IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

2009 CAIOLA FAMILY TRUST, a New Jersey trust, and LOUIS CORTESE,	:	
Plaintiffs,	:	
v.	:	C.A. No. 8028-VCP
PWA, LLC, a Kansas limited liability company, and WARD KATZ,	:	
Defendants,	:	
and	:	
DUNES POINT WEST ASSOCIATES, LLC, a Delaware limited liability company,	:	
Nominal Defendant.	:	

MEMORANDUM OPINION

Date Submitted: January 10, 2014
Date Decided: April 30, 2014

Kurt M. Heyman, Esq., Patricia L. Enerio, Esq., Dawn Kurtz Crompton, Esq., PROCTOR HEYMAN LLP, Wilmington, Delaware; Gary M. Fellner, Esq., Michael J. Naporano, Esq., PORZIO BROMBERG & NEWMAN P.C., New York, New York; *Attorneys for Plaintiffs*.

Thomas E. Hanson, Jr., Esq., Patricia A. Winston, Esq., MORRIS JAMES LLP, Wilmington, Delaware; *Attorneys for Defendants*.

PARSONS, Vice Chancellor.

This case involves a dispute over the management and control of a limited liability company created to own and operate a multifamily apartment complex in Kansas. The plaintiffs are the non-managing members of the LLC and own a 90% interest in the company. The defendants are an entity that is the managing member of the LLC, with a 10% interest in the company, and that entity's own managing member, an individual residing in Kansas. An affiliate of the LLC's managing member began serving as property manager of the apartment complex shortly after the LLC's formation. The plaintiffs attempted to replace the affiliate as property manager through a majority vote of the non-managing members, but the managing member refused to comply with the outcome of that vote on the grounds that the non-managing members lacked the requisite authority.

The LLC's operating agreement grants primary managerial authority to the managing member but grants certain other rights to the non-managing members, the full scope of which is contested by the parties. The parties have cross-moved for summary judgment as to the proper interpretation of a key provision of the LLC's operating agreement. The plaintiffs argue that provision gives the LLC's non-managing members the indirect authority to mandate that certain actions be taken—including terminating and replacing the property manager—through a majority vote of the non-managing members. Based on that interpretation, the plaintiffs contend that the managing member's failure to comply with the non-managing members' vote to terminate the property manager constituted a breach of the operating agreement and provided grounds for removing the managing member for cause under the agreement. The defendants vehemently oppose

the plaintiffs' proposed interpretation and argue that the relevant provision only grants the non-managing members a limited veto power and that the managing member's decision not to terminate the property manager is not grounds for the managing member's removal. For the following reasons, I conclude that the defendants' interpretation of the disputed provision is correct and grant summary judgment in their favor on that specific issue.

I. BACKGROUND

A. The Parties

Nominal Defendant, Dunes Point West Associates, LLC ("Dunes Point" or the "Company"), is a Delaware limited liability company formed on August 9, 2006. Dunes Point owns and operates the Point West Apartments (sometimes referred to as the "Project")—a 172-unit multifamily apartment complex in Lenexa, Kansas.

Plaintiff 2009 Caiola Family Trust ("CFT") is a New Jersey trust. Plaintiff Louis Cortese is an individual residing in New York and the trustee of CFT. CFT and Cortese (collectively, "Plaintiffs" or the "Caiola Group") are the sole non-managing members of Dunes Point and, together, own 90% of the total member interests in Dunes Point.[1]

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[1] Defendants argue that Plaintiffs have not submitted adequate evidence to demonstrate that they are the sole non-managing members of Dunes Point with a combined 90% interest in the Company. *See* Def. Ans. Br. 13–15. Because that issue does not affect my ruling on the motions for summary judgment, I assume, without deciding and for purposes of this Memorandum Opinion only, that Plaintiffs' characterization of their membership status and ownership interests are accurate.

Defendant PWA, LLC ("PWA") is a limited liability company organized under the laws of Kansas. PWA is the sole managing member of Dunes Point and holds the remaining 10% interest in the Company.

Defendant Ward Katz is an individual residing in Kansas and is the managing member of PWA. Katz is also the sole owner of nonparty Dunes Residential Services, Inc. ("DRS"), a Texas company and affiliate of PWA. DRS was the property manager of Point West Apartments from August 14, 2006 through August 31, 2013.

B. Facts[2]

1. Dunes Point's formation and structure

Dunes Point was formed on August 9, 2006 for the purpose of acquiring and operating the Point West Apartments. Dunes Point had three initial members: (1) PWA; (2) NDC Point West LLC ("NDC"); and (3) Block Investment Group Point West LLC ("Block Investment"). PWA owned a 10% interest in Dunes Point, NDC owned a 12% interest, and Block Investment owned the remaining 78% interest. These members entered into an initial operating agreement in August 2006.

On November 28, 2006, Block Investment assigned all of its interest in Dunes Point to Cortese and nonparty Louis S. Caiola, who then both became members of the Company. On the same day, the Amended and Restated Operating Agreement of Dunes

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[2] Unless otherwise indicated, the facts recited herein are undisputed and are drawn from the verified complaint and the evidence cited in the parties' respective submissions regarding their motions for summary judgment.

Point (the "Operating Agreement" or the "Agreement") was executed. The Agreement sets forth the rights, duties, and obligations of Dunes Point's members and governs the structure and operation of the Company.

