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IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re: Dissolution of DOEHLER DRY INGREDIENT SOLUTIONS, LLC, a Delaware limited liability company,	:	No. 350, 2022
	:	
	:	Court below: Court of Chancery of the State of Delaware
	:	
	:	C.A. No. 2022-0354- LWW

REPLY BRIEF OF APPELLANTS RUSSELL DAVIS AND CROSSKEYS ASSOCIATES, LTD.

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Dated: December 23, 2022

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INTRODUCTION

This Court has never interpreted the meaning of the ponderous statutory prerequisite for judicial dissolution described in Section 18-802 of the Delaware LLC Act.[1]

No court has held that a deadlock is a *sine qua non* to satisfy the statutory requirements for judicial dissolution. Yet both Appellees seem to be obsessed with making that a new requirement, mentioning it no less than 260 times in their combined answering briefs, and arguing that notwithstanding notice pleading rules, petitions for judicial dissolution must use that word as if it had some talismanic value.

Appellees also either ignore or otherwise fail to fully address directly several key arguments in the Opening Brief of Appellants Russell Davis and Crosskeys Associates Ltd. (the "Opening Brief"), including:

- The trial court failed to consider all of the allegations in the Petition, including that the Agreement requires unanimous consent of members for nine itemized important business decisions (A-0042-43), and it

[1] Section 18-802 provides, in its entirety, "[o]n application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement."

remains reasonably conceivable that such consent will not be obtainable;

- The trial court imposed a new pure-heart requirement that is not based on any decision of this Court, statutory history, or the weight of applicable non-dicta, but rather based its holding on a string of dicta found in a line of distinguishable Chancery Court cases;
- Given the palpable animosity between Davis and the other two members, confirmed by allegations in the Petition and the Federal Action, it remains a fantasy to believe they could continue to work together in a businesslike manner, or that they would be able to negotiate a fair or equitable price for Appellants' interest in the Company.

Moreover, Appellees are unable to provide a justification for: why the requirement in the LLC agreement that Davis devote his full-time efforts to overseeing the daily operations of the Company--while the LLC refuses to pay Davis for those full-time daily services (i.e., involuntary servitude), doesn't satisfy the statutory standard in Section 18-802 by making it "not reasonably practicable to carry on the business in conformity with [the Agreement]". 6 *Del. C.* §18-802.

Appellees simply disagree without providing a logical analysis or meaningful reasoning to support their disagreement with the above examples, such

as why an operating agreement that requires full-time daily work with no pay; or why an operating agreement that requires unanimous agreement for nine enumerated key decisions among members who are suing each other in three separate lawsuits, does not make it reasonably conceivable at the motion to dismiss stage, as here, that the statutory standard could conceivably be satisfied at trial (without imposing additional requirements not in the statute).

The Answering Briefs of both Appellees, which together total 66 pages, include individually or together:

(i) Untrue statements;[2]

(ii) Unnecessary statements; and

(iii) Incomplete statements.

Appellees attempt to downplay a significant and fundamental dispute regarding the operations of the Company. Specifically, Davis is contractually mandated as a member to devote his full-time efforts to the operation of the

[2] On page 1 of Respondent Garry Beckett's Answering Brief filed on December 8, 2022, he refers to matters outside the record about the financial condition of the Company, which Davis believes is demonstrably untrue based on current financial records, but such a demonstration would require reference to financial statements outside the limited scope of this appellate record. Nonetheless, to his credit, Beckett filed a corrected brief on December 15, 2022 (the "Beckett Brief", or "BAB"), that deleted references to the Company's profitability.

Company (A-0055, § 11(a)), but it remains undisputed that DDIS refuses to pay Davis for those services.

Neither the trial court nor the Appellees provide a principled rationale or well-settled case law to support a new pure-heart condition--not in the statute--relying instead on distinguishable dicta in a handful of Chancery Court cases for a novel barrier to dissolution.

