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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, Appellees.	)	No.: 371,2025 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0665-BWD

CORRECTED APPELLEES' ANSWERING BRIEF

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NATURE AND STAGE OF PROCEEDINGS[1]

As the trial court correctly noted, Plaintiff US Trading Company Metals Re, LLC ("US Trading") asserted "a misleadingly-complex set of causes of action, arising out of a rather simple alleged set of facts, and posing what is, at its heart, a contract and fraud action." A-0870. US Trading has now appealed its previously-dismissed attempt to re-cast simple breach of contract claims into tort claims, in an attempt to secure relief from the Defendants who were dismissed from the litigation below. Because the trial court correctly dismissed US Trading's convoluted and poorly-pled claims, the result below should be affirmed.

In its Amended Complaint, US Trading claims that Defendants Morzev Pty Ltd. ("Morzev"), an Australian company, and Mordechai Gutnick ATF the Morzev Trust (the "Morzev Trust"), an Australian trust, breached their obligations under a July 22, 2019 Australian law-governed share transfer agreement (the "US Trading Transfer Agreement"). US Trading further claimed that Defendant Gutnick, an Australian citizen and New York resident, and Defendant Althaus, also a New York resident, facilitated those breaches.

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[1] The proceedings below included two additional plaintiffs who settled claims that were not dismissed. A-0057 (Am. Compl. ¶¶ 5-6). The proceedings below also included an additional defendant, USA Rare Earth, LLC ("USARE"), A-0057 (Am. Compl. ¶ 8), but US Trading did not assert any claims against that entity and has voluntarily dismissed it from this appeal, *see* Appellant's Notice of Voluntary Dismissal Pursuant to Supreme Court Rule 29(a) (Dec. 1, 2025).

Pursuant to the US Trading Transfer Agreement, the Morzev Trust agreed to accept the transfer of US Trading's shares in Morzev and, in exchange, issue to US Trading "fully paid ordinary shares in the capital of USA Rare Earth on a one for one (1:1) basis (Consideration Shares)" for a total of "23,178,571 Consideration Shares." A-0222-23 (Am. Compl. Ex. E). According to US Trading, this promise carried with it an undocumented protection against share dilution post-transfer. *See* A-0222-23 (US Trading Transfer Agreement containing no express protection against share dilution); A-0076 (Am. Compl. ¶ 86) (alleging that the "spirit of the agreement" included protection against dilution). On this basis, US Trading asserted the following claims, all centering on the alleged unlawful share dilution:

- Breach of the Australian law-governed US Trading Transfer Agreement, against Morzev and the Morzev Trust (Count V);
- Breach of an alleged implied covenant in the US Trading Transfer Agreement, against Morzev and the Morzev Trust (Count VI);
- Breach of fiduciary duty and the duty of good faith and fair dealing against Messrs. Gutnick and Althaus (together, the "Individual Defendants"), in their capacities as manager and chief executive, respectively, of USARE (Counts VII and VIII); and
- Negligent misrepresentation and fraud, against Morzev, the Morzev Trust, and Mr. Gutnick, stemming from alleged misrepresentations Mr.

Gutnick allegedly made on behalf of those Australian entities (Counts XIII and XIV).

Defendants moved to dismiss US Trading's claim on multiple grounds, including lack of personal jurisdiction, *forum non conveniens*, and failure to state a claim. By decision dated October 20, 2023 and order dated December 8, 2023 (the "12(b)(2) Decision"), (A-0868-86; A-0890-92) the trial court dismissed all the US Trading Transfer Agreement-related counts (Counts V, VI, XIII and XIV) for lack of personal jurisdiction. A-0885-86; A-890-92 (12(b)(2) Decision at 16-17). The trial court held that those counts all fundamentally involve "breach of contract or fraud taking place outside of this State." A-0885 (12(b)(2) Decision at 16).

By decision dated April 22, 2024 and order dated May 10, 2024 (the "12(b)(6) Decision"), (A-0913-43; A-0944-49) the trial court dismissed, for failure to state a claim, the remaining counts, which alleged claims for breach of fiduciary duty and the implied covenant (Counts VII and VIII). A-0940-41 (12(b)(6) Decision at 26-27). With respect to the fiduciary duty claim, the trial court concluded that, "[a]bsent some contractual duty, the Individual Defendant managers were not obliged to distribute any particular number of USARE shares, as fiduciaries." A-0939 (12(b)(6) Decision at 25). As the trial court rightly found, any such obligations "would be governed by [the US Trading Transfer Agreement] and [are] not properly brought as a breach of fiduciary duty claim." A-0940 (12(b)(6) Decision at 26). As for the

implied covenant claim, the trial court declined to "rewrite [the USARE operating agreement] simply because Plaintiffs wish they had gotten a better deal." A-0943 (12(b)(6) Decision at 29).

This appeal followed. On appeal, US Trading fails to establish that the trial court incorrectly determined that it could not exercise jurisdiction over foreign defendants in connection with claims arising from or related to the foreign law-governed US Trading Transfer Agreement. US Trading has also failed to establish that the trial court incorrectly determined that US Trading failed to plead its remaining claims. The trial court's orders were correct should be affirmed in their entirety.

SUMMARY OF ARGUMENT

1. Denied. Apart from its claims against Messrs. Gutnick and Althaus for breach of fiduciary duty and the duty of good faith in their capacities as manager and executive of USARE, respectively, none of US Trading's remaining claims arise from or relate to USARE's operating agreement (the "LLC Agreement").[2] As the trial court concluded, those claims arise from the US Trading Transfer Agreement. A-0875-76 (12(b)(2) Decision at 6-7). The forum selection clause in the LLC Agreement therefore offers US Trading no jurisdictional hook.

2. Denied. US Trading fails to allege facts sufficient to support application of the very narrowly construed theory of conspiracy jurisdiction. Despite US Trading's effort to rewrite its pleading on appeal, as the trial court concluded, "[t]he Amended Complaint does not allege that USARE was created for the purpose of facilitating the conspiracy." A-0885 (12(b)(2) Decision at 16). Instead, US Trading alleges that the company was created and that Morzev's assets were transferred to it in order to facilitate access to U.S. capital markets. *Id.* That is not a conspiratorial act, and there are no other acts in furtherance of a supposed conspiracy that are

[2] Unless otherwise noted, citations to the LLC Agreement reference the Third Amended and Restated Company Agreement of USA Rare Earth LLC, dated as of March 3, 2021, which is attached to the Amended Complaint as Exhibit A. A-0143-208.

alleged to have occurred in Delaware, which is fatal to US Trading's theory of conspiracy jurisdiction.

