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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| In re: Dissolution of DOEHLER DRY INGREDIENT SOLUTIONS, LLC, a Delaware Limited Liability Company | : | No. 350, 2022 |
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| | : | Court Below: Court of Chancery of the State of Delaware |
| | : | |
| | : | C.A. No. 2022-0354-LWW |

**APPELLEE DOEHLER NORTH AMERICA INC.'S**
**ANSWERING BRIEF ON APPEAL**

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## NATURE OF PROCEEDINGS

This case involves an appropriate result in an unremarkable case. A disgruntled member of a Delaware limited liability company hastily tried to dissolve that LLC before a federal District Court could order the transfer of that member's units in the LLC to another member. Neither Delaware law nor the LLC's Operating Agreement, however, supports dissolution. The Trial Court correctly applied Delaware law to grant *Respondents Doehler North America Inc., Stuart McCarroll and Andreas Klein's Motion to Dismiss* (the "***Motion to Dismiss***") and dismiss the *Verified Petition for Dissolution of a Limited Liability Company pursuant to 6* Del. C. *§ 18-802 and for Permission to Wind Up Affairs pursuant to 6* Del. C. *§ 18-803* (the "***Petition***").

The Trial Court found the claims in the Petition were not even close to surviving dismissal:

- the "dysfunction and contrived deadlock complained of fall well short of the high bar to plead a claim for judicial dissolution" (Op., 1);
- "[t]he Petition falls well short of satisfying this arduous standard" (*id.*, 17 (for dissolution)); and
- "[t]he Petition comes nowhere close to stating a reasonably conceivable claim for judicial dissolution" (*id.*, 17, n.73).

The dissolution provision of the Limited Liability Company Act is not a cudgel for dissatisfied members to wield as a weapon. The Court of Chancery has explained dissolution is a "limited remedy" that should be "grant[ed] sparingly," given its "extreme nature." *See BET FRX LLC v. Myers*, 2022 WL 1236955, at *6 (Del. Ch. Apr. 27, 2022) (quoting *In re Arrow Inv. Advisors, LLC*, 2009 WL 1101682, at *2 (Del. Ch. Apr. 23, 2009)). To proceed to trial on a dissolution action, a member must allege something more than Petitioner did here.

The "reasonably practicable" standard found within 6 *Del. C.* §18-802 was explored in, among other authorities, *Fisk Ventures, LLC v. Segal*, 2009 WL 73957 (Del Ch. Jan. 13, 2009), which this Court affirmed in *Segal v. Fisk Ventures, LLC*, 984 A.2d 124 (Del. 2009) (TABLE). In *Fisk*, the Court of Chancery explained that although:

> [t]he text of § 18-802 does not specify what a court must consider in evaluating the 'reasonably practicable' standard . . . several convincing factual circumstances have pervaded the case law: (1) the members' vote is deadlocked at the Board level; (2) the operating agreement gives no means of navigating around the deadlock; and (3) due to the financial condition of the company, there is effectively no business to operate.

(Op., 17, n.72 (quoting *Fisk*, 2009 WL 73957, at *4).)

Not only does the Petition make *no mention* of *any* of the factors in *Fisk*, but Petitioner instead chose to focus on alleged breaches of contract or duty, which, as a matter of law, did not warrant dissolution. Petitioner now attempts to: (1) amplify

*one* allegation in its Petition, which it incorrectly contends the Trial Court did not consider; and (2) complain that the Trial Court considered an argument *Petitioner made* in its Answering Brief. This does not change the outcome. The Trial Court properly applied Court of Chancery Rule 12(b)(6) and Delaware law to dismiss the Petition.

Petitioner did not base its allegations for dissolution on a deadlocked Board vote or DDIS's financial condition. Instead, Petitioner bottomed its Petition on vague allegations of "irreconcilable differences" among the members. (A-0068, A-0071-75.) Even if true, Petitioner's allegations, as a matter of law, did not support dissolution because they "do not demonstrate that the 'defined purpose of the entity has become impossible to fulfill.'" (Op., 20). Notably, Petitioner filed suit one day after Respondent filed a related lawsuit in the federal court for the District of Delaware, *Doehler North America Inc. v. Davis*, No. 22-501-RGA (the "***Federal Litigation***"), which seeks *inter alia* to enforce Respondent's right to purchase Petitioner's membership units in accordance with Section 9(f) of DDIS's Operating Agreement.

This Court should affirm the Trial Court's grant of Respondent's Motion to Dismiss. The Trial Court properly considered all the allegations in the Petition and concluded that Petitioner failed to state a claim for dissolution as the Petition did not even remotely allege any factor that, if true, would demonstrate it is not "reasonably

practicable" to carry on the business of DDIS in conformity with the Operating Agreement. (*See generally* Op.).

## SUMMARY OF ARGUMENT

1. Denied. The Trial Court correctly stated and applied the standard for assessing the allegations in the Petition and then properly concluded that these allegations did not establish a "reasonably conceivable" claim for dissolution. In doing so, the Trial Court:

   a. Explained that none of Petitioner's allegations "demonstrate that the 'defined purpose of the entity has become impossible to fulfill'";

   b. Determined Petitioner had not alleged *any* existing deadlock and rejected an argument *Petitioner itself raised* in its Answering Brief in opposition to the Motion to Dismiss by concluding a contrived deadlock does not support dissolution; and

   c. Did not evaluate "potential defenses," but, instead, evaluated all the allegations in the Petition and concluded, as a matter of law, even if true they would not support dissolution of DDIS.

   Far from unharmonious, established Delaware law sets the framework for evaluating whether an LLC's continued operation is "reasonably practicable": (1) Board deadlock; (2) mechanism to navigate the deadlock; and (3) business still to operate based upon the company's financial condition. Instead of alleging any of these recognized bases, the Petition relied on allegations of generalized "dysfunction."

2. Denied. This argument overlooks two truths about the Opinion. First, the absence of any pleaded deadlock was not the sole basis for dismissal of the Petition. The Trial Court began with the absence of any pleaded deadlock and then turned to the Petition's other shortcomings. Second, the Trial Court relied on Petitioner's failure to allege *any* deadlock, genuine or not. "Deadlock" appears nowhere in the Petition. (*See* A-0066-0075.) Petitioner also failed to allege inability to navigate a deadlock under the mechanisms in the Operating Agreement. Under the Operating Agreement there are *multiple* exits from the LLC, which Petitioner did not address. In its Answering Brief in opposition to the Motion to Dismiss, Petitioner first advanced the unpled argument that it intended to cause future deadlock, which the Trial Court properly rejected as an inappropriate basis for dissolution. Further, to the extent that the Trial Court's consideration of Petitioner's argument was error, then it was an error invited by Petitioner and one of which it cannot complain on appeal.

3. Denied. As Petitioner did not allege a deadlock, it is not necessary to assess whether the Operating Agreement provides a means for navigating one. Regardless, the Operating Agreement contains *multiple* means of resolving a deadlock. The interpretation of a contract is a question of law decidable by the Trial Court, and the Trial Court expressly used Section 10(b) of the

Operating Agreement as one "example" of a legal mechanism within it that would remedy a deadlock. In addition, the Trial Court recognized the Operating Agreement provides an express dissolution procedure if the Section 10(b) process fails. Perhaps most importantly, the exit procedure in Section 9(f) already is in process: Respondent exercised its cross-transfer purchase rights to Petitioner's membership units *before* Petitioner filed its Petition. (A-0067-78.) Petitioner: (a) has not alleged that it availed itself of any options to navigate a deadlock; and (b) recognized that one possible exit already was in process.