The trial court and the Appellees overlooked the multitude of material disputes referenced in the Petition, and improperly focused on the dispositive factual nuances--decided on a motion to dismiss record--instead of properly considering why it was reasonably conceivable that a deadlock could be found at trial. Even if the imposition by the trial court of a "pure-heart" requirement was proper, and if the trial court were entitled to decide Davis's state of mind, a subjective factual issue, on a motion to dismiss in a summary proceeding, the Petition contained allegations of several then-existing intractable, grave disputes which warrant at least a trial on the right to a dissolution.

Next, Appellees advocate for an unsupported reading of the Agreement in an effort to force Davis to play a game of Russian roulette with no guarantee of being able to exit--equitably or otherwise--the toxic relationship Appellees created among the three members. The Agreement does not contain the type of contract provision that courts have found sufficient to defeat dissolution. Appellees provide

no controlling authority for their strained and unrealistic reading of the Agreement on that point based on the reality of the dysfunctional relationship between the parties, and the lack of a guaranteed exit for Davis.[3]

Finally, Appellees assert that even if the disputes that Davis identified were true, dissolution is inappropriate because they have not prevented the Company from operating effectively. Not true.

The serious errors of the trial court denied the minority member and former manager of a three-member closely-held LLC an opportunity to present his case at trial in a summary proceeding.

The only way to remedy this inequitable result is to reverse the trial court's premature decision and allow Davis to present his case at trial in a summary proceeding.

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[3] This Court may take judicial notice of the parties' ongoing litigation in the United States District Court for the District of Delaware, regarding the buy-out provisions in the Agreement, which after many months gives no hope of serving as a practical means of separating the parties in the near future. *In re Rural Metro Corp. S'holders Litig.,* 2013 Del. Ch. LEXIS 302, at *28 (Del. Ch. Dec. 17, 2013).

ARGUMENT[4]

I. The Trial Court Did Not Apply The Proper Pleading Standard.

In deciding the Motion, the Court was required to, but did not, consider and accept as true all allegations in the Petition, draw all reasonable inferences in the Appellants' favor, and deny the Motion "unless the [Appellants] would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof." OP 15-16.

The Court failed to apply those standards by, among other things, overlooking many of the plain allegations in the Petition, as well as provisions in the Agreement, and focusing on the conceivability of Appellees' potential defenses rather than the reasonable conceivability that the allegations in the Petition were susceptible of proof. OB 15-27.

[4] DDIS has "elected not to join in the Answering Briefs or file a separate answering brief in this appeal" but "believes the decision below … should be affirmed." D.I. 20 at 2. However, in response to the Petition, DDIS took no position. *Id.* and Exhibit A thereto. Since DDIS's new position was not presented to the trial court it should be disregarded by this Court. *See Shipley v. New Castle Cty.*, 975 A.2d 764, 767 (Del. 2009) ("to the extent that the Shipleys' present arguments not raised in the Superior Court, those arguments are waived.").

a. The Appellees, Like The Trial Court, Fail To Recognize The Numerous Factors Courts Consider In Dissolution Analyses.

The LLC Act does not provide a "blueprint" for determining whether it is reasonably practicable for a company to continue its business in accordance with its operating agreement. OB 16; DAB 15.[5]

With no guidance from this Court or the Delaware Legislature, the Court of Chancery has taken an *ad hoc* approach to judicial dissolution. The Court of Chancery observed that dissolution remains a "discretionary remedy" and that no single factor is individually dispositive; "nor must they all exist for a court to find it no longer reasonably practicable for a business to continue operating." *In re GR Burgr, LLC,* 2017 Del. Ch. LEXIS 156, at *12-13 (Del. Ch. Aug. 25, 2017). Stated differently, the Court of Chancery has confirmed that no one factor is a *sine qua non* of dissolution and the Court may consider the entity as a whole, and the existing circumstances, when evaluating whether dissolution is warranted.

b. Appellees Take An Overly Restrictive View of Deadlock.

This Court has not provided an authoritative interpretation in the context of judicial dissolution of the term "deadlock" (OB 17-18, DAB 19-20). However, based on the case law at the trial court level, it should be viewed as a concept

[5] Citations to "DAB__" refer to the pages of Appellee Doehler North America Inc.'s Answering Brief on Appeal (the "DNA Brief"). Beckett "joins in the arguments made" in the DAB Brief. BAB 4, n. 1.

which considers both specific disputes (including those relating to operational, governance, and strategic issues), and intangible issues (such as animosity and distrust between the members). OB 16-22.