3. Denied. US Trading's fiduciary duty claim fails for three reasons: (1) it is duplicative of its claim for breach of contract; (2) it is derivative, and (3) the Individual Defendants owed no fiduciary duty to issue a certain number of shares of US Trading in the first place. As for the implied covenant claim, the trial court declined to rewrite the LLC Agreement to provide US Trading with additional protections that it had not negotiated for itself. A-0942-43 (12(b)(6) Decision at 29).

4. Denied. The trial court's orders dismissing US Trading's claims should be affirmed.

STATEMENT OF FACTS

Morzev is an Australian private company that once held an option on a rare earth and critical minerals project in Texas. A-0057, A-0060 (Am. Compl. ¶¶ 9, 18). Morzev was founded by Mr. Gutnick, an Australian citizen and New York resident who has never set foot in Delaware. A-0056, A-0058 (Am. Compl. ¶¶ 1, 11); A-0340 (Gutnick Decl. ¶ 5). US Trading was an investor in Morzev. A-0060 (Am. Compl. ¶ 21).

In the summer of 2019, Mr. Gutnick caused Morzev to transfer its option on the Texas rare earth project to USARE in order to afford more ready access to U.S. capital markets. A-0060-61 (Am. Compl. ¶¶ 22, 24-25). On July 22, 2019, US Trading executed a transfer agreement with Morzev and another Australian entity, the Morzev Trust (the "US Trading Transfer Agreement"). A-0057, A0061-62, A-0222-24 (Am. Comp. ¶¶ 6, 28 & Ex. E). The US Trading Transfer Agreement, which is governed by the laws of Western Australia, provides that US Trading would receive 23,178,571 shares in USARE in exchange for surrendering its interest in Morzev. A-0222-23) (Am. Comp. Ex. E at 1 (¶1) & 2 (¶3)). As shown by USARE's capitalization table as of when this case was filed, which the trial court properly considered as part of the pleadings pursuant to Court of Chancery Rule 10(c), that is exactly what happened. A-0281 (listing US Trading as holding 23,178,571 Class A Units in USARE).

Three years after receiving its stake in USARE, US Trading filed this suit asserting various causes of action all based on the theory that its equity percentage in Morzev was unlawfully diluted when transferred to USARE. That alleged promise is not documented anywhere. US Trading instead claims that protection against dilution is implied in the US Trading Transfer Agreement and/or the LLC Agreement or, alternatively, that it was induced into signing the US Trading Transfer Agreement based on that alleged promise.

ARGUMENT

I. DISMISSAL SHOULD BE AFFIRMED BECAUSE THE COURT BELOW PROPERLY CONCLUDED THAT IT LACKS PERSONAL JURISDICTION OVER MORZEV, THE MORZEV TRUST AND GUTNICK UNDER THE LLC AGREEMENT'S FORUM SELECTION CLAUSE

A. QUESTION PRESENTED

Did the trial court err in concluding that the USARE LLC Agreement's forum selection clause does not apply to US Trading's claims, as those claims arise instead out of the Australian law-governed US Trading Transfer Agreement? This issue was raised by Morzev, the Morzev Trust, and Mr. Gutnick below and is addressed at pages 6-7 and 11-12 (A-0875-76, A-0880-81) of the 12(b)(2) Decision.

B. STANDARD AND SCOPE OF REVIEW

This Court reviews the trial court's grant of a motion to dismiss for lack of personal jurisdiction de novo. *See Genuine Parts Co. v. Cepec*, 137 A.3d 123, 129 (Del. 2016). The plaintiff bears the burden of showing a basis for a trial court's exercise of jurisdiction over a nonresident defendant. *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008). To evaluate whether personal jurisdiction may be exercised over a nonresident defendant, Delaware courts determine (1) whether service of process is authorized by some provision of the Delaware Long Arm Statute, 10 *Del. C.* § 3104(c); and (2) whether subjecting the nonresident defendant to personal jurisdiction in Delaware comports with the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *See Genuine*

Parts, 137 A.3d at 137-41; *LaNuova D&B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986). "A party may expressly consent to jurisdiction by contract. If a party properly consents to personal jurisdiction by contract, a minimum contacts analysis is not required." *Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1228 (Del. 2018); *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132 (Del. Ch. 2008).

C. MERITS OF ARGUMENT

USARE's LLC Agreement contains a broadly drafted consent to jurisdiction applicable to its members. But as the trial court correctly found: (1) Mr. Gutnick, individually, was never a member of USARE, which exempts him from the LLC Agreement's consent to jurisdiction, *see infra* Part II; and (2) while Morzev and the Morzev Trust were members of USARE, the claims asserted against them do not arise from or relate to USARE's LLC Agreement or affairs. A-0874-76 (12(b)(2) Decision at 5-7).

On appeal, US Trading argues that the trial court "relied on a false dichotomy" between US Trading's acquisition of shares pursuant to the US Trading Transfer Agreement and the recording of those interests on the books and records of USARE. App. Br. at 10. This is misdirection. Counts V and VI, asserted against Morzev and the Morzev Trust, are for breach of the Australian law-governed US Trading Transfer Agreement and the implied covenant allegedly inhering therein. A-0075-76 (Am. Compl. ¶¶ 79-88). Counts XIII and XIV, asserted against Morzev, the

Morzev Trust, and Mr. Gutnick, arise from claims that they made misrepresentations to induce US Trading into signing the US Trading Transfer Agreement. A-0086-90 (Am. Compl. ¶¶ 140-58).

