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ABA SECTION OF BUSINESS LAW

LLCs—Important Case Law Developments

2016 CUMULATIVE

SURVEY OF DELAWARE CASE LAW

RELATING TO

ALTERNATIVE ENTITIES

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APPENDIX—TABLE OF CASES

2016 CUMULATIVE SURVEY OF DELAWARE CASE LAW RELATING TO ALTERNATIVE ENTITIES

Louis G. Hering[*]
David A. Harris

I. INTRODUCTION

In recent years, there has been a marked increase in the use of limited partnerships, limited liability companies, statutory trusts and other "alternative entities" (i.e., alternative to the traditional corporate form) in a wide variety of commercial transactions. This increased use has, in turn, given rise to a predictable increase in litigation involving alternative entities in the Delaware courts. As a result, the Delaware courts have developed a substantial body of case law addressing a broad spectrum of issues arising in the alternative entity context from the scope of the fiduciary duties of general partners in a limited partnership and issues arising upon the dissolution of a limited partnership to the rights of limited partners to inspect partnership books and records and the requirements and procedures for derivative actions involving alternative entities. In certain of these areas, such as partnership derivative actions, the Delaware courts have borrowed heavily from corporate precedents. In others, however, such as the modification of fiduciary duties, the courts have recognized—and given effect to—the differences between entities based primarily on principles of contract, such as partnerships, and the corporate form of entity, which is based primarily on a complex statutory framework. The body of law thereby developed, and continuing to develop, is and will be a valuable guide to practitioners regarding the legal effect of the various agreements and arrangements they are creating as they continue to use alternative entities in an increasing number of transactions. This outline summarizes the principal cases decided by the Delaware courts over the past several years relating to alternative entities. The outline is organized first by the type of alternative entity involved in the case and then, within each such classification, the cases are divided by the principal issues addressed. The current version of the outline is a cumulative survey and reflects an update of the prior year's version to include cases decided during the last year.[1]

II. LIMITED PARTNERSHIPS

A. Fiduciary Duties

1. Fiduciary Duties of General Partners

a. *DiRienzo v. Lichtenstein*, C.A. No. 7094-VCP (Del. Ch. Sept. 30, 2013)

This case involved a series of transactions in which a hedge fund formed as a Delaware limited partnership merged with a publicly traded portfolio company that was a Delaware corporation with a minority interest held by the public, which was converted in connection with such merger to a publicly traded limited partnership (the "Partnership"). Plaintiff was a minority shareholder of the portfolio company and brought claims based on both pre-merger actions by the board of the portfolio company and others and post-merger actions by the general partner of the Partnership (the "General Partner"), the managing member of the General Partner and the directors of the General Partner. With respect to the claims involving conduct after the merger, plaintiff's main allegations were (i) direct claims against a special committee of the portfolio company, arguing that they functioned as the board of the General Partner post-merger and breached their fiduciary duties in taking certain actions related to the merger, (ii) derivative claims against the General Partner, its managing member and the board of the General Partner for alleged breaches of fiduciary and contractual duties by having the Partnership assume a deferred fee liability that was owed by an affiliate of the hedge fund pre-merger, granting investors in the hedge fund that desired to exit their investment units in the Partnership in addition to cash and distributions in-kind of portfolio securities (the "Partial Unwind") and allowing the managing member of the General Partner to purchase "corporate opportunity units" in the Partnership and (iii) derivate claims against the General Partner for alleged breaches of its express and implied contractual duties under the partnership agreement of the Partnership by disposing of substantially all of the Partnership's assets in connection with the Partial Unwind and

[*] Louis G. Hering and David A. Harris are partners in the law firm of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware. © Copyright 2015, Morris, Nichols, Arsht & Tunnell LLP. All rights reserved.

[1] Certain of the case summaries appearing herein have been previously published in the Delaware Law Review by the Delaware State Bar Association.

acting without a board in place for a certain period of time. The court granted the special committee's motion for dismissal for failing to state a direct claim upon which relief could be granted. The court also granted defendants' motion to dismiss the derivative claims for failure to make a demand.

With respect to the direct claims against the special committee, plaintiff alleged that the special committee impermissibly took actions for which they should be held liable at a time when the General Partner did not constitute a board of directors. Plaintiff claimed the special committee served as the General Partner's de facto board during this time. The court disagreed, ruling that because the special committee had said only that it would "not refuse to grant consent" to proposed actions, it had neither actual nor de facto authority.

