**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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<td>RICHARD BLANCH, VIVIANNA BLANCH, RED BRIDGE & STONE, LLC and CLOVIS HOLDINGS LLC<br><br>Defendants, Nominal Defendant, Counterclaim and Third-Party Plaintiffs-Below / Appellants,<br><br>v.<br><br>STONE & PAPER INVESTORS, LLC, CLOVIS HOLDINGS, LLC,<br><br>Plaintiffs and Counterclaim Defendants-Below / Appellees,<br><br>and<br><br>JAD TRADING LLC, DIAMOND CARTER TRADING, LLC, JOHN DIAMOND, KANOKPAN KHUMPOO, ALBERT CARTER, ELIZABETH CARTER, EISENBERG & BLAU CPAS, P.C., RICHARD EISENBERG, and DD & COMPANY, LLP<br><br>Counterclaim and Third-Party Defendants-Below / Appellees.</td>
<td>No. 262, 2023<br><br>APPEAL FROM THE COURT OF CHANCERY FOR THE STATE OF DELAWARE<br>C.A. No. 2018-0394-PAF</td>
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**<u>APPELLANTS' REPLY BRIEF</u>**

Dated: October 27, 2023

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## PRELIMINARY STATEMENT

The Opening Brief established the managers were entitled, under the express provisions of the Operating Agreement, to compensation for their undisputed *four years* of service on behalf of Clovis. In its Answering Brief, Plaintiff does not dispute the managers provided the very services authorized by the Operating Agreement, *i.e.*, they worked to sell stone-paper products. (AB 31 "Plaintiff did not claim that the Managers improperly 'render[ed] services' to the Company.").) The briefing shows these services did not involve "major decisions" or "interested transactions" and, therefore, the pre-approval requirements of Sections 5.1 and 5.2 did not apply. Accordingly, the trial court's rulings to the contrary must be reversed, including all downstream rulings.

Apparently acknowledging the trial court misinterpreted the Operating Agreement, Plaintiff now argues, "[t]he court did not conclude that the compensation payments are … major decisions, as Appellants suggest." (AB 4 (quotations omitted).) Instead, according to Plaintiff, the trial court found the managers breached Section 5.1 by engaging in the "AaronStone business" "without obtaining Plaintiff's written approval." (*Id.*) It is clear under Section 5.1 that only "major decisions" require pre-approval. As such, if, as Plaintiff argues, the court did not find a "major decision," Blanch could not have breached that provision.

Further, Plaintiff's characterization of the manager's work as the "AaronStone business" is based on its argument Diamond understood his "investment would be used to acquire and operate ViaStone." (AB 1.) The trial court flatly rejected that argument, stating: "This definition of 'Viastone Business' differed from Diamond's original proposal, which would have defined the term more narrowly to mean 'the acquiring of the equity or assets of Tier1 International.'" (Op. 50.) And, using that finding, the court dismissed Plaintiff's fraudulent inducement claim: "Plaintiff's argument that Blanch and Skinner falsely represented that its investment would only be used 'to fund the purchase and operations of ViaStone' fails because the contract does not expressly require Blanch and Skinner to exclusively use Clovis's investment to first purchase and then operate ViaStone." (*Id.* 84.)

The court also rejected Plaintiff's narrow reading of Section 5.1, which sought to exclude "conducting stone paper trials, working to develop a stone paper market in Turkey, purchasing Terraskin paper inventor, seeking to work directly with TLM, and working on behalf of a separate entity named AaronStone without obtaining Plaintiff's written consent." (*Id.* 50–51.) As all of these services fell within the definition of "Viastone Business," they did not involve major decisions and were not subject to a pre-approval requirement.

The Opening Brief also established that the trial court erred in interpreting Section 5.2. In finding the compensation payments were "interested transactions," the court ignored the controlling language in Section 5.2 allowing for manager or employee compensation. In response, Plaintiff makes a series of baseless arguments. First, because the Blanch Defendants made arguments in the alternative, Plaintiff argues they waived their present argument. That is not the case. Indeed, the trial court's Opinion shows the court decided a genuine dispute regarding this issue.

