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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

REPLY BRIEF OF APPELLANT US TRADING COMPANY

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I. The Court of Chancery Erred in Finding Morzev, Morzev ATF Trust, and Gutnick Were Not Subject to the Forum Selection Clause in the USARE Operating Agreement

Forum selection clauses are interpreted like any other part of a contract. *See Ashall Homes Ltd. v. ROK Ent. Grp. Inc.*, 992 A.2d 1239, 1245-1246 (Del. Ch. 2010). This means this Court "will read a contract as a whole and … will give each provision and term effect, so as not to render any part of the contract mere surplusage [and] will not read a contract to render a provision or term meaningless or illusory." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (cleaned up).

The relevant language here is the forum clause in Section 15.3 of the Operating Agreement: "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[.]" (A-529.)

Defendants first argue that a forum selection clause in one agreement cannot be applied to a breach of another. Not so. *See, e.g., Vortex Infrastructure Holdco LLC v. Kane,* 2024 WL 3887117, at *4 (Del. Ch. Aug. 21, 2024), *exceptions denied*, (Del. Ch. 2024), *aff'd*, 345 A.3d 959 (Del. 2025) (applying forum selection clause from one agreement to dispute arising from breach of a closely related agreement among the same parties); *Centene Corp. v. Accellion, Inc.*, 2022 WL 898206, at *13-14 (Del. Ch. Mar. 28, 2022) (same); *Haier US Appliance Sols., Inc. v. EMJ Corp.*, 2025 WL 1618808, at *5 (E.D. Tenn. June 6, 2025) (same) (applying Delaware law). Broadly

written forum clauses using the word "related", like this one here, apply to claims beyond those arising from the underlying agreement: "[T]he use of the phrase 'related to' in [a forum selection provision] expands the scope of the provision *beyond* the universe of claims based on the rights and obligations created by the underlying agreement." *Florida Chemical Co., LLC v. Flotek Indus., Inc.*, 262 A.3d 1066, 1083 (Del. Ch. 2021) (cleaned up) (emphasis in original). All the parties to the US Trading Conversion Agreement were also parties to the Operating Agreement containing the relevant forum selection clause. As argued in Plaintiff's opening brief, the plain language of the forum clause includes any claims "relating to [USARE]'s activities or properties," including the issuance of USARE Units to its Unitholders, including Plaintiff.

Defendants' second argument, by implication in a parenthetical, is that the forum clause applies only to the subject matter covered by 6 Del. C. § 18-109, *i.e.*, the "internal affairs" of an LLC. Defendants do not offer any support for this interpretation. Further, like the Court of Chancery below, Defendants simply do not address the critical text in the forum selection clause, text that extends the mandatory forum selection to "Any Proceeding … relating to … the Company's activities or properties". As previously argued, this language is broader than the "internal affairs" formulation Delaware courts have adopted in interpreting claims under Section 18-109, which the Court of Chancery found support for in the "arising from . . . this

Agreement" portion of the forum selection clause; of course, that is only a part of the clause. Importantly, even so read, the forum clause covers the allegations in the Complaint: in the US Trading Conversion Agreement, Morzev and ATF Morzev Trust explicitly promised to cause USARE to issue units to Plaintiff, acts that go to core features and internal governance of any LLC, *i.e.*, the issuance of units and the determination of equity ownership. To put it bluntly, if the issuance of units and determination of equity percentages among its members are not part of the "internal affairs" of an LLC, it is hard to imagine what is.

Defendants' third argument, for the first time, is that because the acts complained of may have occurred before the date of the August 27, 2019 operating agreement, the forum clause in that operating agreement should not be applied retroactively. However, as Defendants concede, this argument is undermined by the July 3, 2019 agreement, which contains an identical forum clause (Section 15.3, A-0427) and which, if authentic, was in effect before the share transfer at issue. While there is a factual dispute as to whether the July 3rd or the August 27th agreement should control, that dispute should not be decided on a motion to dismiss. Resolving factual disputes as to which document controls requires consideration of evidence extrinsic to the Complaint, a task appropriately undertaken later in the proceedings. *See Green Plains Renewable Energy Inc. v. Ethanol Holding Co., LLC*, 2015 WL 590493, at *6 (Del. Super. Feb. 9, 2015) ("Contract interpretation issues involving

factual disputes, are more appropriately resolved through summary judgment, or at trial.").

