THE SUPREME COURT OF THE STATE OF DELAWARE

LAW OFFICE OF KRUG, Defendant Below, Appellant/Cross-Appellee. v. A&J CAPITAL, INC. Plaintiff Below, Appellee/Cross-Appellant.	C.A. No. 106, 2019 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2018-0240-JRS

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal of the Court of Chancery's granting of plaintiff below A&J Capital, Inc.'s request for declaratory judgment that a vote removing A&J as the Class B Manager of LA Metropolis Condo I, LLC (the "Company") was invalid. As set forth herein, the trial court erred in applying the contractual manager removal standard, which permits a removal for "gross negligence, intentional misconduct, fraud or deceit" by a majority vote of the Class B Members (the "Members").

The Members removed A&J as the Class B Manager because they had lost confidence in A&J as a result of A&J's self-dealing and related failure to adequately inform the Members concerning the status of their prospective immigration to the United States—the sole purpose of the Members' investments in the Company. A critical factor in keeping the Members' immigration hopes alive was that the Members' respective investments in the Company ($500,000 each, for a total of $100 million) had to remain "at risk." As such, the Company loaned the $100 million to a developer to finance a condominium project. The loan would mature in November 2021. Upon repayment of the loan, A&J would be required to reinvest the money in another qualifying project and to keep the funds "at risk" until all Members received approval of their applications for permanent residence in the United States.

In October 2017, the Company's borrower agreed to prepay the loan, and in connection with the prepayment, A&J demanded that the borrower pay a prepayment fee of $2 million, which ultimately was reduced to $1 million. After agreeing to this fee, A&J sent a notice to the Members soliciting their approval of the loan prepayment and associated $1 million prepayment fee. In that notice, A&J misleadingly told the Members that (i) $800,000 (or 80%) of the prepayment fee was required to be paid to A&J as compensation for a list of enumerated services supposedly rendered in connection with the prepayment of the loan and (ii) if any Member's ballot was not returned by the end of the next month, such Member would be deemed to have consented to the prepayment. A&J separately advised the Members that prepayment was necessary to cure a potential immigration violation that threatened the immigration status of most, if not all, of the Members.

A&J's conduct in connection with the prepayment fee caused the Members to lose trust in A&J as the guardian of their substantial investments, and more importantly, their immigration prospects. A&J was using the transaction it touted as essential to the Members' immigration status in an attempt to extract a significant financial windfall for itself. The work A&J supposedly needed to complete in connection with the loan repayment already was required under the governing documents, and A&J was being compensated handsomely for such work. Moreover, even if A&J would be required to perform additional services, or the prepayment caused a short lapse in its agreed upon revenue to serve as Class B Manager, the amount necessary to make A&J whole would have been a fraction of the $800,000 A&J was attempting to extract. All costs and fees incurred in connection with the repayment and redeployment of funds would have been paid by third parties or reimbursed to A&J by the Company.

Once prepayment was identified as a cure to the immigration violation there was no reason for A&J to insist on ***any*** prepayment fee—regardless of allocation between A&J and the Company. Even if a prepayment fee of some amount was determined to be necessary or desired by the Members, no portion of that payment ***to the Company*** was required to be paid to A&J. A&J recklessly solicited the Members' approval of the prepayment, including by (i) misleading the Members that a return of no ballots whatsoever could and would be deemed to be votes approving the transaction, (ii) not explaining alternatives to fix the immigration violation, (iii) not offering alternative prepayment plans, and (iv) not providing adequate detail about A&J's proposed "additional services." If A&J truly was looking out for the Members' interests, then A&J carefully would have advised the Members about these issues. Because A&J was focused on its own lucre, it jeopardized the Members' immigration status.

As a result, a majority of Members voted to remove A&J as the Class B Manager pursuant to the governing agreements and to appoint defendant below Law Office of Krug as the interim Class B Manager. Certainly, the Members, who each invested $500,000 for the prospect of obtaining “green cards” reasonably could have concluded that the Class B Manager advocating for a prepayment fee that created a risk of jeopardizing their receipt was no longer worthy of their confidence and subject to removal, at a minimum, based on gross negligence.

Once this litigation commenced, Members learned of more wrongdoing. A&J previously executed undisclosed agreements with an entity to which it is beholden, Henry Global. Those agreements provided millions of dollars more in compensation than Henry Global was permitted to receive.

The trial court granted A&J’s request for declaratory judgment based upon a legally erroneous burden of proof and application of the contractual standards of conduct permitting removal of A&J. Its post-trial rulings should be reversed.

SUMMARY OF ARGUMENT

1. The trial court reversibly erred in holding that Krug had the burden of proving that the removal of A&J as Class B Manager was effective.

2. The trial court reversibly erred by applying a heightened standard for removal of A&J as Class B Manager, requiring a showing that (i) A&J caused or intended to cause harm to the Company or the Members and (ii) the Members knew the cause for removal at the time they voted. The operative agreements do not include these requirements, and therefore the trial court should not have implied them.

STATEMENT OF FACTS

A. The Parties

A&J is a California corporation and was the plaintiff below. A&J's founder and President is Frank Xu ("Xu"). Krug is an unincorporated law firm and was the defendant below.

Not appearing in this action by name, but nevertheless directly and personally affected by this case, are the Members of the Company.

B. The EB-5 Program, the Company as an "NCE" and the 200 Investors

Although the key events occurred in late 2017 and early 2018, the nature of the enterprise in which the parties have been engaged since 2014 sets the stage for understanding what occurred later; the *raison d'etre* of that enterprise requires some understanding of United States immigration statutes and in particular the EB-5 Immigrant Investor Visa Program (the "EB-5 Program").

In 1990, Congress enacted the EB-5 Program, pursuant to which foreign nationals can become lawful permanent residents of the United States—also known as "green card" holders—by making a threshold investment ($500,000 in a "targeted employment area," otherwise $1,000,000) in a "new commercial enterprise" ("NCE"). The NCE must create or preserve at least ten jobs for qualified U.S. workers in the United States. (A725).

The foreign nationals must maintain their investment in the NCE while the

United States Citizenship and Immigration Service ("USCIS") processes and approves the applications for permanent residence, ***and the investment must remain "at risk" for the duration of the process*** (the wait time can now exceed ten years). (A725-726).

To qualify for a green card, the immigrant investor must actively be engaged in the NCE. This is done by serving as a limited partner of an enterprise that creates the requisite number of jobs or by investing in an entity that makes a loan to an enterprise that creates the requisite number of jobs. (A726). This case involves investments in an entity that made a potentially qualifying (job-creating) loan.