There is no "false dichotomy" here. As the trial court correctly determined, there are two separate contracts, the US Trading Transfer Agreement and the LLC Agreement, and the former governs all but two of US Trading's claims. A-0875-76. The cases cited by US Trading do not allow for an operating agreement's choice-of-forum clause to sweep in claims that arise under a separate contract.[3] And while US Trading makes much of the supposed need for USARE to take action to effectuate the US Trading Transfer Agreement, the US Trading Transfer Agreement itself specifically provides that "Mordechai Gutnick, ATF The Morzev Trust and [Morzev Pty Ltd] will procure and facilitate the issue of 23,178,571 Consideration Shares" with no such obligation for USARE, A-0223 (Am. Compl. Ex. E), such that if, for example, USARE had not issued any shares to US Trading, US Trading would be in the same position it is in now: it would have claims for damages arising from the US Trading Transfer Agreement, not the LLC Agreement. *See Endowment Rsch. Grp., LLC v. Wildcat Venture Partners, LLC*, 2021 WL 841049, at *5, n. 39 (Del. Ch. Mar.

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[3] *See Parcira BioSciences, Inc. v. Fortis Advisors LLC*, 2021 WL 4949179, at *21 (Del. Ch. Oct. 25, 2021) (declining to overextend forum selection clause and dismissing for lack of personal jurisdiction); *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr.*, 2011 WL 4552508, at *5 (Del. Ch. Sept. 14, 2011) (involving routine application of broad arbitration clause).

5, 2021) (holding that 6 *Del. C.* § 18-109 does not provide a basis for a court to exercise personal jurisdiction over "tort or contract claims unconnected to the limited liability company's internal affairs or corporate governance").

In addition, all of US Trading's claims accrued *before* the date on which US Trading claims the consent-to-jurisdiction clause at issue came into existence, *i.e.*, August 27, 2019.[4] US Trading alleges that it received its USARE shares prior to that date. A-0069 (Am. Compl. ¶¶ 52-53). So, the claims for breaches of express and implied terms of the US Trading Transfer Agreement necessarily accrued before the consent-to-jurisdiction clause existed and therefore arise from the US Trading Transfer Agreement only, as the trial court found. A-0876. The misrepresentation claims accrued even earlier, as they are based on alleged statements made in March, April, and May of 2019. A-0062-63 (Am. Compl. ¶ 29). Whatever the breadth of the consent-to-jurisdiction clause in USARE's operating agreement, it cannot apply to conduct that occurred and claims that accrued prior to its alleged effective date. *See AgroFresh Inc. v. MirTech, Inc.*, 257 F. Supp. 3d 643, 661 (D. Del. 2017).

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[4] As discussed in Part V below, US Trading has manufactured a dispute around the date of USARE's original operating agreement. But if US Trading is taken at is word, that date is August 27, 2019, App. Br. at 33 n.6; A-0492 (St. Laurent Aff. Ex. B, August 27, 2019 Company Agreement of USARE), more than a month after the US Trading Transfer Agreement was executed.

II. DISMISSAL SHOULD BE AFFIRMED BECAUSE THERE IS NO GOOD FAITH BASIS FOR US TRADING'S ALLEGATION THAT GUTNICK WAS A MEMBER OF USARE

A. QUESTION PRESENTED

Did the trial court err by considering the facts in the light most favorable to US Trading and declining to find that Mr. Gutnick was a member of USARE for purposes of 6 *Del. C.* § 18-109? This issue was raised by Mr. Gutnick below and is addressed at pages 11-12 (A-0880-81) of the 12(b)(2) Decision.

B. STANDARD AND STANDARD AND SCOPE OF REVIEW

This Court reviews the trial court's grant of a motion to dismiss for lack of personal jurisdiction de novo. *See Genuine Parts*, 137 A.3d at 129.

"The trial court is vested with a certain discretion in shaping the procedure by which a motion under Rule 12(b)(2) is resolved." *Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991) "Since the central question is one of fact, the court may hold a preliminary hearing and determine the necessary facts, or it may decide the matter on affidavits." *Id.*; *see also Chumash Cap. Invs., LLC v. Grand Mesa Partners, LLC*, 2024 WL 1554184, at *6 (Del. Super. Ct. Apr. 10, 2024) (holding that plaintiff's factual allegations can be "contradicted by affidavit," and the court may look outside the Complaint to resolve the motion.) If the motion is decided on affidavits, the court should require only that plaintiff make out a prima facie case. *Hart Holding Co., Inc.*, 593 A.2d at 539. If jurisdictional discovery is permitted, a plaintiff must establish personal jurisdiction

by a preponderance of the evidence. *Id.* Requests for jurisdictional discovery are to be made my motion. *Bay Cap. Fin., L.L.C. v. Barnes & Noble Educ., Inc.*, 249 A.3d 800 (Del. 2021) ("[a]n application to the Court for an order shall be by motion[.]") (*citing* Del. Ch. R. 7(b)(1)).

The decision to deny jurisdictional discovery is reviewed for abuse of discretion. *See Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006). "If a plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between the parties and the forum state, the plaintiff's right to conduct jurisdictional discovery should be sustained." *CLP Toxicology, Inc. v. Casla Bio Holdings LLC*, 2020 WL 3564622, at *15 (Del. Ch. June 29, 2020) (internal citations omitted). But jurisdictional discovery is not appropriate until there is demonstration of a non-frivolous ground for jurisdiction. *Id.*

C. MERITS OF ARGUMENT

US Trading alleges in its Amended Complaint that Mr. Gutnick was "on information and belief, a Member of USARE through Vested Incentive Units he holds." A-0058 (Am. Compl. ¶ 11). This unadorned allegation seeks to sweep Mr. Gutnick into the LLC Agreement's choice-of-forum clause, which binds members of USARE. A-0197-98 (LLC Agreement § 15.3). The trial court rightly concluded that, "even considering the facts in the light most favorable to [US Trading], [it could

not] find that Gutnick was a member of USARE or that the jurisdictional waiver of the LLC agreement applies." A-0881 (12(b)(2) Decision at 12).

US Trading's principal contention on appeal is that the trial court should not have accepted Mr. Gutnick's sworn statement that he has never been a member of USARE. App. Br. at 15-16. According to US Trading, this was error because the trial court reached its conclusion without the benefit of jurisdictional discovery or an evidentiary hearing. *Id.* at 16-17. In US Trading's estimation, the trial court should have deferred to its single conclusory "information and belief" allegation instead. US Trading is incorrect for several reasons.

