 be bound by contractual obligations that precede its
21 existence, this is not something that can extend to
22 potential tort liability.

23 That is the Fischer case decided by the First
24 Department in 1993 which PWP does not distinguish. With
25 respect to PWP --

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1 Would your Honor like me to now go into our
2 response to their challenges to our claims or --

3 THE COURT: Let me here from your adversary.

4 Go ahead.

5 MS. PORTLOCK: Thank you, your Honor. I'll begin
6 with a brief opening to sort of set the stage here. This is
7 a very straightforward case. It's a very clear contract
8 case, as I know your Honor recognizes, and it's a story of
9 defendants' deceit and wrongdoing under the terms of that
10 contract. There were clear contractual breaches that went
11 on here.

12 I want to provide a little bit of context to
13 situate this case within the financial services industry so
14 that we can really appreciate the importance of the issues
15 presented today and, specifically, the provisions that
16 defendants are asking you to invalidate. They're wrong on
17 that and there's a lot of reasons why, which I want to make
18 clear.

19 So, first of all, in this industry, your Honor, the
20 arrangement between financial services professionals is to
21 practice as a collector, as a partnership, however they
22 structure that as a sacred arrangement. That is an
23 arrangement based on trust and loyalty, 100 percent. That
24 is just clear.

25 The partnership memorializes the relationship

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1 because the business is fiercely competitive. It's talent
2 driven. It's based on relationships, client relationships,
3 and the model protects those relationships and protects
4 individuals who are working for one of these firms from
5 conspiring against the better interest of the firm, in
6 conspiring against their fellow partners.

7 Every firm, big and small, plays by the same rules.
8 It's a matter of routine business practice, your Honor, that
9 these firms obligate partners and key employees not to
10 solicit each other and other key employees and partners of
11 the firm and not to solicit the firm's clients.

12 That is standard business practice, okay, and the
13 defendants know this. They know this because Ducera has a
14 newly identical non-solicitation provision in their founding
15 agreement. I would direct the Court to Mr. Belelieu's
16 affidavit in support of this motion, Exhibit 13, section
17 1102, which sets forth Ducera's non-solicitation provisions.
18 They are nearly identical.

19 They vested Mr. Kramer with similar authority to
20 make the kind of decisions that PWP made in this case. PWP
21 is simply enforcing a completely lawful and standard
22 provision in this industry of a contract. So, for sure, you
23 know, Ducera's adoption of this provision reveals its
24 hypocrisy but what I want you to know, your Honor, is it
25 really demonstrates how routine and lawful these provisions

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1 are, and they're really a business imperative.

2 The fourth individual defendants are founding
3 partners of Ducera who were former senior members of the
4 PWP's restructuring group at PWP for over eight years.
5 Kramer was the head of the restructuring group. Slonecker
6 and Scherer were partners. Gross was managing director.
7 They all worked close together, had access to confidential
8 information, were key employees to developing that group,
9 cultivating client relationships.

10 As a result, PWP invested significant money and
11 resources into them. They were developing their talent and
12 they were compensated handsomely. These were not
13 run-of-the-mill employees. Three of them were partners.
14 They were making-- Kramer made over \$50 million over his
15 course of his time at PWP. Slonecker made over \$25 million.
16 The point is, they were talented, sophisticated, and valued
17 professionals, your Honor.

18 Despite this, PWP was deeply harmed by defendants'
19 breach of trust. Defendants conspired to create Ducera
20 while they were at PWP, in violation of their agreements.
21 They plotted the scheme with precision and detail down to
22 the decimal point.

23 You've seen in our papers, you've read the
24 materials here, they came up with the equity shares, the
25 business plans, what clients they were going to take. They

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1 picked out real estate, was speaking to a company top brand
2 Ducera. They went so far as to conceal their
3 communications. They downloaded an app onto their firm
4 phones that had self-destructing messages and communicated
5 over their personal e-mails because they knew what they were
6 doing was wrong and didn't want the firm to find out.

7 January 11, 2015, Kramer held a meeting at his
8 house with his to be Ducera partner, including how all the
9 managers, directors could double their salaries at his new
10 firm from \$1 million to 2. Defendants wanted to believe
11 these were theoretical, hypothetical conversations. Of
12 course, they were not.

13 The proof is in Ducera. The proof is in the fact
14 that Ducera was incorporated the day after their garden
15 leave period expired. That is all the proof that's
16 required. There was nothing theoretical. This was very,
17 very real and it played out just as they planned, your
18 Honor.

19 Ducera continues to compete with PWP to this day.
20 It's overwhelmingly comprised of talent stolen from PWP,
21 including seven of Ducera's nine partners. Now, your Honor,
22 PWP seeks to hold defendants accountable to the contracts
23 they agreed to and to the fiduciary duties they blatantly
24 betrayed.

