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Case Number 371,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

US TRADING COMPANY METALS RE, LLC,

Plaintiff Below, Appellant,

v.

USA RARE EARTH, LLC, MORZEV PTY LTD., MORDECHAI GUTNICK ATF THE MORZEV TRUST, MORDECHAI GUTNICK, and PINI ALTHAUS,

Defendants Below, Appellee,

No.: 371,2025

Appeal From Court of Chancery
C.A. No. 2022-0665-BWD

CORRECTED OPENING BRIEF OF APPELLANT US TRADING COMPANY

October 30, 2025

O'KELLY & O'ROURKE, LLC
Daniel P. Hagelberg, Esq. (No. 6813)
824 N. Market Street
Suite 1001A
Wilmington, DE 19801
(302) 778-4000
dhagelberg@okorlaw.com
Attorneys for US Trading Company Metals RE, LLC

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

NATURE AND STAGE OF PROCEEDINGS

Plaintiff US Trading Metals RE, LLC ("US Trading") appeals from the December 8, 2023, and the May 10, 2024, orders of the Court of Chancery dismissing, in *toto*, its claims against defendants Mordechai Gutnick ATF the Morzev Trust ("ATF Morzev Trust"), Morzev PTY Ltd. ("Morzev"), Mordechai Gutnick ("Gutnick") and Pini Althaus ("Althaus") (collectively, "Defendants").

US Trading filed its Amended Complaint in this matter on November 7, 2023 ("Amended Complaint"). The Amended Complaint stated fourteen counts challenging a series of transactions by which the equity interests of US Trading and its two co-plaintiffs were transferred from Morzev to a new Delaware-based, entity, USA Rare Earth, LLC ("USARE"), as part of a *de facto* domestication of Morzev. Defendants represented that they would, and were legally obligated to, transfer the equity interest of US Trading in Morzev to USARE without diminishment. Notwithstanding these obligations, Defendants did not transfer US Trading's equity interest undiminished, but transferred US Trading a smaller equity percentage of USARE than US Trading had held in Morzev.

Defendants moved to dismiss US Trading's claims. The Court of Chancery dismissed US Trading's claims against ATF Morzev Trust and Morzev, and some of the claims against Gutnick, on personal jurisdiction grounds by order dated December 8, 2023 (reflecting the outcome of an October 20, 2023 decision (the

"Rule 12(b)(2) Decision")), and dismissed the remaining claims against Gutnick and all the claims against Althaus by order dated May 10, 2024 (reflecting the outcome of an April 22, 2024 decision (the "Rule 12(b)(6) Decision")).

US Trading appeals from these orders.[1]

[1] Two other plaintiffs were initially part of the case, Ramco Asset Management, LLC and DinSha Dynasty Trust, and one other defendant, USARE. US Trading did not have any causes of action in which USARE was a defendant and the other plaintiffs reached a confidential settlement that resolved their claims.

SUMMARY OF ARGUMENT

1. All of the Defendants were Members of USARE and consented to personal jurisdiction in Delaware as a condition of membership in the USARE for matters "arising out of or relating to" USARE, its activities, or its properties. The Court of Chancery disregarded this language in dismissing the claims against the ATF Morzev Trust and Morzev, and some of the claims against Gutnick based on personal jurisdiction.

2. In the alternative, the Court of Chancery erred in finding that conspiracy jurisdiction was lacking over Defendants, given that the creation of USARE in Delaware, and the recording of the reduced equity percentage on the books and records of USARE, were both necessary parts of the scheme to reduce US Trading's equity percentage in USARE, and took place for jurisdictional purposes in Delaware.

3. The Court of Chancery erred in dismissing the breach of fiduciary duty and breach of duty of good faith and fair dealing claims against Gutnick and Althaus. Because each of Gutnick and Althaus were responsible for recording the amount of equity US Trading was to receive, each of them knew that US Trading was not receiving its correct amount of equity, each of them owed fiduciary duties to US Trading at the time when its equity was recorded, and each of them breached those duties at the time of the transfer of US Trading's interest in Morzev to USARE. For similar reasons, even if Gutnick and Althaus did not owe US Trading

fiduciary duties at the relevant times, they breached the contractual duties of good faith and fair dealing in the contemporaneous USARE operating agreement by failing to provide US Trading with the amount of equity in USARE that Gutnick and Althaus knew US Trading was owed.

4. The decisions of the Court of Chancery dismissing US Trading's claims should be reversed.

STATEMENT OF FACTS BASED ON THE ALLEGATIONS IN THE AMENDED COMPLAINT

US Trading is a Delaware company with its headquarters in New York. (A-0057.) Prior to and during 2019, it held units in Morzev. (A-0060.)

Morzev is an Australian company founded by Gutnick in 2015. At the time of US Trading's investment in Morzev, Morzev's primary asset was an option to purchase up to 80% of the Round Top heavy rare-earth and critical minerals location in Texas ("Round Top"), owned by the Texas Mineral Resources Corp. (A-0060.)

In 2019, Gutnick decided to transfer the assets and liabilities of Morzev to a US-based entity. (A-0060.)

The principal of US Trading, Steven Rosenfeld, spoke in-person and by phone in March, April, and May 2019, with Gutnick. In these conversations, Gutnick reassured Rosenfeld repeatedly during that time that the transfer from Morzev to the US-based entity would not change or diminish US Trading's interest in any way and specifically stated that US Trading would have the same percentage interest in the new entity that it had in Morzev. (A-0062 – A-0063.)

Althaus formed the new entity, USARE, in Delaware on May 6, 2019. (*Id*.) Rather than have USARE acquire Morzev or merge the two entities, Gutnick effected a series of transactions whereby the liabilities and assets of Morzev were transferred to USARE. (A-0061.)