The Company is an NCE formed in April 2014. Each of the Company's Members invested $500,000, thus raising a total of $100 million. All 200 Members are citizens of China and all have filed applications with the USCIS to obtain permanent residence in the United States based on their investment in the Company. *Id.* Additionally, each Member also paid a $45,000 administrative fee, the purpose and use of which is set out in the Private Placement Memorandum ("PPM") that specifies the terms of each investment. (A120-225).

Pursuant to the PPM, the funds raised were to be, and were, invested in a construction loan (the "Loan") to Greenland LA Metropolis Development I, LLC (including its affiliates, collectively, "Greenland") for the development of a condominium residential tower in Los Angeles (the "Project"). (A726). The Loan matures in November 2021. (A729).

C. Concern over the "At Risk" Requirement for EB-5 Visas

A&J's Complaint filed in the action below admits that its role as the Class B Manager of the Company directly pertains to the immigration issues most essential to the Members. A&J averred its concern that a change of the Class B Manager would "compromise the investors' ability to secure the immigration status ***for which they invested in the Company in the first place***." (A423 at ¶ 38) (emphasis added). A&J alleged that the Company it had been managing "remains committed to ensuring the final completion of its project and the ***successful adjudication of its Class B Member's underlying immigration petitions***." (A417) (emphasis added). A&J's conduct, however, belies that averment—conduct that constituted "cause" for its removal.

As Class B Manager, A&J was charged with devoting its time and resources to immigration issues and "administering the day to day aspects of the business." Among other things, it was to (i) assist "the Regional Center by providing information relating to the Phase 1 Condo Project and the Loan to allow reporting and compliance relative to USCIS", (ii) cause the Company to deploy and maintain the Members' capital in qualifying EB-5 investments; (iii) track and maintain records regarding the Loan, (iv) negotiate loan terms, (v) enforce the Company's rights with respect to loans, and (vi) cause the Members to participate in making management decisions to comply with USCIS regulations (A413 at ¶ 17; A98-99 at § 5.3(d)(ii), A103-04 at ¶5.14(1),(4),(6),(9)). A&J touted that it negotiated for a "pledged account" to hold condominium sales proceeds "to ensure that no diversion of funds takes place so as to be in compliance with the EB-5 rules and regulations…." (A414).

Of paramount importance to the Company and the Members, by mid-2017, concerns arose about the required "at risk" nature of the investment each Member had made, and in particular whether the funds invested by the Members might stop being at risk. It is undisputed that the "accumulation of funds [from sales of condominiums] may reach a threshold of $100 million and may adversely affect investor's immigration status." (A417-418). It also is undisputed that "EB-5 funds must remain 'at risk'" for a considerable period of time, and that "lately, some EB-5 companies have been required to redeploy capital in 'at risk' investments following repayment of EB-5 investments in order to maintain such 'at risk' investment status." (A424).

D. The Prepayment Proposal

Against this backdrop, in the second half of 2017, Greenland and A&J discussed a possible prepayment of the Loan. Although A&J implied that the idea was solely Greenland's, regardless of who first raised the issue or why, it was an idea that, standing alone, would have ameliorated the "at risk" issue.(A414-15).

A memorandum that A&J caused to be distributed to the Members on October 26, 2017 addressed a need to cure a potential immigration violation from an investment no longer being "at risk." (A237-239). The memorandum predicted a nearby completion date for the construction and issuance of a final certificate of occupancy, which "would coincide with a capital buildup in excess of $100 million" in the pledged account. According to the memorandum, this would be "tantamount to ***[the Members'] investment no longer qualifying as being 'at risk', a key requirement under the EB-5 Program***." (A237)(emphasis added). The memorandum then described a step to "cure this potential immigration violation" which was "to allow the developer, Greenland, to prepay the EB-5 loan." (A237)

The Loan documents did not permit prepayment. (A730). However, A&J and Greenland drafted a preliminary proposal for Greenland to repay the Loan before the November 2021 maturity date, which was memorialized in an unsigned Fourth Amendment to the Loan Agreement. Pursuant to the proposed prepayment, Greenland would agree to pay a $1 million "prepayment fee." (*Id.*)

The day after the above-referenced memorandum was sent to the Members, A&J sent a Notice to the Class B Members and Request for Consent to Prepayment (the "Prepayment Notice") (A240-47) that described the prepayment proposal, including the $1 million prepayment fee. The Prepayment Notice provided that $800,000 of the $1 million prepayment fee would be allocated to A&J and $200,000 would be allocated to the Company. A&J included ballots to solicit approval of the proposal. (A730).

The Prepayment Notice claimed that A&J's proposed taking of 80% of the prepayment fee was "for services rendered in connection with the Prepayment" and enumerated eight such services. (A241). A&J already was receiving compensation for these claimed services. (A72 at ¶6(a); A98-99 at ¶¶5.3(d)(ii), (e)(ii)). Although it was disputed at trial whether all the claimed reasons were valid, the inaccuracy of the Prepayment Notice was conceded by A&J's Senior Vice President, Alex Verba ("Verba"), who testified that the eight items listed were "obviously not" all for "services rendered in connection with repayment." (A932-33). A&J was unaware and uninformed that it needed to "ask members to approve a prepayment fee [to A&J] that's not coming from the members themselves." (A934). In connection with the prepayment fee, A&J "decided . . . to give only $200,000 to the company," *id.* 163:24-164:2, and to keep the rest because:

> I'm saying that we weren't obligated to give anything to the investors. It didn't come from the investors – it didn't come from the investors' capital. It didn't come from the investors' interest. It came solely from Greenland. We weren't obligated to give anything.

Id. 164:6-11.

A&J viewed the entirety of the fee as something in which the Company and the Members had no interest, and that it existed because "[A&J] asked for it" because

A&J thought it had been "undercompensated for [the] deal." Id. 168:7, 169:21-23. Regardless, A&J failed to introduce any evidence that ***Greenland*** insisted that any particular sum of money be paid to A&J as a condition to prepayment, as opposed to the Company.