4. Denied. Petitioner's concerns about the Parties' ability to "agree" on a price are unfounded, as the deadlock-navigating provisions within the Operating Agreement do not require it. Moreover, as the Trial Court noted, Petitioner failed to raise this argument in its briefing and thus the argument was not preserved for appeal. (Op., 19, n.80.) Regardless, in the absence of a pleaded deadlock, this argument has no bearing on whether DDIS's continued operation is reasonably practicable or whether Petitioner has properly set forth a claim for dissolution. Further, the Trial Court appropriately determined the Petition lacks any allegation to support an inference DDIS is not performing any of the defined purposes in its Operating Agreement, let alone that such purposes have become impossible to fulfill. (Op., 20.)

## STATEMENT OF FACTS[1]

The Petition seeks the judicial dissolution of Doehler Dry Ingredient Solutions, LLC ("***DDIS***"). (A-0067-68, ¶ 1.) The defined purpose of DDIS is:

> General Character of Business. The Company is formed for the purpose of (i) buying, sourcing, manufacturing, producing, distributing, packaging, marketing and selling air and freeze dried fruits and vegetables in whole pieces, powders and snack blends, including with other foods, spices and materials including dairy, including for business-to-business and direct consumer sales; and (ii) engaging in such lawful activity for which limited liability companies may be formed . . . .

(A-0035-36, § 1(b).)[2]

Russell Davis is a former manager of DDIS and, through CKAL, claims to own 25% of the membership units (collectively, Davis and CKAL are "***Petitioner***"). (A-0070. ¶ 10.) Respondent Doehler North America Inc. ("***DNA***") is a member of DDIS and owns 50% of its membership units. (*Id*., ¶ 13.) Respondent Garry Beckett ("***Beckett***") is a current manager of DDIS and owns 25% of its membership units. (*Id*., ¶ 12.)[3]

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[1] Respondent objects to Petitioner's inclusion of matters in its Statement of Facts that are outside the Petition, such as arguments about discovery while the Motion to Dismiss was pending. (Appellant Br., 11 n.6.)

[2] While Petitioner contends that business of DDIS was limited to "North America" (Appellant Br., 6), the Operating Agreement contains no such limitation.

[3] Petitioner named Stuart McCarroll and Andreas Klein as respondents, but neither is party to this appeal. (Appellant Br., 6, n.4.)

The Petition contends various "irreconcilable differences among the members and managers" justify dissolution. (A-0068, ¶ 2.) Such "irreconcilable differences" allegedly are:

(1) removal of Davis as a manager of DDIS and limiting his ability to invoice DDIS for compensation (A-0071, ¶ 16);

(2) disagreement as to the applicability of a separate agreement among members of DDIS (*id*., ¶ 17);

(3) the purportedly "untenable and impracticable" nature of Section 11(a) of the Operating Agreement (concerning the duties of DDIS's members) and Sections 14(a)-(b) (concerning tax matters and Davis's role therein) in light of Davis's removal as manager (*id*., ¶¶ 18-19);

(4) allegations that Beckett 'hacked' Davis's e-mails (*id*., ¶¶ 20-22);

(5) Beckett's purported competition with DDIS (*id*., ¶ 20);

(6) alleged violations of the Operating Agreement by incurring certain debt without unanimous member consent (*id*., ¶ 23); and

(7) alleged violation of the Operating Agreement with respect to DNA's purchase of Davis's membership interests in DDIS (*id*.).

Outside the Petition, in response to the Motion to Dismiss, Petitioner invented a new contention: Petitioner preemptively would cause a deadlock on any future decisions requiring unanimous member consent. (A-0183-85.)

Based on these allegations, Petitioner asserted two claims: (1) judicial dissolution of DDIS under 6 *Del. C.* § 18-802; and (2) winding up the affairs of DDIS under 6 *Del. C.* § 18-803. (A-0073-74, ¶¶ 25-29.)

Further pertinent to the assessment of dissolution, the Operating Agreement contains certain relevant provisions.

First, with respect to means of exiting the LLC:

a) Section 9(f) contains a Cross-Transfer Purchase provision which permits Petitioner or Beckett to compel DNA to purchase their membership units or DNA to compel Petitioner and Beckett to sell their membership units to DNA. (A-0051.) The Federal Litigation involves, in part, Respondent's attempts to compel Petitioner to comply with Respondent's exercise of these rights. (A-0067-68.) Thus, Respondent both: (1) exercised its option to require Petitioner to transfer its units to Respondent; *and* (2) sought court relief compelling such transfer *before* Petitioner filed its Petition.

b) Section 10(b) contains a Buy-Sell Provision, which is an express procedure for resolving deadlock. (A-0054.) The Petition does not allege that Petitioner tried to invoke this exit or that an attempt would be futile. (*See* A-0066-75.)

c) Section 9(c) provides a process through which a member may sell its units to a third party, subject to certain rights of first refusal. (A-0047-48.)

d) If Section 10(b) procedures fail to resolve a deadlock, such failure would trigger the *contractual* procedure for dissolving DDIS in Section 12. (A-0056-57.)

Second, with respect to Petitioner's claim that dissolution is appropriate because he cannot invoice DDIS for work performed, Petitioner admits the purported requirement that he "commit [his] full-time efforts exclusively on behalf of the Company" relates to his duty and responsibility *as a Member* of DDIS. (*See* Appellant Br., 7; A-0055, § 11(a).) The provision that permitted Petitioner to invoice DDIS was for Davis's "compensation" *as a Manager* of DDIS. (Appellant Br., 7; A-0045, § 7(f).) Petitioner was removed as a Manager of DDIS. (A-0071, ¶ 16.) Nevertheless, nothing in the Operating Agreement or Petition suggests DDIS cannot fulfill its purposes without Davis invoicing DDIS (or without Davis performing any work on its behalf). Indeed, it expressly contemplates that Davis *may not* be a member of DDIS.

Respondent moved to dismiss the Petition for lack of subject matter jurisdiction and failure to state a claim. (A-0076-77.) With respect to its request to dismiss under Rule 12(b)(6), Respondent contended that Petitioner's allegations,

even if true and with all reasonable inferences construed in Petitioner's favor, did not set forth a reasonably conceivable basis for dissolution. (A-0102-105.)

After briefing and oral argument, the Trial Court dismissed the Petition under Rule 12(b)(6) and held: (1) Petitioner's allegations did not support an inference of deadlock, and Petitioner's threats of future deadlock in its Answering Brief could not support dissolution; (2) even if deadlock existed, it could be resolved through mechanisms within the Operating Agreement; (3) Petitioner's allegations did not demonstrate DDIS's defined purposes were impossible to fulfill; and (4) Petitioner's remaining allegations did not support an inference DDIS was unable to operate in accordance with its Operating Agreement. (Op., 17-20.)

