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Case Number 5,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AIBAR HUATUCO, M.D.	:	
	:	No. 5,2014
Plaintiff Below, Appellant	:	
	:	On Appeal from
v.	:	Court of Chancery
	:	C.A. No. 8465-VCG
SATELLITE HEALTHCARE	:	
	:	
and	:	
	:	
SATELLITE DIALYSIS OF TRACY, LLC	:	
	:	
Defendants Below, Appellees.	:	

APPELLANT'S OPENING BRIEF

Counsel for Appellant:
Kenneth E. Aaron, Esquire
Weir & Partners LLP
824 North Market Street
Suite 800
Wilmington, DE 19801
(302)-652-8181
(302)-652-8909- fax
kaaron@weirpartners.com

Dated: February 27, 2014

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Rules

I. Nature of Proceedings

Aibar Huatuco, M.D. ("Huatuco") is an equal member of Satellite Dialysis of Tracy, LLC (the "Company") with Satellite Healthcare ("Satellite" and collectively with the Company the "Defendants"). As a member of the Company, Huatuco filed a Verified Complaint for Judicial Dissolution under 6 Del. C. §18-802 in the Chancery Court of the State of Delaware on April 8, 2013 (the "Complaint"). In response, Defendants filed a Motion to Dismiss on May 31, 2013. On September 25, 2013, Vice Chancellor Glasscock held oral argument on the Motion to Dismiss. The Chancery Court then granted the Motion to Dismiss on December 9, 2013. Huatuco is appealing the granting of the Motion to Dismiss.

II. Summary of Argument

1. The Chancery Court's decision is based on an erroneous finding that the parties bargained away all rights that are not expressly granted to them in the limited liability company agreement they executed (the "LLC Agreement") by misconstruing one sentence in the LLC Agreement.

2. This holding is erroneous as a member cannot waive away the statutory option to apply for judicial dissolution under 6 Del.C.§18-801(a)(5) and §18-802.

3. The statutory language in 6 Del. 18-801(a)(5) specifically provides for the "entry of a decree of judicial dissolution" as one of the statutory mandated ways a limited liability company can be dissolved without any qualifying language.

4. Even if a member could waive the right to apply for judicial dissolution, it has not been waived here as the LLC Agreement does not include a provision by which either of the members specifically waived or surrendered their rights and privileges to apply to court for the judicial dissolution of the Company.

5. To the contrary, the LLC Agreement specifically preserves for the members all remedies to which any person may be lawfully entitled, whether at law or in equity, or otherwise.

6. Further, it would be inequitable to read a waiver into the LLC Agreement as Huatuco would be left without a reasonable escape mechanism while remaining liable for the bank deposits of the Company and subject to a restrictive covenant.

III. Statement of Facts

The Company was formed to develop, own and operate dialysis facilities in San Joaquin County, California. (A9 at ¶17) Huatuco and Satellite are equal members of the Company and entered into the LLC Agreement on August 15, 2007. (A8 at ¶15, the LLC Agreement is located at A35-A86) The Company was later incorporated as a limited liability company in the State of Delaware on October 5, 2007 and commenced its business as a dialysis center in August of 2009. (A8 at ¶16, A12 at ¶32)

Satellite was then appointed the Manager of the Company in accordance with a Management Service Agreement with the Company. (A9, ¶¶20-21) On March 1, 2010, Satellite as Manager entered into a term loan note with Union Bank for a loan of $750,000 loan with a 5 year term due on March 31, 2015 that provided for, *inter alia*, certain loan covenants by the Company to Union Bank including that the Company would maintain a ratio of EBITDA less distributions made during the prior 12 month period preceding the date of calculation, to Debt Service (as defined in that agreement) of not less than 1.50:1.00 at the close of each fiscal quarter ("Debt Service Ratio"). (A12, ¶¶34-35) The Company was in default of the Debt Service Ratio at the time the business loan agreement was signed and for all subsequent fiscal quarters. (A13, ¶36).

On March 23, 2010, Satellite sent to Huatuco a copy of the documentation regarding the term loan with Union Bank without including a copy of March 1, 2010 business loan agreement and requested Huatuco to execute a personal guaranty of the term loan. (*Id.*, ¶37) On August 23, 2010, Satellite as Manager entered into $500,000 line of credit note with Union Bank for a two year term ending on July 31, 2012. (*Id.*, ¶38) Then on August 31, 2010, Satellite sent to Huatuco by email a copy of the paperwork for the $500,000 line of credit that Satellite as Manager had already executed with Union Bank and requested that Huatuco execute a substitute personal guaranty to Union Bank for up to $757,813 (representing 125% of 50% of the $1,212,500 (the term loan and the credit line maximum amount) that would be due to Union Bank under the term loan and the line of credit) ("Huatuco Guaranty"). (*Id.*, ¶39) By executing the Huatuco Guaranty, Huatuco made himself liable for the Company's obligations to Union Bank. (*Id.*, ¶40)

On May 17, 2011, Satellite as Manager, without the knowledge or consent of Huatuco, executed a letter agreement with Union Bank that constituted a First Amendment to the business loan agreement of March 1, 2010 that provided for additional loan covenants by the Company to Union Bank including a minimum EBITDA requirement and a borrowing base covenant. (A13-A14, ¶41) On May 26, 2011, Satellite as Manger of the Company executed another $500,000 line of

credit note with Union Bank for a period ending on July 31, 2013, without Huatuco's knowledge or consent. (A14, ¶42)

On August 31, 2012, Satellite as Manager entered into a Commercial Promissory Note with Union Bank for a $500,000 line of credit for a two year term ending July 31, 2014, without the knowledge or consent of Huatuco. (A18, ¶58) On September 17, 2012, Satellite as Manager, again without the knowledge or consent of Huatuco, executed on behalf of the Company a new Business Loan Agreement with Union Bank with additional covenants by the Company to the Bank. (A19-A20, ¶64)

On September 26, 2012, the executive vice president of Satellite sent an email to Huatuco's representative advising him, *inter alia*, that Satellite would no longer advance funds to the Company to fund the payment of the monthly payment to Union Bank on the Company's debt, that a payment was due to Union Bank of $12,500 in 4 days, and that the lack of payment would trigger Huatuco's personal guaranties and would cause Union Bank to declare the entire debt immediately due and owing. (A21, ¶64) On October 1, 2012, Union Bank sent a letter of notice of default and acceleration to the Company based on the Company's violations of Debt Service Ratio and the Borrowing Base Covenant in September of 2012 and demanded payment of the outstanding balance of loans owed of $875,000 by

October 31, 2012 because the Company was in violation of its loan covenants under the Loan Agreement. (A22, ¶74)

On November 1, 2012, Union Bank sent a notice letter to Huatuco advising him that the Company had failed to comply with Union Bank's demand for repayment by October 31, 2012, that the outstanding balance on the Company's obligations to Union Bank was $875,000 plus $1,844.66 in interest, that Union Bank was demanding that Huatuco immediately satisfy his guaranty no later than on November 30, 2012 and that Union Bank was exercising its right to increase the interest rate by 5% as of November 1, 2012. (A25, ¶84) The Company neither paid the outstanding balance on October 31, 2012 nor the current monthly payment to Union Bank on November 1, 2012. (A26, ¶85)

The Company is currently deadlocked as the two members disagree about the means, method and manner of operation and management of the Company, as well as the continued financial distress of the Company. (A6 at ¶1, A14-A30 at ¶¶43-107)

IV. Argument

A. A member cannot contract away the statutory right to apply for judicial dissolution of the limited liability company.

1. Questions Presented

Did the Chancery Court err in dismissing a member's application for judicial dissolution based upon a finding that the parties to the LLC Agreement waived that right in the LLC Agreement when the waiver of a member's right to seek a judicial order of dissolution of a limited liability company is contrary to the legislature's statutory intent? (A144-147, A228, Opinion at p.11)

SUGGESTED ANSWER: No.