First, importantly, US Trading never made anything other than a single-sentence request for jurisdictional discovery in the proceedings below. A-0633 (MTD Opp. at 15). No motion was made, and US Trading's counsel did not raise the issue at argument. "Given the dearth of factual allegations," and US Trading's failure to seek jurisdictional discovery in a proper way, the trial court was well within its discretion to decline to order discovery so that US Trading could "fish for a possible basis for th[e] court's jurisdiction." *Neurvana Med., LLC v. Balt USA, LLC*, 2019 WL 5092894, at *1-2 (Del. Ch. Oct. 10, 2019) (quotations omitted).

Second, for similar reasons, US Trading's single-sentence "information and belief" allegation that Mr. Gutnick was a member of USARE fails to state a *prima facie* basis for personal jurisdiction. The Amended Complaint provides no basis for

the "information" or "belief" that undergirds US Trading's allegation, and US Trading concedes that it lacks the knowledge necessary to make such an allegation. App. Br. at 16 (claiming that the information at issue is a "matter known only to Gutnick and, presumably, USARE"). Rote, conclusory allegations like those advanced by US Trading need not be accepted as true, even on a motion to dismiss. *See City of Ft. Myers General Employees' Pension Fund v. Haley*, 235 A.3d 702, 716 (Del. 2020) ("The court is not required to accept every strained interpretation of the allegations, credit conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff's favor.") (quotations and citation omitted). The trial court rightly rejected them here.

Third, while Mr. Gutnick's declaration was properly considered for the reasons stated by the trial court, A-0881 (12(b)(2) Decision at 12 & n.37), this Court need not consider Mr. Gutnick's declaration to affirm the result below. The identities of USARE's members are not, as US Trading contends, information that is out of its reach. App. Br. at 16. In fact, in the version of the USARE operating agreement submitted by US Trading as controlling, Mr. Gutnick is not identified anywhere as a member of USARE in his individual capacity.[5] *See* A-0492, A-0532-84 (St. Laurent Aff. Ex. B, August 27, 2019 Company Agreement of USARE) (reflecting

[5] As the record reflects that Mr. Gutnick was never a member of USARE, there is no relevant issue relating to the timing of any such non-existent membership, as suggested by US Trading. App. Br. at 17-18.

that Mr. Gutnick is not among the member signatories or listed as a member on the company's capitalization table). Nor is Mr. Gutnick identified as a member in the earlier version of USARE's operating agreement that Defendants allege is controlling. A-0286, A-0326-30 (Keller Decl. Ex. C, July 3, 2019 Company Agreement of USARE) (reflecting that Mr. Gutnick is not among the member signatories or listed as a member on the company's capitalization table). US Trading's "information and belief" allegation to the contrary is frivolous and completely without basis, and the trial court was right to reject it.

III. DISMISSAL SHOULD BE AFFIRMED BECAUSE THE COURT BELOW PROPERLY CONCLUDED THAT IT LACKS PERSONAL JURISDICTION OVER GUTNICK UNDER SECTION 18-109

A. QUESTION PRESENTED

Did the trial court err by concluding that US Trading's fraud and negligent misrepresentation claims do not relate to Mr. Gutnick's duties as a manager of USARE for purposes of 6 *Del. C.* § 18-109? This issue was raised by Mr. Gutnick below and is addressed at pages 12-13 (A-0881-82) of the 12(b)(2) Decision.

B. STANDARD AND SCOPE OF REVIEW

This Court reviews the trial court's grant of a motion to dismiss for lack of personal jurisdiction de novo. *See Genuine Parts*, 137 A.3d at 129. Under 6 *Del. C.* § 18-109, a manager of a Delaware LLC may be served with process and thereby consent to jurisdiction for actions "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."

C. MERITS OF ARGUMENT

The trial court properly rejected 6 *Del. C.* § 18-109 as a basis for the exercise of personal jurisdiction over fraud and negligent misrepresentation claims against Mr. Gutnick relating to the Australian law-governed US Trading Transfer Agreement. A-0881-82 (12(b)(2) Decision at 12-13).

As a matter of due process, specific personal jurisdiction is analyzed on a claim-by-claim basis. *See Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir. 2007);

Remick v. Manfredy, 238 F.3d 248, 255-56 (3d Cir. 2001). US Trading references unspecified "actions by Gutnick" giving rise to jurisdiction over its fraud and negligent misrepresentations claims, App. Br. at 20, but according to the Amended Complaint Mr. Gutnick's actions were limited to making statements and agreements on behalf of Australian entities pursuant to an Australian law-governed contract. A-0062, A-0075-76, A-0086-90 (Am. Compl. ¶¶ 29, 79-88, 140-58). Those tort claims therefore necessarily arise from or relate to that contract.

Notably, as alleged, these counts in the Amended Complaint include only Mr. Gutnick and the Australian entities and are not asserted against USARE. A-0086 (Count XIII Header); A-0088 (Count XIV Header). In other words, Mr. Gutnick is accused of fraud and negligent misrepresentation based on actions he took as a representative of Morzev and the Morzev Trust, not USARE. Unsurprisingly, then, as the trial court observed, the allegedly fraudulent conduct involving Morzev and the Morzev Trust does not implicate Mr. Gutnick's later role as a manager of USARE or the internal affairs of USARE. A-0882 (12(b)(2) Decision at 13). Section 18-109 simply does not provide a basis for the exercise of personal jurisdiction over Mr. Gutnick as a USARE manager with respect to "tort or contract claims unconnected to the [LLC's] internal affairs or corporate governance." *Endowment Rsch. Grp., LLC*, 2021 WL 841049, at *5, n. 39.

IV. DISMISSAL SHOULD BE AFFIRMED BECAUSE THE COURT BELOW PROPERLY CONCLUDED THAT US TRADING FAILED TO ALLEGE A BASIS FOR THE EXERCISE OF CONSPIRACY JURISDICTION

A. QUESTION PRESENTED

Did the trial court err by concluding that US Trading alleged no basis for application of the narrow doctrine of conspiracy jurisdiction? The issue was raised by Morzev, the Morzev Trust, and the Individual Defendants and is addressed at pages 13-16 (A-0882-85) of the 12(b)(2) Decision.