## ARGUMENT

### I. THE TRIAL COURT APPLIED THE PROPER PLEADING STANDARD AGAINST THE ALLEGATIONS IN THE PETITION AND REASONABLE INFERENCES DRAWN FROM THEM.

#### A. Question Presented.

Whether the Trial Court applied the proper pleading standard when it granted Respondents' Motion to Dismiss? (Preserved at A-0102-105, A-0228.)

#### B. Scope of Review.

Dismissal under Rule 12(b)(6) is reviewed *de novo* "to 'determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (quoting *Feldman v. Cutaia,* 951 A.2d 727, 730–31 (Del. 2008)) (quoting *Dunlap v. State Farm Fire & Cas. Co.,* 878 A.2d 434, 438 (Del. 2005)). Dissolution itself "is a discretionary remedy under 6 *Del. C.* § 18-802 that is reviewed under an abuse of discretion standard." *Acela Invs. LLC v. DiFalco*, 2019 WL 2720480, at *4 (Del. Ch. June 28, 2019).

A court "must accept all well-pleaded allegations as true and draw reasonable inferences in favor of the plaintiff . . . "[n]evertheless, conclusory allegations need not be treated as true, nor should inferences be drawn unless they truly are reasonable." *Country Life Homes, LLC v. Gellert Scali Busenkell & Brown, LLC*, 259 A.3d 55, 59 (Del. 2021). Thus, while the standard for purposes of a Rule

12(b)(6) motion "are minimal" and the primary test is one of "reasonable conceivability," the Court is not required to "blindly accept as true all allegations, nor must [the court] draw all inferences from them in [plaintiff's] favor unless they are reasonable inferences." *Dunlap*, 878 A.2d at 439; *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013).

The Trial Court correctly set forth and followed this standard. (Op., 15-16.)

**C. Merits of Argument.**

The Trial Court assessed all the allegations in the Petition and appropriately dismissed the Petition.

1. The Trial Court Found Petitioner's 'Examples' of 'Dysfunction,' Did Not Support Dissolution.

The Trial Court recounted the allegations in the Petition (Op., 1, 3-4, 20) – including Petitioner's newly emphasized claim regarding invoicing (*id.*, 3) – and noted Petitioner's description of many of the disagreements alleged was "vague at best" (*id.*, 4). After first analyzing the absence of any pleaded deadlock (*id.*, 17-19), the Trial Court found the remaining allegations in the Petition did not "support[] an inference" that DDIS was not currently performing the function of the entity as described in the LLC Agreement (*id.*, 20). Specifically, the Trial Court found that Petitioner's multitudinous claims in the Petition, including "removal as a manager, the attempt to remove him as a member, purported breaches of the LLC Agreement, alleged breaches of fiduciary duty, and an unarticulated 'conspiracy to

commit malfeasance'" were not "valid grounds for judicial dissolution" because the allegations did not suggest DDIS was "unable to operate in accordance with its governing document." (*Id.*) Based on this passage from the Opinion, it is difficult to discern which alleged 'examples' Petitioner contends the Trial Court did not consider. (Appellant Br., 15-16.)

Judicial dissolution is an "extreme" and "sparingly granted" remedy. *BET FRX*, 2022 WL 1236955, at *7 (quoting *In re Arrow*, 2009 WL 1101682, at *2). This discretionary remedy is available only if it is no longer reasonably practicable for an LLC to carry on business in conformity with its operating agreement. *See* 6 *Del. C.* § 18-802; *Haley v. Talcott*, 864 A.2d 86, 93 (Del. Ch. 2004) ("[E]ven if I find that there are no facts under which the LLC could carry on business in conformity with the LLC Agreement, the remedy of dissolution . . . remains discretionary.").

While the LLC Act does not set forth a "blueprint" for assessing whether an LLC's continuation is reasonably practicable, the Court of Chancery has consistently only extended the availability of judicial dissolution to a discrete number of factual circumstances which have "pervaded the case law . . . ." *Seokoh, Inc. v. Lard-PT, LLC*, 2021 WL 1197593, at *8 (Del. Ch. Mar. 30, 2021) (quotations omitted). Among these are: "(1) the members' vote is deadlocked at the Board level; (2) the operating agreement gives no means of navigating around

the deadlock; and (3) due to the financial condition of the company, there is effectively no business to operate." *In re: GR BURGR, LLC*, 2017 WL 3669511, at *5 (Del. Ch. Aug. 25, 2017) (quoting *Fisk*, 2009 WL 73957, at *4); *see also BET FRX*, 2022 WL 1236955, at *6 (quoting *In re Arrow*, 2009 WL 1101682, at *2) ("[J]udicial dissolution is limited to 'situations in which the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in . . . a voting deadlock or where the defined purpose of the entity has become impossible to fulfill.'"). While "none of these factors is individually dispositive; nor must they all exist . . . .," *Seokoh*, 2021 WL 1197593, at *8, Petitioner has not identified *any* cases in which an LLC was dissolved on "dysfunction" alone.

Accordingly, to plead a claim for judicial dissolution, Petitioner must set forth enough factual allegations to show it is reasonably conceivable that one or more of the predicates for judicial dissolution is warranted. Petitioner failed to do so. As summarized by the Trial Court: "Davis appears to base his request for dissolution on his removal as a manager, the attempt to remove him as a member, purported breaches of the LLC Agreement, alleged breaches of fiduciary duty, and an unarticulated "conspir[acy] to commit malfeasance." (Op., 20.) Such allegations are "unquestionably insufficient to support" a claim for dissolution:

> Allegations that an LLC "is currently failing to achieve its 'business plan, goals, and objectives' [or] that [its] managers have breached their

> fiduciary duties fall far short of this threshold." . . . Mere disagreement, or even fiduciary breaches standing alone, do not support a claim for judicial dissolution.

*BET FRX*, 2022 WL 1236955, at *6-7 (quoting *In re Arrow*, 2009 WL 1101682, at *2); *Homer C. Gutchess 1998 Irrevocable Tr. v. Gutchess Companies*, 2010 WL 718628, at *2 (Del. Ch. Feb. 22, 2010) (dismissing petition when allegations did not show unachievable business purpose or deadlock and other grievances could be resolved through "less extreme judicial remedies"). Buried in a footnote, Petitioner acknowledges these authorities, but contends *Arrow* and its progeny do not apply because the Petition outlines a "variety of issues which demonstrate the overall context and circumstances surrounding the parties' dysfunctional relationship." (Appellant Br., 22-23 n.11.)

The problem, of course, is that such issues are of the precise class that *Arrow* and the Trial Court correctly found cannot support a claim for dissolution. Indeed, Petitioner explicitly premised its Petition for dissolution on certain "[i]rreconcilable differences," none of which pertain to the existence of deadlock or DDIS's inability to perform its defined purposes. (*See* A-0068, ¶ 2.) To the contrary, four of the five bases for dissolution consist of alleged breaches of duties among the members (*i.e.*, "freezing-out Davis," general "breach[es]" of "fiduciary duties," "hacking," and "conspiring to commit malfeasance") while the remaining basis consists of alleged breaches of contract ("violating many sections of the

Operating Agreement"). (*See id.*) None of these is sufficient to state a reasonably conceivable basis for dissolution, and each may be addressed through less extreme measures. Petitioner's attempts to suggest such issues are not the focus of the Petition is contradicted by the Petition itself.