2. Management of the Company

The Operating Agreement designates PWA as the "Managing Member."[3] Article 6 of the Operating Agreement governs control and management of Dunes Point. Section 6.1 grants the Managing Member primary managerial control over the Company. In relevant part, that section states:

> Except as otherwise provided in this Agreement and subject to Section 8.4, the Managing Member shall have sole and exclusive control over the Company and the power and authority to take such actions from time to time as the Managing Member may deem to be necessary, appropriate or convenient in connection with the management and conduct of the business and affairs of the Company.

Section 6.1 also grants the Managing Member the authority to execute all agreements, contracts, and other instruments on behalf of the Company. Section 8.2 further specifies that "[e]xcept as otherwise provided in this agreement, the Managing Member shall have all of the rights and powers granted to a manager under the Act," which is defined in the recitals to the Agreement as the Delaware Limited Liability Company Act.[4]

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[3] OA at 1. The Operating Agreement, attached to the amended complaint as Exhibit A, is central to the pending cross motions for summary judgment and is cited as "OA" throughout this Memorandum Opinion.

[4] *See* 6 *Del. C.* §§ 18-101 to 18-1109 (2010).

All members of Dunes Point other than PWA qualify as "Non-Managing Members."[5] The Operating Agreement also designates Caiola and Cortese as "Investment Members."[6] Section 6.2 of the Operating Agreement prohibits Non-Managing Members from participating in the management of the Company. Specifically, that section states:

> Except as otherwise provided in this Agreement or under the Act, the Non-Managing Members shall not have the obligation or the right to take part, directly or indirectly, in the active management or control of the business of the Company, and the Non-Managing Members shall not have the right or authority to act for or bind the Company.

Section 3.8 reiterates the restrictions set forth in Section 6.2, stating that "[e]xcept as otherwise expressly provided in this Agreement, the Non-Managing Members . . . shall not participate in making the decisions of the Company or have the power to manage or transact any Company business or act for or in the name of, or otherwise bind, the Company." Section 3.8 further specifies that "[i]t is the intent of this Agreement that in no event shall any Non-Managing Member be exposed to liability as a manager under the Act." In that regard, Section 3.8 provides that "to the extent that any provision of this Agreement would create any such exposure such provision shall be deemed to be stricken from this Agreement."

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5 OA at 1.

6 The preamble of the Operating Agreement designates Caiola and Cortese as "Investment Member I" and "Investment Member II," respectively. The Agreement refers to them collectively as the "Investment Members." OA at 1.

Although the Agreement grants broad authority to the Managing Member and expressly limits the authority of the Non-Managing Members, it also provides the Non-Managing Members with some important rights. Section 8.4(a) of the Operating Agreement states in relevant part:

> The prior written approval of a Majority Vote of the Non-Managing Members shall be required for the Company to take, or enter into any agreement to take, any of the following actions, and the Managing Member will use all commercially reasonable efforts to carry out and implement any of the following decisions approved by a Majority Vote of the Non-Managing Members . . . .

The items constituting the "following actions" include various significant actions the Company might take, such as approving, modifying, or cancelling the Company's annual business plan, borrowing or investing significant sums outside of the ordinary course of business, selling all or substantially all of the assets of the Company, and suspending or terminating the operation of the Project.[7]

The Agreement defines "Majority Vote of the Non-Managing Members" as "the affirmative vote of Non-Managing Members then entitled to vote whose aggregate Percentage Interests . . . are greater than fifty percent (50%) of the total Percentage Interests of all Non-Managing Members then entitled to vote."[8] That definition also

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[7] OA § 8.4(a).

[8] OA Ex. B at B-9. In this Memorandum Opinion, any reference to a "majority vote" of or by the Non-Managing Members is intended as a shorthand reference to a "Majority Vote of the Non-Managing Members." Similarly, any reference to a "majority" of the Non-Managing Members is intended as a shorthand reference to

states that a "Majority Vote of the Non-Managing Members" may be called by the Managing Member, NDC, or a majority vote of the Investment Members. Section 8.4(f) of the Operating Agreement further provides that, at any time, "NDC or the Investment Members [by majority vote] shall have the right to call for either a meeting of the Members or a vote by the Members without a meeting for the purpose of determining whether the Company should take any of the actions set forth in this Section."

Lastly, Sections 6.4 and 8.4(e) of the Agreement give the Non-Managing Members the authority to remove the Managing Member for "Cause," at any time, through a majority vote of the Non-Managing Members. Section 6.4 defines "Cause" to mean any "Egregious Act" or "Impermissible Act." An "Egregious Act" includes willful misconduct, breach of any fiduciary duty, self-dealing, fraud, and gross negligence. Relevant here, an "Impermissible Act" includes any material breach of the Operating Agreement. Under Section 3.3 of the Agreement, if the Managing Member is removed or otherwise ceases to be the Managing Member, the Non-Managing Members are entitled to appoint a new Managing Member through a majority vote.

3. The Management Agreement with DRS

On August 14, 2006, Dunes Point and DRS, PWA's affiliate, entered into a management agreement (the "Management Agreement"), under which DRS would serve

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those interest holders entitled to exercise a "Majority Vote of the Non-Managing Members."

as the property manager for the Point West Apartments.[9] The term of the Management Agreement is one year, but the agreement automatically renews on a year-to-year basis unless it is formally terminated by one of the parties. Section 6 of the Management Agreement allows either party to terminate the agreement at any time, with or without cause, by giving 30 days advance written notice to the other party.

