



1 APPEARANCES:

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Pepper Hamilton LLP  
for Petitioner

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KURT M. HEYMAN, ESQ.  
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-and-

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LUCY PRASHKER, ESQ.  
of the Massachusetts bar  
Cain, Hibbard & Myers PC  
for Respondent

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1 THE COURT: Good afternoon, everyone.  
2 Mr. Heyman, this is your motion to  
3 dismiss.

4 MR. HEYMAN: Yes, Your Honor. I am  
5 here on behalf of respondent. I rise to make an  
6 introduction of Lucy Prashker, my co-counsel from Cain  
7 Hibbard & Myers in western Massachusetts. I think we  
8 may have their winter this year, Your Honor, and if  
9 you want to order them to take it back, I certainly  
10 won't object to that.

11 With no further adieu, Lucy Prashker.

12 THE COURT: Good afternoon, and  
13 welcome.

14 MS. PRASHKER: Good afternoon, and  
15 thank you for hearing us this afternoon. We are  
16 jealous of all this white stuff. We have very little  
17 of it up north.

18 THE COURT: As Mr. Heyman suggested,  
19 if you want to take with you, you are more than  
20 welcome. I'll give you my home address and you can  
21 pull it off my unshoveled sidewalks.

22 MS. PRASHKER: We represent Gutchess  
23 Companies LLC, and that's a Delaware LLC that was  
24 formed in 2002 by Homer Gutchess who owned a large and

1 successful lumber company in upstate New York, a  
2 lumber company that continues to operate today, and  
3 employs upward of 300 people in upstate New York.

4           The LLC was formed as part of a  
5 comprehensive estate planning program, and as stated  
6 in the operating agreement itself, the initial purpose  
7 of the LLC was to hold the Gutches lumber company  
8 stock, the operating company's stock.

9           The purpose clause of the operating  
10 agreement is very broad, however, and it recites that  
11 the LLC can operate for any lawful purpose, including,  
12 without limitation, holding that lumber's stock and  
13 doing things to increase the value of the underlying  
14 assets.

15           As is common in estate planning, Homer  
16 Gutches, when he formed this LLC, decided to split  
17 the voting interests in the LLC from the equity  
18 interest, and if you look at schedule one to the  
19 original iteration of the operating agreement, you see  
20 that Homer Gutches retained 100 percent of the voting  
21 interest in the LLC; only 1 percent of the economic  
22 interest, but 100 percent of the voting interest.

23           His wife had 1 percent of the economic  
24 interest, no voting rights. And the trust, a

1 pre-existing trust that, again, Homer Gutchess had  
2 established as part of his estate planning program,  
3 held 98 percent of the economic interest, no voting  
4 interest.

5           So Homer controlled 100 percent of the  
6 voting interests of the LLC when the LLC was  
7 established in 2002.

8           A couple of years later, on the advice  
9 of his counsel, he determined to transfer his voting  
10 interest in the LLC to his wife, Martha Gutchess, and  
11 I'll get into the specifics of that transfer a bit  
12 later. But following that transfer, you had Martha  
13 Gutchess owning 100 percent of the voting interest,  
14 Martha Gutchess also owning 2 percent of the economic  
15 interest in the LLC, and again, the 1998 irrevocable  
16 trust continued to hold 98 percent of the economic  
17 interest with no voting rights, no right of control.

18           Now, the current trustees of the 1998  
19 irrevocable trust, who are not the original trustees,  
20 are Mr. Ames and Mr. Keith Gutchess. Mr. Keith  
21 Gutchess is a brother of Homer Gutchess. Mr. Homer  
22 Gutchess died in 2006.

23           So the current trustees have, in this  
24 proceeding, moved for dissolution of the LLC, judicial

1 dissolution. We have moved to dismiss on the ground  
2 that the petition fails to allege facts that would  
3 justify judicial dissolution of this LLC. The law, as  
4 Your Honor knows, views judicial dissolution as an  
5 extreme remedy to be sparingly exercised, and only  
6 when it is not reasonably practicable for the LLC to  
7 continue operations in accordance with the purpose  
8 clause of its operating agreement. And, again, the  
9 purpose clause of this operating agreement is very  
10 broad, and includes operations for any lawful purpose.

11 In this case, there is no allegation  
12 in the petition of any voting deadlock. Indeed, under  
13 this structure, it's impossible to have deadlock  
14 because Homer kept 100 percent of the voting interest  
15 in a single person; first himself and then Martha. So  
16 it's impossible to have voter deadlock in this case.

17 There is no allegation in the petition  
18 of any financial insolvency of the LLC. The LLC is  
19 solvent and is operating. There is no allegation that  
20 the LLC is dormant or is in a state of inertia.  
21 Indeed, the complaint is that the LLC is doing too  
22 much rather than too little. The complaint is that  
23 the current trustees don't like the current manager of  
24 the LLC.

1           The current manager is Gary Gutchess,  
2 the only son of Homer and Martha Gutchess, and he is  
3 currently the manager of the LLC and making management  
4 decisions with which the trustees, the current  
5 trustees, disagree.

6           THE COURT: Well, you indicated that  
7 the formation of the LLC was part and parcel of a  
8 sophisticated estate planning effort that spanned  
9 several years. I look at the purpose set forth in the  
10 LLC agreement, but when I back up and look at the  
11 trust agreement and the sequence of events and the  
12 unhappy relationship that Mr. Gutchess had with his  
13 son, I come away disturbed and concerned that what  
14 really is going on here is not what Mr. Gutchess  
15 intended, because things are not being run as I would  
16 think he intended, given what I draw from the overall  
17 allegations in the amended petition.

18           MS. PRASHKER: Well, as a factual  
19 matter, we disagree with that. We believe that  
20 Mr. Gutchess, Mr. Homer Gutchess, who reconciled with  
21 his son before his death, and in fact, as the  
22 petitioners themselves concede in the petition, left  
23 his son an inheritance. We disagree that things are  
24 being run at the LLC level contrary to the intentions

1 of Homer Gutchess. But in terms of the law --

2 THE COURT: My understanding though  
3 was that as of -- and maybe I missed the facts here,  
4 as of the time the LLC agreement was drafted, they  
5 were still estranged. Is that correct?