Next, Plaintiff attempts, again, to base the Blanch Defendants' entitlement to compensation on the acquisition of ViaStone. (AB 4–5.) But the court did not find, as Plaintiff argues, "the Managers were entitled to management fees only if ViaStone was acquired." (*Id.* 4.). Instead, the court noted Section 5.2 provided that circumstance as an example of when compensation could be paid, but otherwise found management fees were appropriate if consistent with Section 5.2. (Op. 56.) Under a proper reading of Section 5.2, which must include the controlling language allowing for manager compensation, Blanch was entitled to management fees.

Plaintiff also argues pre-approval was required because certain of the compensation payments were characterized as loans. This cannot be the case, because the trial court definitively found they were not loans. (*Id.* 64–65.) Plaintiff's final argument, that the managers did not qualify as "officers" or "employees" under the language the trial court failed to apply, is unavailing. Blanch was an officer and employee of Clovis and, in any event, the language Plaintiff relies on does not exclude managers from receiving compensation for services they undisputedly provided.

The Opening Brief also established the trial court erred when, disregarding (or not considering) the same evidence and reasoning, it found acquiescence for payments to Skinner but not to Blanch. Plaintiff fails to address this argument in its Answering Brief. Instead, Plaintiff critiques the evidence showing Diamond acquiesced to payments to Blanch without showing how it differs from the evidence relied on to find Diamond acquiesced to Skinner. The finding of acquiescence with respect to Skinner is significant because it dispels the notion, as argued by Plaintiff, the managers "received as 'sweat equity'" units in Clovis. (AB 1, 5.) According to Plaintiff, the managers have no entitlement to management fees because they received units in exchange for their hard work. (*Id.*) This argument is refuted by Diamond having acquiesced to compensation payments to Skinner (and to Blanch). Diamond could not have acquiesced to payments if the managers worked only in exchange for units. Plaintiff's arguments in this regard miss the mark.

As demonstrated in the Opening Brief, once the contract is interpreted properly and the management fees are deemed appropriate, the trial court's remaining holdings fall like a house of cards. Rather than deal with the fact its breach of fiduciary duty, fraudulent concealment, civil conspiracy and aiding and abetting claims are premised on the management fees being improper, Plaintiff argues such claims rest on independent factual findings. They do not. Without an underlying wrong, there is no breach of duty, nothing to conceal, no conspiracy and nothing to aid and abet.

The Opening Brief further demonstrates the trial court's award of damages jointly and severally against all defendants, and directly to Plaintiff was legal error. Plaintiff admits Red Bridge and Vivianna cannot be found liable for a breach of Section 5.2—the sole claim the court relied on in awarding damages. Plaintiff then tries to expand the trial court's Motion to Dismiss ruling to include issues not squarely before the court and, if Plaintiff's position were accepted, would contradict the court's analysis on similar claims and issues in the same opinion. The trial court's failure to analyze whether the amended breach of Section 5.2 claim was derivative is reversible error.

Plaintiff's response to the joint and several liability argument fares no better. Plaintiff asserts the familiar, easily refutable, argument that the issue was not raised below while simultaneously recognizing the issue stems from the trial court's Post-Trial Opinion. At bottom, the court's failure to determine whether the breach of fiduciary duty claims were direct and conflating Blanch and Skinner's alleged breaches—in violation of Section 7.1(a)—is what constitutes reversible error.

Lastly, Plaintiff fails to address the underlying argument regarding the court's fee award thereby conceding that point.

## ARGUMENT

### I. Engaging In The Stone-Paper Market Without Purchasing ViaStone Was Not A "Major Decision"

Under Section 5.1, only work involving "major decisions" required pre-approval. Plaintiff does not dispute the work the Managers performed from April 2014 to November 2015 qualified as "[e]ngaging in" "the paper business" that Tier 1 had been conducting and, therefore, did not involve a "major decision." (A000168, A000174.) Plaintiff omits any mention of the trial court's holding that, during that period, the Managers were "attempting to create demand for ViaStone's stone-paper products with a number of prospective customers" and "working on paper trials," and "[t]hat conduct *readily constituted 'engaging' in the 'paper business* [then] currently conducted by ... [the] corporation that [Clovis] is seeking to acquire." (Op. 51–52 (quoting A000168, A000173–A000074, §§1.1(kk), 5.1(c)) (emphasis added).)