Although Huatuco believes that this issue was preserved in connection with the Motion to Dismiss; nevertheless, if it was not, Huatuco respectfully submits that the interest of justice requires this Honorable Court to consider this issue because it involves an issue of first impression of law before this Court, requires the interpretation of statutory intent, impacts the rights of a member of a limited liability company to access to judicial dissolution before the Chancery Court, is out-come determinative and may have significantly implications for future cases.

2. Scope of Review

The decision of the Court of Chancery granting a motion to dismiss under Court of Chancery Rule 12(b)(6) is reviewed by the Supreme Court *de novo.*[1] *Feldman v. Cutaia*, 951 A.2d 727, 730-731 (Del. 2008) The Court is required to accept the well-pled allegations of the complaint as true and draw reasonable inferences in favor of Huatuco. *Id., White v. Panic,* 783 A.2d 543, 549 (Del. 2001). Dismissal is appropriate only after a judicial determination "with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief." *VLIW Tech., LLC v. Hewlett–Packard Co.,* 840 A.2d 606, 610–11 (Del. 2003) (quoting *McMullin v. Beran,* 765 A.2d 910, 916 (Del. 2000)).

3. Merits of Argument

The underpinning of the Chancery Court's decision to dismiss Huatuco's application for judicial dissolution of the Company was grounded in the Chancery Court's decision in *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. 2008).[2] Unfortunately, the holding in *R & R* that the members of a limited liability company can waive their right to apply for judicial

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[1] Delaware law applies here. The LLC Agreement specifically provides that "[t]his Agreement and the rights of the parties hereunder shall be construed and enforced in accordance with the internal laws, and not the laws of conflicts, of the State of Delaware." *See* Exhibit "A" to the Complaint, Section 12.6. Additionally, the Company was incorporated in the State of Delaware.

[2] *R & R Capital LLC v. Buck & Doe Run Valley Farms, LLC* is included in the Appendix at A108-A121.

dissolution in the limited liability agreement was erroneously reasoned and contrary to the General Assemblies' intent.

Delaware's Limited Liability Company Act, 6 Del.C. §18-101, *et seq.* (the "Act"), provides, without qualification, that a limited liability company may be dissolved and its affairs wound up upon "the entry of a decree of judicial dissolution" and that the Court of Chancery may decree dissolution of a limited liability company "[o]n application by or for a member or manager". 6 Del. C. §18-801(a)(5) and §18-802; *see also Lola Cars International Limited v. Krohn Racing, LLC*, Del. Ch., 2009 WL 4052681 (Del. Ch. 2009)[3] (holding that judicial dissolution was a viable remedy even though the operating agreement listed events of dissolution, which did not expressly provide for judicial dissolution). Accordingly, Huatuco as a member of the limited liability was entitled by statute to apply to the Chancery Court for judicial dissolution regardless of whether the LLC Agreement specifically provides for the option[4].

The statutory language of Section 18-801 of the Act also establishes that Huatuco cannot bargain away this ability in the a limited liability company agreement as the General Assembly intentionally omitted the inclusion of language

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[3] *Lola Cars International Limited v. Krohn Racing, LLC* is included in the Appendix at A122A-A135.

[4] Section 18-802 of the Act provides that not only a member but a manager may apply for judicial dissolution. It is clear that LLC Agreement does not act to waive the manager's right. Thus, the argument that the LLC Agreement was intended to eliminate judicial dissolution is unavailing.

stating that a limited liability company can "otherwise provide[]." In construing a statutory or regulatory provision, it is fundamental that the Court ascertain and give effect to the intent of the legislative or administrative body as clearly expressed in the language of the statute or regulation. *In re Adoption of Swanson,* 623 A.2d 1095, 1096–97 (Del. 1993); *Giuricich v. Emtrol Corp.,* 449 A.2d 232, 238 (Del. 1982). Additionally, "[t]he legislative body is presumed to have inserted every provision for some useful purpose and construction, and when different terms are used in various parts of a statute it is reasonable to assume that a distinction between the terms was intended." *Giuricich v. Emtrol Corp.,* 449 A.2d 232, 238 (Del. 1982) (citing *C & T Associates v. Government of New Castle*, 408 A.2d 27, 29 (Del. Ch. 1979)). Where a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume that the Legislature was aware of the omission and intended it. *Id.* All the more true when this omission occurs within the same section of the statute as is the case here.

Section 18-801 of the Act unambiguously states:

> (a) A limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following:
>
> (1) At the time specified in a limited liability company agreement, but if no such time is set forth in the limited liability company agreement, then the limited liability company shall have a perpetual existence;
>
> (2) Upon the happening of events specified in a limited liability company agreement;

(3) *Unless otherwise provided in a limited liability company agreement*, upon the affirmative vote or written consent of the members of the limited liability company or, if there is more than 1 class or group of members, then by each class or group of members, in either case, by members who own more than 2/3 of the then-current percentage or other interest in the profits of the limited liability company owned by all of the members or by the members in each class or group, as appropriate;

(4) At any time there are no members; provided, that the limited liability company is not dissolved and is not required to be wound up if:

a. *Unless otherwise provided in a limited liability company agreement*, within 90 days or such other period as is provided for in the limited liability company agreement after the occurrence of the event that terminated the continued membership of the last remaining member, the personal representative of the last remaining member agrees in writing to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member; provided, that a limited liability company agreement may provide that the personal representative of the last remaining member shall be obligated to agree in writing to continue the limited liability company and to the admission of the personal representative of such member or its nominee or designee to the limited liability company as a member, effective as of the occurrence of the event that terminated the continued membership of the last remaining member, or

b. A member is admitted to the limited liability company in the manner provided for in the limited liability company agreement, effective as of the occurrence of the event that terminated the continued membership of the last remaining member, within 90 days or such other period as is provided for in the limited liability company agreement after the occurrence of the event that terminated the continued membership of the last remaining

member, pursuant to a provision of the limited liability company agreement that specifically provides for the admission of a member to the limited liability company after there is no longer a remaining member of the limited liability company.

(5) The entry of a decree of judicial dissolution under § 18-802 of this title.

(b) *Unless otherwise provided in a limited liability company agreement*, the death, retirement, resignation, expulsion, bankruptcy or dissolution of any member or the occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the limited liability company shall be continued without dissolution.

6 Del. C. §18-801 (emphasis added). The other dissolution events specified in the Section 18-801 specifically state that the limited liability company agreement can "otherwise provide[]". *Id.* The General Assembly also specifically included this phrase in other sections of the Act. *See* 6 Del.C. §§ 18-107, 18-204(b), 18-209(b), 18-301(d), 18-302(d), 18-304(1) & (2), 18-402, 18-403, 18-404(d), 18-502(a) & (b), 18-605, 18-606, 18-702(a), (b) & (d), 18-704(b), 18-803(a), and 18-804(a)(2) & (3). Section 18-801(a)(5), however, does not provide that a limited liability agreement can provide otherwise. If the General Assembly had intended to allow the option of applying for judicial dissolution to be waivable, then it could have and would have specified such.