The Prepayment Notice did not provide for a vote solely on the prepayment proposal, separate from whether A&J would be entitled to an extra $800,000. The language of the ballot and Prepayment Notice is unequivocal—in order to vote in favor of the prepayment, which was recommended by A&J as being a "cure" to the looming immigration violation, a Member would be required to accede to A&J's proposal that it (rather than the Company) receive $800,000 (80% of the prepayment fee). (See A240-47). Such a payment to A&J would have been in addition to the $400,000 annual payment to A&J. The ballot also stated that any unreturned ballots would be counted as approving the proposal. Pursuant to the Prepayment Notice, votes were to be returned by the end of November, 2017. The Members voted to reject the proposed prepayment, as bundled with the payment of $800,000 to A&J.

1. *A&J's Actions Questioned in "Chat Room" Postings*

Although considerable time and verbiage was devoted at trial and in the trial court's Opinion on the issue of whether there had been any showing ***before*** the March 2018 removal vote of any wrongful conduct by A&J, pleadings filed by A&J in a defamation case it commenced shortly after the vote reveals that as early as

December of 2017, some of the Members were livid that the proposal anticipated an additional $800,000 to A&J.

A&J represented in a California state lawsuit filed on April 23, 2018 that three Members made statements about A&J to other Members in order to "undermine its position as Class B Manager." (A436 at ¶¶ 17-19). A&J alleged:

- On December 9, 2017, Xiaoyan Li messaged other Members and other persons stating that: "[w]hen they failed to launder money, they became angry out of embarrassment!" (A437 at ¶ 20).
- On the same day, Xiaoyan Li messaged Members and other persons stating: "[A&J Capital is] fixed on getting that $100 million!" (A437 at ¶ 21).
- Xiaoyan Li further stated: "That [expletive] Class B Manager! I never cuss, but I am just dying to go beat the [expletive] out of that Class B Manager Xu. He is such a nefarious, scheming person!" *Id.*
- Xiaoyan Li also stated: "This person is so nefarious, filled with ulterior purpose! There is no way money can be handed over to that Class B Manager!" *Id.*
- On January 3, 2018, Tao Lin messaged other Members and other persons stating that: "It is not a surprise that they are so determined to reinvest again, like Las Vegas SLS, and rob us blind of our principal." (A436 at ¶ 19).
- On January 3, 2018, Weiwei Zhao messaged to other Members and other persons stating: "SLS is a lesson to learn from. So we can't let the Class B Manager get its hands on the money." (A437 at ¶ 22).
- On January 4, 2018, Weiwei Zhao messaged Members and other persons stating that A&J Capital was "stealing our money." (A438 at ¶ 23).

These statements are included not to prove their truthfulness. What is true, however, is that A&J concedes in its California lawsuit that as early as December 2017

Members were concerned about, and were discussing, A&J's conduct as Manager in general and its proposal to obtain $800,000 that otherwise would have gone to the Company. This was on the heels of the withdrawn prepayment plan. The prepayment proposal's linking of (i) an additional payment to A&J with (ii) the recommended "cure" for the "at risk" problem was perceived as improper by at least some Members before any vote to remove A&J.

2. *The Members Removed and Replaced A&J*

On February 26, 2018, a Notice to Class B Members and Request for Vote (the "Removal Request") was distributed to the Members. (A248-49). At least 105 Members voted to remove A&J and appoint Krug as the interim Class B Manager. (A614-723).

Following the removal of A&J, on March 14, 2018, Krug's counsel sent A&J a letter informing A&J about its removal and replacement. (A250-251). Despite A&J's efforts to establish the removal ballots were invalid or inauthentic, the trial court did not make that determination, and therefore the votes were valid and effective.

On March 20, 2018, the Company filed an action in federal court against Krug, seeking a declaratory judgment that the vote to remove A&J was unlawful and an injunction to prevent Krug from taking any action on behalf of the Company. (A252-394). The court denied these requests on March 27, 2018 for lack of standing.

(A394-404, A428 at ¶48). On April 3, 2018, the Company dismissed that action and A&J filed the Court of Chancery action below. (A405).

E. The Agreements

The Company is governed by the Operating Agreement of LA Metropolis Condo I, LLC (the "Operating Agreement"). (*See* A84-119). Pursuant to the Operating Agreement, the Members are empowered to remove A&J as the Class B Manager for "Cause," defined as "gross negligence, intentional misconduct, fraud or deceit, all as more fully set forth in the Management Agreement."[1] (A97 at § 5.3(c)(ii)). (A728).

On or about July 2014, A&J and the Company also entered into the Management Agreement for A&J to be the Class B Manager of the Company. In that role, A&J received an annual management fee equal to 0.4% of the outstanding loan. Once the Loan had reached $100 million, A&J was receiving $400,000 per year as Class B Manager.

The Management Agreement provides that the Class B Manager may be removed via majority vote of the Class B Members for "Cause." (A728). The relevant provision provides:

> The Class B Manager may be removed by Majority Vote (as defined in the Operating Agreement) of the Class B Members

[1] Management Agreement by and among LA Metropolis Condo I, LLC and A&J Capital Investment, Inc. and Joined Members (the "Management Agreement," together with the Operating Agreement, the "Agreements.")

> for gross negligence, intentional misconduct, fraud or deceit; provided, that in any of such events as specified in this Section 12(b), without limiting any of their respective rights and remedies, the Members shall be entitled to exercise their respective powers under the Operating Agreement to appoint a new Class B Manager and to cause the Company to issue written notice of termination to the Class B Manager hereunder.

(A728-29).

F. Program Locators and Processors Such as Henry Global

In addition to the $800,000 self-interested payment sought by A&J, A&J made undisclosed payments from the Company's funds to a company known as Henry Global Consulting Group ("Henry Global"). Henry Global is owned or controlled by a relative of A&J's owner, but in order to evaluate the import of that evidence it is necessary to explain Henry Global's role. **(***See* A727 at ¶8).

Henry Global is a "Program Locator" and "Processor", which the PPM explains as follows:

> The Company may utilize oversea/offshore finders and agents to seek potential investors in the Company (i.e., Program Locators) and document processors to process immigration paperwork and assisting with their immigration paperwork for those investors (i.e., Processors), and the Company may pay a fee to compensate firms and individuals for those services. All of the Administration Fees[2] are paid to Program Locators and Processors for capital raising and document processing and to the Class A Manager and Regional Center as payment for their fees.

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[2] The Administrative Fee is the $45,000 fee each Member paid in addition to his or her $500,000 investment.

*   *   *

> The Company will pay out of the Administration Fee and interest income all ordinary administrative and operating expenses as well as any Offering costs and expenses of the Company incurred by the Company in connection with maintaining and operating its office and the books and records of the Company as well as payments to Managers and other third party service providers for servicing the Loan, assisting with the Offering, and providing immigration services to the Company, Subscribers, and Class B Members.