Meanwhile, the Petition is devoid of any allegations showing any of the accepted bases for dissolution are reasonably conceivable in this case. The Petition contains no allegations of existing deadlock and does not even contain the word "deadlock." (*See generally* A-0066-75.) There are no allegations that any deadlock—even if it existed—could not be remedied, and the Operating Agreement itself rebuts that notion. *Infra* at § III. There are no allegations that DDIS was not currently fulfilling its defined purposes, let alone that such purposes were impossible. *Infra* at § IV. And as to each of these omissions, the Trial Court properly applied the "reasonably conceivable" standard, correctly determining Petitioner's remaining allegations could not support a claim for dissolution. *Supra* at § I(A); *infra* at § I(C)(4).

Far from asking this Court to provide guidance and clarify the law amidst a "smattering of decisions by the Court of Chancery that do not speak with one voice," (Appellant Br., 16), Petitioner asks this Court to disrupt consistent and clear authority and open the Court of Chancery's doors to dissolution premised on soured

business relationships and claims which may be redressed through less extreme measures.

2. The Petition Does Not Mention Any Alleged 'Deadlock' Nor Can One Be Reasonably Inferred.

Petitioner argues that the existence of deadlock is a fact-intensive inquiry, but overlooks the fatal fact that the Petition does not actually plead the existence of any deadlock. Instead, Petitioner pled general allegations of enmity, dysfunction, and violations of contractual and fiduciary duties, on which no claim of dissolution is possible—let alone reasonably conceivable. *See BET FRX,* 2022 WL 1236955, at *7 (allegations of disagreement and fiduciary breaches "do not support a claim for judicial dissolution."); *Homer*, 2010 WL 718628, at *2 ("alleged breaches of fiduciary duty, by themselves, are insufficient to withstand a motion to dismiss a petition for dissolution"). Such conclusory allegations unsupported by any specific facts are insufficient, even at this stage of the litigation. *See Clinton*, 977 A.2d at 895. Petitioner cannot claim the elements of dissolution are fact-intensive and, therefore, improper for assessment on a motion to dismiss, if the Petition fails to actually plead *any* facts that raises an inference of entitlement to relief.

Further, the cases cited by Petitioner are not only unavailing, but support the Trial Court's findings. Each case cited by Petitioner involved disputes between *equal* owners or under a company structure where a deadlock was evident and prevented the business from functioning in furtherance of its defined purpose. *See*

*In re: GR BURGR,*, 2017 WL 3669511, at *1; *Haley,* 864 A.2d at 93; *see also In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005) (noting "the two sides cannot agree on how to run Silver Leaf" and "the Operating Agreement, which mandates an agreement by the majority in interest . . . provides no mechanism to break the impasse"); *Vila v. BVWebTies LLC*, 2010 WL 3866098 (Del. Ch. Oct. 1, 2010) (holding it was not reasonably practicable for the LLC to continue to operate where there were two 50% owners and managers who were deadlocked as to future direction and management of the LLC and the LLC agreement provided no mechanism to break the deadlock.).

For example, in *GR BURGR*, a case decided on a motion for judgment on the pleadings and not requiring a "fact intensive" inquiry, two members each owned a 50% membership interest and the operating agreement required that all management decisions be made by a majority of managers (*i.e*., unanimously) and provided no means through which the two managers could break a deadlock if they could not agree. *See* 2017 WL 3669511, at *1-2. Similarly, in *Haley*, two 50% managers could not agree on how to best utilize the sole asset of the LLC, and "because no provision exist[ed] for breaking a tie in the voting interests, and because the LLC cannot take any actions . . . absent a majority vote of its members" an "indisputable deadlock" existed preventing the "LLC from functioning as provided for in the LLC Agreement." *See* 864 A.2d at 93. Here, Petitioner holds

only 25% of the interest in the LLC, a simple majority of the members can control most business decisions of the LLC (A-0032-62), a Board of Managers (of which Petitioner is not a member) controls other matters for the LLC (*id.*), and Petitioner has failed to allege *any* existing deadlock on *any* issue - much less that the Company's purpose can no longer be fulfilled. Further, the Operating Agreement does not require unanimous agreement on all business decisions, nor does Petitioner allege it does, and the Agreement expressly provides an exit mechanism should a deadlock arise. (A-0032-62.) Petitioner's case law is inapplicable. Where Petitioner failed to allege any deadlock, no factually intensive inquiry is required.

Moreover, Petitioner's attempt to characterize its claims of "dysfunction" as effectively a "deadlock" is a new argument first made on appeal and is unpersuasive. Nor does *Fisk* stand for the proposition that, as Petitioner now claims, disputes among members are sufficient to establish deadlock. Instead, *Fisk* held that, in evaluating reasonable practicability, existing case law focused on whether members are deadlocked by vote at the Board level, the operating agreement allows for means of navigating a deadlocked vote, and there is any business to operate given the financial condition of the company. *Fisk*, 2009 WL 73957, at *4. The court in *Fisk* further clarified that although all factors need not be present, generally "[i]f a board deadlock prevents the limited liability company from operating or from furthering its stated business purpose, it is not reasonably

practicable for the company to carry on its business." *Id.* The Court in *Fisk* then held because the "[t]he parties have a history of discord and disagreement on almost every issue facing the Company… and as "[t]here exist[ed] almost a five-year track record of perpetual deadlock" dissolution was proper. *Id.* No such record of deadlock or discord has been pled here.

Similarly, in *Symbiont.io*, another case relied on by Petitioner, the court held the company was deadlocked at the Board and member level, where the two members of the Board could not agree on anything, the members each held 50% of the interests in the Company, the Company had no remaining business, no employees, officers or a CEO, it was not selling any products, and did not have any customers or revenue. *Symbiont.io, Inc. v. Ipreo Holdings, LLC*, 2021 WL 3575709, at *58 (Del. Ch. Aug. 13, 2021). *See also Achaian, Inc. v. Leemon Fam. LLC*, 25 A.3d 800, 812 (Del. Ch. 2011) (denying a motion to dismiss where plaintiff had *expressly pled* the LLC had two equal 50% owners, that the members had been unable to agree on management of the venture and the LLC agreement did not provide for a "reasonable exit mechanism" to break deadlock and as such plaintiff had "pled facts sufficient to give rise to the inference that the management of [the LLC] is deadlocked"). That is not the situation here, nor has Petitioner alleged otherwise.

Finally, while Petitioner is correct that in *Meyer* no voting deadlock was

alleged, Petitioner neglects to mention the plaintiff was the *sole* managing member of the LLC and thus no operational deadlock could exist. *Meyer Nat. Foods LLC v. Duff*, 2015 WL 3746283, at *4 (Del. Ch. June 4, 2015) ("operational deadlock is not an issue because of the authority granted to Meyer as managing member. Thus, the dispute is over purpose."). As Petitioner has pled, there are several members of DDIS, and thus any voting deadlock cannot be assumed but must actually be alleged in the Petition. As the Trial Court held, Petitioner failed to plead deadlock expressly or by inference.

3. The Trial Court Properly Assessed the Allegations in the Petition, Including Whether There Was a Reasonably Conceivable Inference of Deadlock and Whether DDIS Could Continue Its Business in Conformity with the Operating Agreement.