Section 8.3(e) of the Operating Agreement expressly provides that either the Managing Member or one of its affiliates "shall act as the initial property manager and leasing agent ('Property Manager') of the Project." One of the enumerated actions requiring Non-Managing Member approval under Section 8.4(a) is, "[o]ther than pursuant to the Management Agreement . . . , the retention of any management company or the amendment, modification or termination of the Management Agreement."[10]

4. CFT and Cortese become the only Non-Managing Members

On January 1, 2009, Caiola assigned all of his interests in Dunes Point to Plaintiff CFT. On June 30, 2012, CFT purchased NDC's interest in the Company. As of the filing of the original complaint in this action on November 12, 2012, CFT owned 86.1% and Cortese owned 3.9% of the member interests in the Company. Plaintiffs, CFT and Cortese, now comprise the only Non-Managing and Investment Members of Dunes

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9 A copy of the Management Agreement is attached to the Operating Agreement as Exhibit D.

10 OA § 8.4(a)(iii).

Point.[11] In several of the documents in the record, Plaintiffs are referred to collectively as the "Caiola Group." PWA remains the sole Managing Member and continues to hold a 10% interest.

5. Plaintiffs attempt to replace DRS as the Property Manager

On July 23, 2013, Plaintiffs, in their capacity as Investment Members, called a vote of Non-Managing Members on whether to require the Company to: (1) terminate the Management Agreement, thereby terminating DRS as Property Manager; and (2) hire GREP South L.P. ("GREP") as the replacement Property Manager for the Company and execute a new management agreement with GREP.[12] Plaintiffs, in their capacity as Non-Managing Members, then executed the vote by signing a resolution indicating their approval of each of the proposed measures.[13] The same day, Plaintiffs' counsel, via letter, notified Katz and PWA of the vote and resolution.[14] The letter also directed PWA to carry out and implement the resolution pursuant to Section 8.4(a) of the Operating Agreement.

Katz and PWA's counsel responded by letter on August 8, 2012. The letter stated PWA's position that:

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11 Am. Verified Compl. ¶¶ 3–4, 18. *See supra* note 1.

12 Enerio Aff. Ex. 5.

13 *Id.*

14 *Id.* Ex. 6.

> Section 8.4(a) appears to confer a 'veto' right to those holding a Majority Vote of the Non-Managing Member[s] with respect to the actions described under the various clauses thereof. . . . [T]he holder(s) of a Majority Vote of the Non-Managing Member[s] do not have the unilateral right to terminate the existing Management Agreement or cause the Company to enter into a new management agreement with a new entity.[15]

By letter dated August 24, 2012, Plaintiffs' counsel sought "to clarify certain inaccuracies in PWA's letter, and to seek [its] consent to replace [DRS] with [GREP] as property manager for the Company."[16] Plaintiffs also reiterated their position that the Operating Agreement allowed the Non-Managing Members to demand removal of the Property Manager through a majority vote.

6. Plaintiffs attempt to replace PWA as Managing Member

On November 8, 2012, Plaintiffs once again called for and executed a vote of the Non-Managing Members, this time resolving to terminate PWA as Managing Member and to elect and admit Curo Dunes Point, LLC ("Curo") as the new Managing Member.[17] In a letter dated the same day, Plaintiffs' counsel notified PWA and Katz of that vote. The letter stated that the Non-Managing Members had removed PWA for "Cause" pursuant to Sections 6.4(c) and 6.4(d) of the Agreement. The "Cause" cited was "PWA's failure to carry out and implement the decision duly voted on and approved by the Caiola

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15 Hanson Aff. Ex D.

16 *Id.* Ex. F.

17 *Id.* Ex. H.

Group to replace the existing property manager of the Company, and . . . PWA's willful misconduct, breaches of the Operating Agreement and breaches of fiduciary duties."[18] PWA declined to resign as Managing Member.

C. Procedural History

On November 13, 2012, Plaintiffs filed their Verified Complaint seeking declaratory relief and asserting various claims against PWA. On November 27, 2012, Defendant PWA removed this action to the United States District Court for the District of Delaware. Plaintiffs filed an Emergency Motion to Remand on November 30, 2012. The District Court granted that motion on July 10, 2013, and remanded the action to this Court.

On July 11, 2013, Plaintiffs renewed the Motion to Expedite Proceedings and Motion for Order to Maintain Status Quo they previously had filed along with their Verified Complaint. After a telephone conference on August 23, 2013, this Court entered a status quo order on August 28 and a scheduling order on October 30, 2013.

Plaintiffs moved for leave to amend their complaint on November 1, 2013. After considering full briefing and arguments, the Court granted that motion, and Plaintiffs filed an Amended Verified Complaint (the "Complaint") on January 13, 2014. The Complaint seeks a declaratory judgment that, pursuant to Section 6.4 of the Operating Agreement, Plaintiffs properly terminated Defendant PWA as the Managing Member and

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[18] *Id.*

designated Curo as its replacement. The Complaint additionally asserts claims for breach of contract against PWA and breach of fiduciary duty and waste against both PWA and Katz.

As directed by the October 30, 2013 scheduling order, the parties submitted partial summary judgment motions regarding the proper interpretation of Section 8.4 of the Operating Agreement on November 7, 2013. After full briefing, the Court heard argument on those motions on January 10, 2014. This Memorandum Opinion constitutes my rulings on the parties' competing motions for summary judgment.[19]

D. Parties' Contentions

Plaintiffs contend that Section 8.4 gives them, as the Company's sole Investment and Non-Managing Members, the authority to call for and execute a vote of the Non-Managing Members on whether to direct the Company to take the various actions enumerated in Section 8.4(a), including removing and replacing the Property Manager.