(A727-28 at ¶11-12). The PPM defines what compensation is permitted (and, naturally what is prohibited) to be paid to Henry Global: "None of such fees shall be paid out of the Subscription Price ***or investment in the Membership Interests of the Company*.**" (A165-166) (emphasis added).

A "Membership Interest" is defined in the PPM as "an offering (the "Offering") of up to two hundred (200) units (the 'Class B Units') with each Class B Unit consisting of a limited liability membership interest in the Company ('Membership Interest')." (A122). A&J recognizes that Membership Interest includes "the Member's right to receive distributions from the Company pursuant to this Agreement." (A760) (quoting Operating Agreement). The only source of income to fund distributions is the interest paid by Greenland. Therefore, the Members' rights to receive distributions from the Company can only refer to interest paid by Greenland. Because such distributions are encompassed by the term

Membership Interest, they may not be used to compensate Henry Global.

There are two contracts between the Company and Henry Global, which were discovered after this litigation commenced that violate the provision precluding payment of fees to the processer from the investment and its earnings. On August 28, 2014, the Company entered into a Distributor Service Agreement with Henry Global wherein Henry Global agreed to perform certain services for the Company in exchange for the compensation set forth in that agreement. (A729). (*See* A226-230). The services described therein are the Program Locator and Processor services mentioned in the PPM. A&J was aware of this agreement, which it "felt was in accordance with the PPM" and with which it did not "have any problem." (A920).

On November 9, 2015, the Company entered into a second Distributor Services Agreement with Henry Global substantially the same as the original agreement, but which specified a different Henry Global entity as the contracting party. (A231-236). A&J executed the second Distributor Service Agreement on behalf of the Company. *Id.* The amount of compensation for Henry Global remained unchanged. (A921-22).

The compensation payable to Henry Global under the Distributor Service Agreements consisted of three types: (1) $41,000 of the $45,000 administrative fee each Member paid upon making his or her investment; (2) 1.3% of the outstanding loan amount (i.e., varies but up to $100,000,000); and (3) 1% of the loan amount at maturity. Between 2015 and 2017, the Company paid $3.2 million to Henry Global in addition to the $8.2 million it paid as part of the $41,000 per investor payment.[3] A&J conceded that the Distributor Services Agreements were not provided or disclosed to the Members, and the Members were not asked to approve them. (A920, A925).

G. A&J's Is Beholden To Henry Global

A&J is beholden to Henry Global. Henry Global was involved with every one of the ten EB-5 companies that A&J managed as of the time of the action below. (A447). Xu is married to the sister of the owner of Henry Global, Henry Zou. *Id.* A&J and Henry Global describe themselves as "strategic partners," and Henry Global considers A&J as one of Henry Global's "Designated Consultants." *Id.* Xu admitted that A&J would be "unable to stay in business" without Henry Global. (A529; *see also* A528).

[3] Xu testified that during 2017, the only services Henry Global performed were distributing memoranda prepared by A&J, and answering inquiries from Members. (A556). Henry Global received $1.3 million in 2018 for such work. (A549-50).

ARGUMENT

I. THE COURT OF CHANCERY ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO KRUG

A. Question Presented

Whether the trial court erred by shifting the burden of proof to Krug. (A884).

B. Scope of Review

This Court's review of whether the trial court applied the correct burden of proof is a question of law subject to *de novo* review. *See Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992); *Yiannatsis v. Stephanis by Sterianou*, 683 A.2d 275, 279 (Del. 1995).

C. Merits of Argument

The trial court found that Krug had the burden of proving that the actions of the majority of members effectively removed A&J as Class B Manager. The trial court found:

> ***If Krug cannot establish that cause for removal existed***, including whether Members knew the cause for removal at the time they cast their votes, then the process by which removal occurred, and the question of whether the Ballots are authentic and valid are irrelevant. For reasons explained below, I find by a preponderance of the evidence that Krug's supposed bases to remove A&J do not rise to the standards for removal set by the Operating and Management Agreements.

Ex. A at 31-32 (emphasis added). The trial court held that "[p]roving [the contractual] predicates for removal is no easy task" and "Krug's supposed bases to remove A&J do not rise to the standards or removal set by the Operating and Management Agreements." *Id.* at 32-33. The trial court also held, "[a]fter carefully reviewing the evidence, I am satisfied that ***Krug did not prove*** that the payments to Henry Global were unauthorized, prohibitively excessive or improperly hidden from the Members. *Id.* at 52 (emphasis added); *see also id.* at 33 ("Proving any one of these predicates for removal is no easy task.).

In so holding, the trial court erred because the party challenging the removal of a manager of a limited liability company bears the burden of proving that the subject removal should be invalidated. *Ensing v. Ensing*,2017 Del. Ch. LEXIS 41, at *2 (Del. Ch. Mar. 6, 2017) (concluding plaintiff "carried her burden of proving that [defendant] had no authority to remove [plaintiff] as manager of [two Delaware limited liability companies]"). The same burden exists in analogous actions to invalidate the removal of directors of Delaware corporations pursuant to Section 225 of the General Corporation Law of Delaware. *See Oberly v. Kirby*, 592 A.2d 445, 457 (Del. 1991) (holding in an action pursuant to 8 *Del. C.* § 225 the burden of invalidating election rests with the challenging party); *Gassis v. Corkery*, 2014 Del. Ch. LEXIS 86, at *40 (Del. Ch. May 28, 2014) (holding plaintiff had the burden of demonstrating director removals he challenged should be invalidated); *In re IAC/InterActive Corp.*, 948 A.2d 471, 493 (Del. Ch. 2008) (holding plaintiff in action pursuant to 8 *Del. C.* § 225 bears the burden by a preponderance of evidence that plaintiff is entitled to relief); *Flaa v. Montano*, 2014 Del. Ch. LEXIS 87, at *21 (Del. Ch. May 29, 2014) ("[t]he burden of proving that a director's removal is invalid rests with the party challenging its validity") (quoting *Unanue v. Unanue*, 2004 Del. Ch. LEXIS 153, at *45-46 (Del. Ch. Nov. 9, 2004)).