25 I'll now allow Mr. Belelieu to speak specifically

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1 to what the plaintiffs are entitled to summary judgment on
2 the contract claims.

3 MR. BELELIEU: Thank you, Ms. Portlock. Your Honor,
4 Ms. Solbakken threw a lot of darts at you in her opening but
5 she missed the bulls eye and the bulls eye in this case is
6 the contract and let me walk the Court through, in five
7 simple steps, why you can decide, as a matter of law, in
8 favor of PWP on the relevant contract at issue here.

9 Your Honor, I'm going to provide a road map to you
10 and walk through in more specific detail. One, the
11 defendants agreed to non-solicits and agreed to be bound by
12 them.

13 Two, defendants agreed the non-solicits are not
14 more restrictive and necessary to protect PWP events. That
15 is in the PWP partnership agreement.

16 THE COURT: Counsel, their agreement to the
17 non-solicitation clause is -- what difference does that make
18 if federal court in Southern District and a colleague of
19 mine in the commercial division found that the
20 non-solicitation clause, the language, similar language was
21 unenforceable? So, I mean they agreed to it. That's fine.

22 They may use it again in the new firm but if it is,
23 as a matter of law, unenforceable, then the agreement
24 doesn't really mean anything.

25 MR. BELELIEU: It does, respectfully, and I'll tell

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1 you why. The DTI decision and the other decision, which I
2 haven't read your Honor but I believe the client
3 solicitation that the Court granted an injunction on the
4 client situation in that case Ms. Solbakken just mentioned.
5 Tell you why it is not relevant. There's two building
6 blocks to this analysis.

7 Number one, Delaware law governs here. DTI has
8 nothing do with Delaware law. Second of all, this decision
9 that Ms. Solbakken has mentioned does not analyze Delaware
10 law. I want to make this very clear to the Court. There is
11 not a single case analyzing Delaware law that has found a
12 non-solicit unenforceable under a partnership agreement.
13 Let me repeat that.

14 There is not a single case analyzing Delaware law
15 that has founded a partnership agreement, non-solicit in the
16 partnership agreement is unenforceable. What did defendants
17 do here? They are like a ship tanker that says we'll pick a
18 passage and that passage is New York law and they will go
19 ahead and they know it's the wrong law and they will hit the
20 iceberg which is Delaware law. That is exactly what
21 happens.

22 They don't analyze Delaware law in any of their
23 briefs. Not a single analysis of Delaware law. By the way,
24 Delaware law is the law of the case here. In the motion to
25 dismiss decision, which Justice Kornreich decided, she said,

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1 and I'm quoting her "this Court views this allegation as
2 arising from the PWP agreements, the contracts that govern
3 the Kramer party's relationship to the company, all which
4 are governed by Delaware law." That is docket number 92 at
5 page 20. She stated here the parties' rights are
6 extensively set forth in limited partnership and LLC
7 agreements.

8 Delaware law mandates strict adherence to
9 contractual terms governing the parties' rights in
10 alternative entities. Page 20 of docket 92. That is the
11 law of the case. The only individual's contract that was
12 not governed by Delaware law is Mr. Verost, the managing
13 director which Ms. Portlock mentioned. His is governed by
14 New York law, and I submit the analysis is exactly the same
15 under New York law and here is why, as Ms. Portlock said,
16 this is industry standard.

17 Again, there is no case law and there is no case
18 law even under New York law finding a non-solicit in a
19 partnership agreement to be unenforceable. There is no case
20 law on point.

21 Your Honor, respectfully, I'll tell you why DTI is
22 completely not on point here, leaving aside it is not
23 Delaware law. In fact, in the preliminary statement of
24 defendant's reply brief, which is a docket 769, they say
25 quote, it is not controlling DTI. That's what they say.

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1 Your Honor, before I saw this case today Ms.
2 Solbakken mentioned, I actually Westlaw'd this case, DTI,
3 which Judge Rakof decided at that point had been cited 12
4 times, not once by New York State Court at that point until
5 the case that Ms. Solbakken has mentioned. All were SCNY
6 cases, EDNY cases and one from the northern district of
7 Illinois.

8 From ten of those dozen cases cited, Judge Rakof's
9 decision was in the context of DTSA, Defend Trade Secrets
10 Act. The other two cases mention, in footnote, and
11 distinguish DTI on this basis. So, this is the third reason
12 it's distinguishable. In the case I have here, the Court
13 says DTI does not contend that the employee non-solicitation
14 covenant is necessary to protect its trade secrets or
15 confidential customer list.

16 In that case, the defendant concedes non-solicit
17 was not necessary. Nowhere does PWP here say
18 non-solicitation is not necessary to enforce its legitimate
19 interest, and the final thing I'll say on DTI is that it's
20 clearly factually distinguishable. We don't have anything
21 close to what is a complete lift out of a group here gone in
22 the dark of the night, which is the same thing as this new
23 case.