In this regard this case is similar to *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982). In *Giuricich* the court held that a statutory subsection requiring a

showing of "irreparable injury" as a prerequisite to relief in a director-deadlock situation (8 *Del.C.* § 226(a)(2)) is inapplicable in a stockholder-deadlock situation (8 *Del.C.* § 226(a)(1)) as the subsection contains no such standard. The court explained that it "may not assume that omission was the result of an oversight on the part of the General Assembly". *Id.* at 238. It further explained that courts may not engraft upon a statute language which has been clearly excluded by the legislature. *Id.* Thus, 6 Del. C. §18-801(a)(5), which clearly and unambiguously provides for the entry of judicial dissolution, can also not be judicially rewritten to add the language "that a limited liability company agreement can provide otherwise." Thus, the General Assembly intended that judicial dissolution be mandatory and non-waivable.

The Chancery Court in *R & R* was further incorrect when it disregarded plaintiff's argument that "certain provisions of the LLC Act are mandatory and non-waivable." 2008 WL 3846318 at *5-6 (Del. Ch. 2008). The Chancery Court explained that it was basing this decision upon: (a) no authority being promulgated to support the argument; (b) the holding in *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999) that a provision in the Act (6 *Del. C.* § 18-109(d)) which did not contain the phrase "unless otherwise provided in a limited liability company" was nevertheless permissive and subject to modification; and (c) on another provision in the Act (6 Del. C. §1101(c)) explicitly forbidding

waiver. *Id.* at *5-6. However, this reasoning does not withstand scrutiny to justify the Chancery Court's decision.

First, the Chancery Court's statement that there is no authority supporting the argument ignores the plain language of the Act and the above-mentioned case law requiring that legislative intent be followed. Additionally, *Elf Atochem* does not support a holding that a provision of the Act can be waived in a limited liability company agreement unless the Act specifically states otherwise. The provision at issue in *Elf Atochem* is Subsection 18-109(d), which provides:

> In a written limited liability company agreement or other writing, a manager or member *may* consent to be subject to the nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction, or the exclusive jurisdiction of the courts of the State of Delaware, or the exclusivity of arbitration in a specified jurisdiction or the State of Delaware....

6 Del. C. §18-109(d) (emphasis added). The inclusion of the word "may" connotes that the options are voluntary and not mandatory. Based upon this reasoning the *Elf* court found that although Section 18-109(d) fails to mention that the parties may choose to agree to the exclusive jurisdiction of a foreign jurisdiction that the parties may agree to exclusive jurisdiction of a foreign jurisdiction. *Elf Atochem*, 727 A.2d at 296. Section 18-801(a)(5), on the other hand, does not contain any permissive language[5]. Further, the decision in *Elf Atochem* stands for the proposition that a member can contract for extra rights or privileges than those

[5] Section 18-802 of the Act does include the word "may" but only in reference to the Chancery Court's discretion.

provided for in the Act and not that something specifically provided for in the Act can be waived away, which is the case here.

Finally, the prohibition of waiver in 6 Del. C. §1101(c) does not establish that a provision can be waived unless the statute says otherwise. 6 Del. C. §1101(c) only forbids the elimination of the implied contractual covenant of good faith and fair dealing after explicitly providing that fiduciary duties can be waived. If the section did not state that "the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement", then there would have been no need to state that there could not be a waiver of the implied contractual covenant of good faith and fair dealing. Thus, the prohibition on waiver is just a qualification of the waiver specifically allowed. In the current case there is no qualification language in 18-801(a)(5), so there is no need for the statute to state that the judicial dissolution cannot be waived.

Accordingly, the Chancery Court's decision that Huatuco could bargained away his right to apply for judicial dissolution is an error and the granting of Motion to Dismiss should be reversed.

B. There was no waiver of judicial dissolution in the LLC Agreement.

1. Question Presented:

When the LLC agreement does not contain a conspicuous waiver or surrender of the member's right to apply for judicial dissolution of the limited liability company and specifically preserves the members' rights to seek any remedy that a member is lawfully entitled to, should the member's application for judicial dissolution been dismissed as waived by the LLC agreement? (A143 at Question No. 1, A148-A150, A299 at 15:13-18, A302 at T18:9-22, A303-310 at T19:11-27:5)

SUGGESTED ANSWER: No.

2. Scope of Review

The decision of the Court of Chancery granting a motion to dismiss under Court of Chancery Rule 12(b)(6) is reviewed by the Supreme Court *de novo. Feldman v. Cutaia*, 951 A.2d 727, 730-731 (Del. 2008) The Court is required to accept the well-pled allegations of the complaint as true and draw reasonable inferences in favor of Huatuco. *Id., White v. Panic,* 783 A.2d 543, 549 (Del. 2001). The Court may also consider documents presented to it outside the pleadings when such documents are integral to, and incorporated within, the complaint. *Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.,* 691 A.2d 609, 613 (Del.1996); *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2009

WL 4052681, at *5 (Del. Ch. 2009). Dismissal is appropriate only after a judicial determination "with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief." *VLIW Tech., LLC v. Hewlett–Packard Co.,* 840 A.2d 606, 610–11 (Del. 2003) (quoting *McMullin v. Beran,* 765 A.2d 910, 916 (Del. 2000)).

3. Merits of the Argument

The LLC Agreement is devoid of a waiver of "judicial dissolution". The term "judicial dissolution" is not even mentioned in the LLC Agreement. Additionally, the Article titled "Dissolution and Winding Up" does not preclude a member from applying to a court to seek judicial dissolution under §18-802 of the Delaware Code, or state that the member waives or surrenders the right to apply to a court for judicial dissolution. To the contrary, Section 12.13 of the LLC Agreement preserves to the members all remedies available to them under the LLC Agreement and does not "exclude any other remedies to which any person may be lawfully entitled, whether at law or in equity, or otherwise." (A55) Thus, the Chancery Court erred in finding that the legal remedy of judicial dissolution was waived in the LLC Agreement.

The Article titled "Dissolution and Winding Up" contains two sections governing dissolution; however, neither section precludes a member from applying for judicial dissolution. Section 8.1 of the Article only serves to provide the

mandatory situations when the Company "shall be dissolved".[6] (A48) Section 8.2 of the LLC Agreement does provide that certain enumerated events do not mandate dissolution of the Company notwithstanding the fact that they would appear to mandate dissolution; however, this section does not proscribe judicial dissolution as a remedy[7]. (*Id.*) The Chancery Court agreed that these provisions do not preclude a member for applying for judicial dissolution, but erroneously held that Huatuco waived his right to a judicial dissolution by relying on a un-bolded and un-italicized sentence hidden in the middle of Section 2.2 of Article II and on Huatuco being a sophisticated party. (Opinion at p. 9-12, 17)

Section 2.2 states:

> Other Member Rights. The respective rights of each Member to share in the capital and assets of the LLC, either by way of distributions or upon liquidation, will be determined by reference to the Percentage Interest of such Member; and each Member's interest in the profits and losses of the LLC shall be established as provided herein. *Except as otherwise required by applicable law, the Members shall only have the power to exercise any and all rights expressly granted to the Members pursuant to the terms of this Agreement.* No Member shall have any preemptive right to purchase or subscribe for additional Membership Interests in the LLC by reason of the admission of any

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[6] Indeed, Section 8.1 of the LLC Agreement is really nothing more than a provision enforcing the two mandatory events of dissolution by the Company caused by a vote of the Super Majority-in-Interest under Subsections 3.4.14 (a vote to dissolve) and 3.4.15 (the liquidation of assets and disbursement of the proceeds) of the LLC Agreement. The third listed event under Section 8.1, any other events of dissolution specified in the Certificate of Formation or this LLC Agreement, is really a null set. Of course, the entry of a decree of dissolution by this Court would be mandatory upon the Company, but it only requires the application of a single member or a manager not a vote of the Super Majority-in-Interest.

[7] These sections do not set in place a procedure that is inconsistent with judicial dissolution. On the contrary, judicial dissolution is merely procedure for dissolving a limited liability company.