Plaintiff ignores these 19 months of work by the managers and simply focuses on the managers' conduct after November 2015. (AB 21.) But this attempt to split out, and treat differently, *pre*-November 2015 work (which included attempting to create demand and working on stone-paper trials) from identical work conducted *post*-November 2015 (also attempting to create demand and conducting stone-paper trials) finds no support in the text of the Operating Agreement.

To the contrary, the Operating Agreement provides that engaging in the ViaStone business was "*not limited to*[] *the funding of the purchase* and operations" of ViaStone, so the fact the managers worked on *operating* the business instead of *acquiring* the business makes no difference under Section 5.1. (A000174 (emphasis added).) Plaintiff and the trial court have turned the contract's text on its head by saying engaging in the business was "*not limited to*" purchasing that business but then arguing engaging in the stone-paper business *must include* working to purchase the business. (*E.g.*, Op. 52–53.)

Plaintiff fails to address either point—the pre-November 2015 work "readily constituted" engaging in the stone-paper business or engaging in the business was "not limited" to purchasing ViaStone. Instead, Plaintiff merely repeats the court's statement that the "AaronStone" business was something different from the ViaStone business. That statement is legal error. It misinterprets the plain text of the Operating Agreement. Read together, the definition of the "ViaStone Business" and the "Major Decisions" provision focus on the *type* of work being done: they provide that "engaging in" "the paper business currently conducted by Tier 1 International" includes but is "not limited to[] the funding of the purchase and operations thereof ..." (A000168, A000174.) Nothing in that definition depends on whether the work the managers performed when conducting the stone-paper business was done under one name or another.

In fact, the "currently conducted" language reinforces the point that it is the *type of business* that matters, because that would remain the same even if Tier 1 were no longer the entity doing the business. Plaintiff concedes the type of services the managers provided were properly the type of work done to sell stone-based paper products: "Plaintiff did not claim that the managers improperly 'render[ed] services' to the Company," and "[t]he court did not conclude that 'the compensation payments are…"major decisions."'" (AB 4, 31.)

Plaintiff's reliance on the trial court's statement the "AaronStone" business was not the ViaStone business also ignores Drew Aaron's involvement in Clovis was contemplated from the beginning. As the court found, "Diamond met with Blanch, Skinner, and Aaron in October 2013, which convinced Diamond to invest in ViaStone." (Op. 84.) "In January 2014, Blanch and Aaron were actively discussing the possibility of Aaron making a 20,000 ton order from ViaStone." (*Id.*) Indeed, shortly after Clovis was formed, Plaintiff claimed it was told "Aaron was going to supply ViaStone with paper orders[.]" (*Id.* 82.) Plaintiff also convinced the trial court it was told "Aaron would be involved in providing order flow for the post-acquisition ViaStone." (*Id.* 80) The plan from the start was for Aaron to "invest[] in ViaStone and distribut[e] its stone paper product through Aaron's entity, The Aaron Group." (*Id.* 13.)

Plaintiff asks this Court to ignore Section 4.1(c), which authorizes the managers to conduct the "day to day operations of the business of the Company"—a business that includes paying employees—on the theory that the issue was not raised below. (A000171.) But, the question whether the Operating Agreement authorized the managers to pay themselves for the work they did was fairly presented. (*E.g.*, Defendants' Pre-Trial Brief at 2 ("this case is a contract dispute over whether Clovis's payment of compensation to its managers violated the Operating Agreement") (Nov. 30, 2020).) That question includes all provisions of the Operating Agreement that address compensation. That is especially true given the court's opinion specifically cited Section 4.1(c). (Op. 97 n.364 (recognizing that "management of the business, affairs, and day-to-day operations of Clovis shall be vested in each of the Managers" and citing § 4.1(b)–(d) of the Operating Agreement).) *See Watkins v. Beatrice Companies, Inc.*, 560 A.2d 1016, 1020 (Del. 1989) ("where the trial court noted in passing that it finds an argument unpersuasive, such issue was deemed to have been fairly raised").

