SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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SOUTHERN ADVANCED MATERIALS, LLC,

Plaintiff,

- v -

ROBERT ABRAMS, ROBERT S. ABRAMS LIVING TRUST, and JOHN DOES,

Defendants.

INDEX NO. 650773/2015

MOTION DATE

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 316, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 456, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 540, 542, 545, 623, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 719, 720, 722

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 317, 318, 319, 320, 321, 322, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 461, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 541, 543, 544, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 624, 625, 626, 627, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 718, 721, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In motion sequence number 008, plaintiff Southern Advanced Materials, LLC (SAM) moves, pursuant to CPLR 3212, for partial summary judgment on its first cause of action for breach of contract against defendants Robert S. Abrams,

individually and as Trustee of the Robert S. Abrams Living Trust, and the Robert S. Abrams Living Trust (Trust). In motion sequence number 009, defendants move, pursuant to CPLR 3212, for summary judgment dismissing SAM's two remaining claims - breach of contract (first cause of action) and breach of fiduciary duty (fifth cause of action).

Background

Nonparty CV Holdings, LLC (CVH) was a holding company for a group of operating subsidiaries, including nonparties CSP Technologies, Inc., Capital Plastic Products LLC, Capital Insulated Products Inc., and Capital Europe S.A, which were engaged in the design and manufacturing of plastic products. (NYSCEF Doc. No. [NYSCEF] 637, Defendants' 19-A Statement ¶ 1; NYSCEF 627, SAM's 19-A Counterstatement ¶ 1.) In August 2001 and March 2004, SAM invested approximately $12.3 million in CVH in exchange for Class C Preferred Interests representing an 8.43% membership interest. (NYSCEF 623, SAM's 19-A Statement ¶¶ 1, 3; NYSCEF 706, Defendants' 19-A Counterstatement ¶¶ 1, 3.) SAM was one of five Preferred Members of CVH. (*Id*. ¶ 2.) Defendant Abrams was the manager, majority member and controlling shareholder of CVH. (NYSCEF 637, Defendants' 19-A Statement ¶ 2; NYSCEF 627, SAM's 19-A Counterstatement ¶ 2.)

Relevant Provisions of the Operating Agreement

SAM's investment in CVH was governed by the Fourth Amended and Restated Operating Agreement (the Operating Agreement). (NYSCEF 623, SAM's 19-A Statement ¶ 4; NYSCEF 706, Defendants' 19-A Counterstatement ¶ 4.) Pursuant to Section 13.1 thereof, "[CVH] shall be dissolved upon approval of the Class A Common Members holding a majority of the Class A Common Interests

and Super-Majority Consent or upon the disposition by [CVH] of substantially all of its assets." (NYSCEF 324, Operating Agreement § 13.1.) Section 13.3 (c) states that

> "[i]f (A) [CVH] dissolves and its assets are to be distributed pursuant to Section 13.2 and (B) the amount to be distributed related to such dissolution under Section 9.7(c)(iii) or Section 13.2(b)(iv) (to the extent it relates to Section 9.7(c)(iii)) to each Preferred Member in respect of its Preferred Interest is less than the Minimum IRR Shortfall Amount at such time, then there shall accrue and become immediately due and payable to each Preferred Member an amount equal to the Preferred Return (either Class A/B Preferred Return or Class C Preferred Return) for the particular Preferred Member."

(*Id*. § 13.3 [c].) The Minimum IRR Shortfall Amount is defined as "an amount . . . equal to the minimum amount of cash that, if distributed by [CVH] to such Preferred Member on such date . . . would result in an annual internal rate of return to such Preferred Member of thirty percent (30%) with respect to such Member's investment in its Preferred Interests." (*Id*. at 20[1].)