B. STANDARD AND SCOPE OF REVIEW

This Court reviews the trial court's grant of a motion to dismiss for lack of personal jurisdiction de novo. *See Genuine Parts*, 137 A.3d at 129. Under this Court's precedent, a nonresident conspirator-defendant may be subject to personal jurisdiction in Delaware on 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.

Instituto Bancario Italiano SpA v. Hunter Eng'g Co., 449 A.2d 210, 225 (Del. 1982). "While a valid path to jurisdiction, the conspiracy theory of personal jurisdiction is very narrowly construed to prevent plaintiffs from circumventing the minimum

contacts requirement." *Morrison v. Berry*, 2020 WL 2843514, at *13 (Del. Ch. June 1, 2020) (quotations and alterations omitted).

C. MERITS OF ARGUMENT

In its most grasping argument for jurisdiction, US Trading falls back on the doctrine of conspiracy jurisdiction, which as the trial court noted is a method of analysis for specific jurisdiction, and not an independent basis for finding jurisdiction. A-0883. This argument fails because, as the trial court concluded, no act in furtherance of a conspiracy is alleged to have occurred in Delaware. A-0885 (12(b)(2) Decision at 16).

On appeal, US Trading contends that the formation of USARE, the issuance of membership interests in USARE, and the amendment of USARE's LLC Agreement suffice as acts in the forum in furtherance of a conspiracy for purposes of the *Instituto Bancario* test. App Br. at 24. But despite its efforts to augment its pleading on appeal, the fact remains that, as the trial court concluded, the Amended Complaint itself alleges that these activities were undertaken for purposes of accessing the U.S. capital markets. A-0060 (Am. Compl. ¶ 22). A review of the Amended Complaint confirms that it "does not allege that USARE was created for the purpose of facilitating the conspiracy," as the trial court found. A-0885 (12(b)(2) Decision at 16).

The cases cited by US Trading offer it no assistance. One does not involve Delaware's theory of conspiracy jurisdiction at all. *See Papendick v. Bosch*, 410 A.2d 148 (Del. 1979) (conducting a federal minimum contacts analysis). The others do not support the proposition that the mere incorporation and standing up of a Delaware LLC can be a "substantial act" in Delaware for purposes of conspiracy jurisdiction. *Compare Altabef v. Neugarten*, 2021 WL 5919459, at *9 (Del. Ch. Dec. 15, 2021) (dismissing case for lack of personal jurisdiction where, as here, defendant did nothing more than lawfully incorporate an entity in Delaware); *with Microsoft Corp. v. Amphus, Inc.*, 2013 WL 5899003, at *16 (Del. Ch. Oct. 31, 2013) (conspiracy jurisdiction found where a Delaware corporation was formed for the express purpose to facilitate defendants' breaches of fiduciary duties to a foreign company); *Chandler v. Ciccoricco*, 2003 WL 21040185, at *8-11 (Del. Ch. May 5, 2003) (alleging that corporate filings were made pursuant to a conspiracy to entrench conspirators in corporate office, similar to the facts of *Instituto Bancario*). The Amended Complaint otherwise contains only rote, conclusory allegations, and fails for that reason as well. *See City of Ft. Myers General Employees' Pension Fund*, 235 A.3d at 716 (Del. 2020) (observing that a court need not credit conclusory allegations).

US Trading next focuses on the alleged situs of its injury in Delaware, claiming that Defendants knew their conduct would harm it there. App. Br. at 26.

But there is no allegation that Defendants knew that US Trading was incorporated in Delaware at the time the US Trading Transfer Agreement was executed. In any event, the issue is of no moment, as regardless of whether an injury in Delaware suffices to establish one of the five elements of conspiracy jurisdiction, mere injury to a forum residence does not suffice for purposes of federal due process. *Walden v. Fiore*, 571 U.S. 277 (2014).

At bottom, if there were some grand conspiracy one would expect to see allegations concerning that conspiracy throughout the operative pleading, but here they are shoehorned into one paragraph in largely conclusory fashion. *See* A-0059-60 (Am. Compl. ¶ 16) (single paragraph parroting the *Instituto Bancario* test). The trial court correctly rejected US Trading's effort to invoke the narrow theory of conspiracy jurisdiction.

V. DISMISSAL SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT PROPERLY DISMISSED COUNT VII OF THE AMENDED COMPLAINT CLAIMING A BREACH OF FIDUCIARY DUTY AGAINST GUTNICK AND ALTHAUS

A. QUESTION PRESENTED

Did the trial court err in dismissing US Trading's claims against the Individual Defendants for breach of fiduciary duty where the claim was based on the same behavior and sought the same remedies as the breach of contract claim against the same parties and where fiduciary duties were explicitly disclaimed? This issue was raised by the Individual Defendants below and was addressed at pages 23-26 (A-0937-40) of the 12(b)(6) Decision.

B. STANDARD AND SCOPE OF REVIEW

"This Court reviews *de novo* the grant of a motion to dismiss under Court of Chancery Rule 12(b)(6), to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (internal quotation marks omitted).

To state a claim for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary duty and (2) a breach of that duty by the defendant. *See Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010), *aff'd sub nom. ASDI, Inc. v. Beard Rsch., Inc.*, 11 A.3d 749 (Del. 2010). While "managers of a Delaware limited liability company owe traditional fiduciary duties of loyalty and care to the

members of the LLC," those duties can be modified or eliminated in the LLC agreement. *William Penn P'ship v. Saliba*, 13 A.3d 749, 756 (Del. 2011).

Furthermore, "a plaintiff may not 'bootstrap' a breach of fiduciary duty claim [from] a breach of contract claim merely by restating the breach of contract claim as a breach of fiduciary duty." *Gruenstein v. Silva*, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009); *Stewart v. BF Bolthouse Holdco, LLC*, 2013 WL 5210220, at *13, *15 (Del. Ch. Aug. 30, 2013) (holding that "the fiduciary duty claim here arises from a dispute relating to the exercise of a contractual right" and "do[es] not implicate potentially different remedies."). A party may only pursue both contract claims and fiduciary claims when the fiduciary duty claims "depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy." *MHS Cap. LLC v. Goggin*, 2018 WL 2149718, at *23 (Del. Ch. May 10, 2018). The relevant inquiry is whether "there is some harm to be remedied through the lens of fiduciary duty which cannot be adequately compensated through enforcement of the contract." *Id.*

C. MERITS OF ARGUMENT

US Trading's claim for fiduciary duty fails for three reasons: (1) US Trading's claim for breach of fiduciary duty is duplicative of its claim for breach of contract; (2) Individual Defendants had no fiduciary duty to US Trading; and (3) US Trading's fiduciary duty claim is derivative.