Further, it is a basic tenet of contract interpretation that a court must construe a contract as a whole and avoid rendering terms superfluous. *E.g., Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014). Accordingly, the Blanch Defendants did not waive the argument Section 4.1(c) applies and entitled the managers to receive compensation for conducting the stone-paper business.

Indeed, Plaintiff does not dispute authority over day-to-day operations includes the right to pay employees. Instead, Plaintiff merely falls back on its argument that "acquiring ViaStone" was a prerequisite to manager compensation. (AB 22.) But, as already explained, operating the stone-paper business was not limited to acquiring ViaStone, and Section 4.1(c) authorized the managers to receive compensation.

## II. Management Fees Did Not Violate The Interested Transactions Provision

Plaintiff argues the Blanch Defendants never raised the argument that paying officers for rendering services was not an interested transaction under Section 5.2. (AB 26.) But, again, that issue was squarely before the trial court. Plaintiff argued payments to the managers were interested transactions, and the managers argued compensation was not self-interested. (*E.g.*, Defendants' Pre-Trial Brief at 21 (Nov. 30, 2020).)

Further, the trial court had a duty to interpret the contract as a whole. That duty included—at the very least—interpreting Section 5.2's definition of what constitutes an interested transaction. To conclude something is an interested transaction, the court had to consider *all requirements* and *all exclusions* in the interested transaction definition. Yet here, the court omitted key language when quoting Section 5.2. (Op. 55–56; *see also* Opening Br. 32 (chart comparing language the court quoted with the full definition).) The court's use of ellipses over the key language indicates it was aware of the language, but omitted it from its analysis. That is enough to show the court was fairly presented with interpreting Section 5.2, but simply erred in applying it to the facts of this case. *See Watkins*, 560 A.2d at 1020 ("In a case where the trial court noted in passing that it finds an argument unpersuasive, such issue was deemed to have been fairly raised.); *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393 at 396–97 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.”).

Turning to the merits, Plaintiff does not deny the managers properly rendered services to the Company. (AB 31 (“Plaintiff did not claim that the managers improperly ‘render[ed] services’ to the Company.”).) Rather, Plaintiff argues the managers were not officers of Clovis. But, the common understanding of the word “officer” is someone who manages the day-to-day operations of the company, which is precisely what the managers did. *Compare* OFFICER, Black’s Law Dictionary (11th ed. 2019) (“In corporate law, the term refers esp. to a person elected or appointed by the board of directors *to manage the daily operations of a corporation*, such as a CEO, president, secretary, or treasurer.”) (emphasis added), *with* A00017 (“the *management of the day to day operations of the business* of the Company shall be vested in each of the Managers”) (emphasis added). And, while Plaintiff notes the Operating Agreement uses both the terms “Managers” and “officers,” the Operating Agreement *does not define* “officers,” so its common meaning controls. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

Plaintiff does not cite any case law in support of its contention that a manager is not an officer—likely because Delaware courts treat managers as officers of limited liability companies. *E.g.*, *Baker v. Impact Holding, Inc.*, 2010 WL 1931032, at *3 (Del. Ch. May 13, 2010) (“Analogizing from the LLC context to the corporate context, the managers of an LLC would be akin to a corporation's directors and officers"); *Pacira BioSciences, Inc. v. Fortis Advisors LLC*, 2021 WL 4949179, at *22 (Del. Ch. Oct. 25, 2021) (recognizing similar treatment for jurisdictional purposes of an "officer of a Delaware corporation or a manager of a Delaware LLC"). Further, "[a] corporation is an artificial being created by law," and so "it can only act by its officers and agents," *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1215 (Del. Ch. 2010), and here it is the managers who act for Clovis by carrying out its day-to-day operations.