Section 9.7 (c) of the Operating Agreement provides that

> "Distributable Cash and Marketable Securities will be distributed within 15 days after the end of each calendar quarter in the following order of priority:
>
> (i) First, to the - Members that have made Additional Capital Contributions under Section 8.2 in proportion to and to the extent of their respective Unrecovered Additional Capital Contributions;
>
> (ii) Next, to the Preferred Members in proportion to and to the extent of their respective Unrecovered Preferred Capital Contributions; and
>
> (iii) Finally, subject to Sections 9.7(d) and 13.1 among the Members, pro rata based on their respective Percentage Interests on the date of the distribution; provided, however, if the Class C Preferred Members become entitled to a distribution of the Class C Preferred Return, if any, upon dissolution of [CVH], the amount distributed to the Class C Preferred Members pursuant to this Section 9.7(c)(iii) shall be increased by the amount of such Class C Preferred Return, and the

[1] NYSCEF pagination.

> amount distributed to the holders of the Common Interests pursuant to this Section 9.7(c)(iii) shall be correspondingly reduced with such reduction borne by the holders of the Common Interests in proportion to the number of Common Interests each holds."

(*Id*. § 9.7 [c].) Class C Preferred Return is defined as "an amount computed like interest at the rate of ten percent (10%) per annum (compounded annually as of December 31 of each calendar year) on each Preferred Member's Capital Contribution for its Class C Preferred Interest from the dates contributed until such relevant date." (*Id*. at 13.)

SiO2 Medical Products, Inc.

In 2011, SiO2 Medical Products, Inc. (SiO2) "was formed as a start-up company to research and develop plastic vessels that would contain a nanometers-thick glass lining." (NYSCEF 637, Defendants' 19-A Statement ¶ 21; NYSCEF 627, SAM's 19-A Counterstatement ¶ 21.)

On December 31, 2011, Abrams and CVH entered into an Option/Nominee Agreement whereby it was agreed that Abrams would hold legal title to 750 shares of one cent par value Class A Voting Common Stock of SiO2's shares for the sole and exclusive benefit of CVH. (NYSCEF 648, Option/Nominee Agreement at 2, 3.) The Option/Nominee Agreement set forth the terms of the nominee relationship and provided CVH with the option to acquire title to SiO2's shares. Specially, the Option/Nominee Agreement provides "that CVH may, at any time during the period [Abrams] owns legal title to the [SiO2] Shares (the 'Option Period'), elect to acquire the [SiO2] Shares from [Abrams] for One Dollar ($1.00) (the 'Exercise Price') and [Abrams] shall sell such [SiO2] Shares to CVH for the Exercise Price (the 'Option')." (*Id.*) CVH could exercise the Option, in whole or part, until expiration of the Option

Period. (*Id*. ¶ 2.) Abrams agreed to act pursuant to CVH's direction and CVH retained the authority to direct Abrams "with respect to the disposition, encumbrance or transfer in whole or in part of the [SiO2] Shares, the disposition of any distribution in cash or in kind of the [SiO2] Shares and the voting thereof." (*Id*. ¶ 4.) This Agreement identifies SiO2 as "a subsidiary of CVH." (*Id*. at 2.)

Pre-Closing Restructuring and Sale to Wendel S.A.

On October 23, 2014, CVH, Abrams, and nonparty Wendel S.A. (Wendel) entered into a letter agreement pursuant to which Wendel agreed purchase "all of the outstanding equity securities" of CVH "for (i) an initial purchase price of USD$360 million" and "(ii) a post-closing 'earn-out' payment up to an aggregate amount of USD$23 million." (NYSCEF 672, Letter Agreement § 1.)

On December 23, 2014, CVH, Wendel[2], and Abrams entered into the Purchase Agreement pursuant to which Wendel acquired "all of the issued and outstanding Interest" in CVH for $360 million less certain closing adjustments. (NYSCEF 682, Purchase Agreement at 4; *id*. § 2.1, 2.3 [a].) The Purchase Agreement provides that CVH "shall consummate the Pre-Closing Restructuring at or prior to Closing." (*Id*. § 6.12.) The Pre-Closing Restructuring is defined as "the restructuring transactions set forth on Schedule A" (*id*. at 6) and required, *inter alia,* the following: (i) nonparty Capitol Medical Devices, Inc. had to merge with SiO2, with SiO2 surviving the merger, and the Option/Nominee Agreement was to be terminated (*id*. Sch. A § 5), (ii) CVH had to distribute "all promissory notes from

[2] Wendel entered into the Purchase Agreement through CSP Technologies North America (Parent), Inc., an entity created by Wendel. (*See* NYSCEF 682, Purchase Agreement at 6; NYSCEF 637, Defendants' Rule 19-a Statement ¶ 60; NYSCEF 627, SAM's Response to Defendants' Rule 19-a Statement ¶ 60.)