24 They're pointing to this as not an issue of en
25 masse resignation. The issue behind PWP leadership's back,

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1 Mr. Kramer and other defendants plotted to form a new firm
2 and did all that and it became true, as Ms. Porlock says, in
3 Ducera partners. The evidence is overwhelming. My eight
4 year old daughter would know --

5 THE COURT: Counsel, the interesting thing about
6 the DTI case is that it put something before the Court that
7 made it look at whether or not something can be resolved.
8 The case can be resolved as a matter of law. If I don't
9 have that, what I seem to have is a set of circumstances
10 that needs to be weighed by a fact finder on all sides.

11 It just seems that we have a situation here where
12 you just said en masse resignation. They say everyone was
13 terminated. You say there was a plotting against. You say
14 there was a plotting against the firm. From their
15 standpoint, a major rainmaker for the firm was kicked out of
16 management, of his management position.

17 It had to be understood that kicking him out of his
18 management position was going to be seen as a rebuke and the
19 people that he brought to the firm, understandably, were
20 concerned when the person they followed to the firm was now
21 effectively demoted within the firm.

22 So, it would be a natural thing for all those
23 parties, all those persons to try to figure out what does
24 the future hold for him, for them. Now that the rainmaker
25 that they followed has lost his leadership perch, what are

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1 they go to do? What are they going to go? And they can say
2 we're trying to figure out how to protect our own interests
3 and it seems the only person that can figure that out is
4 whoever is required to be a fact finder, whether it's the
5 Judge or a jury.

6 It just seems there are necessarily going to be
7 questions of credibility, questions of circumstance and
8 interpretation of particular circumstances and it doesn't
9 seem that this is something that is, as a matter of law, if
10 we get rid of the DTI framework, as you're suggesting --
11 so --

12 MR BELELIEU: May I respond to that?

13 THE COURT: Please. I'm just throwing out-- I'm
14 saying it just seems that it has not, you know -- you can
15 draw a conclusion and they can draw a conclusion but these
16 are a set of circumstances that all human beings looking at
17 it can say if you tell the rainmaker he's no longer on the
18 leadership team then his whole -- all the people he brought
19 to the firm are going to wonder what this means for them,
20 and if they huddle and try to figure out what this means for
21 them then, you know, this is not the same as someone who was
22 riding high and has a group of people who are riding high
23 suddenly saying that well we can make more money by going
24 out on our own.

25 You've taken action that has caused harm to this

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1 individual if you removed him from a position of leadership
2 and if you have taken a position of leadership away from
3 someone who brought people to the firm then it will be
4 natural for those people who were brought to the firm to
5 question whether or not the firm has their interests at
6 heart, if they don't care for their leader.

7 MR BELELIEU: So, your Honor, I'll respond to the
8 factual points there but I want to say to you, none of that
9 is relevant. Those are the darts I'm talking about, the
10 bulls eye. It's the contract and, briefly, your Honor,
11 here's the provisions or analysis that needs to be done.

12 First, they agreed to non-solicit. As I mentioned
13 before, under Delaware law, they're clearly enforceable.

14 THE COURT: Counsel, no. Get to the issues. I do
15 think you need to apply law to the fact. The fact that you
16 say it's a non-solicitation agreement, I said at the outset,
17 assuming DTI doesn't apply, we still have the issue of what
18 does it mean to solicit. How have they solicited some way
19 that is out of compliance with this circumstance? Leader is
20 terminated. They are terminated or not and then they
21 develop an alternative. Of course they developed an
22 alternative.

23 If you're being asked to leave or if you're being
24 told you're no longer top dog, then your circumstances have
25 changed. The agreement that you set up with your

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1 counterpart has changed and the people who came there, all
2 of their circumstances have changed, and they have changed
3 because of something that you did, not because of something
4 that they did. So, circumstances having changed by virtue
5 of what your clients have done.

6 MR. BELELIEU: I apologize. The solicitation
7 discussion, you're asking about the fact discussion of what
8 is solicitation. That is not a decision the Court needs to
9 make because under the agreement, the general partner makes
10 that decision. That is what I was trying to get at. The
11 general partner makes that decision in its sole and absolute
12 discretion.

13 That was done and, as Ms. Portlock said, it's
14 similar to Mr. Kramer's own agreement in Ducera. It's
15 important the discretion is defined under partnership
16 agreement. It says whenever in this agreement the general
17 partner is permitted or required to make a decision in its
18 discretion or under a grant of the similar authority or
19 latitude, the general partner shall be entitled to act in
20 its sole and absolute discretion and consider only such
21 interests and factors as it desires to the fullest extent
22 permitted by law, shall have no duty or obligation to give
23 any consideration of any interest of or factors effecting
24 the partnership, partners or any person.

