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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 CORRECTED REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

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SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. Denied. The trial court properly denied summary judgment in A&J's favor after finding that the relevant agreements did not provide A&J with a right to pre-removal notice or a right to be heard before removal.

STATEMENT OF FACTS

Appellant/Cross-Appellee Law Office of Krug ("Krug") respectfully submits that the issue presented by Cross-Appellant's cross-appeal is solely an issue of law. Accordingly, apart from recognizing that the trial court denied summary judgment in A&J's favor after finding that the common law does not alter or amend the Company's operating agreement with respect to the removal provision at issue,[1] the cross-appeal does not necessitate an additional factual recitation. To the extent a factual recitation is required, Krug incorporates by reference the statement of facts contained in Appellant's Opening Brief.

[1] The trial court's Letter Opinion on A&J's motion for summary judgment ("SJO") is attached to Cross-Appellant's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal at Exhibit 1.

ARGUMENT

Krug's Answering Argument on Cross-Appeal

I. THE COURT OF CHANCERY PROPERLY DENIED A&J'S MOTION FOR SUMMARY JUDGMENT

A. Question Presented

Whether the trial court properly denied summary judgment in A&J's favor as a result of finding that the relevant agreements did not provide A&J with a right to pre-removal notice or a right to be heard before removal.

B. Scope of Review

This Court's review of the trial court's denial of summary judgment is a question of law subject to *de novo* review. *See Bathla v. 913 Market*, 200 A.3d 754, 459 (Del. 2018).

C. Merits of Argument

The trial court correctly concluded that, under the relevant agreements, A&J was not entitled to pre-removal notice or a right to be heard prior to removal. The trial court also correctly concluded that the common law in the corporate director context should not be applied to alter or amend the Company's Operating Agreement with respect to for-cause removal procedures.

1. LLCs are Creatures of Contract

Despite A&J's argument to the trial court on summary judgment that the

common law in the corporate director context should be grafted onto alternative entities like LLCs, the trial court properly declined to so hold. Instead, applying the same distinction between LLCs and corporations as A&J insisted should be applied to the central question of duties and removals of managers, the trial court appropriately pointed to precedent from the Court of Chancery:

> "[A]n alternative entity, like the LLC at the center of this litigation, is not the same thing as a corporation."

2009 *Caiola Family Tr. v. PWA, LLC*, 2015 WL 6007596, at *14 (Del. Ch. Oct. 14, 2015). As recognized by the trial court, "Delaware law with regard to limited liability companies is contractarian." *Huatuco v. Satellite Healthcare*, 2013 WL 6460898, at *1 (Del. Ch. Dec. 9, 2019), *aff'd,* 93 A.3d 654 (Del. 2014). Parties to LLC agreements are afforded broad discretion in drafting such agreements, and with limited exceptions, those agreements will be honored by Delaware courts. *See Huatuco*, 2013 WL 6460898, at *1; *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999). Indeed, Section 18-1101(b) of the LLC Act emphasizes that "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." 6 *Del. C.* § 18-1101(b). Importantly, "Delaware follows the well-established principle that in construing a contract a court cannot in effect rewrite it or supply omitted provisions." *Rockwell v. Rockwell*, 681 A.2d 1017, 1020-21 (Del. 1986).

2. The LLC Act Permits an Operating Agreement to (i) Provide Consequences for Ill-Performing Managers, Including Removal, and (ii) Dictate Manager Removal Procedures

Section 18-405 of the LLC Act provides as follows:

> A limited liability company agreement may provide that:
>
> (1) A manager who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement shall be subject to specified penalties or specified consequences; and
>
> (2) At the time or upon the happening of events specified in the limited liability company agreement, a manager shall be subject to specified penalties or specified consequences.

6 *Del. C.* § 18-405. Hence, the LLC Act specifically has addressed that LLC managers are subject to the provisions of a company's operating agreement, that an operating agreement can delineate the standards of conduct for those managers, and such managers, should they fail to adhere to the contractually enumerated standards or otherwise fail to perform their duties in compliance with the operating agreement, may be subject to consequences spelled out in the agreement. And, of course, one such consequence is removal as manager.