SiO2, in favor of [CVH]" to A. Enterprises, Abrams' affiliate, (iii) CVH had to eliminate certain obligations or assign them to A. Enterprises or SiO2, and (iv) certain assets were to be transferred to SiO2. (*See id*. Sch. A § 1, 6, 8, 11.)

On January 28, 2015, Abrams, SiO2, A. Enterprises, CVH, and other entities entered into an Omnibus Restructuring Agreement to effectuate the Pre-Closing Restructuring. (NYSCEF 697, Omnibus Restructuring Agreement.) For example, pursuant to Section 1(A), CVH was to distribute, transfer, convey and assign all of its rights, title, and interest in and obligations of SiO2 to A. Enterprises. (*Id*. § 1[A].) The Omnibus Restructuring Agreement also provides that, upon the merger of Capitol Medical Devices, Inc with SiO2 the Nominee/Option Agreement terminates. (*Id*. § 3[C].)

On January 29, 2015, the sale of CVH to Wendel closed (Wendel Sale). (NYSCEF 623, SAM's 19-A Statement ¶ 50; NYSCEF 706, Defendants' 19-A Counterstatement ¶ 50.) In connection with the closing, the parties circulated a Flow of Funds & Steps Memorandum detailing "the transaction steps and wire transfers and other payments to occur on the Closing Date." (NYSCEF 596, Flow of Funds Memo at 2.) The payout listed for SAM was $31 million. (*Id*. at 7.)

Prior to the closing, SAM and Abrams entered into a Retained Claims Agreement pursuant to which SAM agreed to consent to the Wendel Transaction in exchange for a $31 million cash payment and three additional options - obtain the most favored payout from the Wendel Transaction (payout option), receive a warrant to purchase $36 million of junior preferred stock in SiO2 (warrant option), or litigate against Abrams (claim option). (NYSCEF 637, Defendants' Rule 19-a Statement ¶ 53; NYSCEF 627, SAM's Response to Defendants' Rule 19-a

Statement ¶ 53; NYSCEF 448, Retained Claims Agreement.) The Retained Claims agreement states that SAM

> "does not accept the financial terms offered by the [CVH] with respect to the Sale Transaction or the disposition of SiO2 Medical Products, Inc. ('SiO2') in the manner proposed by the [CVH] and wishes to reserve its rights with respect to, inter alia, the sale transaction and disposition of SiO2 while otherwise approving the consummation of the Sale Transaction with the Purchaser pursuant to the terms of this letter agreement."

(NYSCEF 448, Retained Claims Agreement at 2.) The Retained Claims Agreement also required Abrams to enter into an Assumption Agreement with CVH whereby Abrams "personally assum[ed] from the [CVH] any and all liability and obligations associated with the Retained Claims." (*Id*. at 3.)

SAM was paid $31 million from the Wendel Sale, and pursuant to the Retained Claims Agreement, exercised the claim option by bringing this action against Abrams. (NYSCEF 637, Defendants' Rule 19-a Statement ¶ 57; NYSCEF 627, SAM's Response to Defendants' Rule 19-a Statement ¶ 57.)

Discussion

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists. (*See Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986] [citations omitted].) If the movant makes such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts

sufficient to require a trial. (*See Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985].)

Motion Seq. No. 008 – SAM's Motion for Partial Summary Judgment

SAM moves for summary judgment on its breach contract claim. The parties agree that, under the Operating Agreement, SAM is entitled to receive the Class C Preferred Return upon dissolution of CVH, which includes "disposition" of "substantially all" of its assets. (NYSCEF 550, SAM Moving Brief at 16; NYSCEF 705, Defendants' Opp Brief at 8.) However, the issue is whether CVH disposed of substantially all of its assets.