In the case below, A&J filed an action for a declaratory judgment seeking to invalidate the actions taken by a majority of the Members resulting in A&J's removal as the Class B Manager. Accordingly, A&J bore the burden of proving that the actions taken by the Members should be invalidated because the members lacked cause to remove A&J. *See Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008) (holding burden of proof always borne by plaintiff in declaratory judgment action); *Policemen's Annuity and Benefit Fund of Chi., Ill v. DV Realty Advisors LLC*, 2012 Del. Ch. LEXIS 188, at *32-36 (Del. Ch. Aug. 16, 2012), *aff'd*, 75 A.3d 101 (Del. 2012) (noting that the parties to the limited partnership agreement could have specified in the document who has the burden of proving removal was valid, and because they failed to do so, the Court of Chancery "must look to the default rule, which places the burden of proof on the limited partners [plaintiffs]"). In light of this error by the trial court, the judgment should be reversed and remanded so that the trial court can evaluate the evidence from the proper perspective. *See In re Will of Melson*, 711 A.2d 783, 788 (Del. 1997) (reversing trial court on burden of proof and requiring that the trial court "upon review *de novo*, evaluate the evidence from a different perspective").

II. THE COURT OF CHANCERY ERRONEOUSLY APPLIED A HEIGHTENED STANDARD FOR REMOVAL

A. Question Presented

Whether the trial court erred by applying a heightened standard for removal of A&J as the Class B Manager by requiring a showing that (i) A&J caused or intended to cause harm to the Company or the Members and (ii) the Members knew the causes for removal at the time they cast their votes. (A821, A845 at n.8; A889-92, A899).

B. Scope of Review

This Court's review of whether the trial court applied the correct contractual standard for removal of A&J pursuant to the applicable agreements is a question of law subject to *de novo* review. *See Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014) (holding questions of contract interpretation are reviewed *de novo*.

C. Merits of Argument

The trial court found that the standards for removal set forth in the Agreements are not just standards of conduct, but require that the conduct was "undertaken for the purpose of causing, or did cause, harm to the Company or its Members." (Ex. A at 32, 34). Accordingly, the trial court found that in order for A&J to have been properly removed for cause pursuant to the removal provisions, A&J must have intended to deceive or harm, or actually harmed, the Company or its Members. (Ex.

A at 40). Based on the trial court's rationale, regardless of how uninformed or deceitful A&J acts, the Members cannot remove A&J without demonstrating actual harm to the Company or the Members or without demonstrating *scienter*. The Agreements do not express this requirement; they provide that the Members may remove the Class B Manager for cause in the event of "gross negligence, intentional misconduct, fraud, or deceit." (A97 at ¶5.3(c)(ii); A76 at ¶12(b)). These standards are not specifically defined, but are silent as to harm or an intent to harm.

1. The Agreements' Manager Removal Provisions Do Not Require Harm Or An Intent To Cause Harm

"Limited liability companies are creatures of contract, and the Delaware Limited Liability Company Act states that '[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract.'" *CSH Theatres, LLC v. Nederlander of San Francisco Assoc.*, 2015 Del. Ch. LEXIS 115, *34-36 (Del. Ch. Apr. 21, 2015). As a result, the precise language of the Agreements is determinative. *See id.* at *36 (citing *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi.*, 75 A.3d 101, 106-07 (Del. 2013) (quoting the "maximum freedom of contract" language in the Delaware Revised Uniform Partnership Act … and stating that the "analysis here must focus on, and examine, the precise language of the LPA that is at issue"); *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 100 (Del. 2013) ("[W]e begin our analysis by examining what duties the Defendants owe to Encore's limited partners under this LPA's precise language."); *Gerber v. Enter.*

Prods. Hldgs., LLC, 67 A.3d 400, 418 (Del. 2013); *Norton v. K-Sea Trasnp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013)); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1991) ("Section 18-1101(b) of the Act, like the essentially identical Section 17-1101(c) of the LP Act, provides that 'it is the policy of [the Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.'").

The trial court impermissibly interpreted the Agreements to include non-existent restrictions on the Members' ability to exercise their franchise to remove A&J for cause—a specifically bargained for provision set forth in the Agreements. *See Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 313 (Del. Ch. 2002) (noting the Court will only enforce contractual "restriction impinging upon fundamental electoral rights [that is] manifested in clear and convincing evidence"). The Management Agreement expressly confirms the Members' right to exercise their removal authority. (A76 at ¶12(b)) (confirming that "the Members ***shall be entitled*** to exercise their respective powers under the Operating Agreement to appoint a new Class B Manager") (emphasis added).

The fact that the Members stopped A&J from effecting a prepayment pursuant to which A&J would receive $800,000 is not relevant to whether or not A&J acted with gross negligence or with deceit. Acting in bad faith or in a grossly negligent manner does not require a corresponding injury or harm. Thwarted gross negligence or intentional misconduct is still gross negligence or intentional misconduct.

Although the trial court relies on *Dawson v. Pittco Capital Partners, L.P.* for its definition of intentional misconduct in the context of a breach of fiduciary duty action, that action includes an instructive example of a contractual standard of conduct that actually did require harm, which is starkly different than the provisions in the Agreements. 2012 Del. Ch. LEXIS 92, at *104 (Del. Ch. Apr. 30, 2012). In *Dawson*, unlike in the instant action, the limited liability operating agreement at issue specifically discussed the concepts of liability, loss and damage associated with conduct that is grossly negligent, fraudulent or constituted intentional misconduct. *Id.* at *103-04. That provision provided:

> No Member, Director or Officer shall have any duty to any Member or the Company, except as expressly set forth herein or in other written Contracts. Except as expressly set for herein or in any other written Contract, no Member, Director or Officer of the Company shall be liable to the Company or to any Member for any loss or damage sustained by the Company or any Member, ***unless the loss or damage shall have been the result of gross negligence, fraud or intentional misconduct*** of such Member, Director or Officer, or in the case of an Officer, breach of such Person's duties pursuant to Section 4.6.

Id. at *104 (emphasis added). Importantly, the removal provisions of the Agreements do not include this language about "loss" or "damage." If the Members intended to require that harm or damage result from the Class B Manager's grossly negligent conduct, deceit or intentional misconduct in order to remove the Manager, then such language would have been included.

The LLC Act does not provide default rules for the removal of a manager of a limited liability company. Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Delaware Limited Liability Companies*, § 9.05[C] (2d. ed. 2018). Therefore, if the Agreements had been silent on the removal of Managers, the Members arguably could not have removed the Managers for any reason. *Id.* Because the Agreements contain specific provisions for the removal of the Managers for cause, the trial court was required to apply the express language of those provisions. The trial court, however, went beyond the written text of the Agreements and inserted a harm requirement by holding, "[i]f there is no ***risk*** of harm to the Company as a result of the Manager's actions, then there can be no deviation from the standards of care or conduct contemplated by the definitions of gross negligence, intentional misconduct, fraud or deceit." Ex. A. at 35 (emphasis added).