The Trial Court properly assessed Petitioner's allegations and correctly held the Petition failed to state a claim. The Court considered all the allegations actually set forth in the Petition including: (1) that $25,000 in debt was incurred without unanimous consent; (2) that Petitioner had failed to allege the defined purpose of DDIS was impossible to fulfill; (3) the unarticulated conspiracy to commit malfeasance; (4) purported breaches of duty and of the Operating Agreement; (5) Davis's removal as manager; and (6) the attempt to remove Davis as a member. (Op., 17-20.) The Court assessed and properly held each of these allegations was insufficient to support judicial dissolution, even if true.

Further, Petitioner's argument that the Operating Agreement requirement that Davis commit his full-time efforts to managing the day-to-day operations of DDIS "self-evidently" demonstrates it is no longer reasonably practicable to carry on the business of DDIS is without merit. First, Petitioner fails to explain how this allegation demonstrates that the purpose of DDIS—to buy, source, manufacture, produce and distribute freeze dried fruits and vegetables—became impracticable. Despite Petitioner's contention that this is "self-evident," it is not. The Petition merely states "the Operating Agreement was not amended to the extent it still provides for the following untenable and impracticable conditions of the LLC . . . paragraph 11(a) still provides that Davis is purportedly expected to commit his full-time services to the LLC and support its day-to-day operations . . . ." (A-0071, ¶ 18.) The logical conclusion here is that Davis's complaint is one in contract, not dissolution. Petitioner does not explain how this makes the purpose of the LLC impracticable. In fact, the Petition does not allege such impracticability, instead vaguely stating these are "impracticable conditions" and complaining the Operating Agreement had not been amended to remove this provision. (A-0071, ¶ 18.) Petitioner's "disappointment with how [DDIS] is structured and managed," however, does not warrant dissolution. *See Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2010 WL 3314484, at *24 (Del. Ch. Aug. 2, 2010) (holding "it is not for the Court to … rewrite[] the Operating Agreement.")

Nor does the "core thrust" of the Petition, as Petitioner now contends, revolve around an allegation that the Agreement obligated Davis to work full-time for DDIS. Instead, this claimed impracticability is nothing more than a contract claim masquerading as a ground for dissolution.

Furthermore, as Petitioner correctly notes, the invoice provision related to Davis's role *as a Manager*, while the "full-time efforts" obligation related to his role *as a Member*. (Appellant Br., 7.) Petitioner remains a Member of the LLC, but is no longer a Manager of the LLC. Thus, by the plain terms of the Operating Agreement, the payments which Davis allegedly no longer receives were not tied to his obligations as a Member. (A-0032-62.) Further, in light of the expectation through Section 9(f) of the Operating Agreement that Respondent could become the sole member of DDIS, Petitioner's removal as Manager or Member does not frustrate the purpose of the LLC as the Agreement expressly contemplates Petitioner's eventual absence from the LLC. (A-0051, § 9(f)).

Petitioner next complains the Court failed to consider "the contentious litigation … in another Court" and the vague "fractious relationship" between the parties. In fact, the Trial Court expressly considered these allegations, held that some of these allegations relied upon extrinsic evidence, and determined they did not provide a valid ground for dissolution. (Op., 20.)

Petitioner then argues the Opinion only cited and considered one allegation

from the Petition—that members of DDIS violated the Agreement by incurring more than $25,000 in debt without unanimous consent. As set forth above, the Trial Court considered more than "one allegation from the Petition." (Op., 17-20.) Regardless, the Trial Court properly held the Petition framed the issue of incurring purportedly unauthorized debt as a breach of contract rather than one of deadlock. (*Id.,* 18.) Petitioner has set forth nothing more than another conclusory allegation, which lacks sufficient facts for the Court to assess whether such a breach may have occurred or whether the purported unanimity was required under the Operating Agreement. *See Clinton*, 977 A.2d at 895 (refusing to consider and accept "conclusory allegations unsupported by specific facts").

4. The Trial Court Assessed the Reasonable Conceivability (or Lack Thereof) of the Claims in the Petition.

The Trial Court properly assessed the allegations in the Petition, concluding that such allegations did not provide a basis for dissolution. Notwithstanding Petitioner's fixation on its allegation that the Operating Agreement was violated because DDIS incurred more than $25,000 in debt without unanimous member consent, as stated above, the Trial Court correctly concluded this allegation was framed as matter of breach rather than deadlock, and, in any event, that no facts were provided to allow the Trial Court to assess the sufficiency of this allegation.

Despite Petitioner's complaints, the Trial Court did assume the accuracy of Petitioner's allegation, and then properly found the Petition failed to set forth any

facts from which the Trial Court could assess whether this alleged "breach" constituted a legitimate deadlock. *See Malpiede v. Towson*, 780 A.2d 1075, 1083 (Del. 2001) ("the trial court is not required to accept every strained interpretation of the allegations proposed by the plaintiff").

This is not, as Petitioner alleges, about the reasonable conceivability of a defense, but rather whether Petitioner has carried its initial burden of setting forth a reasonably conceivable, non-conclusory basis for its claim. As the Trial Court correctly held, it has not.

5. Petitioner's Own Statements in Its Answering Brief Were Appropriately Considered in the Appropriate Context.

Petitioner's complaint that the Trial Court considered Petitioner's *own* statements in its Answering Brief is unfounded. As an initial matter, Petitioner repeatedly urged the Trial Court to consider matters outside its own Petition, including extrinsic exhibits from its summary judgment briefing—which the Trial Court declined. (Op., 20, n.84.) Even now, Petitioner continues to push arguments outside its Petition by citing to its Answering Brief instead of to the Petition. (Appellant Br., 22.)

The Trial Court properly handled Petitioner's statement in its Answering Brief that it would cause future deadlock on unspecified decisions. As the Court noted, the Petition failed to set forth a basis for concluding deadlock existed so to justify dissolution, and thus the assertions of future deadlock could not overcome

a motion to dismiss. (Op., 18.) Regardless, even if the Court were to entertain this unpled theory of future deadlock, such arguments also did not provide a reasonably conceivable basis for stating a claim. It was not that the Court penalized Petitioner for its own admissions by discounting other well-pleaded allegations—it was that no such well-pleaded allegations existed in the first place.

## II. THE TRIAL COURT DID NOT 'ADD' A 'PURE HEART' REQUIREMENT TO SECTION 18-802.

### A. Question Presented.

Whether a member's admission that it would deliberately cause a deadlock by refusing to consider any issue in the future is a sufficient allegation of "deadlock" for purposes of dissolution? This issue is not appropriate for review for two reasons. First, in its Petition, Petitioner never pleaded deadlock – genuine or not – and thus, the issue is not preserved for appeal. *See Mammarella v. Evantash*, 93 A.3d 629, 636 (Del. 2014) (arguments not raised below are waived on appeal). Second, because Petitioner advanced the issue of which it now complains (A-0183-188), such issue is not preserved for appeal.