6 MS. PRASHKER: In 2002, Gary Gutchess  
7 was not working at Gutchess lumber company, and I  
8 would say their relationship was strained. That is  
9 correct.

10 But the LLC -- the intent of the  
11 parties to the operating agreement has to be gleaned  
12 from the purpose clause. It's not appropriate, when  
13 you have an agreement that is unambiguous on its face  
14 as to its purpose, and the purpose is broad, that it's  
15 inappropriate in that circumstance for the Court to  
16 try to glean the subjective intent of the parties to  
17 that agreement when there is no ambiguity in the  
18 contract itself.

19 That's the beauty of an LLC; is that  
20 it's a contract, and sophisticated parties are bound  
21 by the terms of the contract, and the intent has to be  
22 gleaned from the language of the operating agreement  
23 itself.

24 I think the case law is pretty clear

1 on that, because if every time an LLC were formed  
2 where there's a split between the voting rights and  
3 the equity rights, the parties to that agreement are  
4 going to be uncertain as to whether a Court, eight  
5 years later, can going to try to reconstruct the  
6 intent of the parties back in 2002 when the LLC was  
7 formed.

8                   There's going to be no certainty of  
9 contract. There is going to be no certainty that what  
10 you are intending to put together here and what you  
11 express in words as to your intent, is going to be  
12 upheld and enforced by the courts.

13                   I think that's a very serious  
14 circumstance to have a situation where you don't know  
15 whether, in eight years, or ten years, or 12 years,  
16 the Court is going to second guess the intent, and as  
17 you describe it in the operating agreement and look  
18 for some other intent or purpose, look for some intent  
19 that your only son never be permitted to be the  
20 manager of that LLC.

21                   If that was really what was driving  
22 Mr. Gutchess' actions in 2002, it would have been very  
23 simple for him to include in the operating agreement a  
24 provision that says, "The manager shall be appointed

1 by 75 percent of the voting interest except in no  
2 event shall the manager be my son, Gary Gutchess." He  
3 didn't do that. And that wasn't his intent.

4 So, in terms of looking at what the  
5 law is on judicial dissolution, the traditional things  
6 you look for are, number one, voting deadlock. Not  
7 alleged here. Not possible to be alleged here,  
8 because 100 percent of the voting interest resides in  
9 Homer Gutchess's wife, Martha Gutchess.

10 By the way, Your Honor, in terms of  
11 Homer Gutchess' original intent, there is no  
12 allegation, and there can be no allegation that Homer  
13 Gutchess never intended for Martha Gutchess to have  
14 control of that voting interest. That's who controls  
15 the voting interest right now. Not Gary Gutchess.  
16 Martha Gutchess. She controls the voting interest,  
17 and what the petitioners seek is to wrest away from  
18 Homer's widow, Martha Gutchess, the voting control  
19 over the LLC.

20 Gary Gutchess is a little bit of a red  
21 herring here because, yes, Martha Gutchess has  
22 appointed him as manager, but it's really Martha  
23 Gutchess who owns that voting interest; not Gary  
24 Gutchess, and it's Martha Gutchess' control of that

1 voting interest that the trustees are unhappy with.

2           And they, therefore, ask the Court to  
3 ignore the operating agreement, to ignore the split of  
4 voting interest from equity interest, collapse the LLC  
5 structure, and grab control of the underlying  
6 operating company away from Martha Gutchess, away from  
7 Homer Gutchess' widow. And no one has alleged, and no  
8 one can allege, that Homer Gutchess didn't intend  
9 Martha Gutchess to have control of that voting  
10 interest.

11           There is not a single case in Delaware  
12 that has ordered judicial dissolution under these  
13 circumstances, and in all of the reported decisions  
14 where an LLC has been dissolved by the Court, there  
15 has been voting deadlock and/or financial insolvency  
16 or organizational inertia or stalemate. And none of  
17 those things are present here.

18           So if the Court is going to allow this  
19 kind of proceeding to move forward in the absence of  
20 allegation of voting deadlock or financial insolvency  
21 or any other circumstance that makes it reasonably  
22 impracticable for the LLC to continue to operate in  
23 accordance with the terms of the operating agreement,  
24 the Court would be making new law.

1           And I would submit that that new law  
2 would be inconsistent with the most fundamental  
3 principle behind LLC law, which is freedom of contract  
4 and honoring the terms of an unambiguous agreement, as  
5 this operating agreement is.

6           In terms of one other point, if I  
7 might, on Homer Gutchess' intent, whether these  
8 trustees are accurately portraying Homer's intent, and  
9 whether they, in fact, are operating in accordance  
10 with Homer's intent is being litigated up in  
11 Surrogates Court in New York State.

12           Martha Gutchess, who is a primary  
13 beneficiary under the trust -- petitioners would like  
14 the Court to sort of avoid that fact, and they  
15 describe her as only minimally a beneficiary, but in  
16 fact, if you read the trust, she's a primary  
17 beneficiary. She's the first one named.

18           Martha Gutchess, Gary Gutchess and  
19 Martha Gutchess' two grandsons, Matthew and Daniel  
20 Gutchess, have petitioned the Surrogates Court in New  
21 York to remove these trustees as trustees of the 1998  
22 irrevocable trust because they, it is alleged, have  
23 breached their fiduciary obligations to the  
24 beneficiaries, including Martha Gutchess.

1           That's being litigated up in New York  
2 whether these trustees are acting in concert, in  
3 compliance, in a way consistent with the terms of the  
4 trust and Homer's original intent. So that is an  
5 issue that is getting addressed up there where it  
6 should be in Surrogates Court.

7           It's not the issue before this Court  
8 on a petition for judicial dissolution where you  
9 should be looking at the operating agreement and the  
10 purpose clause in that operating agreement.

11           The case that we think is the most  
12 similar to this case in terms of the facts alleged,  
13 and why we think it appropriate that a motion to  
14 dismiss be granted at this stage, is the Seneca case,  
15 Seneca Investments case, which is a relatively recent  
16 case out of the Court of Chancery where the case was  
17 actually stronger for judicial dissolution than this  
18 case, because in Seneca, you didn't have voter  
19 deadlock.

