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

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PERELLA WEINBERG PARTNERS, LLC; PWP MC, LP; PWP EQUITY I LP; AND PERELLA WEINBERG PARTNERS GROUP, LP;

Index No. 653488/15

Plaintiffs,

-against-

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

Defendants.

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PROCEEDINGS

60 Centre Street
New York, New York
May 27, 2021

B E F O R E:

HONORABLE ROBERT REED,

JUSTICE

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

GIBSON DUNN & CRUTCHER
ATTORNEYS FOR THE PLAINTIFF
200 Park Avenue
New York, New York 10166
BY: CHRISTOPHER BELELIEU, ESQ.
BY: KARIN PORTLOCK, ESQ.

(Appearances continued...)

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

ARKIN-SOLBAKKEN
ATTORNEYS FOR THE DEFENDANTS
900 Third Avenue
New York, New York 10022
BY: LISA SOLBAKKEN, ESQ.
BY: DEAN DAVIDIAN, ESQ.
BY: YURIKO TADA, ESQ.

LISA M. DE CRESCENZO,
OFFICIAL COURT REPORTER

THE COURT: Good morning, all.

ALL: Good morning, your Honor

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

THE COURT: I can't.

MS. PORTLOCK: Good morning.

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

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

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

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

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

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

THE COURT: Okay, all right.

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

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

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

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

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

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

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

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

Your Honor, it's undisputed that in October of 2014 Peter Weinberg informed Michael Kramer that he was being removed from all management and all leadership roles at the firm. He was further informed he was not liked or entrusted by his partners, and Mr. Weinberg knew that this would cause Mr. Kramer to consider leaving the firm, which is something that the two sort of openly discussed in the months that followed.

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

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

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

Within 24 hours of that conversation, defendants were terminated without notice and without cause. As set forth in our briefs, this matter is contrary to PWP's obligations. At the outset, your Honor, the employee non-solicitation provision that is at issue is unenforceable. In this respect DTI is instructive. In DTI, the Court, Judge Rakoff was dealing with an essentially identical provision to the one before the Court today and assessed that the words including encourage or entice or induce one employee to leave an employer was just far too vague and potentially overbroad and inconcise and indefinite to be enforced.

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

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

THE COURT: Say that one more time.

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

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

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

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

To the extent they claim Kramer is unique, it fails as well because the courts are pretty clear that just being a client or revenue-generating individual is not what the Court is really talking about when they're talking about whether or not an employee is unique.

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

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

Finally, this Court should decline PWP's suggestion that this provision could be blue penciled. Blue pencilling in BDO-- blue pencilling is something that the employer needs to establish the burden on. PWP doesn't even endeavor to suggest in this case that there is some sort of good faith or lack of overreaching that would warrant any manner of blue pencil to the statute and instead, just as many courts said in Delaware and New York, in this instance, any manner of blue pencilling would simply serve to give PWP another bite at the apple and award them for using a provision in an anticompetitive way.

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

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

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

THE COURT: Right.

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

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

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

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

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

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

I'm going to quote from the record Mr. Kourakos who testified he could not tell you who did what, who said what to who, and didn't recall any action of any one of the individuals. This is a complete abrogation of the protection afforded to the LP's under that contract which require the super majority to actually assess this.

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

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

MS. SOLBAKKEN: Right. The contract --

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

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

MS. SOLBAKKEN: Understood, your Honor, but so we're clear, and this is section 401(b) Romanette nine. It says the super majority must assess whether or not they had discretion, of course, and we'll get to that but they must assess whether an event, act or omission actually occurred and it is not appropriate to not make any judgment at all with respect to, and assume that Mr. Weinberg has made the correct call because there's limited protection offered to these LP's in connection with the termination decisions and this is one of them, and it specifically requires that the members of the super majority who are voting, that they actually understand the event, act, or omission with which the terminated defendants are being charged.

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

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

Moving on to the alleged improper solicitation which we also think -- client solicitation which we also believe should be dismissed as a matter of law. Once again, with respect to Slonecker, they are-- and Verost, there is literally not a single act of client solicitation that PWP directs this Court to.

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

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

There was a pending engagement which is Monsanto-Solutia but that had been resolved years before these events. We also allege that PWP's fiduciary claim, unfair competition claim, and tortious interference claim should all be dismissed. They're all duplicative. If PWP's failed breach of contract claims, and we set forth references in our brief to the complaint and the areas of their brief where they discuss these causes of action, but they also fail on the merits.

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

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

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

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

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

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

THE COURT: Let me here from your adversary.

Go ahead.

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

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

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

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

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

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

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

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

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

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

You've seen in our papers, you've read the materials here, they came up with the equity shares, the business plans, what clients they were going to take. They picked out real estate, was speaking to a company top brand Ducera. They went so far as to conceal their communications. They downloaded an app onto their firm phones that had self-destructing messages and communicated over their personal e-mails because they knew what they were doing was wrong and didn't want the firm to find out.

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

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

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

I'll now allow Mr. Belelieu to speak specifically to what the plaintiffs are entitled to summary judgment on the contract claims.

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

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

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

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

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

MR. BELELIEU: It does, respectfully, and I'll tell you why. The DTI decision and the other decision, which I haven't read your Honor but I believe the client solicitation that the Court granted an injunction on the client situation in that case Ms. Solbakken just mentioned. Tell you why it is not relevant. There's two building blocks to this analysis.