In any event, even if not officers, the managers were at least employees of Clovis, and Plaintiff offers nothing in response to that argument. (*See* OB 32 ("[T]hat provision expressly provides paying a manager for 'the rendering of any services' 'in the capacity of *an employee* or officer of the Company' is *not* an interested transaction.") (first emphasis added); *accord* AB 32 (responding to argument that "payments were sent to 'officers' or 'employees'").) If managers working for a company are not officers, then they are necessarily employees. *See Stiftel v. Malarkey*, 384 A.2d 9, 11 (Del. 1977) ("[W]hile it is true that not all the State's employees are officers, yet, for the purposes of Section 1 of this statute at least, all its officers, including plaintiffs, are employees.").

In short, because Plaintiff concedes the managers were properly rendering services for the Company (AB 31), and because the managers were either officers or employees, the compensation they received did not violate the interested transaction provision.

## III. Diamond Acquiesced As To Blanch

Plaintiff tries to spin this argument as one challenging the trial court's "credibility-based finding[.]" (AB 34.) It is not. The court's ruling was not supported by the evidence (regardless of who it found credible), which amounts to reversible error.

In finding no acquiescence with respect to Blanch, the trial court found, "[t]he only evidence cited by the Blanch Defendants in support of this argument is the November 2016 email between Eisenberg and Diamond[.]" (OP. 58–59.) The court then held, "the November 2016 email does not support a conclusion that Plaintiff acquiesced to the Management Fees paid to Red Bridge because Plaintiff did not have full knowledge of the material facts about the payments." (*Id.* 59.)

But, the Blanch Defendants relied on much more than the November 2016 email in their acquiescence argument—facts the court simply ignored. (Def. Pre-Trial Br. 22 ("Email communications and the tax returns of Clovis Holdings show that SPI was always informed of the compensation that the Managers received.") (citing A000264–A000265, A001417–A001440) (Nov. 30, 2020); Defs.' Suppl. Ans. Br. 7 (Sept. 9, 2021) ("All compensation to the Managers, through their entities … were fully documented in the Clovis holdings bank statements, in Clovis Holdings' tax returns, in the financial documents of Clovis Holdings … and in emails to John Diamond.").) It was reversible error for the trial court to ignore such evidence.

Importantly, as noted in the Opening Brief and ignored in the Answering Brief, the trial court relied on a verbal conversation between Diamond and Skinner that occurred shortly after Clovis was funded to find Diamond acquiesced as to Skinner. (*Id.* 61.) When it came to whether Diamond acquiesced to Blanch, however, the court failed to consider that same verbal conversation. (*Id.* 58–61.) That conversation was critical to the Blanch Defendants' acquiescence argument, as Skinner testified, "John Diamond agreed that Brian Skinner would be paid.… *He also agreed that Richard Blanch and Red Bridge would be paid*. And that was on the call that we had." (A000576, 270:11-20 (emphasis added).)

In sum, the issue is not whether the trial court found Blanch not to be credible (it did), or whether it credited Diamond's testimony that he did not read his emails (A000366, 60:6-16), did not "click[] on the link" to the tax returns (A000391, 85:10-24), "forgot" he had access to Clovis's bank accounts (A000500–A000501, 194:16-195:4), or the litany of other excuses Diamond manufactured. (Op. 4 ("I have generally afforded contemporaneous documents and disinterested witness testimony the greatest weight in making my factual findings.").) Instead, the issue is whether the trial court's failure to analyze such evidence and testimony in rendering a decision on the Blanch Defendants' acquiescence argument constitutes reversible error. It does. *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1264 (Del. 2007) (reversed where court "did not assess or take into account the facts undercutting the conclusion that the court ultimately reached.").

## IV. The Remaining Rulings Rest On The Flawed Breach Of Contract Analysis

Rather than confronting the insufficiency of the downstream rulings should this Court reverse the breach of contract claims, Plaintiff argues the trial court's findings "were based on independent findings of fact, none of which are challenged on appeal." (AB 38.) Plaintiff's argument is misplaced—the facts were challenged and the claims were dependent on the breach of contract rulings.