Ultimately, courts should take a pragmatic view of a company and the relationship among its members and managers. Importantly, a court should consider if it would be a "fantasy" to expect the company to continue businesslike operations. *Symbiont.io, Inc. v. Ipreo Holdings, LLC*, 2021 Del. Ch. LEXIS 174, at *169 (Del. Ch. Aug. 13, 2021).

The Opening Brief is replete with examples of the types of disputes which have led courts to dissolve LLCs. *See* OB 17-22. Those include, for example, disputes regarding:

(a) the utilization of company assets and operating capital, and whether to dissolve the company (*Seokoh, Inc. v. Lard-PT, LLC,* 2021 Del. Ch. LEXIS 62, at *10-11 (Del. Ch. Mar. 30, 2021));

(b) general disagreements on "almost every issue facing the company", including raising and using capital (*Fisk Ventures, LLC v. Segal,* 2009 Del. Ch. LEXIS 7, at *13 (Del. Ch. Jan. 13, 2009)); (*Symbiont.io, Inc.*, 2021 Del. Ch. LEXIS 174, at *168);

(c) the general operation of the company (*In re Silver Leaf, L.L.C.,* 2005 Del. Ch. LEXIS 119, at *41 (Del. Ch. Aug. 18, 2005)); and

(d) corporate governance issues, including the failure to obtain unanimous approval for certain actions as required by the operating agreement (*Vila v. BVWebTies LLC*, 2010 Del. Ch. LEXIS 202, at *27 (Del. Ch. Oct. 1, 2010)).

Appellees encourage this Court to ignore those cases because they involved disputes between equal owners, whereas Appellants own 25% of the Company, along with two other members. DAB 20-21. Appellees argue that Davis cannot stop the Appellees from controlling the Company and causing the Company to take any action they desire. *Id*. Not so. Like the trial court, Appellees do not seem to acknowledge that the Petition identifies at least one action (and as the trial court noted, the Agreement contains others) that requires unanimous member consent which was not obtained. Therefore, the fact that Appellants are minority owners is of no moment.

Next, Appellees argue that a deadlock can only arise "at the board level" and must involve a formal "vote". DAB 21-22; BAB 10. There is no support in the statute or case law for that position.

As explained in the Opening Brief, courts have found a deadlock to exist in the absence of a board vote. *See* OB 18-19 (citing *Meyer Natural Foods LLC v. Duff,* 2015 Del. Ch. LEXIS 162, at *13-14 (Del. Ch. June 4, 2015)); *Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800, (Del. Ch. 2011); *GR Burgr,* 2017 Del. Ch. LEXIS 156, at *15; and *Haley v. Talcott,* 864 A.2d 86, 96 (Del. Ch. 2004)).

Appellees also argue that the dysfunction and overall animosity between the members does not play a role in determining whether the Company is deadlocked. DAB 21-22. That is incorrect.

Rather, in *Symbiont.io,* the Court held that because of the discord between the members it was a "fantasy" to believe they could ever work together again. *Symbiont.io*, 2021 Del. Ch. LEXIS 174, at *168-69. The Opening Brief identifies numerous cases where courts have considered the relationship between the members (among other things) in determining whether there was a deadlock. *See* OB 19-20 (citing *Fisk Ventures,* 2009 Del. Ch. LEXIS 7, at *13; *Symbiont.io, Inc.*, 2021 Del. Ch. LEXIS 174, at *168-69; *GR Burgr,* 2017 Del. Ch. LEXIS 156 at *17; *Silver Leaf,* 2005 Del. Ch. LEXIS 119, at *41; *Haley,* 864 A.2d at 96; and *Mehra v. Teller*, 2021 Del. Ch. LEXIS 16, at *37 (Del. Ch. Jan. 29, 2021)). Appellees largely ignore or misconstrue those cases. DAB 21-23.