20           We don't have voter deadlock here, but  
21 in Seneca, you had really a moribund LLC. There  
22 wasn't even a manager of the LLC and nothing was  
23 happening in the LLC, and there were violations of the  
24 operating agreement going on because distributions

1 weren't being made, and reports weren't being  
2 generated, and there were other problems.

3           So one of the members moved for  
4 judicial dissolution in that case, and the Court said,  
5 no, we're not going to use the extreme remedy of  
6 judicial dissolution to police violations of the  
7 operating agreement. If you want to sue for breach of  
8 the operating agreement, do that. But that doesn't  
9 justify a breach of the operating agreement -- does  
10 not justify the extreme remedy of judicial  
11 dissolution.

12           Here, we actually have an active LLC.  
13 There's no allegation that there's any kind of  
14 management dysfunction. We have all of the voting  
15 interests residing in a single person. We have a  
16 single manager, and that manager is making decisions.

17           The complaint is that the decisions  
18 are not to the liking of the trustees. The complaint  
19 is that he hasn't given them information that they  
20 wanted, or he hasn't made distributions that they  
21 wanted, or he's changed the operating agreement with  
22 the consent of Martha Gutches to provide that he can  
23 be compensated for the work that he does.

24           Those are the complaints. Well, the

1 remedy for those kinds of complaints is not judicial  
2 dissolution. If they really believed that this was a  
3 breach of fiduciary duty or a violation of an  
4 operating agreement, they would have sued for that.  
5 But they haven't included a count for breach of  
6 fiduciary duty or for breach of the operating  
7 agreement in their petition. The only remedy they  
8 seek is the extreme remedy of judicial dissolution.

9 I'd like to take a couple of minutes,  
10 if I might, to address the new argument that was made  
11 in the opposition papers that the transfer of voting  
12 rights by Homer Gutches to Martha Gutches in 2004  
13 was somehow ineffective.

14 This is not an argument -- this is not  
15 an allegation that was made in the amended petition.  
16 There is no allegation in the amended petition that  
17 the transfer of those voting rights was ineffective  
18 because, as they now argue, Homer Gutches had nothing  
19 to transfer when he made that transfer to Martha  
20 because he had already transferred something to the  
21 voting trust.

22 All that is in the amended petition  
23 are a couple of inserts of the word "purported" when  
24 there's a description of Homer's transfer of the

1 rights to Martha. I think it reads "Homer's purported  
2 transfer of the rights to Martha."

3           And then Martha's termination of the  
4 voting trust, they refer to that termination as a  
5 "purported termination." But there is no following-  
6 along allegation that, in fact, the transfer by Homer  
7 Gutches to Martha Gutches was ineffective. You will  
8 not find that anywhere in the petition. And there is  
9 no allegation that it was ineffective because Homer  
10 had already transferred those voting rights to the  
11 voting trust.

12           If, in fact, that's true though, if,  
13 in fact, Homer Gutches had nothing to transfer in  
14 2004 when he transferred these voting rights to Martha  
15 Gutches, and Martha Gutches, therefore, had no power  
16 to terminate the voting trust, then the remedy is a  
17 declaratory judgment that the voting trust still has  
18 control, because all those things that happened didn't  
19 really happen, they were all ineffective.

20           So the voting trust still has control,  
21 so the voting trustees who are different from these  
22 two trustees, by the way, the voting trustees should  
23 have control of the LLC and has nothing to do with  
24 judicial dissolution of the LLC.

1           There's no need for judicial  
2 dissolution of the LLC under that circumstance because  
3 the control would just revert back to the trustees of  
4 the voting trust. But they're not seeking that. They  
5 don't want that. They want to blow up the LLC.  
6 That's the only thing that will satisfy these  
7 trustees, and they want to blow up the LLC because  
8 they're unhappy that their economic interest has been  
9 split from the voting interest.

10           And that was a decision that was made  
11 in 2002 by Homer Gutchess. It's something that's  
12 permitted under the Delaware Limited Liability Company  
13 Act, specifically allowed, a division of voting  
14 interest from economic interest. It was part of the  
15 estate plan, and it shouldn't be eviscerated by these  
16 two trustees because they want to wrest control of  
17 that lumber company away from Homer's widow, Martha  
18 Gutchess.

19           On the transfer of voting rights, if  
20 the Court wants to look at that issue, even though  
21 it's not alleged in the amended petition, but if the  
22 Court wants to look at that issue, we have attached to  
23 our reply papers the documents that are referenced in  
24 the amended petition that relate to those allegations.

1           So there is a reference in the amended  
2 petition to the voting trust. We have attached the  
3 voting trust to our supplemental transmittal  
4 affidavit. I think that's Exhibit D. There is a  
5 reference in the amended petition to the trust  
6 certificate, I think it's called the Voting Trust  
7 Certificate, that was issued to Homer Gutchess when he  
8 delivered to the voting trust the voting interest in  
9 the LLC.

10           What he got back was the certificate,  
11 and under the terms of the voting trust agreement,  
12 that certificate is transferable. The voting trust  
13 says that specifically. The voting trust certificate  
14 is transferable. And we have attached the voting  
15 trust certificate itself, and that certificate also  
16 recites that it is a transferable instrument.

17           And that's what happened. We have  
18 attached the assignment that Homer Gutchess executed  
19 that operated to transfer that trust certificate from  
20 him to Martha, and under the terms of the voting trust  
21 agreement itself, that effected a transfer of that  
22 voting interest subject to the terms of the voting  
23 trust, and Martha then, as a member under the voting  
24 trust agreement, had the right to terminate that

1 voting trust at any time.

2 All of these questions are issues of  
3 law to be determined by viewing the unambiguous  
4 language of the voting trust agreement, the voting  
5 trust certificate and the assignment. There are no  
6 factual issues there for the Court to resolve through  
7 trial.

8 But, again, I don't even think the  
9 Court need go there because it really has nothing at  
10 all to do with dissolution. If they're right that  
11 that transfer was somehow ineffective, there would be  
12 no need for judicial dissolution because control would  
13 revert back to those voting trustees.