3. The Company's Operating Agreement Directly Speaks to and Governs Class B Manager Removal

The Operating Agreement empowered the Class B Members 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." (A97 at § 5.3(c)(ii); A728 at ¶14). Section 4.8 of the Operating Agreement provides that "the Class B Members, by Majority Vote, shall have the sole and exclusive right to approve or disapprove the following . . . (f) Subject to 5.3, appointment, reappointment and removal, as applicable of any Manager." (A94 at § 4.8(f)).

In turn, the Management Agreement provides that the Class B Manager may be removed via Majority Vote[2] 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 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).

As recognized by the trial court, the Operating Agreement and Management Agreement set forth a "comprehensive procedure" for removal: the Class B Members may raise and vote on the issue, and if there is a Majority Vote in favor of

[2] "Majority Vote" is defined as "Class B Members who, at the time in question, have Percentage Interests aggregating more than fifty percent (50%) of all Percentage Interests held by all Class B Members." (A87).

removal, then the "Members shall be entitled to . . . appoint a new Class B Manager and to cause the Company to issue written notice of termination to the Class B Manager[.]" (SJO at 10, n.24). That is precisely what happened.

4. Section 18-1104 of the LLC Act is Not Applicable Because There is No "Gap" Necessitating Reference to the Common Law – Section 18-405 Addresses Consequences of Manager Malfeasance

Reliance on the LLC Act's "gap-filler" provision – Section 18-1104 – in the manager removal context is misplaced where, as here, the relevant operating agreement addresses the triggers and procedures for removal.

Section 18-1104 provides as follows:

> In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern.

6 *Del. C.* § 18-1104. As noted above, Section 18-405 specifically speaks to and permits an operating agreement to address the consequences of a manager's failure to perform in accordance with an operating agreement, and grants the parties to the agreement the contractual ability to provide for penalties or specified consequences. Because the Operating Agreement and Management Agreement provide that (a) the Class B Manager – here, A&J – cannot act with "gross negligence, intentional misconduct, fraud or deceit," and (b) in the event the Class B Manager does so act, it can be removed as Class B Manager, the Company's Operating Agreement and Management Agreement govern the removal of the Class B Manager, including

A&J. Simply stated, there is no "gap" to fill such that the trial court should have turned to Section 18-1104 and then, in turn, the common law in the corporate director context.

Distilled to its core, A&J's position is simple: even though it did not contract for a pre-removal notice provision (although it could have), nor did it contract for an opportunity to respond to a pre-removal notice (although it could have), A&J should still have the ability to rewrite the parties' agreements via reference to Section 18-1104 and force incorporation of common law corporate director protections in the LLC manager removal context. A&J failed to bargain for such protections – protections that are routinely used in Delaware LLC operating agreements – and Delaware courts should not borrow from corporate common law simply to provide A&J with a different deal than the one it actually struck.

A&J's motion for summary judgment was properly denied and the case properly permitted to proceed to trial.

Krug's Reply Argument on Appeal

I. The Trial Court Improperly Shifted the Burden of Proof to Krug

A. A&J Bore the Burden of Proof in the Trial Court

A&J initiated the action as plaintiff in the trial court and sought, pursuant to Sections 18-110 and 18-111 of the LLC Act, a declaration of the invalidity of its removal as Class B Manager of the Company and that its replacement as Class B Manager by Krug was invalid. (A724). Section 18-110 of the LLC Act provides

> [u]pon application of any member or manager, the Court of Chancery may hear and determine the validity of any . . . removal . . . of a manager of a limited liability company, and the right of any person to become or continue to be a manager of a limited liability company, and, in case the right to serve as a manager is claimed by more than 1 person, may determine the person or persons entitled to serve as managers; and to that end make such order or decree in any such case as may be just and proper.

6 *Del. C.* § 18-110.