> new Member or the issuance of any new or additional Membership Interests or other debt or equity interests in the LLC.

(emphasis not original but included in the Chancery Court's opinion at Page 7) [8]. A reading of the entirety of the LLC Agreement unambiguously shows that it was not the parties' intent for this sentence to be a waiver of the ability to apply for judicial dissolution. *See Osborn ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1159 (Del. 2010) (stating a contract should be read as a whole); *Shiftan v. Morgan Joseph Hldgs., Inc.*, 57 A.3d 928, 935 (Del. Ch. 2012) (explaining a court must "attempt to discern the meaning of the contract and the intent of the parties from the language that they used, as read from the perspective of a reasonable third party.")

Section 2.2 is in Article II, which is titled "Members and Membership Interests". (A38) Article II contains sections that pertain to: (a) the members' right to vote (section 2.1); (b) representatives for the members (section 2.3); (c) the identity of members (section 2.4); (d) the admission of additional members (section 2.5); and (e) whether members can withdraw from the company (section 2.6). (A38-39) The Article pertains to the members rights in connection with ownership of the Company. It is not the Article where a reasonable person would expect a waiver of the right or option to apply for judicial dissolution, especially as

[8] Obviously, the court below felt that those reading its opinion needed the italics to be able to pick out the offending sentence in the midst of the paragraph.

a separate Article of the LLC Agreement is titled "Dissolution and Winding Up". (A48-49)

Section 2.2 also cannot be reasonably read to constitute a waiver of the important statutory right to seek the dissolution of the Company. The first sentence of the section is about the rights of members to share in capital and asset of the Company and how interests in profits and losses of the Company are members' preemptive rights to purchase or subscribe to additional interest. The third sentence also pertains to an economic right-the members' preemptive rights to purchase or subscribe to an additional interest. Accordingly, the second sentence of the section should also be read to pertain to a waiver of other economic rights and not a universal waiver of all statutory rights. Additionally, Section 2.2 states that a member can only have the power to exercise a right expressly granted pursuant to the Agreement *except as otherwise required by applicable law*. As applicable law provides for judicial dissolution, this provision does not preclude judicial dissolution or limit events that cause dissolution to those specified in Section 8.1 of the LLC Agreement.

Further, even if Section 2.2 could be read to be a waiver of rights not granted in the LLC Agreement, the LLC Agreement specifically preserved and granted the members the right to seek any remedy at law or equity to which the member was lawfully entitled. Section 12.13 is entitled "Equitable and Other Remedies" and

states that "[t]he remedies under this Agreement are cumulative and do not exclude any other remedies to which any person may be lawfully entitled, whether at law or in equity, or otherwise." (A55) Obviously, Huatuco was entitled to seek judicial dissolution under the law. Indeed, Section 12.13.1 of the LLC Agreement provides that "[w]ithout limiting the generality of the forgoing" (referring to Section 12.13) the any member can seek injunctive relief in addition seeking judicial remedies for breaching of the LLC Agreement. This language makes it clear that the parties to the LLC Agreement did not intend to limit their respective legal recourse let alone eliminate or waive judicial relief including judicial dissolution.

Indeed, any other reading of this LLC Agreement would be contrary to the LLC Agreement overall. *See E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.,* 498 A.2d 1108, 1113 (Del.1985) ("the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan.") The only provision of the LLC Agreement that could possibly limit which events cause or require the LLC to dissolve is Section 8.2 of the LLC Agreement. That provision states that those events included in the definition of "Dissolution Events" with "respect to a Member or Manager shall not cause or require the LLC to dissolve, notwithstanding any provision of the Act or any other laws applicable to the LLC to the contrary." If Section 2.2 of the LLC Agreement absolutely limited the

events that could bring about dissolution of the Company to those rights expressly granted in the LLC Agreement, then Section 8.2 of the LLC Agreement would have been mere surplusage. *See Osborn ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1159 (Del.2010) (stating "[w]e will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.") As the Chancery Court recognized in footnote 27 to its Opinion, Section 8.2 of the LLC Agreement was not a limitation on dissolution of the Company; but rather, a clarification that certain events that would cause the member to be dissolved would not cause dissolution of the Company.

Furthermore, the language in Section 2.2 of the LLC Agreement is especially insufficient to establish intent on the behalf of members to waive their statutory right to judicial dissolution. A "[w]aiver is the voluntary and intentional relinquishment of a known right." *Bantum v. New Castle County Vo–Tech Educ. Ass'n,* 21 A.3d 44, 50–51 (Del. 2011) (quoting *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.,* 871 A.2d 428, 444 (Del. 2005)). "It implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those [ ] rights" and "[t]he facts relied upon to prove waiver must be unequivocal." *Id.*

The waiver of a statutory default principle must be clear and explicit[9]. *See R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318, *3 (Del. Ch. Aug. 19, 2008) (specifically finding that the contractual waiver there was "knowingly, voluntary and unambiguous"); *In re Atlas Energy Resources, LLC,* 2010 WL 4273122 (Del. Ch. Oct. 28, 2010) (stating "Delaware's case law clearly teaches that, 'in the absence of provisions in the LLC agreement **explicitly disclaiming** the applicability of default principles of fiduciary duty, controlling members in a manager-managed LLC owe minority members the traditional fiduciary duties that controlling shareholders owe minority shareholders.'") (citing *Kelly v. Blum*, 2010 WL 629850, *12 (Del. Ch. Feb. 24, 2010) (internal citations omitted) (emphasis added); *Miller v. American Real Estate Partners*, 2001 WL 1045643 (Del. Ch. Sept. 6, 2001)(holding that the drafters of a limited partnership agreement did not make their intent to eliminate the default principles of fiduciary duties sufficiently clear to bar a fiduciary duty claim and "[a] topic as important as this should not be addressed coyly"); *Matter of Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 977 (Del. Ch. 1997)(stating "[s]ince Section 262 [of Delaware's General Corporation Law] represents a statutorily conferred right, it may be effectively waived in the documents creating the security only when the result is quite clearly set forth when interpreting the relevant documents under

[9] The Chancery Court actually reversed this requirement by saying the since the LLC Agreement does not explicitly grant the right to judicial dissolution, it is waived. (Opinion at p. 11-12)

generally applicable principles of construction."); *Fawzy v. Fawzy,* 973 A.2d 347 (N.J. 2009)(citing *Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. Of Educ.*, 78 N.J. 122, 140, 393 A.2d 267 (N.J. 1978)) ("[a]s we have stressed in other contexts, a party's waiver of statutory rights 'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'").

Here, the referenced sentence plucked out of Section 2.2 is not explicit or clear enough to evidence a voluntary and intentional waiver or surrender of the right to apply for judicial dissolution. On the contrary, the relied upon language is secreted in the middle of a paragraph, in an Article that has nothing to do with dissolution, in the midst of a 21 page limited liability agreement (not including schedules). It is not the conspicuous language that even a sophisticated party would read to effectuate a waiver of statutory rights.

Moreover, faced with a question of contract interpretation on a motion to dismiss, if there is ambiguity or the contractual language is "reasonably or fairly susceptible of different interpretations," then the ambiguity must be resolved in favor of the nonmoving party Huatuco. *Eni Holdings, LLC v. KBR Group Holdings, LLC*, 2013 WL 6186326 (Del.Ch. Nov. 27, 2013). Accordingly, to the extent that there is an ambiguity as to whether there was a waiver, then the Motion

to Dismiss should have been denied and this Court should reverse the lower court's decision.