14 So, in sum, unless the Court has  
15 additional questions for me at this point, it's our  
16 position that the petition fails to allege facts that  
17 would support the extraordinary remedy of judicial  
18 dissolution here.

19 There is no allegation of voter  
20 deadlock. There's no allegation of financial  
21 insolvency. There's no allegation that the LLC is  
22 unable to operate in accordance with the purpose  
23 clause of the operating agreement. So judicial  
24 dissolution is inappropriate here. We, therefore, ask

1 that the petition be dismissed.

2 THE COURT: Thank you.

3 MR. JOHNSON: Good afternoon, Your  
4 Honor.

5 THE COURT: Good afternoon.

6 MR. JOHNSON: Edmond Johnson on behalf  
7 of the petitioners. I think it's important to  
8 remember in this case that the petition supported its  
9 claim for relief with at least eight factual  
10 assertions: First, that the current management has  
11 purposely run the Gutchess LLC in a manner designed to  
12 create tax liability for the trust. It's a 98 percent  
13 equity holder.

14 Second, that current management has  
15 purposely stopped GLC, which is the lumber company,  
16 from buying timber from GTP which is the timber  
17 management company so that the trust would be starved  
18 for income with which it could pay the tax liabilities  
19 created by the LLC.

20 Third, that current management has  
21 sued to stop GTP, which was the timber management  
22 company, from selling timber to anyone else so that  
23 the trust would be starved for income from which it  
24 could pay the tax liabilities created by the LLC, and

1 also its own not inconsiderable tax liabilities on the  
2 timber lands that it owns which it has to pay every  
3 year.

4           The trust also, fourth in the  
5 petition, it alleges that certain adverse market  
6 conditions make it unlikely that the Gutchess LLC will  
7 make distributions to the trust sufficient to pay the  
8 tax expense that the LLC has created in the  
9 foreseeable future.

10           Fifth, that current management of the  
11 LLC has refused to provide the trust with certain  
12 information, corporate information that it needs to  
13 fulfill its duties to the lenders and is information  
14 that the manager was required to provide to the  
15 members.

16           Sixth, that current management of the  
17 LLC has taken steps to enable it to refuse to provide  
18 corporate information to the trust in the future; that  
19 current management of the LLC has destroyed the  
20 diversification of the trust assets by making it  
21 totally dependent on the lumber business.

22           Eighth, that all of these actions were  
23 taken purposefully to harm the trust.

24           Ninth, that the actions of current

1 management have been intended to and have all but  
2 destroyed the value of the trust's interests in the  
3 LLC because the trust interest is only an equity  
4 interest, and the person who asserts the right to  
5 choose management is working in concert with current  
6 management to decrease the value of the trust interest  
7 in the LLC so that interest could only be obtained by  
8 Gary and Martha; in other words, transferring value  
9 from the equity interest to the voting interest which  
10 was not supposed to have value.

11           And, finally, that the current  
12 management of the LLC was not put in place through  
13 legally effective means.

14           Respondent has essentially --

15           THE COURT: All of that leads me to  
16 ask what I think is a fairly obvious question. You  
17 have described what to me sounds like, in corporate  
18 parlance, a 225 action for who should be in charge,  
19 and you have described classic breaches of fiduciary  
20 duty.

21           If I have a company where there have  
22 been breaches of fiduciary duty by the directors, I  
23 don't dissolve the company. I fix the board. And  
24 that's what I don't understand about this case. It

1 seems to me there are a lot of steps between here and  
2 dissolution.

3 MR. JOHNSON: I think that the problem  
4 is this split of the voting interest from the economic  
5 interest. There isn't really any way to fix the board  
6 because the voting interest is purportedly held by  
7 someone who is hostile to the trust.

8 THE COURT: But that doesn't mean that  
9 Gary Gutchess doesn't have fiduciary duties to the  
10 entity, and if he's breaching his fiduciary duties,  
11 he's liable at least in the form of damages, isn't he?

12 MR. JOHNSON: I think that he is, but  
13 that doesn't solve the equity interest problem because  
14 you're going to put someone else in there, and I even  
15 think I know who it would be.

16 THE COURT: But doesn't that bring us  
17 back to you're probably in the worst venue in the  
18 world, because if there's one thing the five of us  
19 respect, it's the right of folks to engage in the  
20 private ordering of their affairs.

21 And Mr. Gutchess made a decision, and  
22 from my perspective it was one that didn't turn out  
23 well, but he chose to separate the equity from the  
24 voting power, and I recognize this is done frequently

1 for estate planning purposes, but from a corporate  
2 governance standpoint, it's somewhat unusual, and when  
3 you have unusual events, when you take unusual steps,  
4 they tend to yield unforeseen and unusual  
5 consequences. That, I would suggest, is where you  
6 are.

7 MR. JOHNSON: I think it is, and I  
8 think it's very similar to the same sort of unusual  
9 and unintended consequences that were present in the  
10 Fisk case where they had a 75 percent majority vote  
11 that was required, and the majority voters were left  
12 in a position where they couldn't get what they wanted  
13 done.

14 THE COURT: But the beauty of this is  
15 there's no doubt about who's in charge of this train.

16 MR. JOHNSON: But there wasn't any  
17 doubt as to who was in charge of that one either. The  
18 fellow that had control of over 25 percent of the vote  
19 had control.

20 THE COURT: That's right, but here the  
21 person who's got the majority of the voting power is  
22 able to see that things work out the way she wants to.

23 MR. JOHNSON: That is true, though we  
24 do question whether she has that voting power. The

1 problem with that though is that ultimately she may  
2 end up with that voting power in that the voting trust  
3 will, by its own terms, expire in 2012.

4           So that even if you were to put the  
5 control back in the voting trustees, two of whom are  
6 dead, by the way, you still really haven't solved that  
7 problem, because in two years, it's going to all come  
8 up again, and it would probably take two years before  
9 that was going to take place.

10           So it is an effective remedy, and  
11 that's true of many of the problems that we have here;  
12 is that the eggs have been scrambled. They've been  
13 badly scrambled, and effective remedy is extremely  
14 hard to come up with short of a dissolution. That's  
15 really where we come from on it.