25 In other words, the general partner doesn't have to

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1 look at what the limited partner's concerns are. The only
2 check on this is the super majority in interest vote as they
3 concede in paragraph 25 -- paragraph 125 of our 19-A
4 statement, and these are exhibits 116 through 120 vis-a-vis
5 resolutions and approvals of terminations for cause.

6 In our 19-A statement, it says on February 16,
7 2015, Joe Perella, Peter Weinberg, Robert Steel, Tarek
8 Meguid, and William Kourakos, who make up a super majority
9 interest of members of PWP, voted to terminate the three
10 partner defendants for cause, undisputed by defendants.

11 That is enough, your Honor, to decide this case
12 because under Delaware law, and we cite to these in Norton
13 v. K-Sea Transportation Partners L.P., 67 A.3d, 547 and
14 Sonet v. Timber Company LLP 722 A2d 319. In both of those
15 cases, the courts-- the Delaware courts set out the proper
16 framework that the general partner has sole and absolute
17 discretion . Defines cause as the super majority in
18 interest vote by its limited partners.

19 I'm quoting from Sonet v. Timber Company. "This
20 careful framework established by agreement confirms that to
21 the extent unit-holders are unhappy with the proposed terms
22 of the merger, their remedy is the ballot box." The same as
23 limited partners, Norton v. K-Sea, as in ocean, Limited
24 Partners. The ultimate right to reject the merger under
25 14.3 practically limits that discretion.

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1 In other words, the vote there this is enough to
2 decide. We're not talking about Mr. Weinberg finding
3 Mr. Kramer flew to the moon, so that constitutes
4 solicitation. Everyone knows what the facts are here. The
5 general partner made that determination in its sole and
6 absolute discretion. That is what the contract says. That
7 is Delaware law.

8 Your Honor, I'm quoting Delaware law from *Moscowitz*
9 *v. Theory Entertainment, LLC* 2020 WL.6304899. I quote:
10 "Delaware is more contractarian than many other states,
11 recognizing that parties have a right to enter into good and
12 bad contracts; the law enforces both." Similarly, from the
13 same case, "a party may not come to court to enforce a
14 contractual right it did not obtain for itself at the
15 negotiating table." Delaware law presumes parties are bound
16 by agreements they negotiated especially when parties are
17 sophisticated entities that have engaged in arm's length
18 negotiations.

19 What Ms. Solbakken, we take issue, and I don't
20 think you need to decide the facts. It smells of a
21 constructive discharge. Justice Kornreich got rid of the
22 constructive discharge claim. Quoting from her decision
23 docket 92, she said: "The parties' agreements concerning
24 termination and restrictive covenant implications are
25 matters governed by PWP agreements governed by Delaware

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1 law."

2 Kramer has no contract, in other words, but for the
3 existence of PWP agreements. He cannot maintain any claim
4 for constructive discharge. PWP agreements must govern this
5 issue. She talks of a constructive discharge claim in
6 motion to dismiss. This whole discussion about whether
7 Mr. Kramer was taken out of his role or something else has
8 no relevance.

9 The relevant agreement is the PWP MC agreement and
10 PWP Equity I which governed Mr. Slonecker and Mr. Scherer.
11 Mr. Kramer was never taken off any management committee. In
12 fact, at his deposition, he couldn't explain why in the
13 meeting minutes to the management committee meeting his name
14 still appeared on every one and why he was still at every
15 one of those meetings. It's a made up fact. Because I say
16 I'm the best attorney in the world, doesn't make it such.

17 In one of the e-mails, they actually cite to, it
18 says restructuring would also be-- this is Peter Weinberg
19 from October 7, 2014, Defendant's Exhibit 53. Restructuring
20 would always be his to run. Rebuttal, Exhibit 18 of ours is
21 from December. So, after this purported demotion of
22 Mr. Kramer, Peter Weinberg says, are you going to be on the
23 MC tomorrow, meaning the management committee, meeting it's
24 a made-up story, your Honor, but it doesn't matter because
25 the agreements govern and the general partner had to have

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1 absolute and sole discretion.

2 Ms. Slobakken mentioned bad faith/good faith.
3 There is no such thing. That is governing Delaware law.
4 You can read breach of fiduciary duty. You can rule out
5 good faith based on the case law. There is clearcut case
6 law, even under New York law. I would point your Honor to
7 Justice Sherwood in Valhalla Trust v. Dean 219 WL 1491660.
8 Justice Sherwood found the sole discretion language allowed
9 the party, I'm quoting, to discharge her duties as a manager
10 in good faith with the care of an ordinarily prudent person
11 and Justice Sherwood dismissed the fiduciary duty claim.