Under Delaware law,[3] contracts "must be construed in accordance with their terms to give effect to the parties' intent. The proper construction of . . . any contract . . . is purely a question of law." (*Wenske v Blue Bell Creameries, Inc*., 2018 WL 3337531, *10, 2018 Del Ch LEXIS 221, *23 [Del Ch July 6, 2018, No. 2017-0699-JRS] [internal quotation marks and citations omitted].) If a contract is clear and unambiguous, Delaware courts "give effect to the plain-meaning of the contract's terms and provisions." (*Estate of Osborn v Kemp*, 991 A2d 1153, 1159-60 [Del. 2010] [citation omitted].) When a court "may reasonably ascribe multiple and different interpretations to a contract, . . . [the court] will find that the contract is ambiguous." (*Id.* at 1160 [citations omitted].) The parties here agree that the Operating Agreement is unambiguous.

SAM asserts the Pre-Closing Restructuring and Wendel Sale disposed of substantially all of CVH's assets. Specifically, SAM argues that the Pre-Closing

[3] The parties apply Delaware law in support of their motions. (*See also* NYSCEF 199, Decision and Order [mot. seq. no. 003] at 15 [stating that the parties agree Delaware law applies to substantive claims]; NYSCEF 324, Operating Agreement § 16.3 ["This Operating Agreement and its interpretation shall be governed exclusively by its terms and by the laws of the State of Delaware… ."].)

Restructuring and the Wendel Sale permitted Abrams and Wendel to select which of CVH's assets each wanted to acquire which really resulted in an asset sale not a stock sale. Defendants, on the other hand, assert that Wendel purchased 100% of CVH's membership interests in a stock sale. They further assert that the disposition of all of CVH's membership interests is not the same thing as a disposition of substantially all CVH's assets, which would have left CVH without the ability to operate or exist.

Delaware Step Transaction Doctrine

SAM argues that under Delaware's Step Transaction Doctrine, the Pre-Closing Restructuring and Wendel Sale must be viewed as a whole when analyzing whether there was a disposition of substantially all of CVH's assets. While defendants assert that this is a change of position by SAM in that SAM argued that the Pre-Closing Restructuring was when the disposition of assets occurred in response to defendants' motion to dismiss, they do not dispute that these two transactions should be viewed as a whole, and thus, the court will treat them as one transaction under the Step Transaction Doctrine.[4]

Section 13.1 of the Operating Agreement

[4] "The step-transaction doctrine applies if the component transactions meet one of three tests. First, under the 'end result test,' the doctrine will be invoked if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result. Second, under the 'interdependence test,' separate transactions will be treated as one if the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series. The third and most restrictive alternative is the binding-commitment test under which a series of transactions are combined only if, at the time the first step is entered into, there was a binding commitment to undertake the later steps." (*Bank of New York Mellon Tr. Co. v Liberty Media Corp*., 29 A3d 225, 240 [Del. 2011] [internal quotation marks and citations omitted].) Even thought defendants did not address the merits of SAM's argument, the court finds that these transactions meet the binding commitment test. (*See id*. [the binding commitment test is satisfied when the transactions are contractually tied to each other].)

Pursuant to Section 13.1 of the Operating Agreement, "[CVH] shall be dissolved upon approval of the Class A Common Members holding a majority of the Class A Common Interests and Super-Majority Consent or upon the disposition by [CVH] of *substantially all of its assets*." (NYSCEF 324, Operating Agreement § 13.1 [emphasis added].) The parties agree that, under Delaware law, when a contract provision, such as Section 13.1, uses the phrase "substantially all" when referring to a company's assets without defining that phrase, the phrase will be deemed to have the same meaning it has when used in 8 Del C § 271.[5] (NYSCEF 638, Defendants' Memo in Support of Summary Judgment at 9; NYSCEF 624, SAM's Memo in Opposition at 7; *see also Veloric v J.G. Wentworth, Inc.,* No. CIV.A. 9051-CB, 2014 WL 4639217, *14 [Del. Ch. Sept. 18, 2014] [citation omitted] [where a contract "does not define 'substantially all' … it is appropriate to consider by analogy how that term is interpreted as it appears in 8 Del. C. § 271"].)