16           THE COURT: What your argument is  
17 traces back, I think, to the colloquy I had with  
18 counsel earlier, which is if you look at the overall  
19 purpose, it's been frustrated by the way things have  
20 evolved, but I'm not sure I have the right to come  
21 down and almost impose my subjective judgment of what  
22 might make sense on the parties involved here.

23           And that is ultimately what  
24 dissolution of the LLC takes me to, doesn't it?

1                   MR. JOHNSON: Well, I don't think so.  
2 I think that that has been addressed by other courts.  
3 It was an issue in the Fisk case. It was an issue in  
4 the Talcott case. It was also an issue in the HCH  
5 case. And in those cases, the Court felt that they  
6 didn't like the contract, but they weren't going to  
7 rewrite the contract because, that, you can't do.

8                   The only viable remedy short of  
9 rewriting the contract was to dissolve the situation,  
10 so to speak, that created the problem. Because you  
11 can't continue to live with the problem. You can't  
12 have wrongs of the sort that we are experiencing here  
13 without an effective remedy.

14                  THE COURT: That assumes that damages  
15 would not be an effective remedy. Is the problem here  
16 really with the LLC, or is it with the trust itself  
17 and the way the asset pieces, the bundle of sticks, if  
18 you will, was divided up?

19                  MR. JOHNSON: The trouble is strictly  
20 that there's an LLC, and the problem with the LLC is  
21 that it has split the voting interest from the  
22 economic interest, and the trustees have no control  
23 basically over their investments, and they're  
24 fiduciaries, and they have to have control over that.

1           THE COURT: So you're asking me to  
2 adopt, as a general principle, that where the voting  
3 power and the equity are split, which is something  
4 that clearly can be done, that whenever there are  
5 irreconcilable differences between those who hold the  
6 equity and those who hold the voting power, the LLC is  
7 always going to be dissolved?

8           Give me some principle basis so that  
9 is not the broad black letter law you're asking me to  
10 impose.

11           MR. JOHNSON: No, because I think you  
12 have to go one step further. The step further that  
13 you have to go is you have to see if there's  
14 irreparable harm being done. And I think that that is  
15 the case here.

16           If you have a case, for instance --  
17 for many years, from 2002 until certainly Homer  
18 Gutchess died, there was no problem here that was  
19 caused by this because of the people who were running  
20 it.

21           Then, when you went beyond that, when  
22 you had the voting trustees who were in charge of it,  
23 you didn't have a problem. It wasn't until Martha  
24 stepped in and Gary stepped in that you had this

1 problem. I think that when you have a problem where  
2 people are purposefully acting and have the power  
3 under an LLC of this sort, to purposefully deprive the  
4 other members of what is rightfully theirs, which is  
5 really what's happening here, that at that point, the  
6 Court should step in and dissolve the LLC.

7 I don't think that just because they  
8 have irreconcilable differences that you have to do  
9 that. You have to add in the fact that they are doing  
10 harm, which is the case here. If they're just not  
11 happy, that's a very different sort of circumstance  
12 than what we have here.

13 I think these are very unusual  
14 circumstances, and I think that they're the sorts of  
15 circumstances that fit the -- there was a case, the  
16 associated -- In Re RAO Advisors. Vice Chancellor  
17 Strine set out a whole list of things that would be  
18 sufficient to dissolve an LLC in the absence of either  
19 a limited purpose or a voting deadlock.

20 And I think we have pointed out in our  
21 opening brief and showed how the facts of this case  
22 fit neatly within those standards that were set out by  
23 Vice Chancellor Strine there.

24 I think it's going to be a pretty

1 unusual case that would also fit those -- I don't  
2 think it's going to be a run of the mill case that  
3 would fit those standards, but I think they are the  
4 standards that have been articulated by this, Court  
5 and I think it's appropriate to follow them in this  
6 case.

7                   Could I also address --

8                   THE COURT: Absolutely. I don't mean  
9 to cut you off.

10                   MR. JOHNSON: That's fine. You always  
11 want to hear what the Court likes to discuss because  
12 that's important.

13                   I think it's important I mention all  
14 the different things that we say have happened here,  
15 and it's interesting that respondents essentially  
16 ignored all of them but the last assertion, the one  
17 that the current management of the LLC was not put in  
18 place through legally effective means.

19                   And in an attempt to respond to that  
20 allegation, respondent has told us that they have  
21 inserted a number of documents into the record which  
22 they say that we have incorporated by reference. As a  
23 threshold issue, there are two of them that we  
24 couldn't possibly have incorporated by reference

1 because, frankly, we've never seen them before.  
2 That's Exhibit E and G; Exhibit E being the voting  
3 trust certificate and Exhibit G being the voting  
4 interest certificate.

5 Not conceding that those are correct,  
6 but even if we assume that those documents are correct  
7 for purposes of this argument, we think that those  
8 documents support our position that the voting  
9 interest was not transferred.

10 But even before that, they have  
11 asserted that the argument on this point was a  
12 hindsight fabrication and is not tendered in good  
13 faith because it wasn't included in the petition.  
14 There's no basis for that claim.

15 Petitions are carefully written, and  
16 petitions should be carefully read. Petitioners  
17 carefully allege that Martha was the purported  
18 controlling member of the LLC and that Gary was the  
19 purported manager right up front in paragraph four.

20 Now, that particular paragraph doesn't  
21 explain everything, but it should be a red flag to a  
22 lawyer reading the petition that this is an issue  
23 that's going to be a real issue in the case. And the  
24 use of the word "purported" in the petition indicates

1 that the petitioners do not agree that the status  
2 alleged was effectively conferred on the person so  
3 described.

4 Later in the petition Gary was  
5 described as having effectively, if illegitimately,  
6 gained control over the primary sources of revenue for  
7 the trust. That certainly indicates that petitioners  
8 did not believe that Gary has gained control over the  
9 LLC legitimately.

10 In paragraph 37, the petition alleged  
11 that Homer purported to transfer the voting rights to  
12 Martha, and once again that indicates that the  
13 petitioners do not agree that such a transfer was  
14 legally effective.

15 And, at the same time, the petition  
16 alleges that Homer had already transferred those  
17 rights to the voting trust, which, to a reader who is  
18 reading carefully, would realize that that's the  
19 reason why Homer couldn't then later transfer them  
20 again to Martha.