In an apparent about-face, Appellees then argue that even if the nature of the parties' relationship was a consideration, "no such record of deadlock or discord has been plead here". DAB 22. *But see CPC Mikawaya Hldgs., LLC v. MyMo Intermediate, Inc.*, 2022 Del. Ch. LEXIS 154, at *20 (Del. Ch. June 29, 2022) ("[t]he Court cannot resolve factual disputes on a motion to dismiss").

Nonetheless, the Petition contains several allegations of discord between the members, including, most significantly, that Beckett, DNA, and the managers

(other than Davis) are forcing Davis, through the terms of the Operating Agreement, to continue to devote his full-time efforts to running the Company, but the Company refuses to compensate him at all for his efforts (¶¶ 18, 19). Other examples include allegations that Beckett hacked into Davis's emails and DNA (through its parent company's chairman, Andreas Klein ("Klein")) condoned Beckett's actions. ¶¶20-22. In fact, a March 2022 email chain between Davis, other members of the Company, and Klein, (attached to the Petition as Exhibit C), confirms the "toxic" relationship among the members and managers. ¶ 9, n. 2; AR-005.

c. The Trial Court Did Not Consider All Of The Allegations in the Petition

The Petition identifies at least ten existing substantial disputes between the members which rendered it no longer reasonably practicable to continue the Company's business pursuant to the Operating Agreement. ¶¶1, n.1; 2; 17-24, 26; OB 8-10. By way of example only, there are serious existing disputes between the members over:

i. Appellees preventing Davis, who is contractually required to devote his full-time efforts to overseeing the day-to-day operations of the Company, from being paid for his services (¶¶16, 18, 19, OB 9);

ii. whether the Agreement controls the parties' rights and responsibilities and/or a related agreement is superseded (¶ 1, n.1, OB 8); and

iii. the members inability to obtain the unanimous consent required by the Operating Agreement for at least one significant management decision (¶ 23, OB 8).

The trial court focused on one allegation--that Appellees violated the Agreement by incurring more than $25,000 in debt without unanimous consent. OP 17-18. The Appellees go a step further and actually represent that the Petition

contains fewer allegations that it does. *See* DAB 9 (listing seven "irreconcilable differences" underlying the Petition); and DAB 23 (stating there are only five allegations in the Petition).

Had the trial court considered all ten of the disputes alleged in the Petition the only logical result would have been to deny the Motion.

Furthermore, both the trial court and Appellees improperly classified the disputes in the Petition as merely "violations of contractual and fiduciary duties," which Appellees argue cannot support a claim for dissolution (DAB 16-17, 19).

Appellees go further than the trial court and claim that disputes such as the applicability of the Agreement, and the refusal to pay the person the Agreement tasked with running daily operations of the Company, are insignificant and mundane business disputes (DAB 23-26, BAB 12) which "are not qualitatively significant" (BAB 12), and in Appellees' view do not impact the Company's operations. DAB 23-26, BAB 12.

Their argument suffers from a lack of rigorous scrutiny. First, a dispute whether the Agreement or some other document controls the Company goes to the heart of the Company's business--and the statutory standard. Second, the Agreement obligates Davis to provide a wide range of services. (A-0057-60 (§ 14). However, Beckett, and representatives of DNA decided not to pay Davis to oversee the Company's daily operations, making him work for free. While the Petition

contains several other allegations, the prior allegations alone make it reasonably conceivable that Appellants could, at trial, demonstrate that it is no longer reasonably practicable to carry on the business *in conformity with the Agreement*.

The trial court and Appellees both contend that the Petition fails to allege that the disputes would prevent the Company from engaging in its "defined business". OP 20, DAB 8, BAB 11-12. But that is not a *sine qua non* for dissolution.

II. The Trial Court Added a Pure-Heart Requirement That Is Not Contained In The Statute Or Case Law Of This State.

In dismissing the Petition, the trial court prematurely imposed a new prerequisite that required Appellants to demonstrate that the underlying deadlock was "genuine" and that Davis had a pure heart when he predicted a future deadlock. OB 30, OP 18, n. 77. This requirement is not found in § 18-802, nor is it based on any decision of this Court, statutory history, or the weight of the applicable non-dicta. OB 29-30. Instead, the trial court relied on dicta from a discrete line of distinguishable Chancery Court cases which begin with the Chancery Court's decision in *Francotyp-Postalia AG & Co v. On Target Tech,* 1998 Del. Ch. LEXIS 234 (Del. Ch. Dec. 24, 1998) (defined in the Opening Brief as the Foundation Cases, OB 31-32).