It is axiomatic that a plaintiff bears the burden of proof at trial. "Plaintiffs have the burden of proving each element, including damages, of each of their causes of action against each Defendant by a preponderance of the evidence." *OptimisCorp v. Waite*, 2015 Del. Ch. LEXIS 222, at 188 (Del. Ch. Aug. 26, 2015); s*ee also TA Operating LLC v Comdata, Inc.*, 2017 Del. Ch. LEXIS 166, at *52-53 (Del. Ch. Sept. 11, 2017) (recognizing that "[p]laintiffs . . . have the burden of proving each element, including damages, of each of their causes of action against each Defendant or Counterclaim-Defendant, as the case may be, by a preponderance of the

evidence.”). This is equally true in the context of declaratory judgment actions, including those brought under Section 18-110.

A&J’s argument also fails for a practical reason, as it means that, at the inception of trial, A&J could have rested without introducing a word of testimony or scrap of evidence, following which it would have been entitled to a favorable decision had Krug rested as well. To state the point is to refute it—Krug had been elected Class B Manager, and it was A&J that needed to convince the Court that the vote was invalid.

Accordingly, absent a determination by the trial court that the burden of proof should have been shifted to from A&J to Krug on A&J’s request for declarations pursuant to Sections 18-110 and 18-111, the burden of proving by a preponderance of the evidence that A&J was entitled to such declarations remained with A&J.

B. The Trial Court Never Addressed In Advance – Much Less Determined – That the Burden of Proof Should be Shifted to Krug

The issue of which party bore the burden of proof was never litigated in the trial court. Indeed, the trial court never addressed burden. Instead, the trial court – without discussion and without setting forth a basis for a shift of the burden of proof from A&J to Krug – simply assumed that Krug bore the burden, and did not provide any advance notice to Krug of its view.[3] The court simply announced its

[3] Ironically, the only record reference A&J cites (B167-70) for the proposition it advances (Ans. Br. at 21) that “Krug was aware at least as of the summary judgment

determination that Krug had the burden when it issued its final ruling:

- "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." (PTO[4] at 31-32).
- "Proving [the contractual] predicates for removal is no easy task." *Id.* at 33.
- "Krug's supposed bases to remove A&J do not rise to the standards for removal set by the Operating and Management Agreements." *Id.* at 32-33.
- "[a]fter carefully reviewing the evidence, I am satisfied that Krug did not prove that the payments to Henry Global were unauthorized, prohibitively

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hearing that the Vice Chancellor believed that Krug" had the burden is a comment by the Court at that hearing, which according to A&J involved an issue "that is not before the Court on this appeal." Indeed, the Court's comment as quoted by A&J does not expressly mention burden and is equally susceptible to an interpretation that applies to the ultimate weight of all the evidence, not which party had the burden *ab initio*; that subject was not before the Court at the summary judgment hearing. As a fair concession of the point, A&J then notes that Krug "never sought clarification," something Krug would not have had to do had the record truly reflected a decision by the Court that the burden was on Krug rather than A&J.

[4] The trial court's post-trial Memorandum Opinion ("PTO") is attached to Appellant's Opening Brief at Exhibit A.

excessive or improperly hidden from the Members. *Id.* at 52.

Simply stated, the trial court does not appear to have considered that the burden of proof rested with A&J. Rather, it appears that the trial court did one of two things: (i) the trial court simply assumed that Krug bore the burden, despite Delaware law that holds that plaintiffs like A&J – i.e., plaintiffs claiming under Section 18-110, and plaintiffs seeking declaratory judgments – bear the burden of proof on their claims[5], or (ii) the trial court failed to determine prior to trial which party had the burden of proof.[6] Either scenario constitutes reversible error. Here, without analysis, argument or discussion, the trial court announced, only *after* all the evidence was in and *after* post-trial briefing, that the burden of proof lay with Krug.

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[5] *See 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]"); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008) (burden of proof always borne by plaintiff in declaratory judgment action); *Policemen's Annuity and Benefit Fund of Chi., III 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]").

[6] It must also be noted that this case is not one that involved claims in the trial court that automatically trigger thoughts of burden shifting. For example, in interested party transactions that necessitate entire fairness review, which party bears the burden of proof on some or all of the relevant issues is usually a central feature in the action, and that typically is addressed squarely by the trial court. But this is not an entire fairness case, nor any other type of case that calls for an analysis of which party bears the burden of proof.