In interpreting the phrase "substantially all" in the context of 8 Del C § 271, the Delaware Chancery Court explained that

> "'All' means 'all,' or if that is not clear, all, when used before a plural noun such as 'assets,' means 'the entire or unabated amount or quantity of the whole extent, substance, or compass of; the whole.' 'Substantially' is the adverb form of 'substantial.' Among other things, substantial means 'being largely but not wholly that which is specified.' Substantially conveys the same meaning as 'considerably' and 'essentially' because it means 'to a great extent or degree' and communicates that it is very nearly the same thing as the noun it acts upon. In all their relevant meanings, substantial and substantially convey the idea of amplitude, of something that is 'considerable in importance, value, degree, amount, or extent.' A fair and succinct equivalent to the term 'substantially all' would therefore be 'essentially everything.'"

[5] Section 271 requires stockholder approval for any sale, lease or exchange of all or substantially all of a corporation's assets.

(*Hollinger Inc. v Hollinger Intl., Inc*., 858 A2d 342, 377 [Del Ch 2004] [citations omitted].)[6] The *Hollinger* Court went on to state that

> "[t]he [Delaware] Supreme Court has long held that a determination of whether there is a sale of substantially all assets so as to trigger section 271 depends upon the particular qualitative and quantitative characteristics of the transaction at issue. Thus, the transaction must be viewed in terms of its overall effect on the corporation, and there is no necessary qualifying percentage"

and that Delaware Courts have

> "eschewed a definitional approach to 8 Del C § 271 focusing on the interpretation of the words 'substantially all,' in favor of a contextual approach focusing upon whether a transaction involves the sale 'of assets quantitatively vital to the operation of the corporation and is out of the ordinary and substantially affects the existence and purpose of the corporation'."

(*Hollinger Inc.*, 858 A2d at 377 [citations omitted].) The *Hollinger* Court, applying *Gimbel v Signal Cos., Inc*., 316 A2d 599, 606 (Del Ch 1974), affd 316 A2d 619 (Del 1974), explained that this quantitative and qualitative test is designed "to help determine whether a particular sale of assets involved substantially all the corporation's assets." (*Hollinger Inc*., 858 A2d at 378.)

Here, SAM fails to offer sufficient proof that the CVH assets at issue in the Pre-closing Restructuring and Wendel Sale were quantitatively vital to CVH's operation and substantially affected CVH's existence and purpose. In order to make a determination in

[6] In *Hollinger*, the Chancery Court, in determining whether 8 Del C § 271 required a vote by the stockholders of a parent corporation to approve the sale of certain assets held by an indirect wholly-owned subsidiary, held that the value of the challenged asset sale did not meet the threshold requiring a vote. "In 2005, the year after *Hollinger* was decided, Section 271 was amended to specifically provide that the property and assets of a wholly-owned and controlled, directly or indirectly, subsidiary will be considered the property and assets of its parent corporation for purposes of Section 271." (*City of N. Miami Beach Gen. Employees' Retirement Plan v Dr Pepper Snapple Group, Inc*., 189 A3d 188, 198, n 51 [Del Ch 2018].) While *Hollinger* was effectively overruled by the amendment to the statute, it does not affect the Chancery Court's analysis regarding the phrase "substantially all."

accordance with Delaware law, the court needs evidence to support the value of the assets. Much of SAM's moving brief focuses on testimony detailing which of CVH's assets were acquired by Abrams and Wendel and how, evidence that Abrams negotiated payouts with other Preferred Members, and Abrams' conduct in another transaction. However, none of this evidence makes a prime facie showing of whether the assets at issue were substantially all of CVH's assets, allowing the court to determine whether this was in fact a dissolution under Section 13.1 of the Operating Agreement. SAM does "submit" the expert reports of David Prager, defendants' expert, and Christopher Mercer, SAM's expert,[7] but provides no explanation of these reports other than "SAM's expert opinions that SiO2 was worth $121 million and Abrams' expert opines it was worth $61 million – they now agree SiO2 was a valuable asset." (NYSCEF 550, SAM's Moving Brief at 11.) This does not provide the court with any context.