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[19] The issues presented by the cross motions for partial summary judgment are relatively narrow. For purposes of those motions, there is no material difference between the initial complaint and the amended complaint. Accordingly, unless otherwise noted, the references to the Complaint in this Memorandum Opinion are to the amended complaint.

After the Court heard arguments on the motion to amend, which I granted, and the cross motions for summary judgment, PWA moved to modify the status quo order and, together with Katz, moved to dismiss the amended complaint. Shortly thereafter, Plaintiffs filed a second motion for partial summary judgment addressing issues that I consider distinct from those presented on the motions currently before me. These additional motions are not the subject of this Memorandum Opinion and shall be addressed at a later time.

According to Plaintiffs, PWA, as the Managing Member, must implement the outcome of any such vote. Because PWA refused to carry out the Non-Managing Members' vote to remove DRS as Property Manager, Plaintiffs contend that PWA materially breached the Operating Agreement, providing Cause for its removal as Managing Member. Thus, Plaintiffs argue that they are entitled to partial summary judgment on their declaratory judgment claim and entry of a declaratory judgment that their removal of PWA as Managing Member and appointment of Curo as the new Managing Member were valid.[20]

PWA urges the Court to reject Plaintiffs' interpretation of Section 8.4. According to PWA, Section 8.4 does not provide the Non-Managing Members with affirmative decision-making authority, but rather gives them only the power to veto or block certain actions from being taken by withholding their approval. Thus, PWA avers that Plaintiffs lacked the authority to order that DRS be removed as Property Manager based on a majority vote of the Non-Managing Members. PWA further contends, therefore, that its refusal to implement the outcome of that vote was not a breach of the Agreement and did not provide Cause for its removal. For these reasons, PWA argues that the Court should deny Plaintiffs' motion and grant its cross motion for partial summary judgment, holding that Section 8.4 of the Operating Agreement does not provide the Non-Managing

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[20] Plaintiffs' motion does not request a formal declaration as to the validity of their purported termination of DRS as Property Manager because, as both sides acknowledge, DRS resigned from that post no later than September 2013.

Members with the unilateral right to replace the Property Manager and that the vote held for that purpose was invalid.

II. ANALYSIS

The primary question at issue in these cross motions for summary judgment is whether Section 8.4 gives Plaintiffs, as the Company's sole Non-Managing Members, the right to direct the removal of the Property Manager through a majority vote. I begin my analysis with a brief explanation of the standard governing these motions and of the relevant principles of Delaware contract interpretation. Next, I examine the language of Section 8.4(a), the key disputed provision, alone and in relation to other sections of the Operating Agreement, to determine whether the section is ambiguous. For the reasons stated herein, I conclude that Section 8.4(a) is unambiguous and that the only reasonable interpretation of that provision is that it provides the Non-Managing Members with a limited veto right over significant actions of the Company, not the affirmative power to mandate that those actions be taken.

A. Summary Judgment Standard and Applicable Rules of Contract Interpretation

The Operating Agreement is governed by Delaware law.[21] In Delaware, "[s]ummary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

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[21] OA § 16.10.

law."[22] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence generally are viewed in the light most favorable to the nonmoving party.[23] Pursuant to the Scheduling Order entered in this matter on October 30, 2013,[24] the parties each have submitted motions for partial summary judgment regarding the proper interpretation of Section 8.4 of the Operating Agreement. Thus, the Court need not draw inferences in favor of either party.[25] In addition, although the parties effectively have stipulated, through their cross motions, that the correct interpretation of Section 8.4 can be resolved as a matter of law,[26] the Court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[27]

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22 *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

23 *Id.*; *see also Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

24 D.I. No. 35.

25 *Twin Bridges*, 2007 WL 2744609, at *8.

26 Ct. Ch. R. 56(h) ("[w]here the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.").

27 *Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, 2013 WL 1821608, at *3 (Del. Ch. May 1, 2013) (quoting *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006)).

When the issue being presented for summary judgment is one of contractual interpretation, summary judgment is appropriate where "the dispute centers on the proper interpretation of an unambiguous contract."[28] Therefore, the threshold inquiry is whether the contract is ambiguous.[29] Ambiguity exists "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[30] Ambiguity does not exist, however, simply because the parties disagree about what the contract means.[31] Furthermore, "extrinsic, parol evidence cannot be used to manufacture an ambiguity in a contract that facially has only one reasonable meaning."[32]

When interpreting a contract, the Court "give[s] effect to the parties' intent based on the parties' words and the plain meaning of those words."[33] Of "paramount importance" in contract interpretation is "determining what a reasonable person in the

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28 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007) (citing *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007)); *see also AHS N.M. Hldgs., Inc. v. Healthsource, Inc.*, 2007 WL 431051, at *3 (Del. Ch. Feb. 2, 2007).

29 *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

30 *Rhône-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

31 *United Rentals, Inc.*, 937 A.2d at 830.

32 *Id.*

33 *Smartmatic Int'l Corp.*, 2013 WL 1821608, at *4 (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006)).

position of the parties would have thought the language of the contract means."[34] A contract is read as a whole, and the Court seeks to give effect to all of the contract terms and to reconcile or harmonize all of the contract's provisions.[35] A party will be entitled to summary judgment if it demonstrates that its construction of the contract is "the *only* reasonable interpretation."[36] Additionally, "[i]f parties introduce conflicting interpretations of a term, but one interpretation better comports with the remaining contents of the document or gives effect to all the words in dispute, the court may, as a matter of law and without resorting to extrinsic evidence, resolve the meaning of the disputed term in favor of the superior interpretation."[37]

B. Section 8.4 of the Operating Agreement is Unambiguous

1. The plain meaning of Section 8.4(a) indicates that Non-Managing Members hold a limited veto power, not affirmative decision-making authority

The provision most central to this dispute is Section 8.4(a) of the Operating Agreement. As previously noted, that section provides that:

> The prior written approval of a Majority Vote of the Non-Managing Members shall be required for the Company to take, or enter into any agreement to take, any of the following

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34 *Lorillard Tobacco Co.*, 903 A.2d at 739 (citing *Rhône-Poulenc*, 616 A.2d at 1195–96).