Each of the Foundation Cases identified in the Opening Brief were decided at a different stage than this case, involved different statutes and facts, and, in at least one case, sought different relief. OB 31-35 (discussing: *Francotyp-Postalia; Millien v. Popescu,* 2014 Del. Ch. LEXIS 22 (Del. Ch. Feb. 19, 2014); *In re Shawe & Elting, LLC*, 2015 Del. Ch. LEXIS 211 (Del. Ch. Aug. 13, 2005); and *Kleinberg v. Aharon*, 2017 Del. Ch. LEXIS 24 (Del. Ch. Feb. 13, 2017)).

Appellees do not even address the need for guidance on this issue from this Court or reference the language of Section 18-802. DAB 29-34. Instead, Appellees' entire response comes by way of conflicting conclusory statements that

are untethered to explanation, argument, or authority. Specifically, Appellees simply deny that the trial court added such a requirement (DAB 31), only to then claim, without citation, that "a court is entitled to consider whether the deadlock is genuine" (DAB 33).[6]

Appellees do not address Appellants' argument that the Foundation Cases are inapplicable and do not support the judicial creation of a pure-heart requirement. DAB 29-34. Instead, Appellees cite *Kleinberg* and *Francotyp-Postalia AG & Co.,* for the proposition that a Court will not recognize a "specious premise" as a basis for dissolution. DAB 33. That allegation, however, does not refute the fact that those cases are based on a misguided legal and factual foundation distinguishable from the instant matter.

Finally, Appellees do not address the chilling effect that requiring a petitioner to demonstrate a pure-heart with an altruistic purpose will have on the rights of members and managers of Delaware LLCs who seek judicial dissolution.

Despite not providing any justification for the trial court's premature factual findings, Appellees focus on a legal argument made in Appellants' Answering Brief in Opposition to the Motion (and repeated by Appellants' counsel during oral argument on the Motion). As Appellees repeatedly remind the Court, Davis

[6] Beckett changes the trial court's new requirement to one he mislabels as "good faith"--words not used by the trial court. BAB 14.

argued that a deadlock existed because, among other things, Davis would not approve any of the nine actions that require unanimous member consent under the Agreement going forward.[7] DAB 29-34; OP 18. Appellees and the trial court clung to this argument, finding it was an attempt to manufacture a deadlock which, as a matter of equity (and, as Appellees put it, without reasoning, unclean hands[8]), cannot be used as a basis to grant dissolution. OP 18-19; DAB 32-34.

Appellants' statement does not carry the weight the Appellees and the trial court ascribed to it. First, neither the trial court nor the Appellees identified any authority permitting a Court to make findings of fact about the state of mind or subjective level of sincerity--a nuance not in the pleadings--on a motion to dismiss in a summary proceeding.[9]

Second, even if the trial court properly made such factual findings, and even if this Court also finds a manufactured deadlock bars dissolution claims at the

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[7] Davis has never stated that he would withhold his consent unreasonably, or that he would not consider reasonable proposals which are in the best interest of the Company.

[8] Appellees do not explain why the elements of an unclean hands defense would apply on these facts. That defense does not apply.

[9] Notably, neither the trial court nor the Appellees explained why the new "pure-heart" requirement does not also apply to the Appellees. If the trial court correctly considered the purity of the Petitioners' motives, why should it be permitted to ignore the lack of purity of Appellees' actions (which, as alleged in the Petition, led to this litigation, and are not pristine.) ¶¶ 18, 20-24.

motion to dismiss stage, that does not eliminate the multiple other existing disputes alleged in the Petition which support dissolution. OB 37-38; ¶¶ 1, n.1; 2; 17-24. At most, the trial court should not have relied on that as a basis to reject a claim for dissolution prior to trial.[10]

Appellees attempt to avoid these issues by arguing that the trial court also found that the Petition failed to allege an "existing deadlock". DAB 31-33, 35. As discussed above, the trial court reached that determination by overlooking most of the allegations in the Petition and making premature factual findings without considering what was reasonably conceivable to be proven at trial. *See* OB 15-28, 39-43.