Defendants' fourth argument, based on a hypothetical, is that if USARE had never issued units to US Trading, the US Trading Conversion Agreement would be the only source for Plaintiff's claims. While true, it is irrelevant, as it is undisputed that USARE did issue units to Plaintiff.

Finally, Defendants' attempt (in a footnote) to distinguish the cases cited by Plaintiff fails. *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr.*, 2011 WL 4552508 (Del. Ch. Sept. 14, 2011) does not just address a "routine application" of a "broad arbitration clause" (Am. Answering Br., at 11, n.3) but also explicitly addresses *forum selection* clauses: "Broad forum selection clauses . . . 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." *Id.* at *5 (cleaned up). While, as Defendants point out, the court in *Pacira BioSciences, Inc. v. Fortis Advisors LLC*, 2021 WL 4949179, at *21 (Del. Ch. Oct. 25, 2021) dismissed a complaint for lack of personal jurisdiction, it did so because the forum clause in that case did not contain the broad "relate to" language present here.

Defendants Morzev and ATF Morzev Trust are indisputably Members of

USARE and, as described above, subject to the jurisdiction of this Court.

As argued below, Plaintiff likewise sufficiently pled that Gutnick was a Member of USARE such that the Court of Chancery should not have dismissed the claims against him on the basis of personal jurisdiction in the absence of discovery and/or an evidentiary hearing.

II. The Court of Chancery Erred in Determining Gutnick Was Not a Member of USARE Without Allowing Discovery or a Hearing

Defendants make three points in opposition to Plaintiff's appeal and in support of the Court of Chancery's fact-finding in favor of Gutnick below.

First, Defendants argue that Plaintiff's request for jurisdictional discovery was presented only in a single sentence and was therefore waived. Not so. Plaintiff's single sentence identified the issue and the relief sought so as to preserve it for review by the Court: "However, if the Court believes questions of fact exist concerning one of the bases for jurisdiction, such as the exercise of conspiracy jurisdiction, *or to address Gutnick's denial of his status as Member of USARE in his Affidavit*, and such questions are dispositive, jurisdictional discovery is appropriate, not dismissal." (A-0883 (emphasis added).) This objection specifically identified the issue (Gutnick's denial of his status as a Member of USARE) and the relief sought (jurisdictional discovery). This is sufficient to preserve this claim for review. *See Trala v. State*, 244 A.3d 989, 997 (Del. 2020).[1]

Second, Defendants argue that Plaintiff's sworn contention in the Complaint that Gutnick was a Member of USARE by virtue of Incentive Units he owned is insufficient to make out a *prima facie* case on Gutnick's status as a Member of

[1] Indeed, were the Court to adopt Defendants' suggestion, papers in the lower courts would overflow with verbiage as parties tried to ensure that they included enough language to satisfy the "certain number of sentences" standard that Defendants advocate.

USARE. Defendants misapprehend the meaning of *prima facie*, which means evidence that, if "standing alone and unrebutted", would be sufficient to carry a party's burden. *Zdziech v. Delaware Auth. for Specialized Transp.*, 1988 WL 109338, at *4 (Del. Super. Oct. 13, 1988). Standing "alone and unrebutted", the verified allegation that Gutnick was a holder of Vested Incentive Units and so a "Member" satisfied Plaintiff's burden. It goes without saying that Gutnick's membership status is not a matter of public record or something Plaintiff would have access to. Tellingly, while Gutnick supplied an affidavit denying his membership, USARE, which presumably had complete access to this information, stood silent.

In any event, the Court of Chancery did not find that Plaintiff failed to make a *prima facie* case. Instead, it found that Gutnick's sworn statement was more persuasive than Plaintiff's: "*Aside from the verification of the Amended Complaint*, Plaintiffs provide no evidence that Gutnick was a member at the time of the challenged transactions. Gutnick, however, affirmed that he has 'never been a member or unitholder of [USARE], and never held any incentive units in [USARE].'" (A-880-881 (emphasis added).) Based on the consideration of the competing evidence, the Court of Chancery found Gutnick was not a Member. This was an error. The question the Court of Chancery should have asked was not whether Plaintiff's evidence was more persuasive than Defendants', but whether Plaintiff had identified a plausible claim of facts that would give rise to personal jurisdiction. *See*

Altabef v. Neugarten, 2021 WL 5919459, at *13 (Del. Ch. Dec. 15, 2021). Had the Court of Chancery thought fact-finding was necessary or appropriate at the motion to dismiss stage, it was required to allow jurisdictional discovery, hold an evidentiary hearing, or both. Instead, it did neither, and simply ruled without giving Plaintiff any opportunity to develop its "plausible" claim of personal jurisdiction. In short, Gutnick's affidavit should not be disregarded, but it should have triggered jurisdictional discovery, allowing Plaintiff to test Gutnick's assertions.