With respect to the derivative claims, the court first addressed whether demand was futile. Plaintiff argued that demand was futile because, in the limited partnership context, whether demand would be futile should only be considered from the perspective of the general partner. The court noted that although there is Delaware case authority supporting this position where limited partners had no say in how a general partner was governed, in the instant case, the partnership agreement provided that the limited partners had the right to elect directors of the General Partner. The court held that because the limited partners elected the board of the General Partner and because the members of the board owed fiduciary duties to the limited partners, demand should have been directed to the board of the General Partner and not the General Partner itself. Plaintiff also argued that the exculpatory provisions in the partnership agreement were unenforceable and the board of the General Partner was therefore threatened with liability, rendering demand futile. The court noted that where directors are exculpated contractually or otherwise from liability for certain conduct, such as in a partnership agreement, then a serious threat of liability may only be found to exist if plaintiff pleads a non-exculpated claim against the directors based on particularized facts. Thus, whether a partnership agreement is enforceable is important to a determination of whether demand is excused. The court found the exculpatory provisions in the partnership agreement to be enforceable because the merger was validly consummated in accordance with the DGCL and organizational documents of the portfolio company to which plaintiff was bound by becoming a stockholder thereof. Plaintiff then argued that the exculpation provisions in the partnership agreement were ambiguous and failed to eliminate fiduciary duties. The partnership agreement provided in relevant part that, except as otherwise provided in the partnership agreement, each director shall have the same fiduciary duties as a director of a corporation incorporated under the DGCL. However, the partnership agreement also provided that, notwithstanding anything to the contrary set forth therein, no general partner, board member thereof or other indemnitee would be liable except for bad faith, fraud, willful misconduct or gross negligence. Further, the partnership agreement expressly approved transactions contemplated by the merger and waived any conflicts of interest in connection therewith. The court found that these provisions were not ambiguous and that in cases in which the General Partner executed, delivered or performed any agreement authorized or permitted under the partnership agreement, the General Partner contractually eliminated its liability to limited partners to the greatest extent allowed by law. Because of this, the court dismissed several of plaintiff's claims involving breaches of the partnership agreement because demand was not made and defendants were exculpated for the alleged actions under the terms of the partnership agreement. In addition, with respect to claims involving actions taken by the General Partner during the period of time in which there was no board of the General Partner, because any and all of such actions related to the merger, the court found that demand was also required for those claims. In its analysis as to whether demand was excused, the court last addressed whether a majority of the board members were independent. The court found that each director that met the NYSE test for independence also satisfied the Delaware test for independence. In this finding, the court noted that although a director that qualifies for independence under the NYSE rules does not necessarily mean they are independent as a matter of Delaware law, the NYSE rules are a "useful source" for this determination. Accordingly, the court found that demand was not excused with respect to the derivative claims.

Plaintiff also apparently argued in briefing and at argument that these derivative claims were both direct and derivative under *Tri-Star* and *Gentile*, which required a showing, applying corporate law by analogy, that (i) a stockholder had majority or effective control and caused the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value and (ii) the exchange caused an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) stockholders. Based on the facts in this case, the court found that plaintiff failed to satisfy both of these prongs with respect to each of the claims—assumption of deferred liability fee and purchase by the managing member of the General Partner of corporate opportunity units. The court accordingly treated the claims as derivative, stating that because plaintiff had failed to make a demand upon the General Partner's board, the court would dismiss unless demand could be excused as being futile.

The court next considered whether demand was excused with respect to claims involving the deferred liability fee. The court noted that the *Rales* test applied where (i) a business decision was made by the board of a company but a majority of the directors making the decision was replaced, (ii) where the subject of the derivative suit was not a business decision of the board and (iii) where the decision being challenged was made by the board of a different corporation. In this case, the board applied the *Rales* test to determine whether demand was futile with respect to the claim involving the assumption by the Partnership of the deferred fee liability. Under the *Rales* test, demand is excused only where particularized factual allegations create a reasonable doubt that, as of the time the complaint was filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. A board exercises its independent and disinterested business judgment when it responds to a demand free of personal financial interest and improper extraneous influences, which include domination by a controlling shareholder and a substantial risk of personal liability. The court found that demand was not excused as plaintiff failed to demonstrate this.