12 We're talking about the contract claims here and
13 they're clear. If Justice Sherwood is dismissing breach of
14 fiduciary based on the sole and absolute discretion
15 language, clearly the contract claims fall in our favor.
16 The sole and absolute discretion language of GP.

17 Mr. Kramer has the same agreement as-- the same
18 structured agreement as what PWP has here. In fact, it
19 gives him even more discretion than PWP because you have to
20 get, for PWP, super majority in interest, which is five
21 individuals here, and in Mr. Kramer's case, in Ducera, you
22 can terminate someone for cause by himself.

23 Your Honor, I would finally add, unlike other
24 partners who joined PWP, Mr. Kramer had an out when he
25 joined. He was given a withdrawal right in the framework

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1 agreement he signed with PWP when he joined in the beginning
2 of 2007 and this is in the record.

3 He was given specific rights to withdraw from PWP
4 restrictive if he thought the restrictive governments were
5 onerous or didn't believe they were proper. He had that
6 specific out, which other partners didn't have. He had it
7 on the front end and back end and in Ducera, he had a
8 similar thing. The agreements govern here. It's clearcut
9 and your Honor can follow the agreements without getting
10 into the back and forth of what happened and what
11 solicitation happened.

12 GP exercised its sole and absolute discretion. It
13 got the votes it needed. That is an open and shut case,
14 your Honor. These resolutions here, they voted on cause.
15 They voted on termination for cause. It says they're
16 terminated as a limited partner with cause.

17 Ms. Solbakken mentioned assess. That word assess
18 doesn't appear in the language of the agreement. That word
19 assess is nowhere to be found. The general partner makes
20 that determination. All of the limited partners voting on,
21 they give their consent or approval to the general partner's
22 decision. That is it. They're not independently assessing,
23 themselves, what happened.

24 MS. SOLBAKKEN: Your Honor, there is a number of
25 things I would to like to address with your permission.

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1 THE COURT: Go ahead.

2 MS. SOLBAKKEN: At the outset, PWP is clearly
3 running from DTI. In its own brief-- in a footnote of its
4 own brief, it recognizes New York law and Delaware law
5 restrictive covenants are exactly the same, and any number
6 of New York and Delaware courts have recognized that over
7 time.

8 The other issue that PWP is conflating here and
9 it's particularly important, given they are referring you.
10 The Court. Applying the contract. There are separate
11 provisions in the contract regarding the approval and
12 consent to terminate.

13 In one section, which is section 4.01(b) Romanette
14 5 versus the entirely separate and additional requirement
15 that the super majority consent or approve to make a
16 determination as to whether an act of cause took place. It
17 is not enough. This is what they keep saying over and over
18 again. It is not enough for them to simply vote or consent
19 to termination. There is an entirely separate provision.

20 Section 4.01b Romanette 9, which provides they have
21 to undertake, have to determine whether a particular act or
22 omission constitutes cause. To go even further than that,
23 your Honor, it's simply false to say that Delaware law
24 provides that good faith doesn't matter. None of this
25 matters if we have a sole discretion provision.

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1 I'll refer the Court to page 18 of our opposition
2 to PWP's brief where we cite the Seibold decision. It's
3 Delaware. Siebold v. Camulos Partners LP, 2012, Westlaw
4 4076182, at *10 where the Court says very, very clearly,
5 "the contractually mandated requirement that a specified
6 event occur before the general partner can take a subsequent
7 action is an exception from the general rule that the
8 general partner is given the power to act in its sole
9 discretion without regard for the interests of the
10 partnership or limited partners."

11 What the Court in Siebold is recognizing is you
12 can't have a contractual standard of conduct. Here, the
13 solicitation clause and then say you you get to have a sole
14 discretion provision which completely overrides that and
15 renders it meaningless. So, Delaware courts reject the very
16 argument that PWP is making and, in fact, he's failing to
17 direct this Court to applicable sections or provisions of
18 the agreement.

19 Now, in terms of enforceability and further running
20 from DTI, PWP opposition primarily relies on New York law
21 enforceability. So, on the one hand -- that is the kind of
22 thing, Judge, that New York courts in the past have looked
23 at and said you're telling me I can't apply New York law.
24 Your entire brief is the enforceability argument in New York
25 law. They say 18 New York cases and five Delaware. Most of

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1 the cases they cite are either client solicitation, not
2 employee solicitation or sale or business cases which it
3 doesn't really meaningfully allege is the type of case that
4 exists here.

5 Just to go back to some of the generalities, Ms.
6 Portlock was talking to. She raised issues of confidential
7 information. No fact as to misuse or misappropriation of
8 confidential information. It's literally absent from their
9 papers. They allege they invested in the employees. It's
10 well settled that that's totally irrelevant. You're just
11 paying somebody for the services they rendered.