Third, in a new argument, Defendants argue that because Gutnick was not identified as a Member in either the July 3rd or August 27th version of the operating agreement, he could not have been a Member. While both agreements list Members of USARE, they identify only Class A unitholders (the alleged July 2019 agreement) or only Class A and Class B unitholders (the August 2019 agreement), and do not purport to identify the "Vested Incentive Unit" holders that Gutnick was alleged as being among. ((A-433-434, July 2019 agreement) (A-582-584, August 2019 agreement).) This argument is accordingly unavailing.

Finally, the single case Defendants cite does not support their position. In *Neurvana Med., LLC v. Balt USA, LLC,* 2019 WL 5092894 (Del. Ch. Oct. 10, 2019), the court found that a plaintiff need only identify "some indication that this particular defendant is amenable to suit in this forum" in order to adequately establish personal jurisdiction at the pleading stage and found that the plaintiff had failed to clear even

this low bar. *Id.* at *1. By contrast, Plaintiff here identified Gutnick as a Vested Incentive Unit holder and so a Member of the USARE subject to its mandatory forum clause, satisfying its burden.[2]

The Court should reverse the Court of Chancery's decision on this point and remand for jurisdictional discovery, an evidentiary hearing, or both.

[2] Morzev and the ATF Morzev Trust conceded that they were "Members". Plaintiff sought personal jurisdiction over Althaus under 6 Del. C. § 18-109.

III. The Fraud and Negligent Misrepresentation Claims Provide Personal Jurisdiction Over Gutnick in Accordance with 6 Del. C. § 18-109

6 Del. C. § 18-109 provides that, "A manager [] of a limited liability company may be served …in all civil actions or proceedings … involving or relating to the business of the limited liability company or a violation by the manager … of a duty to … any member of the limited liability company[.]"

Defendants argue that because the fraud and negligent misrepresentation claims relate to statements Gutnick made only on behalf of Morzev and ATF Morzev Trust, they do not relate to the "business" of USARE or the "duty" of a "manager" to "any member of the limited liability company."

Defendants rely on a false dichotomy between Gutnick's role as a Manager of USARE and his role as owner and controller of Morzev and ATF Morzev Trust. That Gutnick carried out both roles was fundamental to the scheme, as alleged. The Complaint alleges that, "Throughout this transitional period from Morzev to USARE from May to July 2019 Gutnick controlled both Morzev and USARE both legally and factually." (A-0063.) To effect the fraud alleged in the Complaint (or even make the misrepresentations about what Plaintiff would ultimately obtain from the exchange), it was necessary that US Trading actually receive fewer units, as recorded on the book and records of USARE, than it was promised by Gutnick. Because of his "double-hatted" role, Gutnick had the ability to effect the scheme by delivering fewer units than promised. Unlike *Endowment Rsch. Grp., LLC v. Wildcat Venture*

Partners, LLC, 2021 WL 841049, at *5 (Del. Ch. Mar. 5, 2021) (Defendants Br., at 19), in which the plaintiff sought jurisdiction under Section 18-109 for a claim unrelated to the operations of the company, but for "fraud in connection with an oral agreement with a third party," the misconduct here depended on USARE's internal affairs and governance: forming USARE for the purpose of effecting the conversion, issuing units to Plaintiff, and incorrectly recording Plaintiff's interest on USARE's books and records.

Accordingly, the recording of Plaintiff's units was not unrelated to the fraud and negligent misrepresentation claims, but fundamental to them. Defendants repeat the same error the Court of Chancery made, ignoring that the scheme, as pled, depended on Gutnick's (and Althaus') access to and control over the books and records of USARE. This is the kind of claim for which jurisdiction is provided by 18-109. "A person who takes on a managerial role has implicitly consented to being sued in a Delaware court to adjudicate disputes that are intertwined with that role." *In re P3 Health Grp. Holdings, LLC*, 285 A.3d 143, 157 (Del. Ch. 2022).