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

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

They don't analyze Delaware law in any of their briefs. Not a single analysis of Delaware law. By the way, Delaware law is the law of the case here. In the motion to dismiss decision, which Justice Kornreich decided, she said, and I'm quoting her "this Court views this allegation as arising from the PWP agreements, the contracts that govern the Kramer party's relationship to the company, all which are governed by Delaware law." That is docket number 92 at page 20. She stated here the parties' rights are extensively set forth in limited partnership and LLC agreements.

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

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

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

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

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

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

They're pointing to this as not an issue of en masse resignation. The issue behind PWP leadership's back, Mr. Kramer and other defendants plotted to form a new firm and did all that and it became true, as Ms. Porlock says, in Ducera partners. The evidence is overwhelming. My eight year old daughter would know --

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

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

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

So, it would be a natural thing for all those parties, all those persons to try to figure out what does the future hold for him, for them. Now that the rainmaker that they followed has lost his leadership perch, what are they go to do? What are they going to go? And they can say we're trying to figure out how to protect our own interests and it seems the only person that can figure that out is whoever is required to be a fact finder, whether it's the Judge or a jury.

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

MR BELELIEU: May I respond to that?

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

You've taken action that has caused harm to this individual if you removed him from a position of leadership and if you have taken a position of leadership away from someone who brought people to the firm then it will be natural for those people who were brought to the firm to question whether or not the firm has their interests at heart, if they don't care for their leader.

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

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

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

If you're being asked to leave or if you're being told you're no longer top dog, then your circumstances have changed. The agreement that you set up with your counterpart has changed and the people who came there, all of their circumstances have changed, and they have changed because of something that you did, not because of something that they did. So, circumstances having changed by virtue of what your clients have done.

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

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

In other words, the general partner doesn't have to look at what the limited partner's concerns are. The only check on this is the super majority in interest vote as they concede in paragraph 25 -- paragraph 125 of our 19-A statement, and these are exhibits 116 through 120 vis-a-vis resolutions and approvals of terminations for cause.

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

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

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

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

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

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

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

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

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

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

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

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

Your Honor, I would finally add, unlike other partners who joined PWP, Mr. Kramer had an out when he joined. He was given a withdrawal right in the framework agreement he signed with PWP when he joined in the beginning of 2007 and this is in the record.

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

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

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

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

THE COURT: Go ahead.

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

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

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

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

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

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

Now, in terms of enforceability and further running from DTI, PWP opposition primarily relies on New York law enforceability. So, on the one hand -- that is the kind of thing, Judge, that New York courts in the past have looked at and said you're telling me I can't apply New York law. Your entire brief is the enforceability argument in New York law. They say 18 New York cases and five Delaware. Most of the cases they cite are either client solicitation, not employee solicitation or sale or business cases which it doesn't really meaningfully allege is the type of case that exists here.

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

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

Similarly, with respect to the evidence of purported plot. I would say, your Honor, that most importantly, given that PWP has taken such an issue with DTI that it's important to note, one, that there is no case to which they said where there's a Court in the land that uses the language in PWP's contract on an employee solicitation provision and find it enforceable.

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

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

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

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

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

MS. SOLBAKKEN: Right.

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

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

MR. BELELIEU: If I can respond.

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

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

She seems to be saying PWP had to have separate votes related to termination and cause in two separate resolutions. I'm confused by that argument myself because we have a resolution that says it's resolved, that they're terminated as a limited partner with cause.

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

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

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

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

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

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

THE COURT: Counsel, it's not a check. All that is-- all that does is say that that expresses the will of the company, all right. If that is done then from a contractual standpoint, all that says is that this decision by the managing member expresses the will of the company. That still can be a bad decision and if they're suing based upon the bad decision then that just means the other people can't say it was the managing member. It was his fault.

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

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

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

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

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

It's typically the case employment is at will, so you say he's gone, he's gone for whatever reason. He's gone but when something says that a person must be terminated for cause then that requires some level of fact finding. It is not discretion. Discretion that is what at-will means -- what at-will means is just discretion. So, the boss can say you got to go. I don't like the way you look. You raised your eyebrow at me and I took offense at that. You know, I didn't like your perfume or your cologne, but when it's for cause, there needs to be some form of demonstration that something amounting to cause under Delaware law or New York law can be shown and it's not shown simply by telling me that you had a super majority who made that determination.

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

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

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

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

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

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

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

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

FILED: NEW YORK COUNTY CLERK 06/15/2021 03:14 PM INDEX NO. 653488/2015
NYSCEF DOC. NO. 778 RECEIVED NYSCEF: 06/15/2021

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

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

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

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

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

So, what I'm trying to determine is whether there is prevailing case law. You say Delaware law. So, is there prevailing case law that says in a circumstance such as this, these specific ones, that a finding of cause that is ratified by super majority but is-- but where no one in the super majority other than a managing member is prepared to say they knew the basis for that, you know. That, to me, a summary judgment is hard. It sounds like people need to come in and give testimony as to what happened.

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

MR. BELELIEU: Your Honor --

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

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

MR. BELELIEU: Your Honor, again, we're happy if your Honor want us to.

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

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

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

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

So, counsel, was there something else you had to say on this?

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

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

MS. SOLBAKKEN: Very good, your Honor.

THE COURT: Thank you, all.

* * *

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

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Lisa M. De Crescenzo
Official Court Reporter