As discussed above, because A&J, as plaintiff, sought declarations pursuant to Sections 18-110 and 18-111 of the LLC Act, the burden of proof properly lay with A&J. Krug had no reason to make a record or otherwise preserve an argument it had no reason to anticipate, until the trial court's opinion was issued.

C. Even if Krug Did Not Preserve the Issue of Which Party Bore the Burden of Proof, the Trial Court Plainly Erred by Improperly Shifting the Burden of Proof to Krug

Krug acknowledges that, as a general matter, this Court will review only those questions presented to the trial court in the first instance. Supr. Ct. R. 8; *see Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 832 (Del. 1995); *Culver v. Bennett*, 588 A.2d 10941, 1096 (Del. 1991). The failure to object at trial ordinarily constitutes waiver of the right to raise the issue on appeal unless the error is "plain." *See Duphily*, 662 A.2d at 832 (*citing Culver*, 588 A.2d at 1096); *Eustice v. Rupert*, 460 A.2d 507, 511 (Del. 1983); *see also Medical Center of Delaware v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995).

This Court will apply a plain error standard of review "where substantial rights are jeopardized and the fairness of the trial imperiled." *Duphily*, 662 A.2d at 832 (*citing Stansbury v. State*, 591 A.2d 188, 191 (Del. 1991)). Plain error will be found when "the error complained of [is] so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.* (*citing Robertson v. State*, 596 A.2d 1345, 1356 (Del. 1991) (*quoting Wainwright v. State*, 504 A.2d

1096, 1100 (Del. 1986), *cert. denied*, 479 U.S. 869 (1986)). This Court has applied the concept of plain error in civil as well as criminal appeals. *See Culver*, 588 A.2d at 1099; *Riggins v. Mauriello*, 603 A.2d 827 (Del. 1992).

The shifting of the burden to Krug improperly colored the entirety of the trial court's analysis. Indeed, the trial court went so far as to structure its analysis under the following bolded heading: **"The Preponderance of Evidence Does Not Support Removal for Cause."** (PTO at 36). And what followed was the trial court's determination that "Krug does not clearly tie [the justifications for the for-cause removal] to any one or more of the particular standards for removal as stated in the operative agreements but rather contends in general terms that the identified conduct violates all of the standards . . . I disagree." (*Id.* at 36-37).

In sum, the framework employed by the trial court was fundamentally flawed because the trial court improperly expected Krug to convince the court that the evidence proved the for-cause removal of A&J was justified. Instead, A&J should have been required to prove (but was not) that cause, as defined in the operative agreements, did not exist to remove A&J. This improperly constructed framework was fundamentally unfair to Krug, and harmed the integrity of the trial process. Making matters worse, Krug never was informed by the trial court that the court expected Krug to carry the burden of proof, compounding the unfairness to Krug, and further undermining the integrity of the trial. The improper – and surprise –

shifting of the burden of proof to Krug was plain error.

D. A&J Really Argues for the Adoption of a New *Per Se* Rule Governing Burden Allocation, and that Argument Should be Rejected

A&J invites the Court to mandate a new rule in the LLC manager removal context: that a party effectuating a for-cause removal of an LLC's manager must always bear the burden of proving that cause existed for such removal. A&J argues that "Krug, as the party seeking to justify the removal of A&J as the incumbent Manager, must bear the burden of proving by a preponderance of the evidence that the removal was justified[.]" (Ans. Br. at 22). This is not our law, nor should it be. Simply stated, there is no reason to depart from the general rule that "[p]laintiffs . . . have the burden of proving each element, including damages, of each of their causes of action against each Defendant or Counterclaim-Defendant, as the case may be, by a preponderance of the evidence." *TA Operating LLC*, 2017 Del. Ch. LEXIS 166, at *52-53.

II. A&J Ignores the Undisputed Evidence that Refutes the Trial Court's Finding That the Voters First Sought Removal, Then Sought Reasons.