The court then addressed whether demand was excused with respect to a separate claim relating to payment of the deferred liability fee. Because *Rales* did not apply to this question, the court applied the *Aronson* test. To succeed under this test, the court noted that plaintiff must plead particularized facts that create a reasonable doubt that (i) the directors are disinterested and independent or (ii) the challenged transaction was otherwise the product of a valid exercise of business judgment. With respect to the first prong, which the court noted was virtually identical to the *Rales* test, the court indicated that, to succeed, plaintiff must have alleged that the board of the General Partner faced a substantial likelihood of personal liability for their decision to change the deferred fee agreement. The court looked to the partnership agreement, which limited liability to, in relevant part for this case, gross negligence, bad faith and willful misconduct. The court found that gross negligence requires pleading and proving that a defendant was recklessly uninformed or acted outside the bounds of reason. The court found that the deferred liability fee agreement had certain benefits to the Partnership and was therefore, among other reasons, not outside the bounds of reason. With respect to bad faith and willful misconduct, the court noted that a fiduciary's conduct is in bad faith if the fiduciary acted with a purpose other than advancing shareholder interests (i.e., the best interests of the corporation), intentionally violated relevant positive law, intentionally failed to respond to a known duty, or exhibited a conscious disregard of a known duty. In this regard, the court noted that to overcome the presumption that a fiduciary acted in good faith and state a claim for bad faith, a plaintiff must show that the fiduciary's actions were so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. The court noted that even if this were a bad business decision, it was approved by independent directors that had a reasonable basis for their decisions and thus plaintiff did not demonstrate bad faith. Turning to the second prong of *Aronson*, the court noted that this would also require a showing of bad faith or gross negligence. For the above reasons, plaintiff did not satisfy this "heavy burden." The court applied the same analysis under the *Aronson* test for the claim relating to the corporate opportunity units and similarly found that plaintiff's claim was deficient.

Finally, plaintiff alleged that certain underlying offenses articulated in its complaint breached the implied covenant of good faith and fair dealing. Because, pursuant to *Gerber v. Enterprise Products Holding, LLC*, only parties to a contract may breach this covenant, the court held that only the General Partner could be liable and not the members of its board. Therefore, plaintiff was required to demonstrate that the General Partner had breached the covenant and that the General Partner's board had facilitated such breach to show that demand was excused. Because the court found that the board of the General Partner did not act in bad faith or with gross negligence, the court held that demand was not excused. The court then dismissed the last claim of aiding and abetting because all underlying claims had been dismissed.

b. *In re Estate of Everett T. Conaway*, C.A. No. 6056-VCG (Del. Ch. Feb. 15, 2012)

In this declaratory judgment action, the petitioner asked the Court of Chancery to determine whether the terms of a limited partner's revocable trust and last will and testament superseded a transfer restriction in a limited partnership agreement and whether the petitioner validly withheld its consent pursuant to such transfer restriction. The petitioner, as trustee of a revocable trust, held a 30% limited partnership interest in EJKC Partnership, L.P. (the "Partnership"). Everett T. Conaway ("Everett"), as trustee of the Everett T. Conaway Revocable Trust (the "ETC Trust"), held a 69% limited partnership interest in the Partnership. Confam, Inc., the general partner of the Partnership (the "GP"), owned the remaining 1% interest in the Partnership. The petitioner and Everett each held 50% ownership stakes in the GP.

The limited partnership agreement of the Partnership provided that a limited partner could not transfer its interest in the Partnership without the consent of the GP and the non-transferring limited partner. In his will, Everett bequeathed household furnishings to the respondent and the rest, residue and remainder of his estate to the ETC Trust. The ETC Trust terminated upon receiving the remainder of Everett's estate and, under the terms of the ETC Trust, Everett's interest in the Partnership was to pass to the respondent. The terms of the ETC Trust further provided that the balance of the ETC Trust corpus and any accumulated income was to go to the petitioner.

Everett did not obtain the consent of the GP or the consent of the petitioner to the transfer of the Partnership interest to the respondent. After Everett's death, the petitioner filed this action and contended that, without the requisite consent, the purported transfer to the respondent was void and, as residuary beneficiary of the ETC Trust, it was sole owner of all interests, including the interest of the GP, in the Partnership. The respondent contended that the petitioner's withholding of consent to the transfer (i) constituted self-dealing and a breach of fiduciary duty, (ii) constituted an unreasonable restraint on alienation and (iii) ran afoul of Everett's intent as a testator.