Plaintiff quotes the court's finding that "the Managers 'acted in bad faith' by approving 'transactions … designed to enrich Blanch and Skinner at Clovis's expense. …'" (*Id.* (quoting Op. 75).) That finding was challenged: "The court found paying managers who did the actual work of conducting the stone-paper business was 'designed to enrich Blanch and Skinner at Clovis's expense and were not intended to 'advanc[e] the best interests' of Clovis.'" (OB 37–38 (quoting Op. 75).) Similarly, with regard to fraudulent concealment, Plaintiff claims the court's conclusion the managers were actively concealing their "self-dealing" was not challenged on appeal. (AB 38 (citing Op. 85–86).) It was. (OB 39 (citing Op. 85–86).) Plaintiff also claims the Blanch Defendants do not challenge the finding that "all of the Defendants formed part of the conspiracy to misappropriate Clovis's funds ..." (AB 39 (quoting Op. 88–89).) Again, that finding was challenged. (OB 39 (quoting Op. 88–89).)

Regardless, the argument on appeal is not whether the findings were supported, but rather whether they are rendered meaningless once the Operating Agreement is interpreted properly. Should this Court find the Operating Agreement allowed the managers to receive management fees, there was nothing to conceal, no "bad faith," nothing to misrepresent and nothing improper at all. In sum, without the "bad act" the trial court found, the breach of fiduciary duty, fraudulent concealment, civil conspiracy and aiding and abetting claims all fail—they are necessarily premised on the nonexistent "bad act."

Such result is analogous to the legal impossibility doctrine found in criminal law. Under that doctrine, someone cannot be found guilty of a crime that is not actually a crime. *People v. Thousand*, 465 Mich. 149, 158–59 (2001) ("[I]t is generally undisputed that 'pure' legal impossibility will bar an attempt conviction.… [T]he concept of pure legal impossibility applies when an actor engages in conduct that he believes is criminal, but is not actually prohibited by law.") (citation omitted); *United States v. Hsu*, 155 F.3d 189, 199 (3d Cir. 1998).

Here too, the Blanch Defendants cannot be found to have beached their duties, or concealed, conspired or aided and abetted, without the underlying bad act. Plaintiff's Answering Brief fails to address or even acknowledge this argument.

## V. The Trial Court Erred In Awarding Damages Directly to Plaintiff

Plaintiff admits "not all of Plaintiff's claims were direct" and "the court did not hold that Red Bridge and Vivianna breached the Agreement." (AB 42–43.) Nonetheless, Plaintiff argues the trial court's award of damages was "based on the total sum of payments found to be improper under Section 5.2" and was awarded directly to Plaintiff because "the claim under Section 5.2 is direct." (*Id.* 42.) But, how can damages be awarded from Red Bridge and Vivianna directly to Plaintiff, based on a claim under Section 5.2, when the court did not hold Red Bridge and Vivianna breached Section 5.2? They cannot—that is reversible error.

The court recognized this point: "[Plaintiff] is entitled to recover *directly from Blanch and Skinner* with respect to the claim for breach of Section 5.2 of the LLC Agreement." (Op. 71 (emphasis added).) When issuing its damages award, however, the court ignored that reality, lumped Blanch with Red Bridge and Vivianna under the label "the Blanch Defendants," and awarded damages directly to Plaintiff based on Section 5.2.[1] Plaintiff fails to address that reversible issue.

Next, Plaintiff argues "Defendants ignore (and have therefore waived any challenge to) the court's determination that Plaintiff's claim for breach of Section

[1] The breach of fiduciary duty and aiding and abetting claims were asserted derivatively, thereby requiring a separate analysis (that was not conducted) in order to award damages directly to Plaintiff. (OB, Ex. C at 39–40.)

5.2 seeks to enforce a 'personal right' belonging to Plaintiff under the Operating Agreement[.]" (AB 43.) But, Plaintiff's argument misses the mark.