First, US Trading's claim for breach of fiduciary duty duplicates its contract claim. As the sole basis for its breach of fiduciary duty claim, US Trading alleged that "[a]s part of those fiduciary duties, Althaus and Gudnick [*sic*] were required to ensure that the Plaintiffs received their equity interests in USARE as set out in the respective agreements." A-0077 (Am. Compl. ¶ 91). The Amended Complaint goes on to allege that between July 22, 2019 "and August 26, 2019, both Althaus and Gutnick took steps in their capacities as chief executive officer and manager to ensure that the Plaintiffs would not receive their proper amounts of equity in USARE but instead would receive meaningfully less." A-0077-78 (Am. Compl. ¶ 94). Given that the basis for US Trading's fiduciary duty claim was the Individual Defendant's *post-execution* alleged violation of the US Trading Transfer Agreement, the trial court correctly held, "DinSha and US Trading Company both have their own respective agreements governing the conversion of their Morzev interests to USARE. Accordingly, any claim related to the Individual Defendants' purported failure to properly convert DinSha and US Trading Company's shares without diminution would be governed by their respective contracts and is not properly brought as a breach of fiduciary duty claim." A-0940 (12(b)(6) Decision at 26).

Now, US Trading attempts to overcome its bootstrapping by arguing that "the breach of contract and breach of fiduciary duty claims are distinct because . . . US Trading is *also* asserting that Gutnick and Althaus failed to abide by their fiduciary

duty of loyalty in the Fiduciary Period to communicate with Members with honesty and fairness, and knowingly provided false, or at least, incomplete information that resulted in damage to US Trading." App. Br. at 33 (footnote omitted). Of note, there are no allegations in the Amended Complaint that Gutnick and Althaus "knowingly provided false, or at least incomplete information" to US Trading during the alleged Fiduciary Period after execution of the US Trading Transfer Agreement.

Further, it is unclear how any representations *after* execution of the contract would affect the equity stake for which US Trading claims it contracted. Additionally, US Trading does not even attempt to argue that the damages arising from its breach of fiduciary duty claim are distinct from its breach of contract claim, because it cannot; for both, it is a diminution of US Trading's equity in Morzev upon transfer to USARE. *Compare* A-0072 (Am. Compl. ¶ 64) (alleging breach of contract based on failure to deliver proper equity interest), *with* A-0077-78 (Am. Compl. ¶ 94) (alleging breach of fiduciary duty due to failure to protect US Trading's equity interest). Delaware law has long foreclosed duplicative claims of this nature. *See Nemec*, 991 A.2d at 1129 ("It is a well-settled principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous.").

The authorities cited in US Trading's opening brief also fail to address, let alone demonstrate as in error, the trial court's holding that US Trading's breach of fiduciary duty claim is duplicative of its breach of contract claim. In fact, and unsurprisingly, as it arguments run contrary to Delaware law, US Trading almost exclusively supports its breach of fiduciary claim with cases that involve no contractual duties.[6] While one case cited by US Trading, *Cygnus Opportunity Fund, LLC v. Washington Prime Grp., LLC*, did involve contractual duties, it does not support US Trading's arguments. There, the allegations underlying the claim for breach of fiduciary duty related to entirely different conduct—a failure to disclose material information—than the breach of contract claim related to a specific "No Acquisition Provision." *Cygnus Opportunity Fund*, 302 A.3d 430, 452 (Del. Ch. 2023). The conduct in US Trading's cited cases—each involving alleged fraud or

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[6] *See* App. Br. at 30-32 (citing *William Penn P'ship v. Saliba*, 13 A.3d 749, 757-58 (Del. 2011) (finding breach of fiduciary duty where defendant-managers violated sale provisions of the LLC operating agreement to sell LLC to themselves); *Paron Cap. Mgmt., LLC v. Crombie*, 2012 WL 2045857, at *7 (Del. Ch. May 22, 2012) (finding breach of fiduciary duty where defendant defrauded LLC members by lying about his own professional track record, employment history and personal finances), *aff'd*, 62 A.3d 1223 (Del. 2013); *Hampshire Grp., Ltd. v. Kuttner*, 2010 WL 2739995, at *29 (Del. Ch. July 12, 2010) (finding breach of fiduciary duty where defendants "were complicitous in causing the company to violate the [Sarbanes-Oxley Act]" by knowingly mischaracterizing corporate expenses); *ATR-Kim Eng Fin. Corp. v. Araneta*, 2006 WL 3783520, at *15 (Del. Ch. Dec. 21, 2006) (finding breach of fiduciary duty where controlling stockholder defrauded minority stockholder to liquidate and transfer $36 million of company assets to defendant's family members), *aff'd sub nom. Araneta v. Atr-Kim Fin. Corp.*, 930 A.2d 928 (Del. 2007)).

self-dealing, and divorced from any independent contractual duty—only serves to underscore that the conduct complained of here can only serve as the basis for a claim of breach of contract.

Second, the Individual Defendants had no fiduciary duties to US Trading in the alleged "Fiduciary Period." The timeline of events here is instructive. USARE adopted an LLC Agreement that was made effective on July 3, 2019 (the "July LLC Agreement"). The July LLC Agreement contains a broad disclaimer of fiduciary duties,

> To the fullest extent permitted by applicable law, and subject to Section 6.3(a) (relating to improper conduct), the Managers shall have no contractual or fiduciary duty to any Member or Assignee or any other person who is a party to or otherwise bound by this Agreement other than the contractual covenant of good faith and fair dealing.

A-0405 (July LLC Agreement § 5.6). The US Trading Transfer Agreement was executed on July 22, 2019, subsequent to the July LLC Agreement. A-0068 (Am. Compl. ¶ 48). While the precise date when US Trading received USARE shares is conveniently not pleaded, US Trading broadly alleges it became a member of USARE "[b]etween July 2019 and August 26, 2019," A-0069 (Am. Compl. ¶¶ 52-53), again, subsequent to the July LLC Agreement.