In July 2019, US Trading executed an agreement with Morzev and ATF Morzev Trust, with Gutnick as the signatory for both entities, that provided for the transfer of US Trading's interest in Morzev to ATF Morzev Trust, with US Trading receiving in exchange an equivalent interest in USARE. (A-0068.) This agreement specifically provided that Morzev and ATF Morzev Trust would transfer US Trading's interest to USARE, which would then issue units to US Trading such that US Trading "will be issued fully paid ordinary units in the capital of [USARE] on a one for one (1:1) basis" and US Trading would receive "23,178,571" units in USARE. (A-0068; *see* A-0221–A-0224 (the "US Trading Conversion Agreement").)

Between July and August 2019, Althaus and Gutnick effected the transfer of USARE equity interests to US Trading on the books and records of USARE. (A-0069–A-0071.) While fiduciary duties were later disclaimed, at this time, both Althaus and Gutnick owed fiduciary duties to US Trading. By virtue of their positions and relationship with Morzev, Gutnick and Althaus knew US Trading's percentage of equity ownership in Morzev and knew the contents of the agreement whereby US Trading agreed to exchange its interest 1:1 for an interest in USARE. Despite knowing these things, Althaus and Gutnick caused USARE to issue US Trading fewer units and a lower percentage of equity that was required by the terms of the US Trading Conversion Agreement. (*Id.*; A-0063.)

Like US Trading, the Defendants: Morzev (A-0057 – A-0058), ATF Morzev Trust (A-0058), Gutnick (*id.*) and Althaus (*id.*) were Members of USARE as that term was defined in USARE's Operating Agreement.

In August 2019, Gutnick caused Morzev to transfer to USARE its most significant asset, its interest in Round Top. (A-0061.)

ARGUMENT

I. THE COURT BELOW ERRED IN FINDING THAT MORZEV, THE ATF MORZEV TRUST AND GUTNICK WERE NOT SUBJECT TO PERSONAL JURISDICTION UNDER THE FORUM SELECTION CLAUSE

A. Question Presented

Did the Court of Chancery err in finding that US Trading's claims in the Amended Complaint fell outside the scope of the forum selection clause in the USARE operating agreement? These issues were raised by these Defendants below and were addressed at pages 6-7 and 11-12 (A-0875 – A-0876 and A-0880 – A-0881) of the 12(b)(2) Decision.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's grant of a motion to dismiss on the basis that personal jurisdiction is lacking. *See AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.,* 871 A.2d 428, 437 (Del. 2005). Upon a motion to dismiss under Ch. Ct. R. 12(b)(2), plaintiff bears the burden of proving jurisdiction over a non-resident defendant. *Id*. If, as here, no evidentiary hearing has been held, plaintiffs need only make a prima facie showing of personal jurisdiction and "the record is construed in the light most favorable to the plaintiff." *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007).

C. Merits of Argument

This Court has held that "where contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties'

contract and enforce the clause, even if, absent any forum selection clause, the [applicable legal principles] might otherwise require a different result*." Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010); *Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 381 (Del. 2013) ("Where the parties to the forum selection clause have consented freely and knowingly to the court's exercise of jurisdiction, the clause is sufficient to confer personal jurisdiction on a court.").

The same fundamental principles of contract interpretation apply when analyzing forum selection clauses as interpreting any other part of a contract, focusing on effectuating the parties' intent as reflected in the agreement and construing the agreement to give effect to all provisions. When a forum selection clause clearly provides for an exclusive forum, Delaware law requires the enforcement of that forum clause. *See Ashall Homes Ltd. v. ROK Entm't. Grp. Inc.*, 992 A.2d 1239, 1246 (Del. Ch. 2010).

The 3rd Amended and Restated Operating Agreement for USARE (the "LLC Agreement") provided the following with regards to the choice of law and choice of forum:

> Any Proceeding arising out of or relating to this Agreement or the Company's activities or properties may be brought only in the Delaware Court of Chancery as provided in the Act, in the state courts of the county where the Company's principal office is located, or, if it has or can acquire jurisdiction, in the United States District Court for the district in which the Company's principal office is located. Each Member and Assignee irrevocably submits to the exclusive jurisdiction of each such court in any such Proceeding, waives any objection it may now

> or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the Proceeding shall be heard and determined only in any such court, and agrees not to bring any such Proceeding in any other court.

(LLC Agreement, Section 15.3 (A-0529).)

By its plain terms, this is a broad forum selection clause that applies to all Members (including the Defendants), and that provides for the Court of Chancery (and the other enumerated courts) as the exclusive forum for "[a]ny Proceeding arising out of or relating to this Agreement or the Company's activities or properties," with each of the Members waiving any objection to personal jurisdiction in these exclusive fora. (*Id.*) "Delaware courts have applied principles of implied consent to hold that when parties specify an exclusive forum for disputes, they implicitly agree to the existence of personal jurisdiction in that forum." *In re Pilgrim's Pride Corp. Derivative Litig*., 2019 WL 1224556, at *12 (Del. Ch. Mar. 15, 2019).

Notwithstanding this broad forum selection clause, and the well-established Delaware law providing for enforcement by the plain terms of forum selection clauses, the court below simply ignored part of the language in the forum selection clause and relied on a false dichotomy between the contract by which US Trading acquired its interest in USARE, and activities conducted on the books and records of USARE to effectuate the acquisition of that interest, in order to grant the motion to dismiss on the basis of Rule 12(b)(2).