As outlined in the Opening Brief, the trial court found Count I was both direct *and* derivative—direct as to the informational rights provided in Section 5.2 (*i.e.*, the requirement that interested transactions be disclosed to members)[2] and derivative as to reimbursements. (OB 42.) In sum, the court's motion to dismiss ruling determined that the *informational rights* in Section 5.2 were "personal rights" belonging to the members. (*Id.* Ex. B at 11.) It did not find payments made for unapproved interested transactions resulted in direct claims. (*Id.*) And, as argued in the Opening Brief, if the court had done that required analysis in either the Motion to Dismiss ruling or the Post-Trial Opinion, it would have held such claim was derivative. (AB 43–45.) The trial court's failure to do the proper analysis is what constitutes reversible error.

Next, Plaintiff claims the Blanch Defendants' reference to the pre-amended complaint "is irrelevant." (*Id.* 43.) Although it may be "irrelevant" as to whether the court failed to conduct the required analysis, it is helpful in understanding why. Count I of the pre-amended complaint did not seek disgorgement of "ill-gotten

[2] OB, Ex. B at 11 ("Section 5.2 requires the Company to disclose terms and conditions of any interested transaction to its members, including Stone, before carrying it out. This is a personal right belonging to the members, and Stone may bring its claim directly.").

gains" (OB, Ex. C at 38), which explains the court's failure to analyze whether payments made for unapproved interested transactions was a derivative claim. In other words, since Count I did not directly request the relief ultimately awarded at the time of the trial court's Motion to Dismiss ruling, the court did not address it. However, since the court's Post-Trial Opinion awarded damages based only on such claim, it was error not to conduct the analysis at that time.

Lastly, Plaintiff relies on a ruling it claims followed "further briefing on this very issue" that the Blanch Defendants "make no mention of" "in their Opening Brief" and, therefore, Plaintiff argues, they "have waived any challenge to it." (AB 43–44.) What Plaintiff overlooks is that ruling was not "on this very issue," was not a ruling made against the Blanch Defendants and, instead, was a ruling on Plaintiff's request that "Brian Skinner be ordered to pay the $510,124.35 judgment for which he is liable … directly to the plaintiff." (B000326.) Plaintiff is right—the Blanch Defendants did not appeal a ruling made against Skinner individually. Nor could they. Del. Const. Art. IV, § 11(1)(a); *Delaware Dep't of Nat. Res. & Envtl. Control v. Food & Water Watch*, 246 A.3d 1134, 1138 (Del. 2021) ("a party only has standing to appeal if that party was 'aggrieved by the judgment' being appealed.").

Even under that ruling, Plaintiff's argument is misplaced. Plaintiff argues "the court correctly determined, because of Skinner's (through Skinner Capital) and Blanch's (through Red Bridge) significant ownership in Clovis, and because they might otherwise benefit from a recovery for their own wrongdoing, Count One was properly deemed direct." (AB 44.)[3] However, any ruling that Blanch had control through Red Bridge is clearly erroneous and inconsistent with the trial court's prior findings that Vivianna was "Red Bridge's sole member" and "[t]here is no credible evidence adduced at trial that any person other than Vivianna Blanch was ever a member of Red Bridge, and Vivianna Blanch was repeatedly held out as Red Bridge's sole member." (Op. 89.)

Accordingly, if the trial court's ruling as to Skinner's damages could be attributed to the Blanch Defendants—without the Blanch Defendants being afforded an opportunity to defend themselves on that issue—the court's ruling was nonetheless inconsistent and contrary to its prior ruling, further warranting reversal.

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[3] "Count One" was for breach of contract, which Plaintiff claims the court's motion to dismiss ruling found was direct. What the court actually ruled, in what Plaintiff cites, was that damages *against Skinner* for *Count III* should be paid directly to Plaintiff. (B000338–339.)