Krug demonstrated (*see* Op. Br. at 12-14) that in the action filed by A&J in California against certain of the Company's members, A&J recognized that various of the Company's members believed A&J's actions as manager to be improper and dishonest. There is no factual dispute about the dates of those assertions—they were, according A&J's own pleadings in the California action, made months *before* the removal vote.

This entire subject is omitted in A&J's Answering Brief; not a word is written to suggest that Krug's timeline is wrong or that the defamation suit A&J filed against the Company's members included an inaccurate recitation of the members' "wechat" communications. This concession by silence by A&J demonstrates that the Court's finding that the members lacked a reason for removal when they removed A&J was incorrect. Krug explained why the October 2017 Memorandum sent by A&J to the Members was misleading and evidence of self-dealing. Most importantly, a majority of the Class B Members felt the same way, and this fact prompted the removal vote.

The fact that more than 50 percent of the members voted a few months later to remove A&J shows that they did not vote first and look for a reason later, and also highlights why the rule adopted by the trial court (requiring a finding of financial harm to justify for-cause removal) sets a standard for removal that would, if applied generally, severely weaken members' ability to keep threatened managerial self-

dealing in check.

III. The Trial Court Erroneously Applied a Heightened Removal Standard That Deprived the Investors of Protections Against A&J's Self-Dealing.

A. A Risk of Harm and Actual Harm: Both Justify Removal of A&J

Much ink is spilled in the parties' briefs regarding whether conduct engaged in by A&J that poses a risk of harm can justify removal of A&J. (*See* Op. Br. at 24-40; Ans. Br. at 24-28). The parties agree, however, that the relevant removal provision provides 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)), and that these standards are not specifically defined in the parties' Agreements, but are silent as to harm, risk of harm or intent to harm. The trial court – erroneously in Krug's view – found that "the contractually imposed standards of conduct must either be harmful or cause harm to justify removal."[7] (PTO at 35).

Our law is replete with examples of situations where the risk of harm flowing from the actions of a party justifies remedial action – i.e., one should not be exempt from sanctions simply because the harm that could have resulted from such behavior

[7] Curiously, the next sentence of the trial court's opinion states that "[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." (PTO at 35). With this, Krug agrees. But it raises the question of why the trial court did not contemplate the logical next inquiry: if there is a risk of harm to the Company as a result of the Manager's actions, does that not in and of itself constitute a deviation from the prescribed standard of conduct?

luckily, or through the actions of others, does not come to pass. *See Del. Bd. of Nursing v. Francis,* 195 A.3d 467, 477 (Del. 2018) (reversing the decision of the Superior Court and stating "we therefore disagree with the Superior Court's apparent finding that unless improper nursing behavior creates actual harm, it is not sanctionable under any of the Nursing Board's rules"); *In re Doughty*, 832 A.2d 724, 736 (Del. 2003) (holding that, although no actual injury resulted from lawyer misconduct, a potential risk of harm to a client, the public or the legal system justified sanctions); *see also In re Gelof*, 142 A.3d 506 (Del. 2016) (stating that "potential injury" is "harm" even though negative consequences are not realized because of "some intervening factor or event").

The rationale for requiring harm before a person may sue another for damages is the result of the common law's virtue of making sure that courts are not used to make pointless declarations of the moral or even contractual failings of a defendant. But that common law virtue has no application to a situation like the one here: an accused manager, placed in charge of millions of dollars invested by others, and having the responsibility to maintain compliance with complex immigration laws, places its constituents' immigration status in jeopardy, attempts to improperly self-deal, and systematically provides significant financial benefits to family members without disclosure of the relationship.

A&J's actions posed multiple risks of harm to the Company and the Class B

Members:

- A&J's linking of the prepayment (which it, as Class B Manager, deemed a critical element to maintain the Class B Members' green card petitions) with a hefty payday for itself (2 years' worth of annual fees) 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 predicated on paying $800,000 to A&J for little to no consideration.
- Similarly, A&J's conduct risked diversion of Company assets to the Class B Manager—a risk of financial harm.
- A&J's engagement in self-interested behavior and transactions eroded the trust of a majority of the Members – a risk of harm.