21 In paragraph 49 of the petition, it  
22 alleges that Martha purported to terminate the voting  
23 trust relying on Homer's purported transfer to her of  
24 100 percent of the voting rights in the LLC. That is,

1 of course, because we have already said that Homer  
2 didn't have the ability to transfer those rights to  
3 her.

4           The petition then goes on to recite  
5 all the different actions that Gary did that we've  
6 already discussed, and then it says that whether or  
7 not Gary has gained control wrongfully, the effect on  
8 the trust is the same. And that was to make clear  
9 that while petition believes that Gary's control was  
10 wrongfully gained, even if it was not, the effect of  
11 that control doesn't vary the relief that's requested,  
12 and that relief is still necessary.

13           THE COURT: If we were to put those  
14 who you would characterize as the good guys back in  
15 control because the voting power was improperly  
16 transferred to Mrs. Gutchess, wouldn't that alleviate  
17 some of the pain and perhaps justify not dissolving  
18 the LLC?

19           MR. JOHNSON: I wish I were in a  
20 position to label those people as the good guys.  
21 There were four of them. Two of them are dead. They  
22 were the two closest advisors and confidantes of Homer  
23 Gutchess. One of the two is basically on the other  
24 side, from what we can see, and this is way outside

1 the petition, Your Honor, and I'm --

2 THE COURT: Better yet, if we don't  
3 have enough trustees, some court can always appoint  
4 more trustees. But the point is that if the wrong  
5 person is exercising authority, isn't the answer to  
6 that to get the right people exercising authority and  
7 not to dissolve the LLC?

8 MR. JOHNSON: I thought I had already  
9 answered that when I pointed out that the voting trust  
10 would only run for another two years.

11 THE COURT: I understand that.

12 MR. JOHNSON: Then you're right back  
13 out of the frying pan into the fire.

14 THE COURT: So the whole issue of a  
15 couple of passing purported references with no  
16 accompanying wherever clauses declaring that Gary  
17 Gutchess is improperly managing the LLC, the whole  
18 question here is almost irrelevant, isn't it, as to  
19 who is in charge right now, because the trust is going  
20 to expire anyway, which leaves everybody, I think,  
21 where they are.

22 MR. JOHNSON: It would in the future.  
23 It would merely change the date at which we have this  
24 hearing. I think that is correct, Your Honor. That's

1 one of the reasons why.

2           Would you like me to make the  
3 documentary argument, because I think their documents  
4 are wrong, and I think that their reading of the  
5 documents is wrong.

6           THE COURT: I can tell you that I am  
7 very reluctant to get into a question of who is  
8 properly the manager of a Delaware LLC without the  
9 petition specifically seeking that relief and  
10 specifically addressing that claim. So I don't think  
11 it's all that important.

12           I think that what we are talking about  
13 here is I have to take the dispute as it is framed by  
14 the petition, and it is whether, on the facts in the  
15 petition, dissolution is warranted. And I will tell  
16 you that if I were confronted with a real debate  
17 about, if the petition had said, A, he's not the  
18 proper manager, and B, we ought to dissolve it, I  
19 probably would turn to resolving A first, because if  
20 putting different management in were a possibility,  
21 and as we've talked about, because of temporal  
22 constraints, it would be a hollow form of relief no  
23 matter what happens, but if it were possible to put in  
24 new management, then I think I would be inclined,

1 rather than to engage in the dissolution process, to  
2 put in different management and see what happens.

3 MR. JOHNSON: The reason we did not  
4 ask for that is the temporal situation is we don't  
5 think that that, as a practical matter, would happen  
6 before it would be undone essentially, and we'd be  
7 back to the same situation.

8 I also -- when going down, one of the  
9 things that they have emphasized at length is what I  
10 call the deadlock argument. Respondent claims that  
11 petitioners have cited no cases that support  
12 dissolution under the circumstances of this case  
13 because all of the successful cases have involved a  
14 voter deadlock.

15 They also say that we have conceded  
16 that. And we don't. We have contested whether  
17 several of the cases on this issue actually involved a  
18 deadlock as that term is understood under Delaware  
19 law. The law of deadlock in Delaware developed  
20 primarily in the area of closely held corporations  
21 which, in many cases, are run by two managers who are  
22 also the stockholders. And in such cases, it is not  
23 unusual for a real deadlock to occur.

24 A real deadlock, as that term has

1 developed over years of case law, involves the  
2 following. The business must be threatened with an  
3 irreparable injury. Two, the cause of the malady,  
4 which is the irreparable injury, must be a direct  
5 result of a division among the directors; and three,  
6 the circumstances must be such that the shareholders  
7 are unable to vote to terminate this division.

8           The language that I have given you  
9 comes from the oft-cited case of Hoban v Dardanella,  
10 but similar language also appears in 8 Delaware Code  
11 Section 226. This definition is now statutorily  
12 mandated in the law of deadlock. Thus, a corporate  
13 deadlock, as that term is understood under Delaware  
14 law, necessarily involves, at a minimum, at a bare  
15 minimum, a need to act, i.e. the presence of some sort  
16 of irreparable harm, and that need to act has to have  
17 come about as a result of an inability of the company  
18 management to agree on a course of action to avoid  
19 that irreparable harm.

20           Petitioners took issue with the use of  
21 the term "deadlock" in connection with the  
22 circumstances of several cases dealing with the  
23 dissolution of an LLC under Delaware law because the  
24 facts of those cases do not comport with the concept

1 of deadlock under Delaware law.

2           For example, in Haley versus Talcott,  
3 the case did not really involve a deadlock because the  
4 company was operating profitably. It was paying its  
5 bills, and there was no need for the two members to  
6 make a decision because there was no irreparable harm  
7 alleged. Simply put, the facts of Haley did not  
8 constitute a deadlock as that area of the law has  
9 evolved in Delaware.

10           Despite that, the Haley court  
11 dissolved the LLC, and it did so -- while it talked in  
12 terms of deadlock, it did so because the status quo  
13 was inequitable, because it exclusively benefited one  
14 of the two members of the LLC. Thus, Haley was not  
15 decided on deadlock grounds. It was decided on the  
16 equities or perhaps the inequities.