SAM also argues that the Appellate Division, First Department, recognized that the Pre-Closing Restructuring would be a dissolution of CVH if Abrams acquired assets worth a substantial amount, and it is undisputed that Abrams acquired such assets. In response to defendants' motion to dismiss, SAM argued that the Pre-Closing Restructuring constituted the dissolution of CVH under the Operating Agreement. (*See* NYSCEF 199, Decision and Order at 17, 19 [mot. seq. no. 003] [Scarpulla, J.].) At that stage, the court (Scarpulla, J.) could not "determine whether the Pre-Closing Restructuring effectively dissolved CVH under that definition in the Operating Agreement . . . [because] [i]t is not

[7] These exhibits were filed under seal as placeholders in connection with motion seq. no. 008. The parties were directed to refile any exhibits that were filed as placeholders so they could be reviewed by the court. These expert reports were not refiled in connection with motion seq. no. 008, causing the court to search the NYSCEF docket. They were filed unredacted in connection with motion seq. no. 009. (*See* NYSCEF 580 and 581.)

irrefutably set forth in the papers whether the alleged transfers to Abrams were liabilities or assets." (*Id*. at 20.) For that reason, the court denied defendants' motion to dismiss the breach of contract claim. (*Id*.) The First Department affirmed, holding that "the transaction could be a 'disposition' of substantially all of CVH's assets (i.e., a 'dissolution'), given SAM's allegations that the Abrams parties transferred to themselves assets worth substantial amounts . . . before nonparty Wendel S.A.'s purchase of the remaining equity interests." (*Southern Advanced Materials, LLC v Abrams*, 151 AD3d 451, 452 [1st Dept 2017].) The fact that the First Department opined in a pre-answer motion to dismiss this action that the Pre-Closing Restructuring "could be disposition" of assets does not bind this court on a summary judgment motion under 3212; the court needs evidence at this stage.

SAM's motion is denied.

Motion Seq. No. 009 – Defendants' Motion for Summary Judgment

Breach of Contract Claim

Defendants move for summary judgment to dismiss SAM's breach of contract claim. Although defendants argue that the Pre-Closing Restructuring and Wendel Sale cannot be an asset sale because Wendel purchased all of CVH's membership interests, the court must look to the Operating Agreement which specifically provides that CVH will be deemed dissolved if there is a disposition by CVH of substantially all of its assets. This court cannot determine on this motion whether, under the terms of Section 13.1 of the Operating Agreement, that there was a dissolution of CVH. The court rejects defendants' argument that, as a matter of law, a dissolution equates to zero left of the company, and thus, the fact that CVH's shares were sold to Wendel automatically means CVH was not dissolved. In fact, Del Code § 278 requires that all dissolved corporations shall be continued for 3 years from dissolution to allow them to gradually settle and close their business, disposing

of property, discharging liabilities, distributing remaining assets, etc., anticipating that there will be assets left after dissolution that will need to be disposed of and/or distributed. Wendel's purchase of CVH's shares does not preclude that CVH was actually dissolved and that the Pre-Closing Restructuring and Wendel Sale were not a winding down of CVH. Rather, there is an issue of fact as to whether the Pre-Closing Restructuring and Wendel Sale were effectively a dissolution of CVH. Further, it is not clear whether CVH even continued to operate after the Wendel Sale. (*See* NYSCEF 576, CVH President Belfance Depo Tr at 358:13-14 ["they stopped referring to CV Holdings at some point" – Belfance could not identify when and his testimony was not clear on this issue].) Thus, defendants' motion for summary judgment dismissing this claim is denied.

Breach of Fiduciary Duty Claim

In second amended complaint, SAM alleges that Abrams, as manager, and the Trust, as CVH's controlling member, owed SAM a fiduciary duty. Sam alleges that defendants structured the Pre-Closing Restructuring and Wendel Sale in a way to deprive it of the Class C Preferred Return owed, while permitting Abrams to take substantial CVH assets, depriving SAM of its *pro rata* share of those assets. (NYSCEF 103, SAC ¶ 118.) Sam further alleges that defendants "misrepresented and/or concealed numerous material facts . . . in order to effect . . . [their] scheme," including misrepresenting the value of SiO2 and the amounts being paid to other preferred members and failing to disclose the assets Abrams received. (*Id*. ¶ 123.)