The next month, USARE adopted an amended LLC agreement, which became effective August 27, 2019 (the "August LLC Agreement"). A-0492. The August LLC Agreement also contained the same language that was adopted in the July LLC

Agreement limiting the Managers' fiduciary duties. A-0507 (August LLC Agreement § 5.6).

In other words, both *before* and *after* the US Trading Transfer Agreement was signed, USARE had disclaimed any fiduciary duties to Members. *See* A-0405 and A-0507.

In addition, both the July LLC Agreement and the August LLC Agreement note that only certain members, not including US Trading, are entitled to anti-dilution rights. *See* A-0401 (July LLC Agreement § 3.6); A-0420 (July LLC Agreement § 11.2); A-0503 (August LLC Agreement § 3.6); A-0522 (August LLC Agreement § 11.2). As US Trading concedes, "managers 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." App. Br. at 30 (citing *William Penn*, 13 A.3d at 756). Here, in both the July and August LLC Agreements, USARE expressly modified those duties. This entirely bars US Trading's claim.

US Trading argued before the trial court that there was a period in which the USARE operating agreement—and the claim-destroying disclaimer in it—did not exist, which it has defined as the "Fiduciary Period." A-0069 (Am. Comp. ¶ 52); *see also* App. Br. at 33. US Trading's argument must be rejected. Under 6 *Del. C.* § 18-201(d), an LLC agreement is a necessary condition to the formation of an LLC, and

the governing agreement may be made effective as of the date stated in the agreement. *See Robinson v. Darbeau*, 2021 WL 776226, at *9 (Del. Ch. Mar. 1, 2021). As the July LLC Agreement states it is effective as of July 3, 2019, the exclusion of fiduciary duties contained in that agreement applies during the alleged "Fiduciary Period" that US Trading has concocted here—and US Trading's breach of fiduciary duty claim is properly dismissed.

Third, US Trading's claim for breach of fiduciary duty is derivative. "A shareholder has no personal or individual right of action against a third party for acts causing injury to a corporation," *Continental Grp., Inc. v. Justice*, 536 F. Supp. 658, 660 (D. Del. 1982), *see also* William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 5910 (2019). Generalized claims of equity dilution allege harm at the company level that would affect all shareholders in the same way. *See Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1266–67 (Del. 2021).

Here, US Trading's claim for breach of fiduciary duty is a derivative claim, *see id.*, for which it has (1) made no demand on either Morzev or USARE to bring such a claim and (2) made no attempt to allege demand futility. As such, USARE lacks standing to sue. *Beam ex. Rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). The unadorned allegation "[u]pon information and belief" that no other USARE Member was "similarly treated or diluted," A-0069 (Am. Compl. ¶ 51), does not suffice to plead standing. *See Griffin*

Corp. Servs., LLC v. Jacobs, 2005 WL 2000775, at *6 (Del. Ch. Aug. 11, 2005) (a "bald statement" made on information and belief is "merely conclusory and need not be accepted as true").[7]

[7] Moreover, as is obvious from the pleadings, at least two other members besides US Trading—DinSha and Ramco—were likewise supposedly "diluted." A-0065, A-0068 (Am. Compl. ¶¶ 38, 47). Additionally, given that the pleadings allege that "Gutnick decided to transfer the assets and liabilities of Morzev to a US-Based entity, upon information and belief, to increase the availability of US-based capital" and that "Gutnick effected a series of transactions whereby the assets and liabilities of Morzev were transferred to USARE," the proposition that no other members were "similarly treated or diluted" becomes logically untenable. A-0060-61, A-0069 (Am. Compl. ¶¶ 22, 24, 51). The entire alleged purpose of the share transfer was to increase additional capital and would thus inevitably result in share dilution.

VI. DISMISSAL SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT PROPERLY DISMISSED COUNT VIII FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. QUESTION PRESENTED

Did the trial court err in dismissing US Trading's claims against the Individual Defendants for breach of the duty of good faith and fair dealing where the Individual Defendants owe US Trading no duty under the LLC Agreement to ensure a 1:1 share conversion and the claim was premised upon the same conduct and requested the same relief as the breach of contract? This issue was raised by the Individual Defendants below and was addressed at pages 26-29 (A-0940 – A-0943) of the 12(b)(6) Decision.

B. STANDARD AND SCOPE OF REVIEW

The Court of Chancery will dismiss a complaint where the plaintiff has failed to state a claim upon which relief can be granted. Ct. Ch. R. 12(b)(6). "This Court reviews de novo the grant of a motion to dismiss under Court of Chancery Rule 12(b)(6), to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (internal quotation marks omitted).

All contracts impose a duty of good faith and fair dealing. *See* Restatement (Second) of Contracts § 205 (Am. Law Inst. 1981). "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of

types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." *Id.* cmt. a. In evaluating a claim of breach of the implied covenant, a court must first determine whether there are "contractual gaps that the asserting party pleads neither party anticipated." *Miller v. HCP & Co.*, 2018 WL 656378, at *9 (Del. Ch. Feb. 1, 2018), *aff'd sub nom. Miller v. HCP Trumpet Invs., LLC*, 194 A.3d 908 (Del. 2018) (citing *Nemec*, 991 A.2d at 1125). "The implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider." *Nemec*, 991 A.2d at 1126. The "implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract." *Nemec*, 991 A.2d at 1128.