17           We also noted Fisk Ventures versus  
18 Segal. I think we've already pointed out that that  
19 operating agreement required a 75 percent majority  
20 vote to do anything. The issue in this case was --  
21 the proposal at issue in the Fisk case was a vote to  
22 dissolve.

23           Several members wanted to dissolve the  
24 company, but the block A member did not want to

1 dissolve. Because he had sufficient voting power to  
2 block a 75 percent majority vote, the dissolution was  
3 defeated.

4           The petitioner referred to it as  
5 length as a deadlock, but it clearly isn't. It was  
6 simply a situation in which certain parties who  
7 happened to hold a majority of the voting interest did  
8 not have sufficient voting power to carry their  
9 proposition. But despite that fact, the Fisk court  
10 dissolved the company.

11           That's a very similar sort of  
12 situation that we have here. It was really based on  
13 the unusual voting provisions of the LLC agreement  
14 that the Court described as a recipe for disaster.  
15 And in a similar manner, in the ECH Management case,  
16 the agreement required that to sell the real estate  
17 that the company was holding, it required the  
18 unanimous vote of the four members.

19           Three of the members wanted to sell  
20 the property. The fourth did not. And while the  
21 Court described that as a deadlock, it wasn't a  
22 deadlock because there was no irreparable harm. There  
23 was no need to sell the company. It was just a  
24 difference in view, and the three members simply

1 didn't have enough votes to carry their proposal.

2           So there are a number of Delaware  
3 dissolution cases that did not involve a deadlock, and  
4 we think that the deadlock issue is a non-issue in  
5 this case.

6           I think we have gone through the  
7 factors that we think are determinative here, and it's  
8 our view that if you take those factual circumstances  
9 as true, which they have to be in this context, and at  
10 this stage of the proceeding, then the factual  
11 circumstances alleged are more than sufficient for the  
12 Court to order dissolution of the company.

13           THE COURT: Thank you very much.

14           MS. PRASHKER: Your Honor, I think our  
15 papers address all of Mr. Johnson's arguments. If the  
16 Court has additional questions for me, I would be  
17 happy to answer them. Otherwise, I have nothing  
18 further.

19           THE COURT: Thank you very much.

20           I don't want to disappoint Mr. Heyman.  
21 Let's take a five minute recess. I think I can  
22 resolve this from the bench.

23           (The Court recessed from 2:55 p.m.  
24 until 3:10 p.m.)

1           THE COURT: In its amended petition,  
2 the Homer C. Gutchess 1998 irrevocable trust seeks  
3 dissolution under 6 Delaware Code Section 18-802 and  
4 Section 18-803 of Gutchess Companies LLC, a Delaware  
5 limited liability company. The company has moved to  
6 dismiss under Court of Chancery Rule 12(b)(6).

7           The trust owns 98 percent of the  
8 company's equity, but at least as reflected in the  
9 amended petition, it does not allege that it owns any  
10 voting power.

11           Mr. Gutchess initially placed the  
12 equity in the trust but held on to the voting power.  
13 This was motivated by estate planning considerations.  
14 Later, there was concern that retention of voting  
15 control would frustrate the estate planning  
16 objectives. He then eventually transferred voting  
17 control to his wife.

18           As an aside, the trust now suggests in  
19 its answering brief, which is where it is first  
20 squarely raised, that the transfer of the voting power  
21 was not valid or effective as it remains with the  
22 trustees of the original voting trust.

23           I don't believe that claim is fairly  
24 framed by the amended petition. For example,

1 paragraph 37 refers to the purported transfer of  
2 voting rights to the wife, but that is not a fair  
3 means of raising an ineffective transfer claim.  
4 Obviously, the necessary parties are not present, and  
5 that is consistent with the Court's view that this  
6 issue simply is not properly before it.

7           The wife eventually appointed  
8 Mr. Gutchess's son to manage the company. The trust,  
9 or perhaps more accurately the trustees, are not happy  
10 with his managerial acts. They have not, however,  
11 brought any fiduciary duty claims against him.

12           On this motion to dismiss for failure  
13 to state a claim, the Court must accept the trust's  
14 well pled allegations of fact and draw all reasonable  
15 inferences from them in the trust's favor. If there  
16 are sufficient facts alleged to suggest plausibly that  
17 the trust would be entitled to the relief which it  
18 seeks, the motion to dismiss must be denied.

19           Section 18-802 provides: "On  
20 application by or for a member or manager, the Court  
21 of Chancery may decree dissolution of a limited  
22 liability company whenever it is not reasonably  
23 practicable to carry on the business in conformity  
24 with a limited liability company agreement."

1           I note that although the petition  
2 cites section 18-803, no reference to that section has  
3 been made in the trust's answering brief in opposition  
4 to the motion to dismiss, and I do not understand the  
5 trust to assert that there is some independent basis  
6 for dissolution under that section.

7           I also do not join the debate over  
8 whether this action should have been brought by the  
9 trust or by its trustees.

10           Dissolution of a limited liability  
11 company is an extraordinary remedy. There is no  
12 deadlock here. All of the voting power is  
13 conveniently held by one person. That some who claim  
14 an interest in the limited liability company disagree  
15 with those in control does not create a deadlock.

16           A deadlock will occur if there is an  
17 equal division of power or if some other arrangement  
18 such as the requirement of a super majority vote  
19 frustrates the members' ability to reach some needed  
20 consensus or if one entity, even though a minority  
21 holder, is given an equal say in the decisionmaking  
22 process.

23           This is a fact-driven analysis, but  
24 from the face of the amended petition, there simply is

1 no basis for concluding that there is any deadlock,  
2 and frankly, I don't understand the trust to claim  
3 that there is deadlock in this sense.

4           The company is not insolvent. Its  
5 operations may be relatively passive now. It may not  
6 be managed as efficiently as it could be, but there is  
7 nothing indicating that the company is in any imminent  
8 danger of going under or failing in some other sense  
9 of the term.