### B. Scope of Review.

Dismissal under Rule 12(b)(6) is subject to *de novo* review. *Clinton*, 977 A.2d at 895; *see also Dunlap*, 878 A.2d at 438. Dissolution is a discretionary remedy reviewed for abuse of discretion. *Acela*, 2019 WL 2720480, at *4. A party cannot invite an error by the trial court and then complain of such error on appeal. *See Dashiell v. State*, 154 A.2d 688, 690 (Del. 1959); *see also In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 55 (Del. 2006).

### C. Merits of Argument.

Petitioner did not plead future deadlock in its Petition *at all*, and thus the Court need not consider whether allegations of future deadlock—good faith or not—set

forth a reasonably conceivable basis for dissolution. The allegations in the Petition did not raise an inference of any deadlock, present or future.

Further, Delaware law is clear that Petitioner cannot invite error and then complain of such error on appeal:

> [T]he argument is precluded by Rule 8 of this Court, which provides that arguments not fairly presented to the trial court will not be considered by this Court. The appellants' . . . argument goes beyond being not fairly presented. It borders on being unfairly presented, since the appellants are taking the trial court to task for adopting the very analytical approach that they themselves used in presenting their position.

*In re Walt Disney,* 906 A.2d at 55; *see Dashiell,* 154 A.2d at 690 ("invited error is not ground for reversal"). Thus, if it was error for the Trial Court to consider *Petitioner's own arguments*, then the consideration of those improper arguments cannot support reversal.

Further, and despite Petitioner's claims that the Court based its dismissal on an argument in the Answering Brief rather than the Petition, the Trial Court did no such thing. Instead, it expressly held Petitioner had "fail[ed] to identify any *existing* deadlock" in its Petition and that, regardless, a "*prospective* deadlock" contrived by Petitioner in its Answering Brief could not "support a claim for dissolution." (Op., 18.) The Court then discussed that Petitioner had not adequately alleged deadlock. (*Id.*) Petitioner selectively quotes from the Opinion, claiming it is clear the Trial Court based its finding on an "argument" in the Answering Brief because it stated

that Petitioner's "argument fails." (Appellant Br., 29.) The Trial Court, however, properly assessed Petitioner's contention in the Answering Brief that it would decline to approve nine actions critical to the LLC for which unanimous consent was required, and then held regardless the "argument fails to identify any *existing* deadlock." (Op., 18) ("His argument fails to identify any *existing* deadlock. Rather, it concerns *prospective* deadlock if the petitioner withholds future consent. This contrived attempt to manufacture deadlock cannot support a claim for judicial dissolution.") (emphasis in original). Petitioner selectively omits the rest of that quote as it makes clear that the Trial Court assessed Petitioner's arguments in the Answering Brief and then discounted them as Petitioner had failed to plead a then-existing deadlock. (*Id.*)

Nor did the Trial Court rely on a "smattering of Chancery Court cases" to impose any requirement that the deadlock be "genuine" and require that Petitioner be "pure of heart to survive a motion to dismiss." (Appellant Br., 30.) Whether Petitioner was saint or sinner was immaterial to the Opinion and a misstatement of the Trial Court's findings. The Trial Court merely required Petitioner first actually plead deadlock. It appears Petitioner is arguing on the one hand that the Trial Court should not have considered a legal argument in Petitioner's own Answering Brief, and on the other hand that the Trial Court did not correctly consider the nine

decisions identified in the Answering Brief that Petitioner preemptively claimed would cause a deadlock. Petitioner cannot have it both ways.

Regardless, Petitioner's urging that this Court adopt a "no fault" dissolution standard based on "scholarship" would undermine the equitable nature of the proceeding and is still another instance of Petitioner contradicting its own arguments. (Appellant Br., 30, n.12 & 42 (urging this Court from applying equitable principles in this dissolution proceeding).) A dissolution proceeding is an equitable proceeding. *See Vila*, 2010 WL 3866098, at *6 (holding dissolution is within the court's "equitable discretion."). It has long been held that one who seeks equity must do equity. This rule applies to judicial dissolution, to which a defense of unclean hands properly applies. *See In re Rural/Metro Corp. S'holders Litig*., 102 A.3d 205, 237 (Del. Ch. 2014) (holding "Courts of equity have extraordinarily broad discretion in application of the unclean hands doctrine"); *In re Data Processing Consultants, Ltd.*, 1987 WL 25360, at *4 (Del. Ch. Nov. 25, 1987) (recognizing the court can deny a petition that satisfies its standards where there is "bad faith in the seeking of a dissolution"). After all, a member who manufactures deadlock for the specific purpose of forcing a dissolution should not be rewarded for its inequitable conduct. *In re Mobilactive Media, LLC*, 2013 WL 297950, at *33 (Del. Ch. Jan. 25, 2013) (denying request for dissolution and holding plaintiff "should not be permitted to use its inequitable conduct to extricate itself from what it has long considered to

be a bad deal"). While unclean hands is typically a defense that would await resolution at trial, this Court has held that defenses that clearly are established by the allegations in the complaint may justify dismissal. *Seven Invs., LLC v. AD Cap., LLC*, 32 A.3d 391, 397 (Del. Ch. 2011) (quoting *Canadian Com. Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at *3 (Del. Ch. Feb. 22, 2006)) (holding "when a motion to dismiss relies upon affirmative defenses … the Court may dismiss a claim if the plaintiff includes in its pleadings facts that incontrovertibly constitute an affirmative defense to a claim.").

In the context of dissolution, a court is entitled to consider whether the deadlock is genuine. Thus, and even if Petitioner had pled that it would decline to approve the nine actions for which unanimous member consent is required, a contrived attempt to manufacture deadlock cannot support dissolution. *See Kleinberg v. Cohen*, 2017 WL 568342, at *11 (Del. Ch. Feb. 13, 2017) ("A court will not recognize a deadlock if one side sought to manufacture it 'by refusing to consider any issue.'") (quoting *Millien v. Popescu*, 2014 WL 656651, at *2 n.17 (Del. Ch. Feb. 19, 2014)); *Francotyp–Postalia AG & Co. v. On Target Tech., Inc.*, 1998 WL 928382, at *4 (Del. Ch. Dec. 24, 1998) (holding a court will not recognize a deadlock "based upon a specious premise."). Here, Petitioner attempted to claim it would not consider certain issues in order to create a deadlock justifying dissolution. That is the very type of false premise which Delaware courts have warned against:

> A deadlock must also be genuine for it to have legal effect… A genuine deadlock does not exist where it is "based upon a specious premise" or "one side sought to manufacture it 'by refusing to consider any issue.'" Delaware courts have denied petitions for judicial intervention where the respondent has shown that "the [constituent] seeking intervention has done so in bad faith by manufacturing a deadlock." "[T]he bad faith defense ... seeks to demonstrate that a director or stockholder has manufactured a 'phony' deadlock or has sought to give the appearance of a deadlock by refusing to agree to any business decisions ...."

*Mehra v. Teller*, 2021 WL 300352, at *18 (Del. Ch. Jan. 29, 2021) (citations omitted).

Here, the first time Petitioner raised the theory of future deadlock, it did so by making an admission in its Answering Brief that it would refuse to consider *any* issue requiring its consent. (*See* A-0183 ("the Operating Agreement lists nine actions critical to the LLC, which require *unanimous* approval of members, but for which CKAL, as a member does not approve")). Even if such an allegation had been properly presented in the Petition, which it had not, an unclean hands defense would be conclusively established from the face of the Petition so as to prevent dissolution on this basis as well.