35 *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998).

36 *Smartmatic Int'l Corp.*, 2013 WL 1821608, at *3 (citing *United Rentals, Inc.*, 937 A.2d at 832 n.104).

37 *Wills v. Morris, James, Hitchens & Williams*, 1998 WL 842325, at *2 (Del. Ch. Nov. 6, 1998).

> actions, and the Managing Member will use all commercially reasonable efforts to carry out and implement any of the following decisions approved by a Majority Vote of the Non-Managing Members.

The actions enumerated in Section 8.4(a) include various significant actions of the Company, including, "[o]ther than pursuant to the Management Agreement . . . , the retention of any management company or the amendment, modification or termination of the Management Agreement," under which DRS was appointed Property Manager.

Plaintiffs emphasize the language in Section 8.4(a) that requires the Managing Member to "use all commercially reasonable efforts to carry out and implement any of the following decisions approved by a Majority Vote of the Non-Managing Members." According to Plaintiffs, this means that whenever the Non-Managing Members vote by a majority in favor of the Company taking one of the actions enumerated in that section, PWA, as the Managing Member, must carry out that action. Because "termination of the Management Agreement" and "retention of any management company" are actions included in Section 8.4(a), Plaintiffs contend that their vote to remove DRS as Property Manager and appoint GREP as its replacement was valid, and that PWA was obligated to implement the outcome of that vote.

PWA counters that Plaintiffs' interpretation is incorrect and ignores the very first phrase or clause of Section 8.4(a), which provides the necessary context for the subsequent language. That clause states that "[t]he *prior written approval* of a Majority Vote of the Non-Managing Members shall be required *for the Company* to take, or enter into any agreement to take, any of the following actions." It is against this backdrop that

the second clause of Section 8.4(a) provides that "the Managing Member will use all commercially reasonable efforts to carry out and implement any of the following decisions *approved by* a Majority Vote of the Non-Managing Members." According to PWA, when these clauses are read in combination, they clearly indicate that Section 8.4(a) provides Non-Managing Members with only the limited power to approve or reject a decision, presumably made by the Managing Member, that the Company should take one of the enumerated actions, and not with the unilateral right to mandate that those actions be taken. Thus, PWA contends that Plaintiffs lacked the authority, through a majority vote or otherwise, to order that the Property Manager be terminated.

The plain meaning of the language in Section 8.4(a) supports PWA's interpretation of that provision. The first clause of Section 8.4(a) states that the "prior written approval" of a majority of the Non-Managing Members will be required for the Company to take one of the enumerated actions. The clear implication of this clause is that it gives the Non-Managing Members the limited right to either permit the Company to take one of the enumerated actions, by providing the required "prior written approval," or to prevent the Company from taking one of the enumerated actions, by withholding the required "prior written approval." In other words, the first clause of Section 8.4(a) gives Non-Managing Members a veto right as to the actions enumerated in that section. Nothing in the first clause of Section 8.4(a) reasonably can be read as conferring on Non-Managing Members the affirmative authority to mandate unilaterally that any of the enumerated actions be taken.

Similarly, the second clause of Section 8.4(a) does not grant the Non-Managing Members a unilateral right to compel the Company to take any of the enumerated actions. That clause provides that the Managing Member will use all reasonable efforts to implement "any of the following decisions *approved by* a Majority Vote of the Non-Managing Members." Importantly, the Managing Member is not directed to implement any decision *made by* the Non-Managing Members, but rather those *approved by* them. Read in conjunction with the first clause, this language indicates only that the Managing Member will carry out a decision of the Company to take one of the enumerated actions, where that decision has received the required "prior written approval" of the Non-Managing Members. Section 8.4(a), however, is silent on who has the authority to initiate or make such a decision on behalf of the Company. Thus, the answer to that question must be found in the other provisions of the Agreement.

Section 6.1 of the Operating Agreement states that, "[e]xcept as otherwise provided in this Agreement," the Managing Member shall have "sole and exclusive control over the Company" and the "power and authority to take such actions" as he deems appropriate in the "conduct of the business and affairs of the Company." Thus, by default, the power to make decisions on behalf of the Company rests with the Managing Member. Although the grant of authority in Section 6.1 is expressly "subject to Section 8.4," nothing in the language of Section 8.4(a) indicates that it was intended to permit Non-Managing Members to wrest initial decision-making authority from the Managing Member with respect to the significant actions included in that section. Therefore, the

initial decision as to whether the Company should take one of the actions enumerated in Section 8.4(a) generally lies with the Managing Member.

With that in mind, the implication of the second clause of Section 8.4(a) is that if the Managing Member proposes or decides that the Company should take one of the enumerated actions, and that decision is approved by the Non-Managing Members as required by the first clause of that section, then the Managing Member will use all commercially reasonable efforts to complete that action. The second clause does not, however, give the Non-Managing Members the authority to initiate any of the enumerated actions unilaterally.[38]

For the foregoing reasons, I conclude that the plain meaning of Section 8.4(a) indicates that it provides the Non-Managing Members with a limited veto power over the actions enumerated in that section, not with the unilateral authority to compel the Company or the Managing Member to take those actions. I next consider how the parties' competing interpretations of Section 8.4(a) fare in light of the other provisions of the Agreement.