At bottom, because the operative Agreements did not include a requirement that actual harm result from A&J's actions before the Class B Managers could contemplate removal, the trial court erred in reading into the removal provision the requirement of actual harm befalling the Company and the Class B Members. A risk of harm posed by A&J's actions was sufficient to trigger the Class B Members' right to remove A&J for conduct equating to gross negligence, intentional misconduct, fraud or deceit. The fact that the Class B Managers exercised their franchise and prevented A&J from harming the Company should not and cannot mean that their right to remove A&J had been eviscerated by their own diligence.

B. A&J Never Refutes or Explains Why Its Admitted False Statements and Lack of Candor Should Be Disregarded and Cannot Form a Basis for Removal

As discussed in Krug's Opening Brief, A&J's attempt to obtain for itself the majority of a prepayment fee to be paid by the borrower to the Company is self-dealing equating to, at a minimum, gross negligence, but in Krug's (and a majority of the Class B Members') view, it also is intentional misconduct. (*See* OB at 34-38). But not only did A&J get caught with its hand in the proverbial cookie jar, A&J's Prepayment Notice contained the falsity 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." (A241 at ¶1(b)(iii)(A)). And when it came to light that this was a fallacy, A&J abandoned the justification that the fee was for "additional services," but rather was to recoup revenue it would lose from the prepayment. Either way, these reasons are self-interested and constitute gross negligence or intentional misconduct.

A&J's response to this is remarkable:

> Krug also argues (as he did below) that the disclosures in the Prepayment Notice were misleading because most of the listed services in the Prepayment Notice were not associated with the negotiation of the prepayment. . . . But Krug testified at trial that it was "obvious" that most of the listed services were not associated with the negotiation of the prepayment. . . . Accordingly, the disclosures could not have misled anyone.

(Ans. Br. at 35). In other words, even though A&J attempted to mislead the Class

B Members and enrich itself at the Company's expense, since the falsehood upon which the prepayment fee was based was easily spotted, A&J's misrepresentations must go ignored. But in the Class B Members view, this conduct could not go ignored, and the removal vote followed.

And not only did A&J attempt to enrich itself at the Members' and the Company's expense, A&J orchestrated millions of dollars of payments via the Distributor Services Agreement to Henry Global, an entity owned by a relative of A&J's owner. (*See* A727 at ¶ 8; Op. Br. at 16-19). 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 far in excess of what the Members themselves could gain via their investment in the Company. (A925, A996; A499-500). Worse yet, A&J and Henry Global hid the Distributor Services Agreement from the Members by removing pages from the Financial Statements that would have revealed the import of the Distributor Services Agreement. (*Id*; *see* Op. Br. at 16-19). And, still further, A&J never provided Company financial statements to the Members in the Members' native tongue, Mandarin. (A927, A953, A956, A963-64, A599, A505-06).

Again, A&J's response is half-hearted. A&J does not respond whatsoever to the point that A&J hid the Distributor Services Agreement from the Members. A&J only states that there is no evidence that "anyone ever complained about the

Financial Statements being in English." (Ans. Br. at 37). In other words, A&J's sole argument is that A&J was permitted to enter into contracts on behalf of the Company, and in light of this ability, the trial court and this Court should not and cannot analyze the facts that (1) the party with whom A&J contracted was "all in the family," (2) the contract was inordinately lucrative, and (3) the contract was hidden from the Members through (a) the removal of pages from the Financial Statements that would have revealed the sums flowing to Henry Global as a result of the suspect contract and (b) the provision of inculpatory documents that were not in Mandarin.

At bottom, where there is smoke, there is fire, and the Class B Members smelled smoke with respect to A&J's relationship with Henry Global and the active concealment of the import of the agreements with that entity. That the Class B Members determined A&J's actions to be grossly negligent and/or intentional misconduct necessitating A&J's removal should not be surprising, and should not have been disturbed by the trial court. The Class B Members should not have been required to wait until their immigration hopes went up in flames before they were permitted to remove A&J.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Appellant's Opening Brief, 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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