12 That is not a particular investment in employees
13 that courts are looking to when looking at restrictive
14 covenant. It has to be something bigger and better than
15 that. In those cases it has to deal with like a Master Card
16 which is one of the cases they cite. This was a specific,
17 Master Card created a plan which had a ton of confidential
18 information related to it and the Court -- we want to hold
19 you for a set period of time so you cannot essentially
20 exploit that confidential information. They literally cite
21 to no confidential information whatsoever. It's platitude
22 and no evidence in the record

23 Similarly, with respect to the evidence of
24 purported plot. I would say, your Honor, that most
25 importantly, given that PWP has taken such an issue with DTI

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1 that it's important to note, one, that there is no case to
2 which they said where there's a Court in the land that uses
3 the language in PWP's contract on an employee solicitation
4 provision and find it enforceable.

5 That case does not exist and it exists only in the
6 sale of business context where there's good will involved
7 with respect to that.

8 I also wanted to spend a moment on their claim that
9 Ducera's provision in its agreement is identical to PWP's
10 contract. It's not identical at all. PWP was hire,
11 solicit, recruit, induce, entice, influence, or incurrence.
12 Ducera has a plain vanilla market provision that says
13 Ducera's employees cannot hire or solicit any individual
14 who's been employed by the company.

15 They say can't encourage a third party. So, the
16 word encouragement isn't directed employee to employee, it's
17 saying you agree you're not going to encourage a third party
18 to hire one of Ducera's employees. It is not identical.

19 PWP is like DTI's provision and is grossly
20 overbroad. I'll go further to say New York has a particular
21 interest in protecting this type of information. The New
22 York labor law section 194, I believe it's A4 specifically
23 provides that an employer cannot prevent its employees from
24 discussing wages and compensation and there is a similar
25 statute that exists on the federal level, the NRA which --

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1 THE COURT: Counsel, we're not talking about low
2 level employees here.

3 MS. SOLBAKKEN: Right.

4 THE COURT: These are people having salary or
5 partnered withdrawals.

6 MS. SOLBAKKEN: Right but I would suggest that the
7 same principal applies here because what these statutes are
8 trying to protect are people bettering their lives. These
9 are investment bankers and different ball games in that
10 respect but in terms of public policy and free flow of
11 information and what we want people to be out there doing in
12 the market place, we submit, is no different and the
13 statutes make no exception on that basis.

14 MR. BELELIEU: If I can respond.

15 THE COURT: No response to that. You've had two
16 people in opposition. She's made a reply. Let's hear on
17 motion 10.

18 MR. BELELIEU: Your Honor, motion 10 has similar
19 issues. I am not going to spend a lot of time going back
20 and forth and wasting the Court's time. For the most part,
21 a lot of contract claims mirror one another, so I won't
22 waste the Courts's time on that. If I could, and your Honor
23 does not want me to do so, I'm happy to stop but I wanted to
24 respond to three things Ms. Solbakken said.

25 She seems to be saying PWP had to have separate

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1 votes related to termination and cause in two separate
2 resolutions. I'm confused by that argument myself because
3 we have a resolution that says it's resolved, that they're
4 terminated as a limited partner with cause.

5 So, by implication, you're voting on the cause when
6 you're voting on the cause termination. Last sentence says
7 resolve further that any and all actions heretofore, meaning
8 before now, taken by the partners, officers, and members of
9 the company with respect to matters prescribed in this
10 resolution and hereby are approved, ratified and confirmed
11 in all respects. That language in itself would be enough to
12 ratify. I don't understand that argument.

13 THE COURT: That argument is simply that-- I mean,
14 you both are coming at it from different areas. You're
15 saying that the ratification of this by a super majority.
16 The ratification of a decision by a super majority makes it
17 effective. The question from the other side is whether if
18 there needs to be cause, there has to be cause. So, it's
19 basically you're -- if somewhere in the contract it is
20 declared that were you to take certain steps, that you must
21 make a finding, an actual finding of cause, there must be a
22 determination, an actual determination of cause then the
23 argument is that that part of the-- that part of the
24 contract would be rendered meaningless, if all that was
25 necessary was for there to be a super majority ratification

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1 of some abuse of discretion.

2 That's, you know, so those are the two things we're
3 dealing with. The Court needs to make sure that a
4 contract's language comes together, right. That's what I
5 have to deal with. So, as long as you two are coming at
6 this from entirely different angles, then I'll have to look
7 at the contract and see how I can make the contract whole.

8 Right now, you know, if all you're relying upon is
9 that a super majority vote, in and of itself, as a matter of
10 law, makes whatever decision that's done in discretion
11 correct then it ignores the idea that there needs to be --
12 there's no reason to terminate for cause or not cause.