Specifically, the court below found that "claims of [US Trading] arise out of the Australian law … govern[ing] [the] Transfer Agreement[] involving [US Trading's] investments in an Australian company, Morzev. The causes of action asserted, in other words, arise out of promises made in contracts to exchange [US Trading's] interest in Morzev for USARE units—[US Trading's] complaint against these Defendants is that Plaintiffs received insufficient units to satisfy the promises, resulting in breaches of contracts or torts. These common-law legal claims do not arise as part of the internal affairs of USARE or from the LLC agreement itself, and the jurisdictional waiver in that entities' LLC agreement cannot confer personal jurisdiction here." (A-0875 – A-0876 (footnotes and internal punctuation omitted).)

There are two problems with this analysis.

First, the court below simply ignores the second part of the forum selection clause, and treats the clause as if it only applies to "claims arising out of [the LLC agreement]," without considering or even quoting the remainder of the forum selection clause which includes claims "relating to the [LLC agreement] or [USARE's] activities or properties." Delaware courts have noted that forum selection clauses that include "relating to" language are broader and cover more controversies than forum selection clauses that contain only "arising from" language. *See Pacira BioSciences, Inc. v. Fortis Advisors LLC*, 2021 WL 4949179, at *21 (Del. Ch. Oct. 25, 2021) (noting broadness of forum selection clauses that contain "relate to" language). "Broad forum selection clauses, on the other hand,

which expressly cover, for example, all claims between the contracting parties that 'arise out of' or 'relate to' a contract, apply not only to claims dealing directly with the terms of the contract itself, but also to 'any issues that touch on contract rights or contract performance.'" *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr.*, 2011 WL 4552508, at *5 (Del. Ch. Sept. 14, 2011). This accords with the broad meaning given to "relates to" in ordinary English, which is much more expansive than that of "arising from". In this case, of course, the forum selection clause includes not only claims that "relate" to USARE but also to USARE's "activities or properties", making the clause even broader. The Court of Chancery compounded its error in interpreting the clause by effectively replacing the words "activities or properties" from the operative forum selection clause with the much more restrictive "internal affairs" in the part of its decision quoted above.[2]

Second, the court below imposed upon the pleadings in the Amended Complaint an artificial, and untenable, distinction between the contract by which US Trading acquired its interest in USARE and the recording of that interest on the books and records of USARE. It should be beyond reasonable dispute that a claim, like that of US Trading here, could "arise" out of a contract under Australian law

[2] Courts have used the phrase "internal affairs" to limit Delaware courts' jurisdiction over managers of LLCs. *See, e.g., Matrix Parent, Inc. v. Audax Mgmt. Co., L.L.C.*, 319 A.3d 909, 928 (Del. Super. Ct. 2024) (*infra*, p. 20). However, there was no reason for court below to have applied that statutory standard to broad language of the USARE operating agreement forum selection clause and the court below identified none.

with two defendants (Morzev and ATF Morzev Trust) and also "relate" to the "activities or properties of" USARE (the recording of the units transferred by the US Trading Conversion Agreement on the books and records of the LLC).

In an ordinary case, in which the transfer of LLC interests must be recorded on the books and records of an LLC, that sale "relates" to the "activities" of the LLC that must record the transfer. Furthermore, the equity balance of the LLC determines the ongoing control of the company, which encompasses all activities the Company could engage in. Further, the fact that the transfer of US Trading's interest "relates" to the "activities" of USARE is underscored here by the plain language of the US Trading Conversion Agreement which provides that Morzev and the ATF Morzev Trust "will procure and facilitate the issue of 23,178,571 [units in USARE] to [US Trading Company] as soon as practicable after return of the signed Transfer Form." (A-0222 – A-0223.) The US Trading Conversion Agreement not only mentioned the need for action by USARE in connection with that agreement, but the agreement also depended on that action to be effective: after all, had USARE refused to issue the units, the US Trading Conversion Agreement would have failed for lack of consideration. It should not be overlooked that Morzev and ATF Morzev Trust were able to make these promises in the US Trading Conversion Agreement as to what USARE would do following the execution of the agreement because they were all controlled by Gutnick.

In sum, the acts complained of by US Trading "related to" the LLC Agreement and the "activities and properties" of USARE such that its claims fell within the scope of the broad forum selection clause in the USARE agreement applicable to Members, including Morzev and the ATF Morzev Trust. The court below erred by not giving effect to those parts of the forum selection clause. When a contract, like this one, is unambiguous, a court errs by not giving effect to all the contract terms. *See In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016).

The Court should reverse the Court of Chancery's decision dismissing Morzev, the ATF Morzev Trust, and Gutnick under Ch. Ct. R. 12(b)(2).

II. THE COURT BELOW ERRED IN FINDING THAT GUTNICK WAS NOT A 'MEMBER' OF USARE SUBJECT TO THE FORUM SELECTION CLAUSE IN THE ABSENCE OF DISCOVERY AND WITHOUT AN EVIDENTIARY HEARING BEING HELD

A. Question Presented

Did the Court of Chancery err in ruling against US Trading at the motion to dismiss stage on the disputed fact as to whether Gutnick was a Member of USARE, in the absence of discovery and without an evidentiary hearing? This issue was raised by this Defendant below and was addressed at pages 11-12 (A-0880 – A-0881) of the 12(b)(2) Decision.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's grant of a motion to dismiss on the basis that personal jurisdiction is lacking. *AeroGlobal Cap. Mgmt., LLC*, 871 A.2d at 437. When facts going to personal jurisdiction are in dispute, at the motion to dismiss stage the court must permit plaintiff discovery before dismissing based on a factual representation by a defendant unless plaintiff's claim is entirely implausible. *See Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 538–39 (Del. Ch. 1991).