IV. The Court Has Personal Jurisdiction Over All Defendants Under *Instituto Bancario*

Conspiracy jurisdiction is often considered "in connection with Delaware's Long-Arm Statute because the acts of one conspirator that satisfy the long-arm statute can be attributed to the other conspirators[.]" *Microsoft Corp. v. Amphus, Inc.*, 2013 WL 5899003, at *13 (Del. Ch. Oct. 31, 2013) (cleaned up). Because Delaware's Long-Arm Statute is a "single act" statute, a "single transaction is sufficient to [] confer jurisdiction where the claim is based on that transaction." *Harris v. Harris*, 289 A.3d 310, 337 (Del. Ch. 2023) (cleaned up). In other words, a single act in Delaware by one party to a conspiracy, in furtherance of that conspiracy, confers personal jurisdiction under *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 222 (Del. 1982).

Here, the pleadings sufficiently allege facts satisfying the *Istituto Bancario* test. Indeed, the Court of Chancery found the Complaint alleged concerted conduct sufficient to plead a conspiracy. (A-0884.) The Court of Chancery, however, went on to misapply the standard and disregard the allegations in the Amended Complaint.

In support of the Court of Chancery's holding, Defendants argue that Plaintiff failed to allege that an act in furtherance of a conspiracy occurred in Delaware. Am. Answering Br., at 21. Defendants' arguments essentially boil down to a complaint that Plaintiff did not satisfy *Defendants'* pleading requirements. Specifically, Defendants lament that "if there were some grand conspiracy one would expect to

see allegations concerning that conspiracy throughout the operative pleading…". *Id*. at 23. However, courts do not review allegations in a vacuum, and the Complaint contains more than a "single paragraph" setting forth a sufficient basis to find conspiracy jurisdiction.

Delaware courts review a complaint with an eye toward substance over form. *See Trifecta Multimedia Holdings Inc. v. WCG Clinical Serv. LLC*, 318 A.3d 450, 472 (Del. Ch. 2024) ("Delaware law is concerned with actual notice, rather than technicalities that elevate form over substance."). Plaintiff need not start each allegation detailing conspiracy jurisdiction with magic words, and conspiracy jurisdiction may be found even where "the plaintiffs poorly argued the conspiracy issue." *Chandler v. Ciccoricco*, 2003 WL 21040185, at *10 (Del. Ch. May 5, 2003).

Viewing the allegations of the Complaint holistically, it is clear that the Court has conspiracy jurisdiction over Defendants. As discussed, the Court of Chancery found a conspiracy to defraud Plaintiff existed, and Defendants were part of that conspiracy, satisfying the first two elements of the *Istituto Bancario* test. (A-0884.)

As to the third element, the Complaint sufficiently alleges several substantial acts or effects in furtherance of Defendants' conspiracy occurred in Delaware. (A-0061 – A-0069.) *First*, Gutnick decided to transfer the assets and liabilities of Morzev to the U.S., not solely to access the U.S. capital markets, but also to *exploit* that access and diminish Plaintiff's ownership interest during the conversion, while

simultaneously increasing Defendants' own interests. *Second*, Althaus formed USARE on May 6, 2019 in Delaware, a necessary step to effectuate the desired transfer. (A-0853–0854.) *Third*, Defendants amended USARE's operating agreement, authorizing the diminished interests to Plaintiff. *Fourth*, Defendants issued the diminished interests in Delaware. Each allegation is sufficient to establish conspiracy jurisdiction: given that 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, "USARE was created for the purpose of facilitating the conspiracy."

Defendants claim that the cases cited by Plaintiff do not support this contention. Am. Answering Br., at 22. Not so. In *Microsoft Corp. v. Amphus Inc.*, the Court of Chancery found that two substantial acts occurred sufficient to warrant conspiracy jurisdiction: formation of a Delaware corporation and use of that corporation to improperly transfer a patent. 2013 WL 5899003, at *13. Similarly, the Court of Chancery held in *Chandler v. Ciccoricco* that the plaintiff's allegations of filing a Certificate of Designation of Rights and Preferences in connection with a challenged preferred stock issuance was a sufficient "substantial act". 2003 WL 21040185, at *10-11. Such facts are similar to those here, where Defendants formed and incorporated USARE in Delaware and then facilitated the improper conversion of Plaintiff's interest in Morzev for a diminished interest in USARE. So long as the

Delaware act furthered the conspiracy, the fact that it also served other legitimate or lawful purposes does not defeat jurisdiction. *See Microsoft Corp.*, 2013 WL 5899003, at *16 (formation of a Delaware entity that facilitates a challenged transaction constitutes a substantial act even though incorporation itself is lawful and multi-purpose); *Istituto Bancario Italiano SpA*, 449 A.2d at 225–27; *see also AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 440 (Del. 2005) (finding jurisdiction where defendant created a subsidiary in Delaware "for the express purpose of facilitating private equity investments in the United States, including Delaware.").