13 Anything is just at the whim of the person who has
14 sole discretion. That's what we're looking at.

15 MR BELELIEU: Your Honor, respectfully, I would
16 disagree with you because, again, if the super majority in
17 interest, which was five individuals, five partners, have to
18 make the determination, there is sufficient cause and there
19 is a finding the termination for cause is proper, they have
20 to vote on that. That is the check here. It's not simply
21 that the GP can decide whatever it wants on a whim. There
22 is that check.

23 THE COURT: Counsel, it's not a check. All that
24 is-- all that does is say that that expresses the will of
25 the company, all right. If that is done then from a

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1 contractual standpoint, all that says is that this decision
2 by the managing member expresses the will of the company.
3 That still can be a bad decision and if they're suing based
4 upon the bad decision then that just means the other people
5 can't say it was the managing member. It was his fault.

6 Don't cause -- don't seek to take retribution
7 against the company. It was simply the bad decision by an
8 individual and we shouldn't be held responsible. All that
9 super majority, to my mind, is saying this decision, good or
10 bad, about cause is something that reflects the decision
11 that the company is prepared to stand behind.

12 MR. BELELIEU: I generally agree with that, your
13 Honor, but there's no good or bad in the agreement. That
14 language doesn't appear there and standing behind the
15 decision is important in the investment banking industry.
16 You're not going to fire somebody for cause for no reason.

17 Five individuals who voted for this, their
18 reputations are on the line. You're not going to say let's
19 get four guys and terminate them for cause on a whim. We're
20 not talking about facts. Mr. Kramer says he flew to the
21 moon and we say he did X, Y, and Z. We're not arguing over
22 those things. They're saying what they did is okay because
23 Mr. Kramer was discontent and had been demoted. The core
24 set of facts are the same. We're not talking about apples
25 and oranges.

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1 THE COURT: The question is again, this is not a
2 trial. This is motion for summary judgment or twin motions
3 for summary opposing motion for summary judgment and the
4 question is that they at deposition testimony in which those
5 people who provided the super majority giving cover to the
6 managing member say they don't know what happened. If that
7 is the case, then that goes before a fact finder and they
8 said well, did you just rubber stamp this or did you
9 actually understand what you were undertaking, the
10 assessment or the determination or whatever it was that the
11 contract requires in relation to cause.

12 If you say the contract didn't require us to do it,
13 all we had to do was ratify that, then, well, we have to see
14 whether this language is consistent within the contract. Is
15 there an inherent consistency or is there an inherent
16 consistency if there is somewhere in the contract that says
17 that an action a person can be terminated for with cause or
18 without. Those are very different.

19 It's typically the case employment is at will, so
20 you say he's gone, he's gone for whatever reason. He's gone
21 but when something says that a person must be terminated for
22 cause then that requires some level of fact finding. It is
23 not discretion. Discretion that is what at-will means --
24 what at-will means is just discretion. So, the boss can say
25 you got to go. I don't like the way you look. You raised

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1 your eyebrow at me and I took offense at that. You know, I
2 didn't like your perfume or your cologne, but when it's for
3 cause, there needs to be some form of demonstration that
4 something amounting to cause under Delaware law or New York
5 law can be shown and it's not shown simply by telling me
6 that you had a super majority who made that determination.

7 It could be that that's the case but the super
8 majority members who have to be held into Court and testify
9 that, you know, what was the basis for your decision and if
10 there's deposition testimony saying I don't know, I don't
11 know what decision, I just made my decision based upon what
12 the big guy said, you know.

13 MS. PORTLOCK: Your Honor, very briefly, if I may.
14 I think we're not situated with the right context here. I
15 hear your point with respect to cause in a traditional
16 employment typically requiring some sort of fact finding but
17 that's not where we're situated.

18 THE COURT: Counsel, we're situated, either there's
19 some language in the contract requiring cause or there
20 isn't. I didn't write the contract. Either it's there or
21 it's not. If it's there, if it's there, then we're situated
22 the same way. We have to make a determination whether or
23 not there is cause because that is what the contract
24 requires. Does the contract require cause or does it not.

25 So, it doesn't matter whether it's employment or

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1 whether it's partnership. It's still if a contract requires
2 cause or not. You can't ignore the requirement of cause and
3 say it's simply a matter of discretion because discretion
4 and cause are at odds. They're inconsistent. Without cause
5 is the standard in employment relationships. That's without
6 cause is the standard.

7 When someone puts cause in, we have to give it
8 respect and we don't give it respect if we try to read it
9 out by saying there is sole discretion. Discretion equals
10 no cause.

11 MR BELELIEU: Your Honor, I would submit you're
12 reading discretion out of the contract based on what you
13 just said because, again, the language says the termination
14 as to whether cause has occurred shall be made by the
15 general partner in its discretion which is defined as
16 absolute and sole discretion.