## III. THE TRIAL COURT CORRECTLY INTERPRETED THE OPERATING AGREEMENT TO IDENTIFY NUMEROUS EXITS FROM DDIS, WHICH THE PETITION DOES NOT MENTION.

### A. Question Presented.

Whether the Operating Agreement provides a legal mechanism to navigate any deadlock? (Preserved at A-0104, A-0232-33.)

### B. Scope of Review.

A decision concerning the interpretation of the Operating Agreement is reviewed *de novo*. *Sunline Commercial Carriers, Inc. v. CITGO Petro. Corp.*, 206 A.3d 836, 845 (Del. 2019). Dissolution is a discretionary remedy reviewed for abuse of discretion. *Acela*, 2019 WL 2720480, at *4.

### C. Merits of Argument.

The Trial Court was empowered to review the Operating Agreement and evaluate the numerous exit mechanisms within it because "[t]he proper construction of any contract . . . is purely a question of law." *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1266-67 (Del. 2017) (internal quotations omitted). Where, as here, the contract is unambiguous, extrinsic evidence is impermissible to add to its terms. *See id.* Thus, even if Petitioner had adequately alleged an existing deadlock, dissolution still would be inappropriate—and dismissal warranted—because the four corners of DDIS's Operating Agreement provided mechanisms for navigating the deadlock. *See Fisk*, 2009 WL 73957, at *4 (on

request for dissolution, the court considers whether "the operating agreement gives no means of navigating around the deadlock"); *Seokoh*, 2021 WL 1197593, *8 ("this court has emphasized that a judicial decree of dissolution is typically inappropriate when the entity's constitutive documents provide an equitable and effective means of overcoming the deadlock"). The Petition is silent on exit mechanisms in the Operating Agreement or their equitability, presumably because the Petition also is silent on deadlock. (A-0066-75.) Petitioner's silence supports dismissal.

The Operating Agreement has at least four mechanisms to navigate deadlock: (1) the Cross-Transfer Purchase in Section 9(f), through which (a) Petitioner may compel Respondent to purchase its membership units or (b) Respondent may compel Petitioner to sell the same units; (2) the third party sale and right of first refusal provisions of Section 9(c); (3) the Buy-Sell provisions of Section 10(b), which are a specific means for resolving deadlock "with respect to any decision that materially and adversely affects the Corporation's business as a result of their dispute"; and (4) the dissolution procedures in Section 12, which apply if the procedures in Section 10(b) are unsuccessful. (A-0047-57.) The Trial Court explicitly addressed the latter two, finding both provided "a legal mechanism set forth within the four corners of the operating agreement" through which the Parties could remedy any deadlock without resorting to judicial dissolution. (Op., 18-19 (quoting *Fisk*, 2009 WL 73957, at*7).) As the Trial Court noted, Petitioner "did not avail himself of" the buy-sell

option in Section 10(b) "(or even reference it in his Petition)." (*Id.*, 19.) Petitioner's failure even to mention the means for breaking a deadlock or exiting the LLC supports dismissal.

Petitioner neither contends that such contractual mechanisms do not exist nor that they would not resolve deadlock between the parties—only that Section 10(b) does not "guarantee an exit" from the Company (Appellant Br., 40), that "Section 12 is not applicable" unless it is "triggered" (*id.*, 40 n.14), and any exit through Section 10(b) would be "inequitable" (*id.*, 43). A cursory review of the relevant provisions of the Operating Agreement dispenses with each of these contentions.

First, the Trial Court correctly assessed and summarized the procedures set forth in Section 10(b), under which the "Electing Members" could deliver notice to the "Responding Members" and propose a purchase price for DDIS's units, and after receiving such notice the Responding Members were required to either purchase all of the Electing Members units or sell their units to the Electing Members at the Buy-Sell Price. (Op., 19 n.79; A-0054). This meets all the requirements of an adequate exit mechanism to break the deadlock.

As explained by the court in *Seokoh*, an exit provision will not warrant dismissal if "negotiations . . . are required as a matter of course" as to key terms of the exit like "price, pricing formula, or a closing timeline . . . ." 2021 WL 1197593, at *15. Section 10(b) requires no such negotiations; indeed, it permits none. Once

the Buy-Sell Price is established, the Responding Members must either purchase the Electing Members' units at the Buy-Sell Price or sell their own within a set time. (*See also* A-0054.) Petitioner's complaints that it may be left with total control of DDIS instead of the Buy-Sell Price is of no import—it is a classic example of an enforceable deadlock-breaking provision which would wholly remedy any deadlock, without the need for further negotiation or agreement on the part of the parties. *See Seokoh*, 2021 WL 1197593, at *1, 15 (calling "divide-and-choose" agreements an "effective strategy" to "confront intractable gridlock in the management of their business").

Similarly, Petitioner's complaint that the Trial Court unrealistically speculated that "this concern [of Petitioner being compelled to purchase Respondent's units] would only arise if Davis proposed an unreasonably high price'" is unfounded. (Appellant Br., 41-42.) That Davis prefers to instead divide *and* choose does not mean Section 10(b) is not an effective and equitable way of resolving any deadlock

Further, Section 12 of the Operating Agreement provides a back-up procedure "in the event that a deadlock cannot be duly resolved under the provisions of Section 10(b)" by setting forth contractual procedures for liquidation of DDIS's assets and the distribution of the proceeds to DDIS's members. (Op., 19; A-0056-57.) Petitioner contends this is "not applicable" unless it is triggered. (Appellant Br., 40

n.14.) The uncomfortable conclusion that Petitioner sidesteps, however, is that Section 12 *would* be triggered if Petitioner's concerns about Section 10(b)'s inability to resolve deadlock came to fruition. Again, Petitioner merely seeks to supplant the provisions to which it agreed in the Operating Agreement with judicial dissolution. This it may not do, particularly as DDIS's members agreed to limit the availability of judicial dissolution. *See R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318, at *6 (Del. Ch. Aug. 19, 2008) ("[t]he mere fact that the business relationship has now soured cannot justify the petitioners' attempt to disregard the agreement they made").

Additionally, while not addressed by the Trial Court, the Petition establishes that Respondent already has triggered the exit mechanism in Section 9(f) of the Operating Agreement. (A-0073, ¶ 23.) While Petitioner disagrees with Respondent's application of the pricing formula, Section 9(f) again provides an adequate exit mechanism by including all the necessary elements which were lacking in *Seokoh*: "a price, pricing formula or a closing timeline at which either Member can buy out the other . . . ." 2021 WL 1197593, at *15.

In sum, and even if Petitioner had pled an existing deadlock, any such deadlock could be resolved using nothing but the provisions within the Operating Agreement. Petitioner cites no authorities indicating it would be inequitable to hold Petitioner to any of these mechanisms. Neither case cited by Petitioner stands for the

proposition that equity permits a recalcitrant member to obtain judicial dissolution notwithstanding agreed upon procedures for breaking deadlock. *See XRI Inv. Holdings, LLC v. Holifield*, 283 A.3d 581, (Del. Ch. 2022) (discussing contractually specified incurable voidness); *In re WeWork Litig.*, 2020 WL 7343021, at *9-10 (Del. Ch. Dec. 14, 2020) (discussing ability of stockholders to enforce provisions of a master transaction agreement). Indeed, even if the Court considers Petitioner's claim that the exit mechanisms are inequitable because Davis's other obligations in the Operating Agreement amount to involuntary servitude—it cites no authorities in support of this proposition. Petitioner's hyperbolic complaints of "involuntary servitude" fail to demonstrate dissolution is appropriate by rendering DDIS's continued operation impracticable. *See supra* § I(C)(3). As such, regardless of whether any deadlock exists, dissolution would still be inappropriate.