Finally, it was an error on the part of the Court to hold that Huatuco was a sophisticated party. (Opinion at p. 12) Nowhere in the Complaint are there facts from which the Chancery Court could have made such a finding. Huatuco is not E.I du Pont de Nemours, Shell Oil Co., or other well-known major corporate entities that regularly avail themselves of the judicial expertise of the Delaware Courts. Huatuco is at most sophisticated as a medical doctor, but that does not mean he is sophisticated in reading and negotiating complex multi-page LLC agreements. *See e.g, Reilley v. Richards*, 69 Ohio St.3d 352, 354, 632 N.E.2d 507, 508 (Ohio 1994)(stating "was a lawyer but he had no experience in real estate law and, thus, was an unsophisticated party at the time of the transaction.")

On the contrary, the LLC Agreement clearly evidences that this was a one-sided agreement drafted for the singular benefit of Satellite. It required only Huatuco to guaranty the loans and sign a restrictive covenant, not Satellite, while insuring that Satellite would always have a controlling interest in the Company (Section 12.9.2). If further provides that Satellite is the perpetual manager under a Management Agreement providing it with fees for operating; but, Huatuco's entity was only given a 5 year agreement that Satellite as manager could terminate. Additionally, the LLC Agreement not only lacks the usual provision that all parties

had separate counsel who assisted them in the drafting of the Agreement; but actually, includes a waiver of conflict provision due to Paul, Hastings, Janofsky and Walker, LLP representing both the Company and Satellite with regard to the preparation of the LLC Agreement (Section 12.8).

There is nothing in the LLC Agreement or the record to suggest that Huatuco was a sophisticated participant in the drafting of this LLC Agreement and any review of the LLC Agreement would bear out the opposite conclusion. At the very least, there is an issue of fact that should not be determined on a motion to dismiss where the court is required to accept plaintiff's alleged facts as true. *See McGeorge v. Van Benschoten*, No. 87-1050 PHX CAM, 1988 WL 163063, at *7 (D. Ariz. Dec. 8, 1988) ("[T]he McGeorges' lack of sophistication raises a question of fact."); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, 181 (Ill. App. Ct. 2005) ("[T]he plaintiff's level of sophistication and the degree to which it relied upon the commitment are questions of fact for the trier of fact to determine."); *Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889, 894 (Minn. App. 1993) ("The unique qualifications of the buyers and sellers in this case create questions of fact regarding the relative sophistication of the parties.").

Accordingly, the Chancery Court's decision that Huatuco waived his right to apply for judicial dissolution in the LLC Agreement is an error and the granting of Motion to Dismiss should be reversed.

C. It would be inequitable to read a waiver into the LLC Agreement.

1. Questions Presented.

Should the application of a member for judicial dissolution of the limited liability company be dismissed on the basis of waiver of the right to make that application in the limited liability company agreement when the member would have no other reasonable and equitable exit mechanism under the limited liability company agreement? (A143 at Question No. 1, A150-A151, A310-A314 at T26:19-30:3)

SUGGESTED ANSWER: No.

2. Scope of Review.

The decision of the Court of Chancery granting a motion to dismiss under Court of Chancery Rule 12(b)(6) is reviewed by the Supreme Court *de novo. Feldman v. Cutaia*, 951 A.2d 727, 730-731 (Del. 2008) The Court is required to accept the well-pled allegations of the complaint as true and draw reasonable inferences in favor of Huatuco. *Id., White v. Panic,* 783 A.2d 543, 549 (Del. 2001). The Court may also consider documents presented to it outside the pleadings when such documents are integral to, and incorporated within, the complaint. *Vanderbilt Income & Growth Assocs, LLC v. Arvida/JMB Managers, Inc.,* 691 A.2d 609, 613 (Del.1996); *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2009 WL 4052681, at *5 (Del. Ch. 2009). Dismissal is appropriate only after a

judicial determination "with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief." *VLIW Tech., LLC v. Hewlett–Packard Co.,* 840 A.2d 606, 610–11 (Del. 2003) (quoting *McMullin v. Beran,* 765 A.2d 910, 916 (Del. 2000)).

3. Merits of Argument.

It would be against public policy and unenforceable to read a waiver into the LLC Agreement because Huatuco would be without any equitable remedy to his plight. *See R & R Capital, LLC*, 2008 WL 3846318 at *3. Even given the contractual emphasis of the Act, public policy still requires that a member have a "reasonable exit mechanism." *Haley v. Talcott*, 864 A.2d 86, 96 (Del.Ch. 2004). Indeed, the purpose of statute allowing judicial dissolution of a limited liability company is to provide an avenue of relief when the company cannot continue to function in accordance with its chartering agreement. *Id.* at 94. Here, if the granting of the motion to dismiss is affirmed, then Huatuco would be held captive as a member of the Company with no reasonable and equitable escape from the clutches of Satellite[10].

Under the LLC Agreement, Huatuco cannot compel Satellite to buy out his interests; but rather, he only can offer it to Satellite to see if it wants to buy it.

[10] The Chancery Court unfairly mocks Huatuco's plight in footnote 2 of the Opinion as not being caught in Jeane-Paul Satrtre's existential hell with no way out. (Opinion at p. 2-3) The reality is that Huatuco's only way out of his "alternative-entity" dilemma is to walk away from his investment while being bound by a restrictive covenant and guarantying the Company's bank debt. Maybe not Hois Clos, but close.

Sections 2.6, 7.1 and 7.2 and Schedule 5. Even more draconian, Huatuco cannot withdraw or resign without Satellite's consent or else he will not receive any consideration for his membership interests. If that were not bad enough, Huatuco was required to guaranty bank debts of the Company that were secretly incurred by Satellite as the Manager and are now in default and to sign a restrictive covenant to not compete with the Company for a period of two years after withdrawing from the Company (which Satellite did not have to sign) under Schedule 3 of the LLC Agreement. Accordingly, if Huatuco cannot seek a judicial dissolution, he will be equitably remediless while he will remain liable for the bank debt of the Company and subject to a restrictive covenant. *Fisk Ventures, LLC v. Segal,* 2009 WL 73957 at * 7 (Del Ch. Jan. 13, 2009).[11] He will be without any reasonable exit mechanism from this plight if the Court would preclude him from seeking a decree of judicial dissolution. Equity will not permit such a result.

Accordingly, the Chancery Court's decision that Huatuco is not entitled to equitable relief by judicial dissolution is an error and the granting of Motion to Dismiss should be reversed.

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[11] *Fisk Ventures, LLC* is included in the Appendix at A169-A177.

V. Conclusion

For all the foregoing reasons, this Court should reverse the lower court's decision to grant the Motion to Dismiss.

WEIR & PARTNERS LLP
A Pennsylvania Limited Liability Partnership

By: _____
Kenneth E. Aaron (#4043)
824 N. Market Street, Suite 800
Wilmington, DE 19801
(302) 652-8181
(302) 652-8909-fax
kaaron@weirpartners.com

Dated: February 27, 2014

EFiled: Dec 09 2013 03:26PM EST
Transaction ID 54675798
Case No. 8465-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AIBAR HUATUCO, MD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 8465-VCG
	)	
SATELLITE HEALTHCARE and SATELLITE DIALYSIS OF TRACY, LLC,	)	
	)	
	)	
Defendants.	)	

ORDER

AND NOW, this ninth day of December, 2013,

The Court having considered the Motion to Dismiss filed by Defendants Satellite Health Care and Satellite Dialysis Tracy, LLC, and for the reasons stated in my accompanying Memorandum Opinion, IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED, and the Complaint is DISMISSED.