17 So, if we have to find a determination of cause
18 based on the facts, I submit you're reading the definition
19 out of the agreement entirely under that reading and it is
20 not consistent with Delaware law. We're in Delaware here.
21 It's a partnership agreement.

22 Ms. Solbakken mentioned the Seibold case. Not on
23 point. There is a carveout there in the discretion said at
24 the end definition, except as otherwise expressly provided
25 herein and the proof was an exception to the rule and there

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1 is no exception to the rule under this agreement, so that
2 case has nothing on point.

3 The defendants, they said we're running from DTI.
4 We're not running from DTI. It is not on point. Defendants
5 are running from Delaware law which governs these agreements
6 and is the law of the case, according to Justice Kornreich.
7 So, your Honor, I submit they're consistent. Again --

8 THE COURT: Where are the Delaware cases that you
9 cite that say in circumstances like this that the Courts not
10 need to try to establish what cause is at the summary
11 judgment stage?

12 MR BELELIEU: Your Honor, at least sitting here
13 today I'm not aware of a case that goes either way on that.
14 It either supports us or goes against us under Delaware law
15 for the specific question you just asked.

16 THE COURT: That's what I'm dealing with. I'm not
17 here trying to opine upon -- hopefully, I'm saying things
18 that not from the standpoint of is this my determination of
19 the trial. I'm looking at this as I'm required to here
20 where I have opposing motions for summary judgment, right.

21 So, what I'm trying to determine is whether there
22 is prevailing case law. You say Delaware law. So, is there
23 prevailing case law that says in a circumstance such as
24 this, these specific ones, that a finding of cause that is
25 ratified by super majority but is-- but where no one in the

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1 super majority other than a managing member is prepared to
2 say they knew the basis for that, you know. That, to me, a
3 summary judgment is hard. It sounds like people need to
4 come in and give testimony as to what happened.

5 You say it can be done on the law but if it's on
6 the law then I need a Delaware case that is like this, not a
7 Delaware case that broadly says these are the principals. I
8 understand the principals. The problem is the principals
9 don't make sense if you say in the same sentence that
10 something is in the sole discretion of a particular person
11 but it's for cause. We can't assess cause.

12 MR. BELELIEU: Your Honor --

13 THE COURT: We can't assess cause in a vacuum and
14 if someone just says I've looked at the circumstances and I
15 believe there's cause, that's unusual, at least in New York.
16 I don't know what it's like in Delaware. That is why I'm
17 saying if you have a Delaware case that points me in that
18 direction at all.

19 I have a lot of paper here you gave me on these two
20 motions. So, somewhere in that paper there should be a case
21 that you can tell me is in Delaware that is exactly like
22 this. If not, then it shouldn't be decided on summary
23 judgment. You, all of you, should take your boxes of paper
24 and be prepared to have a trial somewhere.

25 MR. BELELIEU: Your Honor, again, we're happy if

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1 your Honor want us to.

2 THE COURT: I can't get any more paper. I have
3 boxes here full of papers. All I'm asking for you is to
4 tell me where it is in this box of paper.

5 MR BELELIEU: I would they're not -- they're not the
6 specific cases you're asking for but I would submit, your
7 Honor, to take a look at the two cases I already mentioned
8 which is Sonet . Timber, I believe, and then I gave you the
9 name of the second case which was Norton v. K-Sea and, your
10 Honor, those are not cause cases but I would submit they set
11 forth the structure, and based on what you're telling me, I,
12 believe respectfully, your Honor, you're reading the sole
13 and absolute discretion out of the contract.

14 I think that is a determination for the GP to make.
15 It was ratified and --

16 THE COURT: So, all I'm asking you on this motion
17 for summary judgment, which is an extraordinary remedy in
18 that it takes this matter out of the hands of the fact
19 finder because the language is based upon something that is
20 a matter of law. There's no issues of fact here. There
21 ought to be a Delaware case that is just like this that
22 you're pointing me to. There ought to be. I can't give
23 summary judgment to you if you don't have a Delaware case
24 that is like this case.

25 So, counsel, was there something else you had to

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1 say on this?

2 MS. SOLBAKKEN: No, your Honor. We distinguish
3 they're New York and Delaware cases in our brief and we'll
4 rest there.

5 THE COURT: All right. What I'm going to have you
6 do is, Ms. Solbakken, if you can order a copy of the
7 transcript, I'll direct the parties to split the cost of the
8 transcript and send it to the clerk in part 43 so that the
9 Court can use it in rendering its decision.

10 MS. SOLBAKKEN: Very good, your Honor.

11 THE COURT: Thank you, all.

12 * * *

13

14 Certified to be a true and accurate transcript of the above
15 matter.

16

17 Lisa M. De Crescenzo

18

19 Official Court Reporter

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