After briefly discussing the contractual freedom afforded under DRULPA, the court found the language of the transfer restriction to be clear and unambiguous. As a result, the court concluded, the purported transfer to the respondent did not comply with the terms of the transfer restriction and was therefore invalid.

Turning to the respondent's arguments for invalidating the transfer restriction, the court declined to determine whether the petitioner's dual roles as a general and limited partner required it to meet fiduciary obligations when exercising its consent right in the context of a transfer because, even assuming the full panoply of fiduciary duties applied, mere exercise of a contractual right, the purpose of which was to preserve the original partnership structure absent unanimous consent, did not constitute a breach of fiduciary duty. The court also noted that it would be inequitable to conclude that by transferring his ownership interest in the GP to the petitioner, Everett could impose fiduciary obligations requiring the petitioner to consent to a transfer it would otherwise oppose pursuant to its contractual rights under the limited partnership agreement.

The court also concluded that the transfer restriction was not an unreasonable restraint on alienation. The purpose of the Partnership was to permit Everett to make transfers to the petitioner with limited tax consequences and the transfer restriction sought to preserve this purpose. The court also found unpersuasive the respondent's argument that Everett's intent as a testator should control. The court noted that a testator's intent controls interpretation of a testator's will. Such intent, however, cannot change preexisting contractual obligations. Thus, according to the court, Everett's subsequent amendment to his testamentary scheme could not invalidate his pre-existing contractual obligations pursuant to the limited partnership agreement of the Partnership.

c. *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC,* C.A. No. 5501-CS (Del. Ch. Aug. 8, 2011)

Defendant, Lerner Master Fund, LLC ("Lerner"), provided a $40,000,000 seed investment to Paige Opportunity Partners, L.P., a Delaware limited partnership (the "Hedge Fund"), a new hedge fund formed by one of the plaintiffs, Michele Paige ("Michele"). In connection with Lerner's investment in the Hedge Fund, Lerner entered into a Revenue Sharing Agreement to govern the relationship between Lerner and the Hedge Fund's Manager (the "Seeder Agreement"). Pursuant to the Seeder Agreement, Lerner had the right to share in the fees generated by the Hedge Fund, and, in return, Lerner agreed that it would not withdraw its capital for at least three years, except that Lerner could withdraw its capital immediately if Paige GP, LLC, the general partner of the Hedge Fund (the "General Partner"), committed certain proscribed actions set forth in Section 6.4 of the Seeder Agreement. Under Section 8.02 of the limited partnership agreement of the Hedge Fund (the "Partnership Agreement" and together with the Seeder Agreement, the "Agreements") limited partners were permitted to withdraw capital only on certain dates and in certain amounts, and depending upon the date of withdrawal, the withdrawal would be subject to penalties. The general withdrawal scheme set forth in Section 8.02 of the Partnership Agreement included Section 8.02(b) of the Partnership Agreement, the so-called "Gate Provision," which limited capital withdrawals to 20% of the total amount in the Hedge Fund in any given six-month period. Section 8.02(d) of the Partnership Agreement, however, provided that the General Partner could waive or modify the conditions relating to withdrawals for certain large or strategic investors. The central issue before the court was whether the Hedge Fund could use the Gate Provision to prevent Lerner from withdrawing all of its capital upon the expiration of the three year lock-up period.

The only investor in the Hedge Fund, other than Lerner, was Michele, who invested $40,000 in the Hedge Fund. Nearly two years after the formation of the Hedge Fund, the Hedge Fund had yet to make any investments in the distressed and special situation investments it was set up to invest in. Eventually, Lerner determined that it was not going to receive any fees under the Seeder Agreement and decided to cut its losses and withdraw its capital on October 31, 2010, the third anniversary of its investment. To this end, Lerner informed Michele and Christopher Paige, general counsel of the Hedge Fund ("Christopher," and together with Michele, the "Paiges"), of its decision and requested that the Paiges be mindful of the liquidity required to redeem Lerner's interest in the Hedge Fund. In response to Lerner's withdrawal request, Christopher sent Lerner a "hostile" nine-page single-spaced letter (the "March 2010 Letter") suggesting that the Paiges would take unilateral action harmful to Lerner if it did not agree to their settlement demands. In the March 2010 Letter, the Paiges suggested that Lerner could withdraw immediately (on March 1, 2010, six months prior to the expiration of the three year lock-up period) if Lerner agreed to pay 5% of its total capital balance plus legal and accounting fees. Also, the Paiges suggested that they would use the Gate Provision to lock up Lerner's capital. Following receipt of the March 2010 Letter, Lerner sought to obtain certain information from the Hedge Fund. The information requested was never provided to Lerner. Two months later, the Paiges filed this action, seeking a declaratory judgment that (i) the Gate Provision allowed the General Partner to restrict Lerner's ability to withdraw all of its capital on October 31, 2010 notwithstanding the Seeder Agreement and (ii) they were entitled to indemnification from the Hedge Fund for pursuing the action. Prior to answering the Paiges' complaint, Lerner filed an action in a New York state court seeking damages for, among other things, fraud and breach of fiduciary duty. On July 30, 2010, Lerner filed its answer and counterclaim. The counterclaim contained the following four counts: (1) breach of contract against the Paiges for failing to allow Lerner to withdraw all of its investment, violating their fiduciary duties, and not honoring Lerner's information rights, (2) a declaratory judgment count to enforce its right to withdraw all of its capital without application of the withdrawal restrictions contained in the Partnership Agreement, (3) breach of fiduciary duty against the Paiges, and (4) a claim for judicial dissolution under Section 17-802 of the DRULPA.