Moreover, even the Court of Chancery's holding in *Altabef v. Neugarten* is instructive here. In that case, the court noted that "[i]ncorporation may be a jurisdictionally significant act if it is part of a wrongful scheme…", but denied finding conspiracy jurisdiction because the incorporation took place three years before plaintiffs invested and five years before they became shareholders. 2021 WL 5919459, at *9. This is distinguishable from the facts here, where the formation of USARE occurred mere months before the conversion of Plaintiff's interests in Morzev took place, and the conversion itself was predicated upon USARE's formation. (*See* A-0061-63, A-0068-71.)

The fourth element, that Defendants "knew or had reason to know" that their conduct in Delaware would have an effect in Delaware, is likewise met. Defendants

claim there is no allegation they knew Plaintiff was incorporated in Delaware at the time the US Trading Conversion Agreement was executed, and therefore could not have known Plaintiff would be injured in Delaware. Am. Answering Br., at 22-23. Such argument belies the fact that Defendants hand-selected Delaware as the state of incorporation for USARE, made representations to Plaintiff to convert its interests in Morzev to this *Delaware* corporation, purposefully amended USARE's operating agreement with the Secretary of State of Delaware, knew USARE would issue converted interests to Plaintiff, and purposefully effectuated the conversion of interests *in Delaware*. The Complaint asserts more than "mere injury" in Delaware, and *Istituto Bancario* holds that such allegations are sufficient. 449 A.2d at 227.

As to the final element, Defendants do not contest that authorizing the issuance of a "1:1" conversion of interests from Morzev to USARE, and then issuing less than that "in a Delaware corporation 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."

Accordingly, the Court of Chancery erred when it rejected a finding of personal jurisdiction over Defendants on this basis, and the decision should be reversed.

V. Gutnick and Althaus Breached Fiduciary Duties by Providing Fewer USARE Units to Plaintiff Than They Knew Plaintiff Was Entitled To

Defendants make five arguments in opposition to Plaintiff's appeal from the dismissal of its fiduciary duty claims.

First, Defendants argue that Plaintiff's breach of fiduciary duty claims against Gutnick and Althaus are duplicative of the breach of contract claims against Morzev and ATF Morzev Trust. Defendants argue that because Plaintiff has contract claims against Morzev and ATF Morzev Trust, Plaintiff may not maintain claims against Gutnick and Althaus for the same injuries, *i.e*., the delivery of a lower equity interest in USARE than Plaintiff had been promised. Relying on *Nemec v. Shrader*, Defendants argue Plaintiff has improperly "bootstrapped" its fiduciary claim onto its contract claims. 991 A.2d 1120, 1129 (Del. 2010).

However, as this Court recently held, "bootstrapping case law only requires dismissal where a fiduciary duty claim wholly overlaps with a concurrent breach of contract claim." *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 109 (Del. 2021); *see also Nemec*, 991 A.2d at 1129 (The Delaware courts allow parallel breach of contract and breach of fiduciary duty claims when the fiduciary duty claims are "grounded on an additional and distinct fact.") (citation omitted). The breach of fiduciary duty claims here do not "wholly overlap" the breach of contract claims because they involve different defendants and the fiduciary duties come from a

source other than the US Trading Conversion Agreement (Plaintiff's status as a Member in USARE). The fact that fiduciary duty and breach of contract claims seek a common remedy is no bar at the pleading stage. *See Garfield on behalf of ODP Corp. v. Allen*, 277 A.3d 296, 361-362 (Del. Ch. 2022).