## IV. THE TRIAL COURT CORRECTLY CONCLUDED PETITIONER FAILED TO ALLEGE A REASONABLY CONCEIVABLE BASIS FOR CONCLUDING DDIS'S DEFINED PURPOSES WERE IMPOSSIBLE.

### A. Question Presented.

Whether the Petition pled sufficient facts to establish a reasonably conceivable basis for concluding any of DDIS's defined purposes were impracticable, let alone impossible? (Preserved at A-0104, A-0228-32.)

### B. Scope of Review.

A dismissal under Rule 12(b)(6) is subject to *de novo* review. *Clinton*, 977 A.2d at 895. Dissolution is a discretionary remedy reviewed for abuse of discretion. *Acela*, 2019 WL 2720480, at *4.

### C. Merits of Argument.

Petitioner failed to plead a reasonably conceivable basis that DDIS was not fulfilling any of its defined business purposes, let alone that such purposes were impracticable. *See BET FRX*, 2022 WL 1236955, at *6 (quoting *In re Arrow*, 2009 WL 110168, at *2) (dissolution is proper where "it is no longer practicable to operate the business, such as . . . where the defined purpose of the entity has become impossible to fulfill'"); *In re GR BURGR*, 2017 WL 3669511, at *6 (same). While dissolution under 6 *Del. C.* 18-802 does not require showing DDIS's purpose is impossible as a whole, dissolution is still only "granted sparingly," such as "where the *defined* purpose of the entity has become *impossible* to carry out." *See id.*

(emphasis added). The Petition is bereft of any facts suggesting DDIS is not fulfilling its defined purposes[4]—indeed, it does not even mention them, and sets forth no facts showing DDIS is unable to fulfill such purposes. (Op., 20.) Again, Petitioner cannot proceed with its dissolution claim on this basis.

On appeal, Petitioner offers only a perfunctory challenge to the Trial Court's determination on this point, repeating its arguments that the Trial Court's decision "is based on the application of the incorrect pleading standard and overlooked key facts." (Appellant Br., 44.) These arguments fail.

As to the "pleading standard," Petitioner again confuses the overall standard for when dissolution is appropriate with the specific factual circumstances which courts have found (and which Petitioner, in turn, must plead) satisfy that standard. (Appellant Br., 44-45.) By now, the standard itself is well-established: "the Court of Chancery may decree dissolution . . . whenever it is *not reasonably practicable* to carry on the business in conformity with a limited liability company agreement." *See* 6 *Del. C.* § 18-802 (emphasis added). This is the standard cited and applied by the Trial Court. (Op., 16.) While Petitioner emphasizes that the "not reasonably practicable" standard of Section 18-802 does not require it to demonstrate that

[4] Although the heading to Petitioner's fourth argument contends the Trial Court erred in "determining the scope" of DDIS's operations, the substance of the argument does not address this point and, therefore, Petitioner abandoned that argument by failing to address it.

DDIS's continued operation is impossible (Appellant Br., 44-45), the Trial Court did not suggest otherwise.

Instead, where the parties diverge, and where Petitioner errs, is in what factual predicates Petitioner must allege in order to set forth a reasonably conceivable showing that DDIS's continued operation is "not reasonably practicable." As Petitioner's own authorities acknowledge, "[o]ur law provides no blueprint for determining whether it is 'not reasonably practicable' for an LLC to continue, but 'several convincing factual circumstances have pervaded case law . . . ." *In re GR BURGR*, 2017 WL 366951, at *5. Aside from the circumstances already addressed above, such circumstances include "situations . . . where the defined purpose of the entity . . . was impossible to carry out." *Id.* (quoting *Meyer,* 2015 WL 3746283, at *3). "When analyzing purpose, the Court looks to the parties' foundational contractual agreement and asks whether it is reasonably practicable to carry on the business in line with that purpose, not whether 'the purpose . . . has been completely frustrated.'" *Meyer*, 2015 WL 3746283, at *3 (quoting *Fisk*, 2009 WL 73957, at *4-5).

The Petition makes no such showing. Instead, Petitioner merely gestures to the same insufficient allegations concerning breaches of fiduciary and contractual duties which it contends show the impracticability of DDIS's business. (Appellant Br., 45.) The insufficiency of these allegations already has been discussed above.

None of these allegations, moreover, addresses DDIS's *defined* purposes, which—although spelled out explicitly in the Operating Agreement—go wholly unmentioned in the Petition. As the Trial Court correctly stated, "[n]othing in the Petition supports an inference that the Company is not currently performing these functions." (Op., 20.) Thus, the problem with Petitioner's argument on appeal is that dismissal plainly did not turn upon whether the Trial Court applied an "impossibility" or "reasonably impracticable" standard to Petitioner's allegations as they pertained to DDIS's defined purposes.

Nor did the Trial Court hold Petitioner had to show impossibility. Instead, it merely held that Petitioner's allegations did not demonstrate that the *defined purpose* of the entity has become impossible to fulfill. (Op., 20.) The Trial Court relied on *In re Arrow,* a case quoted and relied upon in *In re: GR BURGR,* which Petitioner purports to quote for the opposite proposition. *See* 2017 WL 3669511, at *5 ("While judicial dissolution of an LLC is … granted sparingly,' 'it has been granted in situations where there was 'deadlock' that prevented the [entity] from operating and where the defined purpose of the entity was ... impossible to carry out.'").

The Trial Court granted dismissal because the Petition did not address DDIS's defined purposes or its ability to fulfill them *at all*. Petitioner has failed to point to any allegation in the Petition to the contrary.

As Petitioner has not identified any allegations showing DDIS cannot fulfill its defined purposes or even any allegations showing that DDIS is not currently fulfilling those purposes, DDIS's continued operation is not reasonably impracticable on this basis. Accordingly, the Trial Court correctly dismissed the Petition.

## CONCLUSION

The Petition seeks the extreme relief of judicial dissolution of a limited liability company. The Petition did not allege *any* of the recognized bases for dissolution: (1) a deadlocked Board vote; (2) no means within the Operating Agreement of navigating around the deadlock; or (3) that due to the financial condition of the company, there is effectively no business left to operate. Instead, Petitioner asked the Trial Court to dissolve DDIS because of vague, generalized "dysfunction," which, standing alone, fails as a matter of law to support judicial dissolution.

Accordingly, this Court should AFFIRM the order of the Trial Court granting the Motion to Dismiss and dismissing the Petition.


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Dated: December 8, 2022

## CERTIFICATE OF SERVICE

Melissa N. Donimirski, Esquire, hereby certifies that, on December 8, 2022, the foregoing Appellee Doehler North America Inc's Answering Brief on Appeal was served electronically upon the following:

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