10           I turn to the company's limited  
11 liability agreement to ascertain its purpose. Under  
12 "Character of Business" Section 1.4, the "Company is  
13 formed for any lawful business purpose or purposes.  
14 The initial business purpose of the Company includes,  
15 without limitation, holding the stock of Gutchess  
16 Lumber Co. Inc. and holding any real and/or personal  
17 property. The Company may engage in any activities  
18 that are reasonably necessary or appropriate to  
19 promote the interests of the Company or enhance the  
20 value of its property."

21           This is a general and broad  
22 description of the purpose for an entity such as the  
23 company. The allegations of the amended petition do  
24 not support the inference that the company is unable

1 or likely to be unable to carry on business in a  
2 manner consistent with this broad purpose stated in  
3 the limited liability company agreement.

4           The trust is not happy with the  
5 current arrangement. That is understandable. It  
6 holds 98 percent of the equity, but it does not derive  
7 the financial benefit from its holdings that it would  
8 expect. In short, its expectations have been  
9 frustrated.

10           The problem, however, goes back to  
11 Mr. Gutchess and those who advised him. He separated  
12 the equity interest from the voting power, and perhaps  
13 that did make estate planning sense. But in the area  
14 of corporate governance, it is not uncommon to find,  
15 at least as my experience in this job has taught me,  
16 that when somewhat unusual actions are taken, those  
17 steps tend to breed unusual outcomes. That, frankly,  
18 is where we find ourselves.

19           The trust's unhappiness, thus, is the  
20 product of two considerations: First, Mr. Gutchess'  
21 informed and carefully advised decision to split  
22 equity and voting, and second, the current manager's  
23 conduct.

24           As for Mr. Gutchess' decision, the

1 Court must respect the private ordering of affairs.  
2 As for the manager, there are no fiduciary duty claims  
3 asserted. Simply because things have not worked out  
4 as the trust might have liked does not afford the  
5 Court a basis for dissolving the limited liability  
6 company.

7           The trust cites to *Lola Cars*, but  
8 there, both members had to bring their unique  
9 expertise to bear on the common goal of the business.  
10 The members otherwise shared equal control and were  
11 deadlocked over whether to replace the chief executive  
12 upon the 51 percent member's complaints of  
13 ineffectiveness and disloyalty.

14           Moreover, both sides in *Lola* needed to  
15 provide funding for the nascent enterprise, and there  
16 was a legitimate concern that the business could not  
17 carry on without continual and substantial loans and  
18 capital contributions from its members.

19           The facts alleged here are materially  
20 different from those alleged in *Lola Cars*. There is  
21 no conflict in terms of control here, and the business  
22 can lurch forward. In *Lola Cars*, there was a serious  
23 problem with who was running the business, and there  
24 was even a bigger problem with whether or not, at

1 least as alleged, the venture could continue.

2           As stated above, the business of Lola,  
3 and, for that matter, the business of the entity in  
4 Haley, required, by its very nature, the members'  
5 mutual cooperation. In other words, Lola was a joint  
6 venture between virtually equal business partners,  
7 each of which brought special skills to the venture.  
8 That clearly is not a factor with regard to the  
9 company here.

10           As an aside, I draw my reference to  
11 Lola from the motion practice. I have recently tried  
12 that, and nothing I say here is to be taken as any  
13 kind of product of my experience in trial.

14           Haley is interesting here because, in  
15 a sense, there was no abject deadlock in that case,  
16 although I think it was inevitable because of the  
17 50 percent ownership. But there was no specific  
18 dispute that had engendered the deadlock as we  
19 normally understand it. Yet dissolution was still  
20 granted. Circumstances had changed there which  
21 rendered the business structure simply infeasible.

22           Here, the problem arises from the  
23 split that Mr. Gutches, on his own, imposed and  
24 decided upon. I am simply reluctant to grant the

1 trust relief in these circumstances because I don't  
2 know how to draw an effective line for the situation  
3 where voting control and the equity are divided, and  
4 there is simply no agreement between the two  
5 interests.

6           It would seem that there is a risk  
7 that there will always be some dispute or substantial  
8 risk of some dispute that would trigger a dissolution,  
9 and dissolution cannot be that simple a matter to  
10 achieve.

11           Perhaps Seneca Investments is the best  
12 source of guidance. There the Court first looked to  
13 Section 18-802 and whether it was reasonably  
14 practicable to carry on the business in conformity  
15 with the limited liability agreement. As I have  
16 noted, in this instance, the company's limited  
17 liability agreement sets forth a broad but general  
18 statement of purpose. That has been quoted earlier.

19           I am not able to give some specific  
20 limited purpose for the company that the trust might  
21 be happy with. As alleged, what the company is doing  
22 is not inconsistent with the business purpose set  
23 forth in the limited liability company agreement.  
24 There is nothing to suggest that this purpose cannot,

1 at least in general terms, be achieved.

2 I have indicated there is no risk of  
3 deadlock. I have indicated that the company's  
4 management may be passive in a sense. It may not be  
5 doing what the trust thinks ought to be done, and it  
6 may have made some bad decisions. But that doesn't  
7 combine to give me a basis for ordering dissolution.

8 In short, the text of Seneca  
9 Investments frames it well. "The role of this Court  
10 in ordering dissolution under Section 18-802 is  
11 limited, and the Court of Chancery will not attempt to  
12 police violations of operating agreements by  
13 dissolving LLCs. This court will also not attempt to  
14 define some of the business purpose by interpreting  
15 provisions of the governing documents other than the  
16 purpose clause."

17 I submit, unfortunately, that that is  
18 what the trust is now asking the Court to do. In  
19 short, I do not find in the allegations of the amended  
20 petition, any cognizable basis for dissolution under  
21 the controlling provisions of the Limited Liability  
22 Company Act.

23 The motion to dismiss will be granted  
24 and I will enter an order in due course.

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With that, thank you all very much. I appreciate your coming to Dover.

Recess Court please.

(The Court adjourned at 3:25 p.m.)

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## CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 49 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Dover, this 22nd day of February, 2010.

/s/Maureen M. McCaffery

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Maureen M. McCaffery  
Official Court Reporter  
of the Chancery Court  
State of Delaware

Certification Number: 201-RPR  
Expiration: 1/31/11