First, a "risk" of harm is different than the *scienter* to cause harm or actually causing harm. And, a risk of harm did exist. A&J's greed in linking the prepayment with its own substantial payment (2 years' worth of annual fees) is a "risk" of harm. This conduct put the immigration status of the Members in jeopardy—a risk of harm—by forcing the Members to accept or reject a fix that was tied to a hot button issue (paying $800,000 to A&J for little to no consideration). A&J's conduct not only put at risk the Members' immigration prospects, it also risked diversion of

Company assets to the Class B Manager—a financial harm. That type of self-interested behavior is problematic for the ongoing relationship—that is, if A&J got away with a self-interested transaction this time, it is a slippery slope. A&J's behavior eroded the trust of a majority of the Members. That alone is a risk of harm. Second, the trial court cites only one case, *Ramsey v. Georgia Southern University Advanced Development Center*, 189 A.3d 1255 (Del. 2018), to support its holding that harm cannot be divorced from the contractual removal standards set forth in the Agreements. *Ramsey* does not support the trial court's holding, however. *Ramsey* involved an asbestos related tort claim and analysis as to whom a manufacturer of a dangerous asbestos containing product owes a ***duty***. 189 A.2d at 1279-80. The Court, in *Ramsey*, recognized that questions of ***ultimate liability***—which require the plaintiff to prove all elements of the tort claim, including harm—is a separate and more encompassing issue. *See id.* at 1284. Of course, harm is a required element of proving liability in a plenary tort claim, but that is a far cry from the trial court's proposition that harm is a required precondition to remove A&J as the Class B Manager.

The trial court also did not consider *R&R Capital, LLC v. Merritt*, a decision whereby the Court of Chancery permitted the removal of a manager for cause based on fraud without requiring proof of resulting harm to the limited liability company. 2009 WL 2937101, at *4-5 (Del. Ch. Sept. 3, 2009). The subject removal provision in that action provided:

> The Manager may be removed as Manager for "Cause" upon the written demand of [Plaintiffs]. Such written demand shall set forth with specificity the facts giving rise to such Cause. As used herein, a removal for "Cause" shall mean that the Manager to be removed shall have (a) engaged in fraud or embezzlement, (b) committed an act of dishonesty, gross negligence, willful misconduct, or malfeasance that has had a material adverse effect on the Company or any other Member, or (c) have been convicted of a felony.

Id. at *6. Although subsection (a) of this provision required a showing with "specificity" that the manager "engaged in fraud," the Court of Chancery found that the removal was valid without requiring a finding of a resulting harm to the Company. Only subsection (b) of this removal provision, concerning "gross negligence" and "willful misconduct," specifically required a showing of harm, which was described as "a material adverse effect on the Company or any other Member." *Id.* Such a specific requirement of harm is not included in the removal provisions of the Agreements at issue in this action.

Finally, from a policy perspective, it would be a mistake to require that the standards for removing managers of limited liability companies rise to a level of actually proving damages as required to prove plenary claims for liability.

2. A&J Acted, At A Minimum, With Gross Negligence

As a result of the fact that the terms "gross negligence" or "intentional misconduct" were not defined in the Agreements, the trial court was required to apply the traditional interpretations of these standards, including under analogous corporate law. The trial court erred when it applied a heightened gross negligence standard. Gross negligence is the equivalent of breaching the fiduciary duty of care. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 664 (Del. Ch. Nov. 18, 2012) (holding limited liability company agreement's "gross negligence" language "is the standard for evaluating a breach of the duty of care"); *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 115 & n.6 (Del. Ch. 2009). "The duty of care requires that directors 'inform themselves, prior to making a business decision, of all material information reasonably available to them.'" *In re Synutra Int'l Inc. S'holder Litig.*, 2018 Del. Ch. LEXIS 266, at *15 (Del. Ch. Feb. 2, 2018) (quoting *Aronson*, 473 A.2d 805, 812 (Del. 1983); *see also Dawson*, 2012 Del. Ch. LEXIS 92 at *111, *127-28 (describing "due care factors" as a "loose, sloppy deal process that strays far from what is standard and expected of an informed, well-functioning board"). Specifically, "[i]n the duty of care context with respect to corporate fiduciaries, gross negligence has been defined as a reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 Del. Ch. LEXIS 151, at *61-62 (Del. Ch. Aug. 18, 2017) (citing *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005)).

Dawson is again instructive. The *Dawson* Court described the duties to refrain from acting in a manner constituting gross negligence, fraud or intentional misconduct as "only the duty of care and a small sliver of the duty of loyalty (the duty to refrain from intentional misconduct)."[4] *Id.* at *111. The Court of Chancery also noted that "intentional misconduct involves a different mental state than gross negligence." *Id.* at *121 (discussing that a claim for intentional misconduct is easier to defeat).

Based on the trial court's view of the removal provisions, if the Members completely lost the trust of the Class B Manager because of grossly negligent or deceitful conduct, they would be stuck with the Class B Manager because the Class B Manager was stopped by the Members before it could consummate the harmful act. This is a drastic result that was not part of the Members' bargain contained in the Agreements. The rationale for including a gross negligence removal standard—a fairly low standard on the hierarchy of corporate and commercial standards of conduct—is to enable constituents to replace a manager that is not performing adequately in a manner that is more than simple negligence. But that does not mean the Members needed to show intentional misconduct, *scienter* or harm. Such a finding would turn the case law on gross negligence and duty of care on its head.

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[4] In dismissing the gross negligence claim, the Court of Chancery found that the claim was not fairly presented because the phrases "gross negligence" and "duty of care" were not used in the complaint, and the allegations focused almost exclusively on self-dealing and duty of loyalty issues. *Id.* at *115-117.

The trial court appears to have overlooked that gross negligence only requires reckless indifference and not *scienter* to act improperly. Other than reciting the standard for gross negligence and concluding that A&J's conduct does not rise to the level of gross negligence, the trial court ends its analysis of gross negligence, and focuses on the standard of conduct for intentional misconduct and harm. (*See* Ex. A at 43) ("In hindsight, perhaps A&J should have structured the vote differently or separated the prepayment proposal from the fee, but neither of these choices rises to gross negligence, bad faith, fraud or deceit when A&J informed the Members of the exact terms of the plan and the structure of the vote.")