## VI. The Trial Court Erred In Awarding Damages Jointly And Severally

To avoid the merits, Plaintiff claims "Appellants waived this argument." (AB 46.) Plaintiff's sole argument is that "Defendants did not previously argue that joint and several liability was unavailable on the grounds that the trial court 'did not award damages for breach of fiduciary duty[.]'" (*Id.*) That argument must be rejected for the simple reason the Blanch Defendants *could not have presented* this argument because it arose directly from the trial court's ruling and damages award that is the subject of this appeal. Plaintiff acknowledges the significance of this point. (AB 24 n.8, 41 n.17, 45 n.19 ("By the nature of this argument, it could not have been raised below.").)

Regardless, to the extent this argument could have been raised below, it was. In requesting reconsideration, the Blanch Defendants argued the court's "finding that the Defendants were jointly and severally liable is not supported by the evidence. Joint and several liability requires knowing joinder of a breach of fiduciary duty and trust." (Mot. for Reargument at 11–12 (Aug. 6, 2021).) In response, Plaintiff argued, "Defendants merely repeat arguments made at trial and in their post-trial briefing," and "co-conspirators are jointly and severally liable for the acts of their confederates committed in furtherance of the conspiracy." (Plf.'s Op. to Mot. For Reargument at 2, 12 (Aug. 13, 2021).) Plaintiff restates that same argument here. (AB 47.)

Reaching the merits, Plaintiff quotes the court's statement that "Plaintiff's damage resulting from Blanch's and Skinner's fraudulent concealment are already subject to recovery by Plaintiff through its breach of contract and breach of fiduciary duty claims," to argue the court awarded damages for breach of fiduciary duty. (*Id.* 46 (quoting Op. 86–87).) Plaintiff ignores the court's reasoning immediately prior to making that finding: "Their fraudulent concealment, however, does not support a damages award beyond the damages *awardable* from Skinner's and Blanch's breaches of contract and fiduciary duty." (Op. 86 (emphasis added).) And, Plaintiff's argument is belied by the court's actual damages award: "These payments all result from Interested Transactions that *violated Section 5.2 of the LLC Agreement*. Because these claims are direct claims, these damages are to be paid to Plaintiff." (Op. 104 ¶¶1, 2)[4]

As articulated in the Opening Brief, the trial court's error lies with its award. On the one hand, the court awarded damages directly to Plaintiff based on a breach of Section 5.2, but, on the other hand, in order to hold the defendants jointly and severally liable, relied on the breach of fiduciary duty claim. (Op. 104–106.) However, in doing the latter, the court disregarded the fact it had only awarded damages for a breach of Section 5.2 and failed to determine whether the breach of

[4] The breach of fiduciary duty claims were not asserted directly (OB, Ex. C at 39), and the trial court never found they were direct claims.

fiduciary duty claim was direct. The court likewise conflated Blanch and Skinner's breaches of fiduciary duties—jeopardizing the logic behind its Section 7.1(a) analysis (finding no limitation of liability because Blanch—through "his" LLC—gained a financial benefit) (*id.* 78), and its aiding and abetting and conspiracy findings (Vivianna and Red Bridge were the "mechanisms through which Blanch" "obtained and funneled the misappropriated assets.") (*id.* 90).[5] The trial court's failures and conflated analysis are what constitutes reversible error.

[5] Plaintiff's argument co-conspirators are jointly and severally liable is misplaced. (AB 47.) Vivianna and Red Bridge were found to be co-conspirators to Blanch's breach of fiduciary duties (*i.e.*, they are the "mechanisms through which Blanch" "obtained and funneled the misappropriated assets") (Op. 90) and Skinner Capital was found to be a co-conspirator to Skinner's breach of fiduciary duty. Vivianna and Red Bridge could be found jointly and severally liable for Blanch's breaches of fiduciary duties, but not Skinner's.

## VII. Because No Breach Occurred, Plaintiff Is Not Entitled To Fees

Plaintiff does not address the Blanch Defendants' argument that, if this Court reverses on the merits, Plaintiff would no longer be the prevailing party and, based on the trial court's ruling, would no longer be entitled to attorneys' fees. (OB 48–50.) As such, upon reversal on the merits, the attorneys' fee award should also be reversed.

## CONCLUSION

For these reasons, this Court should reverse the judgment of the trial court and enter judgment in favor of the Blanch Defendants.

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