Further, "[a] party may maintain a claim for breach of the implied covenant of good faith and fair dealing only if the factual allegations underlying the implied covenant claim differ from those underlying an accompanying breach of contract claim." *Edinburgh Hldgs., Inc. v. Educ. Affiliates, Inc*., 2018 WL 2727542, at *9 (Del. Ch. June 6, 2018) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 539 (Del. 2011)). Put differently, the covenant "does not apply when the contract addresses the conduct at issue." *Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 896 (Del. 2015)

(footnotes omitted). "[O]ne generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement." *Nemec*, 991 A.2d at 1125-26. Thus, the standard for pleading a breach of the covenant of fair dealing is accordingly high: "[g]eneral allegations of bad faith conduct are not sufficient. Rather, the plaintiff must allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract. Consistent with its narrow purpose, the implied covenant is only rarely invoked successfully." *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

C. MERITS OF ARGUMENT

US Trading alleges that the Individual Defendants breached their duties to "ensure that [US Trading] would not receive [its] proper amounts of equity in USARE but instead would receive meaningfully less, notwithstanding their personal knowledge of the [US Trading Transfer Agreement], the Plaintiffs' ownership percentages in Morzev, and in violation of their obligations to the Plaintiffs." A-0079 (Am. Compl. ¶ 100). Yet the Individual Defendants (1) have no such duty to US Trading and (2) US Trading's claim for breach of good faith and fair dealing is impermissibly duplicative of its breach of contract claim. Accordingly, the Trial Court correctly dismissed US Trading's claim that the Individual Defendants breached the implied covenant of good faith and dealing inherent in the LLC Agreement.

First, it bears highlighting that Count VIII of the Amended Complaint is vague as to the purported source of the Individual Defendants' purported obligation to act in good faith and deal fairly with US Trading. As neither Mr. Althaus nor Mr. Gutnick (in his individual capacity) executed the US Trading Transfer Agreement (*see* A-0221-24 (Am. Compl. Ex. E)), the sole source of such an obligation can only come from the LLC Agreements. *See also* A-0071 (Am. Comp. ¶ 60) ("In addition, and in alternative, as officers, Managers, Members, and in Gutnick's case, majority owner of USARE directly or through entities he controlled, Gutnick and Althaus owed at all relevant times non-waivable 'duties of good faith and fair dealing' that they breached by failing to deliver to Plaintiffs interests in USARE equivalent to the interests in Morzev that Plaintiffs surrendered.").

The flaw inherent in this theory is that neither USARE—nor its Officers and Managers—have any obligation under the LLC Agreements to ensure that one Member honor its contractual obligations to another Member. Indeed, by its terms, the US Trading Transfer Agreement requires that "Mordechai Gutnick ATF The Morzev Trust and [Morzev] will procure and facilitate the issue of 23,178,571 Consideration Shares to the Shareholder as soon as practicable after return of the signed Transfer Form." A-0223 (Am. Compl. Ex. E). USARE is not a party to the US Trading Transfer Agreement, the US Trading Transfer Agreement is not mentioned in the LLC Agreements, and US Trading's purported contracted-for

equity stake is not mentioned in the LLC Agreements. Accordingly, there is no credible argument that the purpose of the LLC Agreement was frustrated by USARE's Officers and Managers alleged "failure" to force the Morzev Trust and Morzev to provide US Trading with the larger equity stake that it believes it is owed. The purpose of the LLC Agreement was to operate USARE, not to effect a share transfer.

Even if this were not the case, US Trading does not allege any purported contractual gaps that existed in the LLC Agreements. "Delaware courts do not use the implied covenant 'as a backstop to imply terms that parties failed to include but which could easily have been drafted.'" A-0941 (12(b)(6) Decision at 27) (citing *Baldwin v. New Wood Res. LLC,* 283 A.3d 1099, 1117 (Del. 2022)). The trial court correctly determined that "Plaintiffs' assertion of a claim for breach of the implied covenant inhering in the LLC Agreement appears to me to be an attempt to use an 'implied' duty in the LLC Agreement to vindicate what they agreed to, or wish they had agreed to, *i.e.*, exact percentages in USARE. This Court, however, will not rewrite a contract simply because Plaintiffs wish they had gotten a better deal." A-0943 (12(b)(6) Decision at 29).

Having no authorities that support its argument, US Trading turns to hyperbole, arguing that "[i]t is because such obligations so obviously inhere in the functions of the managers of LLCs that such language is not included." App. Br. at

37. US Trading further argues that "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." *Id.* But this argument only underscores the trial court's point: US Trading could have bargained for a lot of things—non-dilution of its position, a specific equity percentage, that USARE be a signatory, anti-dilution provisions to be adopted in the LLC Agreements—that it simply did not. In pleading a breach of the implied duty of good faith and fair dealing in the LLC Agreements, US Trading is seeking to obtain enforcement of an agreement it did not have. The trial court correctly determined not to re-write the LLC Agreement to provide US Trading with the relief it desired.

US Trading's reliance on *Chamison v. HealthTrust, Inc. — The Hospital Co*., 735 A.2d 912, 922 (Del. Ch. 1999), *aff'd*, 748 A.2d 407 (Del. 2000), is misplaced. In *Chamison*, on the eve of a trial, the defendant attempted to force plaintiff to abandon his long-standing individual counsel to join in a comparatively ineffective group defense strategy. *Id*. While the indemnification agreement granted defendant broad discretion selecting counsel for plaintiff, the court found the defendant "abused this discretion by trying to force [plaintiff] to accept a defense that was markedly inferior to an existing and known alternative." *Id*. Foisting an ineffective

defense on an indemnified party certainly frustrates the purpose of an indemnification contract, but US Trading cannot point to any purpose of the LLC Agreement that was frustrated, as it does not prescribe conduct as to contracting between members, the transfer of stock, or any conduct related to US Trading's claim.

Second, US Trading's cause of action for breach of good faith and fair dealing is nothing more than a repackaging of its breach of fiduciary duty claim, which itself is a repackaging (and duplication of) its breach of contract claim, and the damages that would be recoverable on each claim is identical, *i.e.*, the purported balance of the equity interest in USARE that US Trading contends it should have received in the conversion. *Compare* A-0071-72 (Am. Compl. ¶¶ 61-65), *with* A-0077-79 (Am. Compl. ¶¶ 89-101), *and* A-0071-72 (Am. Compl. ¶¶ 61-65) *with* A-0078 (Am. Compl. ¶¶ 96-101). Delaware precludes a breach of good faith and fair dealing claim that, as here, is entirely duplicative of the breach of contract claim. *See Gower v. Trux, Inc.*, 2022 WL 534204, at *11 (Del. Ch. Feb. 23, 2022).

CONCLUSION

For the reasons stated above, the trial court's orders dated December 8, 2023 and May 10, 2024 dismissing US Trading's claims should be affirmed.

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