The trial court did not consider *Venhill Limited Partnership v. Hillman*, a relevant decision whereby the Court of Chancery found that an investment in a generationally unprofitable company to further a manager's personal interest in serving as the chief executive of the failing entity constituted gross negligence and willful misconduct. 2008 Del. Ch. LEXIS 67 (Del. Ch. June 3, 2008). In so finding, the Court of Chancery articulated that the decisions made by the manager

> did not involve any rational consideration of relevant factors. He did not make any genuine effort to comply with the expected duty of care. No rational investor would have made the decisions Howard did, or in the manner he did.

Id. at *94. A&J's conduct similarly was grossly negligent under these standards and need not have risen to the type of conduct described by the trial court.

a. A&J's Self-Dealing Does Not Require a Showing of Harm

A&J's self-interested attempt to obtain for itself the majority of a prepayment fee to be paid by the borrower to the Company rises to a level of intentional misconduct, but, at a minimum, constitutes gross negligence. The Company was the lender and it was the Company's money that the borrower would repay. Moreover, the Company paid all of the costs and fees associated with the Loan, which were not paid by the borrower. In light of the fact that the Company was the lender that funded the Loan and paid all associated fees, the Company should receive all fees paid back by the borrower, including the entirety of the prepayment fee. (A960, A966). A&J did not pay anything to the borrower and had no legitimate right to $800,000 of the prepayment fee. The $800,000 could have offset the Company's payment of Loan expenses (or increased the Members' return on investment).

The fact that A&J, as Class B Manager for the Company, attempted to obtain a significant payday without disclosing to the Members the real reason for this payment—or even obtain such a payment at all— and all other viable options for the Members, is gross negligence and intentional misconduct. Simply stated, A&J intended to receive 80% of the $1,000,000 prepayment amount for itself, and it is improper conduct for one in a position of authority that manages an enterprise for constituents to self-deal and divert funds to itself.[5] (*See* A948-49).

Not only did A&J get caught self-dealing, the Prepayment Notice was deceitful because it inaccurately stated that the $800,000 prepayment fee to be received by A&J "shall be payable" as compensation "for services rendered in connection with the Prepayment."[6] (A241 at ¶1(b)(iii)(A)). If the inaccurate language indicating the fee was required was a mere oversight, then this could fall within the category of simple negligence. But the evidence and motivations indicate that it was not an oversight. This is corroborated by A&J later abandoning the justification that the fee would be paid for "additional services," but rather the diverting of $800,000 to itself was to recoup revenue it would lose from the prepayment.[7] Either way, these reasons are self-interested and therefore rise to the predicate standard of gross negligence or intentional misconduct.

Before it changed course, A&J offered to the Members eight "additional

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5 This is the case even if the Agreements included disclaimers of fiduciary duties because (again), there is a substantive distinction between manager liability for breach of duty and manager susceptibility to removal.

6 A&J never requested an increase in compensation from the Members. A&J simply informed the Members that $800,000 was required to be paid to it for the prepayment. (A241 at ¶1(b)(iii)(A)) (providing the $800,000 "shall be payable to the Class B Manager.").

7 A&J did not include an explanation of "changed circumstances" that rendered its contractual compensation insufficient, nor does the Prepayment Notice include this motive. (A933, 946A; A487-488, *see also* A241-247).

services" in an effort to justify why A&J was paying $800,000 to itself. A&J never attempted to explain to the Members that the $800,000 was intended to recoup for A&J purported lost revenue due to prepayment or for work previously done for which A&J believed it already was compensated. (A240-47; A933; A576; A494). As for the supposed "additional services" initially offered by A&J as justification for an additional $800,000 to itself, A&J's Prepayment Notice was misleading because (i) A&J already was obligated to perform certain services, even if related to prepayment and (ii) certain of the services already were performed and/or were unrelated to prepayment (A932)[8]:

- "Negotiating with the Borrower of the Fourth Loan Amendment": The Operating Agreement already required A&J to negotiate loan agreements or amendments. (A98 at ¶5.3(d)(ii)(7); A491-92). A&J is compensated for this service by its existing management fee. (A72 at ¶6(a); A99 at ¶5.3(e)(ii); A492; A577-78). Greenland paid the costs and fees associated with the proposed prepayment; A&J did not incur out-of-pocket expenses. (A930, A949-50; A573-74; A472-73, A490, A493).

- "negotiating ***prior*** amendments to the Loan Agreement" (emphasis added): These prior amendments relate to the First through Third Loan Amendments, which already had been completed and were unrelated to prepayment. (A481-82) (emphasis added).

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[8] The services discussed in all bullet points other than the first and last were unrelated to prepayment. They are services already required of A&J under its general management obligations. (A98-99 at ¶5.3(d)(ii) (listing 12 categories of the Class B Manager's duties, which include but are not limited to "[a]dministering the day-to-day aspects of the business of the Company…."). As such, A&J already was entitled to compensation for those services under the Agreements. (A72 at ¶ 6(a); A99 at 5.3(e)(ii) (providing 0.4% of outstanding Loan amount per annum to A&J as its management fee).

- “negotiating inter-creditor terms with the secured lender”: This service was performed before the proposed prepayment. (A482-83). There were no “inter-creditor” terms to negotiate. (A484-85).

- “preparing documentation and conducting research with respect to preserving the collateral securing the Loan”: This is unrelated to the proposed prepayment, and unnecessary if the Loan is being prepaid. (A973-74). To the extent this service ever was performed, it would have been done so well prior to the proposed prepayment and A&J would have received compensation pursuant to the Agreements. (*Id.*).

- “assisting developer to organize the construction supporting documents”: Construction was complete prior to the proposed prepayment and A&J would have performed and been compensated for this service in the context of approving Loan disbursements. (A98-99 at ¶ 5.3(d)(ii); A489; A974-75). Even so, organization of construction supporting documents is unrelated to and performed regardless of prepayment. (A489; A974-75).

- “coordinating execution of legal documents relating to the Company”: There is no obvious or articulated connection between this vague service and prepayment. (A240-41 at ¶1(b)(iii)(A)). To the extent this category of service relates to actual work done, such work would have fallen within A&J’s general management responsibilities. (A975).