Finally, Appellees make a confusing argument about inviting error then complaining of it on appeal. DAB 30-31. Relying on this Court's decision in *In re Walt Disney Co. Deriv. Litig.*, Appellees appear to suggest that, when one has argued hypothetically to the trial court that a deadlock was based, in part, on a future event, one—in their views--cannot argue on appeal that it was inappropriate for the trial court to make a pre-trial factual finding based on that hypothetical. DAB 29-30.

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[10] The fact that this issue arose at all further demonstrates why this Court must provide guidance on whether a petitioner must satisfy the trial court's new pure-heart requirement before trial in order to obtain dissolution under § 18-802--and if that nuanced factual finding should be made on a motion to dismiss record in a summary proceeding.

To the extent that is Appellees' argument, it fails. In *Disney,* this Court was considering post-trial rulings which involved a robust record developed during an extensive trial. 906 A.2d 27 (Del. 2006). Unlike *Disney*, the Court below was required to decide the Motion purely on the allegations in the Petition, the documents attached thereto, and any reasonable inferences to be drawn therefrom. As a result, at this stage it was premature for the trial court to make a factual finding on that key factual nuanced issue before trial.

III. The Agreement Does Not Contain The Type Of Exit Provision Needed To Preclude Dissolution.

The existence of a contractual exit mechanism does not, by itself, preclude dissolution. *Haley*, 864 A.2d at 88, 96-98. But the fact that Appellant is still a member is evidence that the Agreement does not provide a realistic or practical means for Davis to exit an LLC he wants to leave. Such a provision must "provide[] a fair opportunity for the dissenting member who disfavors the inertial status quo to exit and receive the fair market value of her interest … If an exit mechanism offered in the LLC agreement was not a reasonable alternative to a continued deadlock, the party is not required to seek relief from the deadlock under its provision". *Id.*

Section 10(b) of the Agreement does not meet that requirement because it does not guarantee any member an exit from the Company. OB 40-41. Instead, it creates only the mere possibility of an exit subject to the Responding Members requiring the Electing Member, who wants to exit the Company, to instead buy the interest of the Responding Member(s). OB 40-41.

Appellees claim that because the Electing Member may propose the price of any purchase or sale, that Section 10(b) is an exit mechanism, and therefore dissolution is inappropriate. But Section 10(b) is not a guaranteed exit clause. Appellees' argument is based on the same unrealistic and unwarranted speculation

the trial court relied on.[11] To accept Appellees' argument "presume[s] that the Members would deal with each other in a commercially reasonable manner". *Seokoh*, 2021 Del. Ch. LEXIS 62, at *38. The pendency of the Federal Action in which the parties are disputing the proper buy-out price for a member's interest in the Company based on a formula, confirms that is not a reasonable presumption.

Importantly, unlike Section 9(f) being litigated in Federal Court, Section 10(b) lacks key terms, including a pricing formula. Therefore, as a matter of law it is not an equitable, actual exit mechanism. *Seokoh*, 2021 Del. Ch. LEXIS 62, at *38.

The dispute here is whether Section 10(b) provides an exit mechanism that would allow Davis to predictably exit the Company by selling his interest. *Haley,* 864 A.2d at 96-98. It does not.

As Appellees note, the Petition did not reference Section 10(b), and that is for good reason--it does not apply. By Appellees' reasoning, to withstand a motion to dismiss the Petition would have to identify every provision in the Agreement,

[11] The trial court relied on the same assumption -- that the vague nature of Section 10(b), and the option it gives the Responding Member, would only become a problem "if Davis proposed an unreasonably high price." OP 19, n. 80. We respectfully suggest that assumption does not reflect real-world business realities and the parties' pending Federal Action where the price of an interest in the Company is being litigated.

whether it was applicable or not – even though the entire Agreement was attached to the Petition.

Finally, Appellees point to three other sections of the Agreement they claim provide exit mechanisms. The trial court did not consider two of those sections--9(c) and 9(f)--therefore they are not at issue here.