SO ORDERED:

/s/ Sam Glasscock III

Vice Chancellor

EFiled: Dec 09 2013 03:21PM EST
Transaction ID 54675687
Case No. 8465-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AIBAR HUATUCO, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	*Civil Action No. 8465-VCG*
	)	
SATELLITE HEALTHCARE and SATELLITE DIALYSIS OF TRACY, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: September 25, 2013
Date Decided: December 9, 2013

Kenneth Aaron, of Weir & Partners, LLP, Attorney for the Plaintiff.

Kevin R. Shannon, Matthew J. O'Toole, and Matthew D. Stachel, of Potter Anderson & Corroon LLP; Of Counsel: Luke G. Anderson, of K&L Gates LLP, Attorneys for the Defendants.

GLASSCOCK, Vice Chancellor

Delaware law with regard to limited liability companies is contractarian; individuals may create an organization that reflects their perception of the appropriate relationships among the parties, most conducive to their interests, as represented by their mutual agreement. Chapter 18 of Title 6 of the Delaware Code provides default provisions applicable to Delaware LLCs where the parties' agreement is silent; where they have provided otherwise, with limited exceptions,[1] such agreements will be honored by a reviewing court.

Here, the parties agreed to reject all default provisions, and expressly limited members' rights to those provided in the LLC Agreement. That Agreement strictly limits member rights of withdrawal, and does not provide for judicial dissolution. Nonetheless, the Plaintiff seeks a judicial dissolution under Section 18-802 of the LLC Act, pointing to a member deadlock in the conduct of the business. The Defendants have moved to dismiss. Because the right to judicial dissolution is a default right which the parties may eschew by contract,[2] and because they have done so here, the Defendants' Motion must be granted.

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[1] One important exception is our statutory prohibition on contracting out of the covenant of good faith and fair dealing. *See* 6 *Del. C.* § 18-1101(c) ("To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; *provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing*.") (emphasis added).

[2] Whether the parties may, by contract, divest this Court of its authority to order a dissolution in *all* circumstances, even where it appears manifest that equity so requires—leaving, for instance,

I. BACKGROUND

The facts that follow are taken from the Verified Complaint, unless otherwise noted. Satellite Dialysis of Tracy, LLC (the "Company") is a Delaware limited liability company that owns and operates dialysis facilities in San Joaquin County, California. The Company consists of two members, Plaintiff Dr. Aibar Huatuco and Defendant Satellite Health Care ("Satellite"). The members entered into the Limited Liability Company Agreement of Satellite Dialysis of Tracy, LLC (the "LLC Agreement") on August 15, 2007. Each member holds a fifty percent interest in the Company, and Satellite manages the Company pursuant to the terms of a Management Services Agreement. The Company and A & I Huatuco, Inc., an entity affiliated with the Plaintiff, entered into a Medical Director Services Agreement ("MDSA") under which the Plaintiff would serve as the Company's Medical Director for a five-year term ending August 15, 2012.[3]

On March 1, 2010, the Company, via Satellite, and Union Bank entered into a business loan agreement, which contained a provision requiring that the Company maintain a certain ratio of EBITDA to debt service. Satellite, as manager, provided the loan documentation to the Plaintiff; however, the documentation did not contain the business loan agreement, and the Plaintiff

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irreconcilable members locked away together forever like some alternative-entity version of Sartre's Huis Clos—is an issue I need not resolve in this Memorandum Opinion. As I find below, considerations fundamental to equity are absent here.

[3] Compl. ¶¶ 30, 48.

personally guaranteed the loan, unaware of the debt service ratio provision. Then, in August 2010, the Plaintiff again personally guaranteed a loan to the Company, this time for a $500,000 line of credit. On May 17, 2011, Satellite amended the initial business loan agreement with the bank to include a "borrowing base covenant" that immediately placed the Company in default of that provision. Finally, on May 26, 2011, Satellite, again without the Plaintiff's knowledge or consent, executed an additional $500,000 line of credit with Union Bank.

One month before the MDSA was set to expire, in July 2012, Satellite informed the Plaintiff that under new regulations issued by the Centers for Medicare & Medicaid Services, the Plaintiff was no longer eligible to serve as the Company's Medical Director. The Plaintiff suggested that the Company seek a waiver from the Centers for Medicare & Medicaid Services so that the MDSA could be renewed, but Satellite rejected that proposal. Instead, Satellite proposed a recapitalization plan, which "permitted Satellite the right to convert the Company's debts to Satellite for loans into an increase in Satellite's Percentage Interests to make Satellite the majority member . . . ."[4] The proposal also contained a provision increasing the percentage interests of a member who made a disproportionate capital contribution.[5] The Plaintiff understood Satellite's intent was to "force [the Plaintiff] to either 'pour more good money after bad' into the

[4] *Id.* at ¶ 46.
[5] *Id.*

Company controlled by Satellite or force [the Plaintiff] out of the Company."[6] Days before the MDSA was to expire, Satellite proposed an additional amendment to the LLC Agreement, which provided that, as manager, Satellite could enter into a medical director services agreement with a party other than the Plaintiff. The Plaintiff rejected that proposal on August 15, the day the MDSA expired, and Satellite informed the Plaintiff that it intended to sign a new medical director services agreement with another doctor the next morning. In addition, Satellite contended that the expiration of the MDSA constituted a "Transfer Event" under the LLC Agreement,[7] triggering its right to purchase the Plaintiff's interest in the Company.[8]

The Plaintiff responded by asserting that, because Satellite had failed to negotiate with the Plaintiff in good faith as required by the MDSA, the MDSA had not expired, and thus such expiration could not constitute a Transfer Event.[9] Instead, between August and October 2012, the Plaintiff identified the following Transfer Events, which he claimed triggered *his* right to purchase *Satellite's* interest in the Company: Satellite concealed information from the Plaintiff

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[6] *Id.* at ¶ 47.
[7] *See* LLC Agreement § 7.2 ("Members of the LLC shall have certain repurchase rights upon the occurrence of a Transfer Event, which rights shall be exercised pursuant to the terms and conditions of Schedule 5."); *id.* Schedule 4 at ¶ 35(ix) (including in the definition of "Transfer Event" the "[t]ermination or expiration of the Medical Director Agreement between the LLC and A&I").
[8] Compl. ¶¶ 52, 55.
[9] *Id.* at ¶ 55.

regarding loans and unilaterally entered loan agreements without the Plaintiff's consent; Satellite induced the Plaintiff to sign loan guaranties without providing him comprehensive loan documentation; Satellite amended loan agreements without the Plaintiff's consent, and entered an additional line of credit without his knowledge; Satellite improperly paid itself a management fee while the Company was insolvent; Satellite failed to negotiate the MDSA in good faith; and Satellite entered into another medical director services agreement without the Plaintiff's consent.[10] In January 2013, the Plaintiff also asserted that Satellite had entered into an additional note in violation of Section 3.4.1 of the LLC Agreement, triggering yet another Transfer Event.[11]

Surprisingly, in this action, the Plaintiff does not seek a judgment that Satellite's breaches of the LLC Agreement constitute Transfer Events, and that he therefore has a contractual right under the LLC Agreement to purchase Satellite's interest in the Company. Instead, the Plaintiff filed a Complaint with this Court on April 8, 2013 seeking judicial dissolution of the Company under 6 *Del. C.* § 18-802.[12] Accordingly, the parties agree that this Motion to Dismiss is not reliant on the underlying facts alleged in the Complaint. Rather, the parties submit that

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[10] *Id.* at ¶¶ 55, 67, 80

[11] *Id.* at ¶ 97.