C. Merits of Argument

As noted above, US Trading alleged in the Amended Complaint that Gutnick, through Vested Incentive Units that he owned, was a Member of USARE. (A-0058.) While acknowledging that this allegation in the Amended Complaint was supported by the verification of US Trading (and other plaintiffs), the court below nonetheless

found, based on an affirmation by Gutnick, that he had never been a Member of USARE and accordingly that the forum selection clause above did not apply to him. The court below accordingly granted Gutnick's motion to dismiss under Ch. Ct. R. 12(b)(2) on this basis, in addition to the basis addressed in Section I above.

This was an error. While courts in Delaware retain considerable discretion in whether to allow jurisdictional discovery or to hold an evidentiary hearing prior to deciding a motion to dismiss based on the lack of personal jurisdiction, in the absence of discovery or a hearing, a plaintiff on such a motion need only make a prima facie case that the court has jurisdiction over the claim. *Ryan*, 935 A.2d at 265. If the court below intended to require more of the plaintiff here, it was obligated to give the plaintiff an opportunity to submit evidence, *see Hart Holding Co. Inc.,* 593 A.2d at 538–39, and, further, given the nature of the matter in dispute (*i.e*., whether and how many USARE Vested Incentive Units Gutnick held—a matter known only to Gutnick and, presumably, USARE), the opportunity to conduct at least limited discovery.

A plaintiff "may not be precluded from attempting to prove that a defendant is subject to the jurisdiction of the court, and may not ordinarily be precluded from reasonable discovery in aid of mounting such proof." *Id.* at 539. It should be noted that US Trading specifically requested the opportunity to conduct jurisdictional discovery in the event the Court of Chancery found any facts to be in dispute,

including specifically whether Gutnick was or was not a Member of USARE (A-0632 – A-0633), a request the Court of Chancery ignored or tacitly rejected.

US Trading (and the other plaintiffs) had sworn upon information and belief that Gutnick was a Member by virtue of the Vested Incentive Units he possessed. Further, there was nothing implausible about that claim given Gutnick's position as a Manager of USARE for several years and given the hundreds of thousands of Vested Incentive Units that USARE had awarded. A non-frivolous claim of facts that would give rise to personal jurisdiction is all that is required for discovery at the motion to dismiss stage. *See Hart Holding Co. Inc.,* 593 A.2d at 542 (plaintiff's claims required only to be "non-frivolous" for jurisdictional discovery). In any event, the court below did not find US Trading's claim that Gutnick was a Member of USARE through Vested Incentive Units he held was "frivolous."

While the court below asserted that it was "considering the facts in the light most favorable to [plaintiff]," (A-0881) (as it was, of course, required to do, *see Ross v. Earth Movers, L.L.C.*, 288 A.3d 284, 293 (Del. Super. Ct. 2023)), resolving a disputed issue of fact against plaintiff based on a bare affidavit is not "considering the facts in the light most favorable" to plaintiff given the reasonable possibility that a limited amount of discovery could have led to a different result.

Finally, with regards to the finding by the court below that Gutnick was not a "member of USARE at the time of the acts complained of" (A-0880), there is nothing in the forum selection clause (quoted above) that requires a Member to be a Member

at the time "of the acts complained of" in order for the forum selection clause to apply. In any event, had the timing of Gutnick's membership in USARE been dispositive, the court below should have allowed US Trading to engage in at least some discovery on this point before dismissing the claims against Gutnick on that basis.

III. THE COURT BELOW ERRED IN FINDING THAT GUTNICK WAS NOT SUBJECT TO PERSONAL JURISDICTION IN DELAWARE FOR US TRADING'S CLAIMS FOR NEGLIGENT MISREPRESENTATION (CLAIM XIII) AND FRAUD (CLAIM XIV) UNDER SECTION 18-109

A. Question Presented

Did the Court of Chancery err in finding that US Trading's claims in the Amended Complaint for negligent misrepresentation and fraud against Gutnick did not "involve or relate to the business of the limited liability company" in concluding that personal jurisdiction was lacking over Gutnick under 6 Del. Sec. § 18-109? This issue was raised by this Defendant below and was addressed at pages 11-13 (A-0880 – A-0882) of the 12(b)(2) Decision.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's grant of a motion to dismiss on the basis that personal jurisdiction is lacking. *AeroGlobal Cap. Mgmt., LLC*, 871 A.2d at 437.

C. Merits of Argument

Del. Code Ann. tit. 6, § 18-109 provides that, "[a] manager [] of a limited liability company may be served with process in the manner prescribed in this section in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager or the liquidating trustee of a duty to the limited liability company or any member of the limited liability company[.]"

In granting the motion to dismiss under Rule 12(b)(2), the court below

concluded that the "contract and fraud [] claims here [] bear no relationship to the duties of managers and do not involve the internal affairs of USARE." (A-0882.)

However, even applying a narrow view of the statute to comply with due process and holding that Section 18-109 applies only to claims arising in connection with the "corporate governance and the internal affairs of an LLC," *Matrix Parent, Inc.*, 319 A.3d at 928, the court below again created, and then relied on, a false dichotomy between the contract claims against Morzev and ATF Morzev Trust (two entities that Gutnick controlled) and the issuance of units in USARE to US Trading on the books and records of USARE. As argued above, the surrender of the units by US Trading to ATF Morzev Trust explicitly depended on USARE issuing units to US Trading. The scheme to reduce US Trading's equity necessarily involved the "internal affairs of" USARE as it would have failed if Gutnick and/or Althaus had not been able to use their authority as Managers to effect the issuance of new units in USARE to US Trading, which was, as noted above, an explicit requirement of the US Trading Conversion Agreement that Gutnick executed on behalf of Morzev and the ATF Morzev Trust. Simply put, matters going to the *ownership* of an LLC are well within the "internal affairs" of that LLC. The actions by Gutnick alleged here were sufficient to support jurisdiction over him under Section 18-109, consistent with due process. *See In re P3 Health Grp. Holdings, LLC*, 285 A.3d 143, 154 (Del. Ch. 2022).