Courts deny "bootstrapping" arguments when, as here, the claims involve different defendants. Under such circumstances, "it could not be said that the fiduciary duty claim asserted in Schuss was duplicative of the breach of contract claim." *Grunstein v. Silva*, 2009 WL 4698541, at *7 (Del. Ch. Dec. 8, 2009). The breach of fiduciary duty claims here arise from distinct facts. Separate and apart from Morzev's and ATF Morzev Trust's *contractual* obligations to deliver USARE units to Plaintiff equivalent to its investment in Morzev, Gutnick and Althaus, as Managers of USARE, had an obligation to see that the investment in USARE by Plaintiff was honored, just as they would for any other Member. "[M]anagers of a Delaware limited liability company owe traditional fiduciary duties of loyalty and care to the members of the LLC[.]" *William Penn P'ship v. Saliba*, 13 A.3d 749, 756 (Del. 2011). When a breach of fiduciary duty claim arises from such obligations separate from the breach of the contract claims, as here, the fiduciary duty claims are not duplicative, and the "bootstrapping" argument finds no purchase. *See Stone & Paper Invs., LLC v. Blanch*, 2019 WL 2374005, at *6 n.57 (Del. Ch. May 31, 2019) (contract claims were not duplicative of fiduciary duty claims).

Accordingly, Plaintiff did not "bootstrap" its breach of contract claims onto its fiduciary duty claims, which involve different Defendants and a different source of obligation.

Second, Defendants argue that no fiduciary duties were owed to Plaintiff because the alleged July 3, 2019 operating agreement disclaimed such duties. In the first place, the Court of Chancery declined "to reach the fact-intensive issue of when USARE adopted the [July 3rd] operating agreement that disclaimed fiduciary duties." (A-0940 n. 114.) Defendants are therefore asking the Court to decide a factual issue not reached below. This Court does not engage in fact-finding under such circumstances. "'The failure of the lower court to make a specific finding upon a material issue does not upon appeal lay upon this court the duty of examining and analyzing the evidence for the purpose of making its own findings.'" *Cruz v. State*, 12 A.3d 1132, 1135 n.5 (Del. 2011) (quoting *Scott v. State,* 117 A.2d 831, 833 (Del. 1955)).

Defendants note, alternatively, that fiduciary duties were also disclaimed in the August 27, 2019 operating agreement. While true, this is irrelevant. The Complaint states that the breaches of fiduciary duties by Althaus and Gutnick occurred in the "fiduciary period" in July and August 2019, before fiduciary duties were disclaimed. (A-069-71.)

Third, in a new argument, Defendants argue that the "anti-dilution" rights were reserved for specific Members, not including Plaintiff. This argument has no greater merit at this stage. As pled in the Complaint, the "anti-dilution" provisions were not in effect at the time of the breaches of fiduciary duty complained of therein, even if Plaintiff's claims arise from a dilution, which it is not at all clear at this stage that they did.

Fourth, Defendants assert that "an LLC agreement is a necessary condition to the formation of an LLC," implying that no functions of an LLC can be carried out without a written agreement. This is not the case, however, as a Delaware LLC can lawfully operate under an oral or implied agreement. "Under the LLC Act, however, such an agreement may be 'written, oral, or implied.'" *Robinson v. Darbeau*, 2021 WL 776226, at *9 (Del. Ch. Mar. 1, 2021). Nothing prevented the Managers at USARE from carrying out the ordinary functions of an LLC between May 5, 2019 when it was formed and the July 3, 2019 agreement (should that agreement turn out to be the "original" agreement) or the August 27, 2019 agreement (should that agreement be the "original" agreement"), or being held liable for actions taken in that window. While Defendants point out, correctly, that an operating agreement could have been made retroactive to USARE's incorporation date of May 6, 2019, it is undisputed that neither of them did. (A-394 (July 3, 2019 Agreement); A-496 (August 27, 2019 Agreement).)

Fifth, Defendants argue that Plaintiff's claim is a "generalized claim" for "equity dilution" and is, as such, derivative, requiring dismissal in the absence of a demand or an excused demand. Defendants are incorrect. Plaintiff pled that no other USARE Member (other than DinSha and Ramco (previously named Plaintiffs)) was "similarly treated or diluted," (A-0069 (Am. Compl. ¶ 51)), and upon "information and belief" is sufficient to make out a direct claim at this stage. All that a well-pleaded complaint need do is state "a claim that is provable under any reasonably conceivable set of circumstances[.]" *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 538 (Del. 2011). In this context, the language that a particular allegation is "upon information and belief" serves to identify those allegations that Plaintiff believes "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Del. R. Ch. 11(b)(3). Tellingly, although in possession of the relevant documents, neither USARE nor any other Defendants offered any evidence that the dilution effected on Plaintiff's USARE Units applied to, for example, all Class A Unitholders.[3] Under the circumstances, Plaintiff has adequately pled a direct injury. *See Tooley v. Donaldson,*