> "[P]referred shareholders are owed fiduciary duties in some circumstances. Specifically, when the preferred shareholders share a right equally with the common shareholders the directors owe the preferred shareholders the same fiduciary duties they owe the common shareholders with respect to those rights. When the articles of incorporation, the preferred share designations, or some other appropriate document articulate rights that are uniquely enjoyed by the preferred class of stock, however, those rights are

> purely contractual in nature; directors do not owe preferred shareholders any fiduciary duties with respect to those rights. The import of this is that when preferred shareholders assert fiduciary claims that relate to obligations expressly treated by their unique contractual rights with the corporation, the Court will review those claims as breach of contract claims and the claims for breach of fiduciary duty will be dismissed as superfluous."

(*MCG Capital Corp. v Maginn*, 2010 Del Ch LEXIS 87, at *54-55 [Del Ch 2010] [citations omitted]; *see also In re Trados Inc. Shareholder Litig*., 73 A3d 17, 39 [Del Ch 2013].)

Here, SAM's breach of fiduciary duty claim is based on the rights granted to it in Section 13 of the Operating Agreement. Its contractual right to receive Class C Preferred Return is not shared equally with common members. Instead, this contractual right was given elusively to Preferred Members in the event of dissolution of CVH. (*See* NYSCEF 324, Operating Agreement ¶ 13.3 [c].) Thus, defendants did not owe fiduciary duties to SAM and this claim fails as a matter of law.

SAM's reliance on *HB Korenvaes Inv., L.P. v Marriott Corp*., 1993 Del. Ch. LEXIS 90 1993 WL 205040 (Del Ch 1993), is misplaced as *HB Korenvaes Inv.* does not warrant a different result. *HB Korenvaes Inv*. offers two examples, which exemplify the conclusions by more contemporary Delaware Courts that preferred stockholders are owed fiduciary duties only when they rely on a right shared equally with common stockholders:

> "[i]n some instances (for example, when the question involves adequacy of disclosures to holders of preferred who have a right to vote) such a duty will exist. In others (for example, the declaration of a dividend designed to eliminate the preferred's right to vote) a duty to act for the good of the preferred does not."

(*Id*. at 16-17 [citations omitted].) The *HB Korenvaes* Court does not suggest diving into an analysis of whether there was bad faith as SAM implies.

Nevertheless,

> "[e]ven when directors do owe fiduciary duties to preferred stockholders, however, if claims for breach of such duties are based on the same facts

> underlying a breach of contract claim and relate to rights and obligations expressly provided by contract, then such claims are superfluous. As a result, unless the fiduciary duty claims are based on duties and rights not provided for by contract, a plaintiff cannot maintain both contractual and fiduciary duty claims arising out of the same alleged wrongdoing."

(*Fletcher Intl., Ltd. v ION Geophysical Corp*., 2010 Del Ch LEXIS 125, *30 [Del Ch 2010].)

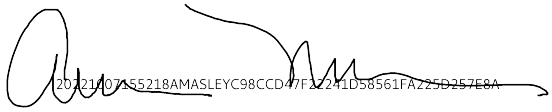
Accordingly, it is

ORDERED that plaintiff Southern Advanced Materials LLC's motion for summary judgment on the first cause of action for the breach of contract is denied; and it is further

ORDERED that defendants Robert S. Abrams and the Robert S. Abrams Living Trust's motion for summary judgment is granted, in part, to the extent that the fifth cause of action for breach of fiduciary duty is dismissed; and it is further

ORDERED that Parties shall file motions in limine by November 10, 2022; otherwise waived; and it is further

ORDERED that a pretrial conference shall be held virtually on November 28, 2022 at 4 p.m. at which a trial date will be selected.



10/7/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			**X**	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	**X**	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**