For these reasons, the court below erred in finding that jurisdiction was lacking over Gutnick under Section 18-109 for US Trading's negligent representation and fraud claims.

IV. THE COURT BELOW ERRED IN FINDING THAT DEFENDANTS WERE NOT SUBJECT TO PERSONAL JURISDICTION IN DELAWARE FOR US TRADING'S CLAIMS UNDER CONSPIRACY JURISDICTION

A. Question Presented

Did the court below err in finding that Defendants were not subject to personal jurisdiction under a theory of conspiracy jurisdiction in Delaware? This issue was raised by the Defendants below and was addressed at pages 13-16 (A-0882 – A-0885) of the 12(b)(2) Decision.

B. Scope of Review

A grant of a motion to dismiss for lack of personal jurisdiction under Ch. Ct. R. 12(b)(2) is reviewed *de novo*. *AeroGlobal Cap. Mgmt., LLC*, 871 A.2d at 437.

C. Merits of Argument

Because the formation of USARE was a "necessary step" in the conspiracy to defraud US Trading, USARE units were issued in Delaware in furtherance of the plead scheme to defraud, and because such issuance was recorded on USARE's books and records in Delaware, personal jurisdiction existed based on the conspiracy jurisdiction analysis over the Defendants.[3]

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[3] The Court of Chancery noted, "Plaintiffs also argued that this Court can exercise personal jurisdiction over *Gutnick and Althaus* [excluding Morzev and the ATF Morzev Trust] regarding the legal claims, under the conspiracy theory of jurisdiction." (A-0882 (emphasis added).) This was apparently an oversight on the part of the Court of Chancery, which noted later in the same decision that conspiracy jurisdiction was sought over the "Morzev Defendants" (A-0884), an undefined term by the Court but defined by Gutnick to include the ATF Morzev Trust, Morzev and Gutnick (A-0235). In any event, US Trading pleaded conspiracy jurisdiction against

Conspiracy jurisdiction is found where there is a factual showing that:

> (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

Istituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc., 449 A.2d 210, 225 (Del. 1982).

At the motion to dismiss stage, an inference of conspiracy requires the pleading of "facts supporting: (i) the existence of a confederation or combination of two or more persons; (ii) that an unlawful act was done in furtherance of the conspiracy; and (iii) that the conspirators caused actual damage to the plaintiff." *Harris v. Harris*, 289 A.3d 310, 339 (Del. Ch. 2023) (citation omitted).[4]

In analyzing the elements, the Chancery Court found that a conspiracy existed, and the Morzev Defendants were members of that conspiracy. Specifically, the Chancery Court found the Morzev Defendants "acted in concert to defraud or

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all the Defendants in the Amended Complaint (A-0059) and argued that all Defendants were subject to conspiracy jurisdiction in its opposition to Defendants' motions. (A-0630 – A-0632.)

[4] While the Court of Chancery also found that it needed a statutory basis for exercise of jurisdiction over at least one defendant (A-0884), it found that it had personal jurisdiction over Althaus and Gutnick under Section 18-109 for the breach of fiduciary duty and breach of the duty of good faith and fair dealing claims (A-0878 – A-0879), although it ultimately dismissed both those claims against both Defendants under Ch. Ct. R. 12(b)(6). (A-0940 – A-0943.)

misrepresent facts to Plaintiffs, and Plaintiffs were harmed by receiving lesser interests than they were promised." (A-0884.)

The Chancery Court erred, however, in finding that no other elements of conspiracy jurisdiction set forth by *Istituto Bancario* were present. As alleged in the Amended Complaint, Gutnick decided to transfer the assets and liabilities of Morzev to a US-based entity to increase the availability of US-based capital to exploit Morzev's primary asset, the Round Top Option. (A-0060.) To effectuate the transfer from Morzev to the US-based entity – that entity being USARE – Althaus formed USARE on May 6, 2019, as a Delaware limited liability company. (A-0061.) Moreover, USARE was also used for the purpose of diminishing Plaintiff's ownership interest during the conversion – while increasing Defendants' own interests in the process. (*Id.*; *see also* A-0061 – A-0069.) Finally, in furtherance of the conspiracy to deprive Plaintiff of his rightful interest in USARE, Defendants amended the operating agreement of USARE, a Delaware entity, and did in fact issue the units. The foregoing allegations are sufficient to establish the remaining elements as set forth under *Istituto Bancario*.

The next element, whether "a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state", is easily met. It is well established under Delaware law that "[t]he formation of a Delaware corporation that facilitates a challenged transaction is a 'substantial act' in Delaware for purposes of

the *Istituto Bancario* test." *Microsoft Corp. v. Amphus, Inc.*, 2013 WL 5899003, at *16 (Del. Ch. Oct. 31, 2013); *Papendick v. Bosch*, 410 A.2d 148, 152 (Del. 1979); *see also Altabef v Neugarten*, 2021 WL 5919459, at *9 (Del. Ch. Dec. 15, 2021) ("Incorporation may be a jurisdictionally significant act if it is part of a wrongful scheme…"). USARE was formed on May 6, 2019 (A-0061), and as was stated by Counsel at oral argument on the Motions underlying this appeal, the formation of USARE was a "necessary step" in the conspiracy to defraud Plaintiff. (A-0853–0854.) In the alternative, and to the extent the Court accepts the Court of Chancery's interpretation of the Amended Complaint that USARE was not, at least in part, created for the purposes of effecting the conspiratorial purpose, filing a certificate of amendment with the Secretary of State of Delaware and authorizing the issuance of Membership Units is a "substantial act in furtherance of the conspiracy" within the state sufficient to warrant conspiracy jurisdiction. *Istituto Bancario*, 449 A.2d at 226-227.