[3] The single case cited by Defendants, *Griffin Corp. Servs., LLC v. Jacobs*, 2005 WL 2000775, at *6 (Del. Ch. Aug. 11, 2005), is not to the contrary. There, a lawyer alleged generically that another party interfered with the lawyer's relationships with its clients but, despite the fact that at least the names of the clients would have been known to the lawyer, had not identified a single such client. While the lawyer made this allegation on "information and belief," that was not the defect that led to the dismissal of the claim.

Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004) (holding that a claim is direct where the plaintiff suffers an injury "separate and distinct from that suffered by other shareholders" and would receive the benefit of any recovery).

VI. Plaintiff Stated a Claim for the Breach of the Duty of Good Faith and Fair Dealing Against Gutnick and Althaus

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, as the ones at issue here do, 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 response, Defendants raise three arguments.

First, Defendants argue the source of the duty of good faith and fair dealing is unclear. This is a bad argument. As the Court of Chancery found: "The Individual Defendants' duties arise under the original and third amended and restated USARE Company Agreements that provide that managers of USARE have contractual obligations to act in accordance with the implied covenant." (A-0940.)

Second, Defendants argue "the purpose of the LLC Agreement was to operate USARE, not to effect a share transfer" (Am. Answering Br., at 36), and that, as a result, there were no "purported contractual gaps" to fill in the USARE LLC agreement. (*Id.*) As pled in the Complaint, the key purpose of the LLC Agreements and their Amendments was to effect transfers of *both* the Roundtop Option *and* the

equity interests in that asset to a Delaware entity. (A0060-61.) These were the core purposes of the original LLC Agreement.

Defendants cannot reasonably come before the Court and say that had Plaintiff been told it was being diluted, it would not have pushed for or demanded "a contractual term proscribing the conduct" it now complains of. *See Baldwin v. New Wood Resources LLC*, 283 A.3d 1099, 1117-18 (Del. 2022). As Plaintiff argues above, maintaining correct records of equity ownership is one fundamental purpose of any Delaware LLC. *Supra*, at 4, 24. In this case, maintaining equivalent equity interests for unitholders in Morzev during the transfer of those interests to USARE was of fundamental importance to Members and USARE. Plaintiff is not seeking, as the Court of Chancery would have it, a provision seeking an "exact percentage" (A-0943) nor was it seeking anti-dilution protection on a going forward basis after the initial conversion of its interest, as Defendants would have it (Am. Answering Br., 38). As pled, Plaintiff sought only that USARE Managers honor the transfer agreement among USARE's Members (A-0070-71). Gutnick and Althaus's failure to do so makes out a sufficient claim for the breach of the duty of good faith and fair dealing under the LLC Agreement against them.

Third, Defendants argue that the breach of the duty of good and fair dealing claims are duplicative of the breach of fiduciary duty and contract claims. This argument has no merit. The "duty of good faith and fair dealing" is expressly pled in

the alternative to the breach of fiduciary duty claims. (A-0071 ("In addition, and in the alternative . . . Althaus and Gutnick owed . . . non-waivable 'duties of good faith and fair dealing'").) There is no bar to alternative claims at the pleading stage. *See Garfield*, 277 A.3d at 361-62.

The duty of good faith and fair dealing and breach of contract claims are not duplicative for the same reasons the fiduciary duty claims are not: the duty of good faith and fair dealing claims arise from a different source than the breach of contract claims and are pled against different defendants. The single case cited by Defendants, *Gower v. Trux, Inc.*, 2022 WL 534204, at *11 (Del. Ch. Feb. 23, 2022), is not to the contrary. In that case, the court sustained a contract claim and dismissed, as duplicative, a breach of the good faith and fair dealing arising from the same contract against the same defendants. That is not the case here, where the underlying agreements and Defendants for each claim are different.

CONCLUSION

For the reasons set forth herein, and in Plaintiff's Amended Opening Brief, the Court should reverse the Court of Chancery's orders as to US Trading Company, and reinstate Claims V-VIII, XIII, and XIV of the Amended Complaint.

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