- “continued oversight of the Company and investment management”: This bears no connection to prepayment. To the extent it expresses a legitimate service rendered, it is a service that falls within A&J’s general duties for which it already is compensated, regardless of prepayment or lack thereof. (A571-72).

- “Identifying opportunities for redeployment of capital”: A&J must provide this service regardless of prepayment. (A103-05 at ¶ 5.14) (“The Managers shall operate the Company in a manner that is designed to comply with legal and policy requirements of the EB-5 Program….”). Compliance with these “legal and policy requirements” obligates the Company to keep its EB-5 funds invested in a qualifying investment until immigration applications of all investors are approved and green cards are issued. (A977; A103 at ¶ 5.14 (1) (specifically requiring the Managers to “***deploy*** the Capital Contributions of Class B Members in job creating activity constituting the Project, directly or indirectly, and to keep such funds invested (including by loan) in job creating activity until all Class B Members have received adjudication of removal of conditions from permanent residence"); A103 at ¶5.14 (4) (requiring the Managers to "***maintain*** an ongoing business deploying capital to job-creating activity)). Compliance further requires that A&J redeploy the invested funds following repayment, whether early or at maturity. (A977) (emphasis added).

Even if A&J was not contractually obligated to redeploy a Loan repayment, the cost to identify opportunities for redeployment is a fraction of the $800,000. (A935) (cost would be $150,000). Moreover, A&J conceded that all costs and expenses associated with a redeployment would be paid by the borrower and the Company, and therefore it would not incur additional out-of-pocket expenses associated therewith. (A950-51; A580-82, A583-86). The Agreements provide that A&J is entitled to reimbursement of all such out-of-pocket expenses from the Company (if the borrower does not pay them).

Failing to inform the Members that A&J already was compensated for the additional services for which it now was seeking additional compensation is either intentional misconduct or a reckless indifference to the Members' interests, i.e., grossly negligent. It also was misleading for A&J to claim that it would lose revenue due to the prepayment—a portion of its annual 0.4% of the outstanding loan balance. If A&J redeployed the funds to another loan, as it was required to do upon a prepayment, then A&J would have continued to receive 0.4% of the outstanding loan balance of the reinvested funds. A&J needed to quickly redeploy the money after the borrower prepaid the loan, and thus any loss of fees would be de minimis (i.e., 2 to 3 months of lost fees). (A587). Even if the prepayment would have caused A&J to lose some of its expected revenue, there is nothing in the applicable agreements that would permit A&J to divert $800,000 to recoup lost revenue. (*See* A74 at ¶10(b)) (providing that "the Company shall not be responsible for any loss suffered by the Class B Manager as a result of the Developer's failure to repay the Development Loan.") A&J's revenue was not guaranteed. A&J's omitted and misleading disclosures cannot reasonably be characterized as mere negligence.

b. The Payments to Henry Global Are Grossly Negligent And Do Not Require a Showing of Harm

A&J failed to demonstrate that its payment of millions of dollars from the Company to its familial partner, Henry Global, was not gross negligence or intentional misconduct warranting removal. The Members knew about payments to Henry Global prior to the removal of A&J and were suspicious about them. A&J claims it did not know that it concealed the explanation for the payments from the Members until after the removal. Henry Global distributed the Financial Statements on behalf of A&J and thus actively concealed information relating to the payments by removing pages from the Financial Statements of the Distributor Service Agreement. In addition, the Members discovered that the Distributor Services Agreement violated the PPM by requiring the Company to pay Henry Global using the Members' investment income rather than the Administration Fee.

It is inexcusable—and supports removal—that A&J never sought the

Members' approval of the Distributor Services Agreement, pursuant to which A&J would pay millions of dollars of Company funds to Henry Global—sums which far exceeded the return on investment recoupable by the investors who bore all the risk. (A925, A996; A499-500) A&J concealed the Distributor Services Agreement from the Members. (*Id.*) And, A&J never provided the necessary Mandarin translation of the Financial Statements disclosing the payments to the Members. (A927, A953, A956, A963-64; A599, A505-06). This is a reckless indifference to the Members.

Further problematic is the trial court's recognition that payments under the Distributor Services Agreements approved by A&J likely constituted double dipping by Henry Global. (Ex. A at 50). The trial court was not troubled by this because (i) there was no evidence that A&J was aware of the double dipping and (ii) there was unallocated fee money remaining under the PPM. (*Id.* at 49-51). A&J is tied to Henry Global by family relationships and relies on Henry Global for its existence. (*See supra* at 19). That it did not know of the double dipping is a dubious proposition. Nevertheless, A&J's lack of knowledge or effort to inform itself about the double dipping is a classic example of a breach of the duty of care—grossly negligent. Equally devoid of care would be a decision to condone an extra fee grab simply because it was mathematically possible under the PPM.

3. The Removal Provisions Only Require That Cause Exists At The Time Of Removal

The trial court erroneously held that the Members could not establish cause for A&J's removal unless they had knowledge of the cause for removal when they cast their votes. (Ex. A. at 31). To the extent the trial court held that the Members must have discussed the reasons for removal prior to or when they voted. This too is erroneous. The removal provisions do not specifically provide these requirements for removal. *Cf. DV Realty Advisors*, 75 A.3d at 107 (affirming removal of general partner where operative agreement expressly required a determination of removal by the limited partners).

It appears that the trial court relied on *Davenport Group MG, L.P. v. Strategic Investment Partners, Inc.*, 685 A.2d 715 (Del. Ch. Jan. 23, 1996), but *Davenport* does not stand for this proposition. *Davenport* merely confirms that cause must exist to justify a "for cause" removal. A good faith basis alone is enough to justify a for cause removal. *See Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *16 & n.50 (Del. Ch. July 21, 2000) (finding no evidentiary basis to challenge the good faith belief that cause existed for removal); *2009 Caiola Family Tr. v. PWA, LLC*, 2014 Del. Ch. LEXIS 63, at *42-44 (Del. Ch. Apr. 30, 2014) (expressing willingness to consider additional grounds for removal for cause that were not presented on motion for summary judgment). The *Davenport* Court's ruling supports Krug's position that the discovery of the payments to Henry Global in violation of the PPM and A&J's conflicted relationship with Henry Global after the removal vote alone can be grounds for the Members' removal of A&J. *See Davenport*, 685 A.2d at 723.

CONCLUSION

For the foregoing reasons, Krug respectfully requests that this Honorable Court reverse the judgment of the Court of Chancery.

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CERTIFICATE OF SERVICE

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