Here, Defendants formed USARE and then issued units to Plaintiff in that entity in exchange for Plaintiff's interests in Morzev. Those units were supposed to be converted on a 1:1 basis, but were not. The challenged transaction – the conversion of Plaintiff's interests in Morzev for equivalent interests in USARE – would not have taken place but for Defendants' incorporation of USARE and issuance of the units in Delaware. This element is met.

Next, the allegations in the Amended Complaint sufficiently show that Defendants "knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state." *Istituto Bancario*, 449 A.2d at 226-227. Defendants selected Delaware as the state in which they wished to form the new, US-based entity to effectuate the conversion and increase the availability of US capital to exploit the Round Top Option. Defendants made substantial representations to US Trading to convince it to convert its assets in Morzev for an equivalent interest in this new Delaware entity. Defendants then amended USARE's operating agreement in Delaware, converted Plaintiff's interests in Morzev, and, after using the laws of the State of Delaware, issued new units in USARE to Plaintiff, giving Plaintiff a lesser amount than promised. Such allegations are sufficient to establish Defendants' knowledge. *See id.*, at 227. When conspirators commit an act that results in an unfair dilution:

> It is fair to say that the entity was injured in its chosen home -- Delaware -- the situs that reflects the center of gravity of the [entity] for all issues involving its internal affairs. The balance sheet and voting dilution injuries that result in fiduciary duty cases are in some sense metaphysical, but that reality strengthens the argument that the corporation at the very least suffers these injuries in its chosen domicile.

Chandler v. Ciccoricco, 2003 WL 21040185, *11 fn. 46 (Del. Ch. May 5, 2003) (finding personal jurisdiction through 10 Del. C. § 3104(c)(3) and the conspiracy theory of jurisdiction).

Finally, as to whether the act of forming USARE in Delaware and issuing USARE units to Plaintiff was a direct and foreseeable result of the conduct in furtherance of the conspiracy, such is obvious. It is clear that authorizing the issuance of a "1:1" conversion of interests from Morzev to USARE, and then issuing *less* than a 1:1 conversion "in a Delaware [entity] through the use of the corporation laws of the State of Delaware", thereby significantly decreasing Plaintiff's interests, "is a direct and foreseeable result of the conspiracy." *Istituto Bancario*, 449 A.2d at 227.

Accordingly, the Court of Chancery had personal jurisdiction over the Defendants under a conspiracy analysis: (a) the Morzev Defendants were already held to have been engaged in a conspiracy; (b) Gutnick as director and acting on behalf of the Morzev Defendants in perpetuating the conspiracy; and (c) Althaus as manager of USARE, who assisted in forming USARE and issuing and recording the fraudulent units.

The decision by the Court of Chancery rejecting personal jurisdiction over the Defendants on this basis should be reversed.

V. THE COURT BELOW ERRED IN FINDING THAT US TRADING HAD FAILED TO STATE A CLAIM AGAINST GUTNICK AND ALTHAUS FOR BREACH OF FIDUCIARY DUTY (CLAIM VII)

A. Question Presented

Did the court below err in dismissing US Trading's claims against Gutnick and Althaus for breach of fiduciary duty for failure to state a claim under Ch. Ct. R. 12(b)(6)? This issue was raised by these Defendants below and was addressed at pages 23-26 (A-0937 – A-0940) of the 12(b)(6) Decision.

B. Scope of Review

A grant of a motion to dismiss for failure to state a claim under Ch. Ct. R. 12(b)(6) is reviewed *de novo*. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167 (Del. 2006).

C. Merits of Argument

Plaintiff sufficiently alleged breach of fiduciary duty (Count VII) against Gutnick and Althaus.

As alleged in the Amended Complaint, during the time which Althaus and Gutnick had fiduciary obligations to Members of USARE, including Plaintiff, Althaus and Gutnick owed US Trading a duty of loyalty and a duty of care. An analysis of the relevant allegations in the context of the controlling law in this area compels the conclusion that these duties required Althaus and Gutnick to take reasonable steps to ensure that US Trading either received the 1:1 equity conversion

in USARE as set out in the US Trading Conversion Agreement or to inform US Trading that it would not be receiving that amount of equity and to further inform as to the amount of equity US Trading would in fact receive. Both Althaus and Gutnick knew the proper amount of equity US Trading was to receive, yet both took steps to ensure that Plaintiff received meaningfully less in USARE than what it had in Morzev. Acting in their capacities as officers, Managers, and, in Gutnick's case, majority owner of USARE, Althaus and Gutnick knowingly issued fewer units to US Trading than it was entitled to, and recorded such issuance on the books and records of USARE, in violation of these duties. (*See* A-0069 – A-0071, A-0077 – A-0078.)

In addressing the claim by US Trading for breach of fiduciary, the Court of Chancery found that: it had jurisdiction over Althaus and Gutnick with respect to the claim (A-0876 – A-0879); Defendants had a personal pecuniary interest in the diminishment of US Trading's equity in USARE (A-0883)[5]; and, at least for the purposes of deciding the motion to dismiss, during the period in question Althaus and Gutnick owed fiduciary duties to US Trading because those duties had not yet

[5] The Court of Chancery specifically used the term "Morzev Defendants" to refer to those persons having a personal pecuniary interest in the diminishment of US Trading's share of USARE equity. As noted in fn. 3, *supra*, the term "Morzev Defendants" at least includes Gutnick, and is part of a discussion of conspiracy jurisdiction applicable to the Defendants, including Althaus. In any event, the same allegations in the Amended Complaint support the same inference against Althaus.

been disclaimed. (A-0880 n. 32; A-0940 n.114.) Notwithstanding these findings and the allegations described above, the Court of Chancery dismissed the claim, finding that the claim was based in contract: "[i]f USARE's managers had a duty to distribute units to Plaintiffs, that duty arises in contract. Absent some contractual duty, the Individual Defendant managers were not obligated to distribute any particular number of USARE units, as fiduciaries." (A-0939.) Moreover, the Court of Chancery held that to the extent Plaintiff alleged the fiduciary duties arose from the Conversion Agreement, the breach of fiduciary claim was one of improper bootstrapping. *Id.*

Such holding misstates controlling Delaware law and Plaintiff's theory of the case.