[12] *See* 6 *Del. C.* § 18-802 ("On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.").

whether the Plaintiff is entitled to judicial dissolution is governed by the interplay of 6 *Del. C.* § 18-802 and certain provisions in the LLC Agreement. First, Section 2.2 of the Agreement states:

> The respective rights of each Member to share in the capital and assets of the LLC, either by way of distributions or upon liquidation, will be determined by reference to the Percentage Interest of such Member; and each Member's interest in the profits and losses of the LLC shall be established as provided herein. *Except as otherwise required by applicable law, the Members shall only have the power to exercise any and all rights expressly granted to the Members pursuant to the terms of this Agreement.* No Member shall have any preemptive right to purchase or subscribe for additional Membership Interests in the LLC by reason of the admission of any new Member or the issuance of any new or additional Membership Interests or other debt or equity interests in the LLC.[13]

The Defendants argue that the second sentence of that paragraph applies generally, and forecloses a right to seek judicial dissolution. Second, Section 8 of the LLC Agreement provides that dissolution requires a super-majority[14] vote of the members:[15]

> Section 8.1 Dissolution. The LLC shall be dissolved, its assets disposed of, and its affairs wound up, on the first to occur of the following: (i) the approval of a Super Majority-in-Interest of the Members to dissolve the LLC; (ii) the sale or other disposition of all or substantially all of the LLC's assets and distribution to the Members of the net proceeds thereof; or (iii) upon the happening of

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[13] LLC Agreement § 2.2 (emphasis added).

[14] A "Super-Majority-in-Interest of the Members" is defined as "any one or more Members who, in the aggregate, possess Percentage Interests in the LLC of more than seventy-five percent." LLC Agreement Schedule 4 at ¶ 33.

[15] Section 3.4 of the LLC Agreement also requires a super-majority vote to authorize dissolution of the LLC.

> any other event of dissolution specified in the Certificate of Formation or this Agreement.
>
> Section 8.2 Consequences of a Dissolution Event. The occurrence of a Dissolution Event with respect to a Member or Manager shall not cause or require the LLC to dissolve, notwithstanding any provision of the Act or any other laws applicable to the LLC to the contrary.[16]

Schedule 4, Paragraph 10 of the Agreement defines a "Dissolution Event" as "the Insolvency, dissolution or occurrence of any other event that terminates the continued membership of any Member, but does not include a change of ownership with respect to such Member or a transfer of such Member's Membership Interest as permitted by the Agreement."[17] The parties agree that a dissolution under the terms provided in Section 8.1 is unavailable here, and that the Agreement does not expressly provide a right to judicial dissolution. The Defendants argue that because the LLC Agreement does not expressly provide a right to seek judicial dissolution, and because the parties agreed to forgo any rights not explicitly granted by the Agreement, judicial dissolution is unavailable to the Plaintiff, as well.

II. STANDARD OF REVIEW

A motion to dismiss under Court of Chancery Rule 12(b)(6) will be granted only where a Complaint fails to state a claim under "any reasonably conceivable

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[16] *Id.* §§ 8.1, 8.2.
[17] LLC Agreement Schedule 4 at ¶ 10.

set of circumstances."[18] Where the interpretation of contractual provisions determines the sufficiency of a complaint, such a determination is the appropriate subject for a motion to dismiss.[19]

III. ANALYSIS

The Plaintiff's Complaint seeks solely to judicially dissolve the LLC on the basis that it is not reasonably practicable to carry on its business due to deadlock between the Plaintiff and Satellite. Satellite has moved to dismiss the Complaint under Chancery Court Rule 12(b)(6) on the grounds that the express language of the LLC Agreement forecloses a member from seeking judicial dissolution.

Satellite points to the second sentence of Section 2.2 of the LLC Agreement, which provides that "[e]xcept as otherwise required by applicable law, the Members shall only have the power to exercise any and all rights expressly granted to the Members pursuant to the terms of this Agreement."[20] Satellite argues that judicial dissolution is not a mandatory provision of the LLC Act, and is therefore not "required" by law; further, the LLC Agreement provides for dissolution under certain circumstances not present here, but fails to grant a right to seek judicial dissolution. The Plaintiff contends that the second sentence of Section 2.2 does not

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[18] *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).

[19] *See Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) ("Under Delaware law, the proper interpretation of language in a contract is a question of law. Accordingly, a motion to dismiss is a proper framework for determining the meaning of contract language.").

[20] LLC Agreement § 2.2.

address a right to seek dissolution, as it is embedded in a paragraph that deals only with the members' economic interests in the LLC. In other words, the Plaintiff argues that Satellite has pulled the second sentence of Section 2.2 out of context, and that a right to seek judicial dissolution is not a right that must be made express pursuant to Section 2.2.

I disagree with the Plaintiff's interpretation of the LLC Agreement. Section 2 of the LLC Agreement addresses "Members and Membership Interests."[21] In particular, Section 2.1 governs member voting rights, while Section 2.2—"Other Member Rights"—serves as a "catch-all" addressing miscellaneous other rights associated with membership. While Section 2.2 addresses two kinds of economic rights—rights to distributions of assets upon liquidation, and preemptive rights—it also provides more generally that "the Members shall only have the power to exercise *any and all rights* expressly granted to the Members . . . ."[22] This statement is not qualified by reference to "economic" rights, but instead applies to "any and all" rights, that is, both economic and noneconomic, including a right—or lack thereof—to seek judicial dissolution. Further, the provision applies to any and

[21] I recognize that Section 12.11 of the LLC Agreement provides that "[t]his section, subsection and any paragraph headings contained herein are for the purpose of convenience only . . . ." While I do not rely on the section headings to give meaning to the LLC Agreement, such headings are useful for explaining the organization of the Agreement.
[22] LLC Agreement § 2.2.

all rights "pursuant to the terms of this Agreement," not, as the Plaintiff would have it, solely to rights under Section 2.2.

Reading Section 2.2 in this way, it is clear to me that judicial dissolution is not available to the Plaintiff here. The parties specifically considered, and addressed, dissolution and dissolution rights in Sections 8.1 and 3.4 of the LLC Agreement. So long as the LLC has assets and remains in operation,[23] those sections provide for dissolution only where a super-majority of the members so approve.[24] The parties did not agree to a right to judicial dissolution, and, as I have found above, instead rejected all default rights under the Act unless explicitly provided for in the LLC Agreement or "otherwise required" by law. As Satellite points out, a right to seek judicial dissolution under 6 *Del. C.* § 18-802 is not "required" by law. Rather, in *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, this Court upheld a provision in an LLC agreement purporting to eliminate certain parties' rights to judicial dissolution otherwise expressly granted in the LLC agreement.[25] Permitting waiver of a contractual right to judicial dissolution, or enabling opting out of the statutory right altogether, is consistent with the broad policy of freedom of contract underlying the LLC Act, and

[23] A sale of all or substantially all of the assets of the LLC would itself require a super-majority vote. *See* LLC Agreement § 3.4.14 (requiring a super-majority vote to "[s]ell all or substantially all of LLC's or any Center's assets, or authorize the merger or dissolution of LLC").
[24] Other than upon liquidation and distribution, or a super-majority vote in favor of dissolution, Section 8.1 provides for dissolution "upon . . . any other event of dissolution specified in the Certificate of Formation or this Agreement." No other events of dissolution are so specified.
[25] 2008 WL 3846318 (Del. Ch. Aug. 19, 2008).

comports with the Act's approach of supplying default provisions around which members may contract if they so choose.[26] Accordingly, the relevant inquiry is whether the members here did opt out of the statutory default provided in 6 *Del. C.* § 18-802, or whether the LLC Agreement is silent on judicial dissolution such that the statutory default applies. Here, the LLC Agreement is not silent: rather, Section 2.2 provides that members are entitled *only* to the rights expressed in the LLC Agreement.[27] Since the LLC Agreement does not expressly contain a right to judicial dissolution, the members have effectively opted out of the statutory default contained in 6 *Del. C.* § 18-802.