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[38] Plaintiffs also have argued that their interpretation of Section 8.4(a) is reinforced by Section 8.4(f), which authorizes them, as successors to NDC and as Investment Members, to call a vote of the Members to determine "whether the Company should take any of the actions set forth in this Section 8.4." Plaintiffs' argument is unpersuasive, however, because Section 8.4(f) does not specify whose vote will actually determine whether the actions included in Section 8.4 should be taken and nowhere references the Non-Managing Members. Thus, Section 8.4(f) is equally consistent with an interpretation of Section 8.4(a) that would leave initial decision-making authority with the Managing Member and grant Non-Managing Members only a limited veto right, as it is with Plaintiffs' interpretation.

2. The Operating Agreement, read as a whole, supports the interpretation of Section 8.4(a) as providing only a limited veto power

Having reviewed the contract as a whole, I find that the other provisions of the Operating Agreement undermine Plaintiffs' proposed interpretation of Section 8.4(a) and provide further support for PWA's proposed reading of that section. At the outset, I note that the Agreement elsewhere explicitly provides the Non-Managing Members with affirmative rights to take action and that the lack of parallel language in Section 8.4(a) weakens Plaintiffs' argument that it was intended to confer an affirmative right to take unilateral action on the Non-Managing Members. More significantly, I find that Plaintiffs' interpretation conflicts with the Agreement's general division of authority between the Managing and Non-Managing Members and would lead to arguably absurd results.

It is noteworthy that the language used in Section 8.4(a) is different from the language used in other parts of the Agreement where an affirmative right to take or direct action is conferred on the Non-Managing Members. Specifically, Section 8.4(e) grants the Non-Managing Members the right to remove the Managing Member for cause. That Section states that: "the Non-Managing Members by a Majority Vote of the Non-Managing Members, with or without the consent of the Managing Member, *shall have the right* to remove the Managing Member for 'Cause.'" There is no equivalent language in Section 8.4(a). That is, nothing in Section 8.4(a) provides that the Non-Managing Members "shall have the right" to direct the Company or the Managing Member to take the actions enumerated in that section. Instead, Section 8.4(a) states that the Non-

Managing Members' "prior written approval" shall be required for such actions to be taken. Section 8.4(e) indicates that when the drafters of the Agreement intended to confer an affirmative right to take or direct action on the Non-Managing Members, they used language that clearly evidenced that intent. The absence of such language from Section 8.4(a) buttresses PWA's contention that Section 8.4(a) does not grant the Non-Managing Members a unilateral right to order that the Company take the actions included in that section, but rather a limited veto right.[39]

Furthermore, I find that Plaintiffs' interpretation of Section 8.4(a) conflicts with the general management scheme and division of authority between Managing and Non-Managing Members prescribed in the rest of the Operating Agreement. Article 6 of the Agreement establishes as a default that the Managing Member shall have "sole and exclusive control over the Company," including the authority to take actions, conduct business, and execute contracts on its behalf, whereas the Non-Managing Members "shall not have the obligation or the right to take part, directly or indirectly, in the active management or control of the business." Section 3.8 reiterates that "[e]xcept as otherwise expressly provided in this Agreement, the Non-Managing Members . . . shall not participate in making the decisions of the Company or have the power to manage or

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[39] *See Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 364 (Del. 2013) ("Section 7.6(d) indicates that the LPA's drafters knew how to impose an affirmative obligation when they so intended, and that Section 7.9(a)'s language does not result from sloppy drafting."); *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *7 (Del. Ch. Dec. 30, 2010).

transact any Company business." Taken together, Article 6 and Section 3.8 establish a clear division of authority between Managing and Non-Managing Members, with the Managing Member having primary managerial and decision-making control over the Company.

Plaintiffs' interpretation of Section 8.4(a), however, would result in the Non-Managing Members having the unilateral right to make various major decisions on behalf of the Company. In that regard, Section 8.4(a) enumerates a number of significant actions the Company potentially could take, including, among others: terminating and replacing the property manager; approving, modifying, or cancelling the Company's annual business plan; borrowing or investing significant sums outside of the ordinary course of business; selling all or substantially all of the assets of the Company; and suspending or terminating the operation of the Project. According to Plaintiffs, every time the Non-Managing Members execute a majority vote in favor of one of the actions included in Section 8.4(a), the Managing Member has an obligation to implement the outcome of that vote and the Company is required to take that action. This would amount to the Non-Managing Members having a unilateral right to compel the Company to take all of the major actions listed in Section 8.4(a). Indeed, this interpretation would give Non-Managing Members greater authority with respect to those major actions than the Managing Member, because the Managing Member would have to obtain the approval of the Non-Managing Members before it could carry out those actions. Yet, according to Plaintiffs, the Non-Managing Members unilaterally could mandate that those actions be taken without the consent of any other member.