"[M]anagers of a Delaware limited liability company owe traditional fiduciary duties of loyalty and care to the members of the LLC, unless the parties expressly modify or eliminate those duties in the operating agreement." *William Penn P'ship v. Saliba*, 13 A.3d 749, 756 (Del. 2011). Self-dealing conduct that benefits managers of Delaware LLCs at the expense of a member or members can violate both the duty of care and the duty of loyalty. *See Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 875 (Del. Ch. 2012), *judgment entered sub nom, Auriga Cap. Corp. v Gatz Properties, LLC* (Del. Ch. 2012), *aff'd*, 59 A.3d 1206 (Del. 2012).

The duty of loyalty is breached if directors or officers present give "incomplete information" to members of the LLC or take action for their own benefit to the detriment of members of the LLC. *See Auriga Cap. Corp.,* 40 A.3d at 874. Fiduciary duties are breached when a manager takes an action for his or her own benefit at the expense of a member. *See Kelly v. Blum,* 2010 WL 629850, at *13 (Del. Ch. Feb. 24, 2010) (alleged action by manager to the detriment of member was sufficient to support direct claim for breach of un-waived fiduciary duties). Moreover, such fiduciary duties are breached when a director or officer prepares fraudulent materials or conceals material information (and fails to correct such misrepresentations). *Paron Cap. Mgmt., LLC v. Crombie*, 2012 WL 2045857, at *7 (Del. Ch. May 22, 2012), *aff'd*, 62 A.3d 1223 (Del. 2013).

Here, Althaus and Gutnick in their official capacity, knew US Trading's "last day" equity percentages at Morzev and the corresponding "first day" equity percentages at USARE (A-0070) – US Trading was supposed to receive 15.68% of the equity of USARE; instead, it received 13.805% of the equity in USARE. (A-0069.) Gutnick and Althaus nevertheless recorded the fraudulent, diminished investments that were issued to US Trading that they knew did not represent the "1:1" conversion on the USARE books and records (specifically, including the Cap Table). Knowing that US Trading did not receive the equity it was supposed to receive, Althaus and Gutnick should have (a) provided the value expected; and (b)

recorded the *actual* value of the equity as it should have been issued to US Trading; or, alternatively, (c) corrected the books and records to show that US Trading's converted equity was not converted on a 1:1 basis; and (d), informed US Trading of the reduction in its equity interest following the Morzev to USARE conversion. Failure to do the foregoing breached the un-waived fiduciary duties owed US Trading. *See e.g., William Penn P'ship*, 13 A.3d at 757 (finding breach of fiduciary duty when managers acted in their own self-interest though material misrepresentations and omissions); *Paron Cap. Mgmt., LLC*, 2012 WL 2045857, at *7 (finding breach of fiduciary duty where defendant prepared fraudulent marketing materials, continued to conceal material information, and failed to correct misrepresentations); *Cygnus Opp. Fund, LLC v. Washington Prime Grp., LLC*, 302 A.3d 430, 451 (Del. Ch. 2023) (denying motion to dismiss breach of fiduciary duty claims based on officers providing misleading information in disclosures); *see also Hampshire Grp., Ltd.*, 2010 WL 2739995, at *30 (Del. Ch. July 12, 2010) (defendants breached fiduciary duties by incorrectly recording financial transactions on company's books); *ATR-Kim Eng Fin. Corp.*, 2006 WL 3783520, at *18 (Del. Ch. Dec. 21, 2006), *aff'd sub nom., Araneta v Atr-Kim Fin. Corp.*, 930 A.2d 928 (Del. 2007) (finding breach of fiduciary duty where defendant knowingly signed false documents representing assets were transferred when they were not).

Moreover, US Trading's claim is not one found in contract, nor is it one of

impermissible bootstrapping. US Trading asserts more than that it simply did not receive the value of units contractually promised to it. Instead, US Trading asserts that Althaus and Gutnick failed to disclose accurate financial information to US Trading about USARE—at a time when they owed fiduciary duties to US Trading as a Member of USARE—pertaining to those units. Namely, the units issued were not the 1:1 equivalent for US Trading's units in Morzev, and the units issued by USARE (and the value of those units) were impermissibly diluted. (A-0069 – A-0071.) While similar, the breach of contract and breach of fiduciary duty claims are distinct. The nuance lies in that while arguing for claims of breach of contract (the US Trading Conversion Agreement), US Trading is *also* asserting that Gutnick and Althaus failed to abide by their fiduciary duty of loyalty in the Fiduciary Period[6] to communicate with Members with honesty and fairness, and knowingly provided false, or at least, incomplete information that resulted in damage to US Trading. *See Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 109 (Del. 2021).

Accordingly, US Trading's breach of fiduciary duty claim should not have been dismissed. Defendants Althaus and Gutnick failed to properly disclose truthful

[6] As alleged in the Amended Complaint, Gutnick and Althaus owed fiduciary duties in the period between July and August 2019 before those duties were disclaimed by USARE's first operating agreement. The Court of Chancery specifically declined to reach the factual issue of whether there was an even earlier effective operating agreement for USARE that disclaimed those duties, an operating agreement which US Trading argued was spurious. (*See* A-0940 n. 114.)

information to their Members, thus violating their fiduciary duties. That claim stems from Delaware LLC law—not the US Trading Conversion Agreement.