Even if Sections 9(c) and 9(f) were at issue, they do not apply. Section 9(c) applies when a Member receives a "bona fide offer from any other Person" which is obviously not the case here. Section 9(f) provides the Members with certain transfer rights, however, as demonstrated by the Federal Action, that provision is far from an adequate exit provision, to the extent it could take years for litigation over that provision to be resolved.

Appellees argue that Section 12 is a "back-up procedure" in the event that a deadlock cannot be duly resolved under the provisions of Section 10(b)". DAB 38. The content of Section 12, however, does not provide for dissolution but rather lays out the liquidation procedure after dissolution. A-0056. Furthermore, accepting Appellees' argument would render a portion of Section 12 superfluous in violation of contract law. *See, e.g., Seidensticker v. Gasparilla Inn, Inc*., 2007 Del. Ch. LEXIS 155, at *9 (Del. Ch. Nov. 8, 2007).

IV. The Company's Purpose is Frustrated by the Disputes.

The test for judicial dissolution is "whether it is reasonably practicable to carry on the business of the [Company], and not whether it is impossible." *Silver Leaf,* 2005 Del. Ch. LEXIS 119, at *40. Furthermore, "the not reasonably practicable standard does not require a petition to 'show that the purpose of the limited liability company has been completely frustrated." *GR Burgr, LLC*, 2017 Del. Ch. LEXIS 156, at *12-13.

In granting the Motion, the trial court applied a more stringent test, requiring the Appellants to "demonstrate that the 'defined purpose of the entity has become impossible to fulfill." OP 20.[12] That is a higher burden that the law requires and is itself a basis to reverse the trial court's decision.

Furthermore, under the applicable standard of review, Appellants were not required to *"demonstrate*" or prove at the motion to dismiss stage that the disputes alleged would frustrate the purpose of the Company. At this stage, all that is required is that, based on the allegations in the Petition, it is reasonably conceivable that Appellants can present proof to support the relief sought at trial.

[12] Appellees assert that the trial court did not apply the "impossibility" standard. That argument is belied by the very language of the Opinion. OP 20. Furthermore, while Appellees agree that the appropriate test is not impossibility (DAB 41-45), they collectively use the term impossibility 21 times in 21 pages, including in the title of DAB's argument on the issue (DAB 41).

As discussed above, the allegations in the Petition go to the core problems with the Company's operations and governance.

Therefore, the trial court erred when it granted the Motion prematurely based on an alleged failure to *demonstrate* before trial that factual allegations in the Petition would render it "impossible" to fulfill the purpose of the Company.

CONCLUSION

The trial court's decision has profound and inequitable consequences, not only to Appellants but to all members and managers of Delaware LLCs around the world who seek statutory judicial dissolution. Appellees fail to support the trial court's premature factual findings. Specifically, Appellees:

- Ignore or distort many of the allegations in the Petition which, when fairly considered, demonstrate that the Petition satisfies the minimal "reasonable conceivability" test.
- Fail to justify how it is reasonably practicable to carry on the Company's business in conformity with the Agreement in light of the paralyzing disputes set out in the Petition, including disputes regarding such critical issues as:
    - Whether the Agreement in fact governs the parties' relationship or whether another agreement also controls the governance of the Company;
    - The Agreement forces Davis into involuntary servitude by requiring him to dedicate his full-time efforts to the operation of the Company--despite the Company refusing to compensate him for his daily efforts; and

- The Company cannot obtain unanimous member consent for the multitude of critical actions as required in the Agreement.

This Court should provide authoritative guidance for the Bench and Bar, and for all Delaware LLCs around the world, regarding:

- The trial court's imposition of a novel and unjustified requirement that anyone seeking judicial dissolution must demonstrate they have a pure heart and altruistic intentions if they allege a deadlock; and,
- Whether Delaware allows an LLC Agreement to trap members in a dysfunctional and toxic relationship contrary to the intent of the parties forming the LLC.

For the reasons stated above and in the Opening Brief, Appellants respectfully request that this Court reverse the trial court's dismissal of the Petition and allow Davis to proceed to trial in this summary proceeding.

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