The Plaintiff argues that *R & R Capital* is inapplicable here, because the Defendants have not demonstrated that the Plaintiff knowingly and intelligently waived his right to judicial dissolution, as he suggests is required under the holding in that case. The Plaintiff points to the Court's finding that the contractual waiver there was "knowing, voluntary and unambiguous."[28] That finding is unremarkable and imposes no positive burden on the moving parties to demonstrate anything

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[26] *See Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) ("The basic approach of the Delaware Act is to provide members with broad discretion in drafting the Agreement and to furnish default provisions when the members' agreement is silent.").

[27] The Plaintiff suggests that reading the LLC Agreement in this way renders superfluous Section 8.2, which states that "[t]he occurrence of a Dissolution Event with respect to a Member or Manager shall not cause or require the LLC to dissolve . . . ." However, this Section is not superfluous, as it is meant to clarify the otherwise ambiguous distinction between events mandating dissolution of the LLC under Section 8.1, and events mandating the dissolution of an individual's membership interest as described in Schedule 4, Paragraph 10.

[28] *R & R Capital*, 2008 WL 3846318, at *8.

other than that a binding and unambiguous contract exists between these parties, which contract rejects judicial dissolution. Sophisticated parties entering unambiguous LLC agreements are presumed to understand the consequences of the language they have chosen, and are bound thereby, lest contract rights be subject to endless second-guessing and opportunistic revision.[29]

The Plaintiff also suggests that the LLC Agreement here is similar to that in *Lola Cars Int., Ltd v. Krohn Racing, LLC*, in which this Court found an LLC operating agreement did not supersede the statutory default of a right to judicial dissolution.[30] However, in that case, the LLC agreement contained a nonexclusive provision enumerating the circumstances in which dissolution was permissible. The Court sensibly reasoned that "[i]t simply cannot be true that a number of nonexclusive, permissive termination clauses in the Operating Agreement can preclude judicial dissolution as provided for in the Act."[31] By contrast, Section 2.2 of the LLC Agreement here specifically excludes all rights not expressly provided by the Agreement or required by law. Therefore, I do not find the reasoning of *Lola Cars* persuasive here.

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[29] *See, e.g.*, *Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *1 (Del. Ch. July 9, 2002 (holding that, in the absence of fraud or other unconscionable circumstances, the plaintiff would be bound by the clear terms of its contract, including an unambiguous integration clause, and explaining that "[s]ophisticated parties are bound by the unambiguous language of the contracts they sign").
[30] 2009 WL 4052681, at *7 (Del. Ch. Nov. 12, 2009).
[31] *Id.*

Additionally, the Plaintiff argues that even if the LLC Agreement does foreclose judicial dissolution, as a matter of public policy the Court should not deprive the Plaintiff of such a remedy where no alternative exit options are available. First, as Satellite correctly points out, the explicit policy of the LLC Act is to "give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."[32] Permitting judicial dissolution where the parties have agreed to forgo that remedy in the LLC Agreement would frustrate that purpose, and change in a fundamental way the relationship for which these parties bargained. This is especially true where several provisions in the LLC Agreement act to prevent one party from unilaterally changing the terms of the other members' investments.[33] Engrafting judicial dissolution rights onto an LLC agreement requiring a super-majority consent to dissolution, where default rights to dissolution under the Act have been rejected, would not preserve the bargain these parties made. Generally, our courts uphold

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[32] 6 *Del. C.* § 18-1101(b).

[33] *See, e.g.*, LLC Agreement § 2.6 ("No member may withdraw or resign as a Member from the LLC without the approval of the other Members, except upon consummation of the transfer of the Members' entire Membership Interest to a transferee in compliance with the applicable provisions of Article VII hereof."); *id.* § 3.4.14 (requiring a supermajority vote of the members to "[s]ell all or substantially all of the LLC's or any Center's assets, or authorize the merger or dissolution of the LLC"); *id.* § 3.4.15 (requiring a supermajority vote to "[l]iquidate or dissolve the LLC or file any petition or other request for bankruptcy or insolvency protection of the LLC under any applicable law"); *id.* § 8.1 ("The LLC shall be dissolved, and its assets disposed of, and its affairs wound up, on the first to occur of the following: (i) the approval of a Super Majority-in-Interest of the Members to dissolve the LLC . . . ."); *id.* § 11 ("[U]pon the agreement of a Super Majority-in-Interest of the Members, the business of the LLC as a limited liability company may be transferred to a corporation to be formed for the purpose of conducting such business.").

rights bargained for by contract, and only where "a public policy interest even stronger than freedom of contract" must be vindicated will such rights go unenforced.[34]

To the extent that the Plaintiff argues that it would be inequitable to foreclose judicial dissolution as a remedy where he cannot withdraw as a member, the latter option does exist, although not in a form that may be palatable to the Plaintiff: while Section 2.6 of the Agreement states that "[n]o member may withdraw or resign as a Member from the LLC without the approval of the other Members,"[35] this Section does not *prevent* the Plaintiff from dissociating from the LLC; instead, it provides consequences for such a withdrawal. The Agreement provides that "[i]f a Member does withdraw or resign without such consent and in violation of the applicable provisions of Article VII hereof, the withdrawing Member shall not be entitled to receive any consideration for its Membership Interest."[36] In other words, there is no absolute prohibition on withdrawal, and the Plaintiff's argument that the LLC is insolvent and may require him to undertake further liability is equitably deficient.

In any event, the Plaintiff does have an alternative that would allow him to recover the value of his economic interest in the LLC, if any remains, and to

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[34] *Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, 2013 WL 3353743, at *15 (Del. Ch. July 1, 2013) (internal citations omitted).
[35] LLC Agreement § 2.6.
[36] *Id.*

remove himself from an association with Satellite in a way contemplated by the LLC Agreement: he may pursue an action against Satellite for breach of the LLC Agreement, and if he is successful in doing so, exercise his contractual right to purchase Satellite's interest in the Company. The Plaintiff contends in his Verified Complaint that the Defendants have committed a large number of breaches amounting to Transfer Events which trigger his contractual right to buy out Satellite.[37] The Defendants concede that breach may trigger such a right, under Schedule 5 to the LLC Agreement.[38] According to the Complaint, however, Satellite contends that *it* is the party entitled to purchase the *Plaintiffs'* interest under the contract. Here, where both the Plaintiff and the Defendants contend that a "Transfer Event" has occurred, triggering each party's rights under the LLC Agreement to purchase the others' interest in the Company,[39] a contract action—and *not* a judicial dissolution action, where those issues will necessarily go unresolved—is the appropriate venue for the parties to vindicate their rights.

With these alternatives available, I see no compelling equitable reason to grant a judicial dissolution remedy that the parties have bargained to forgo.

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[37] *See* Compl. ¶¶ 55, 63, 67, 80, 97.
[38] Def.'s Reply Br. at 12.
[39] *See* LLC Agreement § 7.2 ("Members of the LLC shall have certain repurchase rights upon the occurrence of a Transfer Event, which rights shall be exercised pursuant to the terms and conditions of Schedule 5.").

IV. CONCLUSION

I have found that Section 2.2 of the LLC Agreement applies generally to exclude all rights associated with membership not required by law or expressly granted in the LLC Agreement. Because a right to judicial dissolution is not required by law or expressly granted in the LLC Agreement, and because reading the Agreement as a whole it is clear that the parties meant to exclude any right to judicial dissolution, I find that the Plaintiff does not have a right to seek a dissolution under 6 *Del. C.* § 18-802. Satellite's Motion to Dismiss is therefore granted. An order accompanies this Memorandum Opinion.