In addition, Plaintiffs' reading of Section 8.4(a) would have implications for other parts of Section 8.4 in that it would expand the Non-Managing Members' unilateral decision-making authority still further, to an arguably absurd extent. Most notably, the operative language in Section 8.4(b) parallels that in Section 8.4(a), except that Section 8.4(b) requires the prior approval of all of the Non-Managing Members, rather than a majority of them, for the actions listed in that section to be taken. Those actions include such major decisions as the modification of the Operating Agreement, the making of distributions to the Members, and a change in the nature of the business of the Company. Applying Plaintiffs' reading of Section 8.4(a) to Section 8.4(b) would result in the Non-Managing Members having the unilateral right to make any of those major decisions. This would produce arguably absurd results, including, for example, enabling the Non-Managing Members unilaterally to modify the Operating Agreement as they saw fit, an outcome completely at odds with the express restrictions on the authority of the Non-Managing Members as well as with the carefully crafted nature of the Agreement.

For these reasons, I find that Plaintiffs proposed interpretation of Section 8.4(a) would be inconsistent with the managerial framework and division of authority between Managing and Non-Managing Members called for by the other sections of the Agreement. Plaintiffs' interpretation also produces arguably absurd consequences. Moreover, I can think of no coherent rationale, and Plaintiffs have articulated none, for a management scheme that, by default, would preclude Non-Managing Members from participating in the management and control of the Company, but simultaneously give

them unilateral decision-making authority as to the most significant actions of the Company.

By contrast, PWA's interpretation of Section 8.4(a), which provides Non-Managing Members with a limited veto right as to the major actions included in that section, comports with the general management scheme established in the Agreement. Under PWA's interpretation, the Non-Managing Members could not initiate the major actions listed in that Section 8.4(a), but could prevent the Managing Member from taking those actions by withholding their "prior written approval." This allows the Non-Managing Members to protect their investment in the Company by preventing the Company from taking major actions that they deem unadvisable, but keeps the primary managerial and decision-making authority in the hands of the Managing Member. I also consider it significant that LLC agreements frequently provide non-managing members with veto rights over major decisions affecting the company, as evidenced by numerous cases cited by PWA in its briefs.[40] On the other hand, Plaintiffs have not cited to any

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[40] *See, e.g., Feeley v. NHAOCG, LLC*, 62 A.3d 649, 654 (Del. Ch. 2012) ("As managing member, AK–Feel generally has authority to run the day-to-day business of Oculus, subject to NHA having approval rights over certain major decisions."); *Auriga Capital Corp. v. Gatz Props.*, 40 A.3d 839, 846 (Del. Ch. 2012) ("Under the LLC Agreement, the Manager was forbidden from making a 'major decision affecting the Company' without 'Majority Approval,' which was defined as the vote of 66 2/3% of the Class A interests and 51% of the Class B interests. Thus, control of the Class A and Class B interests gave the Gatz Members veto power over many of Peconic Bay's key strategic options. . . ."); *Eureka VIII LLC v. Niagara Falls Hldg. LLC*, 899 A.2d 95, 99 (Del. Ch. 2006) ("Eureka also was named managing member, but Eureka was required to seek the approval of Holdings before undertaking the major decisions listed in § 3.2(c) of

example of an LLC agreement that vested unilateral decision-making authority over major decisions in the non-managing members. This is unsurprising because such a broad grant of authority probably would defeat the main purposes of having both managing and non-managing members.

3. If Section 8.4 were interpreted as suggested by Plaintiffs, it likely would be stricken under Section 3.8 of the Agreement

In addition to the foregoing analysis, I note that if Section 8.4 were interpreted as suggested by Plaintiffs, that section probably would be stricken under Section 3.8 of the Agreement. That section provides, in relevant part, that:

> It is the intent of this Agreement that in no event shall any Non-Managing Member be exposed to liability as a manager under the Act . . . and to the extent that any provision of this Agreement would create any such exposure such provision shall be deemed to be stricken from this Agreement.

Under § 18-109 of the Delaware Limited Liability Company Act, a person who "participates materially in the management of the limited liability company" is considered a manager. As I have noted, Plaintiffs' reading of Section 8.4 would result in the Non-Managing Members being able to dictate unilaterally that the Company take actions such as terminating and replacing the Property Manager and approving, modifying, or cancelling the Company's annual business plan. These are quintessential

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the LLC Agreement."); *Kelly v. Blum*, 2010 WL 629850, at *3 (Del. Ch. Feb. 24, 2010) ("The 2008 LLC Agreement also provided that Marconi could not enter any merger, conversion, or consolidation agreements without the prior written approval of the Class A Member or Managers and the Class C Member or Managers.").

management decisions that, if left to the discretion of the Non-Managing Members, probably would expose them to liability under the Act.[41] Thus, if Section 8.4 were interpreted as suggested by Plaintiffs, that section likely would have to be "deemed to be stricken" from the Agreement in accordance with Section 3.8. This is yet another reason for finding that the drafters of the Agreement did not intend Section 8.4 to have the meaning that Plaintiffs posit.

4. Section 8.4(a) is unambiguous and provides Non-Managing Members with only a limited veto power

The parties presented two competing interpretations of Section 8.4(a) of the Agreement. According to Plaintiffs, Section 8.4(a) grants the Non-Managing Members the authority to require the Company to take, and the Managing Member to implement, any of the actions listed in that section through a majority vote of the Non-Managing Members. According to PWA, Section 8.4(a) provides the Non-Managing Members with only the limited right to veto the actions enumerated in that section, by withholding the "prior written approval" of a majority of the Non-Managing Members.

For the reasons stated in the preceding sections, I conclude that PWA's interpretation of Section 8.4(a) is the only reasonable interpretation of that provision and that Section 8.4(a), therefore, is unambiguous. In particular, I find PWA's interpretation to be reasonable because it is supported by the plain meaning of the language of Section

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41 *See Feeley*, 2012 WL 966944, at *6–7 (member subject to liability as a manager for taking actions such as not renewing an officer's employment contract).