The Court of Chancery erred in dismissing Claim VII.

VI. THE COURT BELOW ERRED IN FINDING THAT US TRADING HAD FAILED TO STATE A CLAIM AGAINST GUTNICK AND ALTHAUS FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING (CLAIM VIII)

A. Question Presented

Did the court below err in dismissing US Trading's claims against Gutnick and Althaus for breach of the duty of good faith and fair dealing for failure to state a claim under Ch. Ct. R. 12(b)(6)? This issue was raised by these Defendants below and was addressed at pages 26-29 (A-0940 – A-0943) of the 12(b)(6) Decision.

B. Scope of Review

A grant of a motion to dismiss for failure to state a claim under Ch. Ct. R. 12(b)(6) is reviewed *de novo*. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d at 167.

C. Merits of Argument

The implied covenant is inherent in all contracts and "is used to infer contract terms to handle developments or contractual gaps that…neither party anticipated." *Am. Healthcare Admin. Servs., Inc. v. Aizen*, 2022 WL 17077552, *9 (Del. Ch. Nov. 18, 2022) (citation omitted). Where an operating agreement so provides, managers may be bound to the implied covenant. *See Miller v. HCP & Co.*, 2018 WL 656378, at *8 (Del. Ch. Feb. 1, 2018), *aff'd sub nom. Miller v. HCP Trumpet Invs., L.L.C.*, 194 A.3d 908 (Del. 2018). In this case, both the original and Third Amended and Restated USARE Company Agreement provide that Managers of USARE were

required to act in accordance with the implied covenant of good faith and fair dealing. (A-0507 – A-0508; A-0174.)

The covenant applies where "the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Am. Healthcare Admin. Servs.*, 2022 WL 17077552, at *9 (citation omitted). In determining the parties' reasonable expectations, "the court analyzes whether the parties would have bargained for a contractual term proscribing the conduct that allegedly violated the implied covenant had they foreseen the circumstances under which the conduct arose." *Baldwin v. New Wood Resources L.L.C.*, 283 A.3d 1099, 1117-18 (Del. 2022) (internal quotations and citation omitted).

To prevail on such claim, a plaintiff must prove a specific implied contractual obligation, a breach of that obligation, and resulting damage. *See Am. Healthcare Admin. Servs., Inc.,* 2022 WL 17077552, at *10.

Althaus and Gutnick, as Managers of USARE, had implied duties to ensure that investors in the LLC, including US Trading, received the equity in USARE to which they were entitled by virtue of the transfer agreements to which those investors were a party. (A-0078 – A-0079.) By providing US Trading with less equity than it was entitled to, Althaus and Gutnick breached that obligation. This resulted in diminishment in US Trading's interest in USARE in an amount to be determined.

Notwithstanding these points, the Court of Chancery dismissed US Trading's claims for breach of the duty of good faith and fair dealing, finding that any obligation to provide US Trading with the correct amount of equity pursuant to the US Trading Conversion Agreement arose solely under that contract. (A-0942.) Because the "LLC agreement is completely silent as to what interests USARE investors would receive if they converted their equity previously held in Morzev," (*id.*), US Trading had no remedy for the diminishment of its interests effected when Gutnick and Althaus recorded that interest on the books and records of USARE.

This conclusion defies common sense. It is difficult to imagine a more fundamentally important principle for an investor in a Delaware LLC than to get the benefit of the bargain from their initial agreements to invest in the LLC. Any reasonable investor, had they thought there was the faintest possibility that the managers of the LLC would disregard the plain terms of an investment agreement and deliver less equity than the investor was entitled to, would have demanded that an appropriate provision be included in the LLC agreement. *See Baldwin*, 283 A.3d at 1117-18. It is because such obligations so obviously inhere in the functions of the managers of LLCs that such language is not included: this is exactly the situation the duty of good faith and fair dealing was designed to address. *See, e.g., Chamison v. HealthTrust--Hosp. Co.*, 735 A.2d 912, 922 (Del. Ch. 1999), *aff'd*, 748 A.2d 407 (Del. 2000) (relying on duty of good and fair dealing to prevent one party of depriving another of the benefit of its bargain in an indemnification agreement).

The decision of the Court of Chancery dismissed US Trading's Claim VIII, for the breach of the duty of good faith and fair dealing, should be reversed.

CONCLUSION

For the reasons stated above, the Court of Chancery's order dated December 8, 2023 (reflecting the outcome of an October 20, 2023, decision) and order dated May 10, 2024 (reflecting the outcome of an April 22, 2024, decision) should be reversed as to US Trading Company. Claims V – VIII and XIII and XIV of the Amended Complaint should be reinstated.

Dated: October 30, 2025

O'KELLY & O'ROURKE, LLC

/s/Daniel P. Hagelberg
Daniel P. Hagelberg, Esq. (No. 6813)
O'KELLY & O'ROURKE, LLC
824 N. Market Street
Suite 1001A
Wilmington, DE 19801
(302) 778-4000
dhagelberg@okorlaw.com
Attorneys for US Trading Company Metals RE, LLC

OF COUNSEL:

HARRIS ST. LAURENT & WECHSLER LLP
Andrew St. Laurent, *pro hac vice forthcoming*
Ashley Robinson, *pro hac vice forthcoming*
40 Wall Street, 53rd Floor
New York, NY 10005
Telephone: (212) 397-3370
E: andrew@hs-law.com
E: arobinson@hs-law.com