8.4(a), is consistent with the contract read as a whole, and does not result in any obviously unreasonable consequences. By contrast, Plaintiffs' interpretation is unreasonable because it is not supported by the plain meaning of Section 8.4(a), is inconsistent with the general management scheme contemplated by the Agreement, and would produce several improbable and arguably absurd consequences. Therefore, I conclude that Section 8.4(a) is unambiguous and provides the Non-Managing Members with only the limited right to veto the actions enumerated in that section.

Having found Section 8.4(a) unambiguous and adopted PWA's interpretation of that provision, I next address Plaintiffs' contention that their vote to remove DRS as Property Manager was effective and that PWA's failure to implement the outcome of that vote was a breach of the Agreement. I then discuss the related issue of whether Plaintiffs have demonstrated that they had "Cause" to remove PWA as Managing Member under Section 6.4 of the Agreement.

C. Plaintiffs' Vote to Remove DRS as Property Manager Was Ineffective, and PWA's Failure to Implement that Vote Did Not Breach the Agreement

Plaintiffs contend that they properly called for and obtained a majority vote of the Non-Managing Members to terminate DRS as Property Manager, and that PWA, as Managing Member, was required under Section 8.4(a) to implement the outcome of that vote. On that basis, they contend that PWA's failure to carry out the results of the vote constituted a material breach of the Agreement.

Based on the interpretation of Section 8.4(a) that I have adopted, Plaintiffs' argument fails. The argument rests on the flawed premise that Section 8.4(a) gives

Plaintiffs, as Non-Managing Members, the unilateral authority to terminate the Property Manager and requires the Managing Member to carry out any such decision. For the reasons previously explained in this Memorandum Opinion, Section 8.4(a) does not give the Non-Managing Members the unilateral authority to dictate that the Company take, or the Managing Member implement, any of the actions enumerated in that section. Instead, it provides them with a veto right as to those actions. Thus, Plaintiffs lacked the authority to terminate DRS as Property Manager through a majority vote of the Non-Managing Members, and PWA's refusal to implement the outcome of that vote did not breach its obligations under the Agreement.[42]

D. Plaintiffs Have Not Demonstrated That They Had Cause to Remove PWA as Managing Member Under Section 6.4

On their motion for partial summary judgment, Plaintiffs request a declaratory judgment that they validly removed PWA as Managing Member and appointed Curo as its replacement, through a majority vote of the Non-Managing Members. Sections 6.4

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[42] As discussed *supra* in Section II.B.1, Section 8.4(a) only requires the Managing Member to carry out and implement "decisions *approved by*" the Non-Managing Members. Subject to any other relevant provisions in the Agreement, the initial decision as to which actions the Company should take rests with the Managing Member. *See* OA §§ 6.1, 8.2. Thus, generally speaking, the only time the Managing Member is required to implement a majority vote of the Non-Managing Members as to one of the actions listed in Section 8.4(a) is when that vote provides approval for a preexisting proposal or decision *by the Managing Member* that the Company take one of the enumerated actions. That situation does not exist here, however, because there is no evidence that PWA ever sought the removal of DRS as Property Manager or submitted that decision for approval to the Non-Managing Members.

and 8.4(e) of the Agreement do give the Non-Managing Members the authority to remove the Managing Member through a majority vote, but only for "Cause." The Operating Agreement defines "Cause" to include, among other prohibited acts, any material breach of the Agreement or any breach of fiduciary duty.[43]

Here, Plaintiffs have failed to show that they had Cause to remove PWA as Managing Member. Plaintiffs contend that PWA's failure to implement their vote to remove DRS as Property Manager was a material breach of Section 8.4(a) of the Agreement that provided Cause for PWA's removal. For the reasons previously stated, however, that failure was not a breach of the Agreement.

In their answering brief to PWA's motion for partial summary judgment, Plaintiffs asserted that they also had Cause to remove PWA on the grounds that it breached its fiduciary duties by permitting DRS to commingle tenant security deposits with the Company's operating funds, thereby allegedly violating Kansas law. Plaintiffs' belated assertion of this argument, however, is procedurally improper and appears to require further development of both the facts and the applicable law before this Court could make an adequately informed decision about it. Furthermore, this recently minted basis for removing PWA for Cause is outside of the scope of the present motions for partial

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[43] OA § 6.4.

summary judgment, which the parties expressly agreed would be focused on the proper interpretation of Section 8.4.[44]

For purposes of the pending cross motions, therefore, I find that Plaintiffs have not demonstrated their entitlement to the declaratory relief that they seek. I reserve judgment, however, as to the merits of the additional grounds for PWA's removal that Plaintiffs have asserted beyond PWA's refusal to implement the removal of DRS at the behest of the Non-Managing Members.

III. CONCLUSION

For the reasons set forth in this Memorandum Opinion, I deny the Plaintiffs' motion for partial summary judgment, including their request for a declaration that their removal of PWA as Managing Member and appointment of Curo as the new Managing Member were valid. I grant PWA's motion for partial summary judgment. In that regard, I hold that Section 8.4 of the Operating Agreement does not provide the Non-Managing Members with the unilateral right to replace the Property Manager and, consequently, that Plaintiffs' vote to terminate DRS as Property Manager and appoint GREP to that position was invalid and ineffective.

IT IS SO ORDERED.

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[44] D.I. No. 35 (Stipulation and Order Governing Case Schedule).