The court addressed the parties' contractual claims first and stated that the claims come down to two main issues: (1) whether the withdrawal provisions in the Partnership Agreement applied to Lerner at all in light of the Seeder Agreement and (2) whether the Paiges breached the Seeder Agreement in a way that would have allowed Lerner to withdraw immediately without penalty. The court stated that the resolution of the foregoing issues were governed by New York law. The Paiges argued that the Seeder Agreement did not amend the Partnership Agreement and therefore the Gate Provision would apply to Lerner. In support of their position, the Paiges pointed to (1) Section 9.8 of the Seeder Agreement, which states that it does not amend the Partnership Agreement, (2) the negotiating history of Section 9.8 of the Seeder Agreement, which, according to the Paiges, showed that they refused Lerner's request to add language stating that the Seeder Agreement amended the Partnership Agreement and (3) the fact that the Seeder Agreement does not conflict with the Partnership Agreement. In response, Lerner argued that the Seeder Agreement trumped the Partnership Agreement. In support of its position, Lerner pointed to (1) a principle under New York contract law that provides that if two documents govern the relationship between parties and one is "specifically prepared for the transaction and the other is a general form," the specific document takes precedence over the general, (2) the overall structure of the Partnership Agreement and the Seeder Agreement, because the Partnership Agreement provides for three specific instances in which the General Partner can modify the Partnership Agreement for certain investors, each of which was addressed by the Seeder Agreement, (3) the unreasonableness of reading the two agreements as suggested by the Paiges because after three years the Paiges could run the Hedge Fund however they wanted and Lerner would be trapped by the Gate Provision and (4) the negotiation history among the parties, which, according to Lerner, supported its reading of the Agreements.

The court stated that the Agreements were ambiguous as to the applicability of the Gate Provision to Lerner but found that the reading suggested by Lerner was the more reasonable reading based on the text of the Agreements. The court based its conclusion on the following: (1) because the Partnership Agreement specifically contemplated that the General Partner could modify the Partnership Agreement's terms for certain large investors, the Seeder Agreement did not need to specifically amend the Partnership Agreement, (2) based on the Paiges' reading, if Lerner violated the withdrawal provisions, it would be liable for damages under both Agreements, (3) reading the Agreements as suggested by the Paiges lead to unreasonable results because even if Lerner were entitled to withdraw under Section 6.4 of the Seeder Agreement due to a proscribed action by the General Partner, Lerner could still be held liable for a withdrawal fee under the Partnership Agreement, and after the three year period, when the Seeder Agreement terminated, Lerner would be deprived of the protections of Section 6.4 and yet could not withdraw without penalty even if Michele or the General Partner committed a proscribed action. Since both parties' readings were reasonable, the court also examined the negotiating history to try to determine which meaning was intended. In reviewing the negotiating history, the court concluded that the negotiating history supported Lerner's position. The court pointed to Michele's own statement that the Seeder Agreement operated much like a side letter and therefore it was not necessary to add contractual language acknowledging the amendment of the Partnership Agreement. Thus, the court concluded that Lerner's withdrawal rights were governed by the Seeder Agreement, consequently following the expiration of the three-year lock up period, Lerner was entitled to an immediate return of its invested capital and the Paiges' refusal to do so constituted a breach of contract.

The court also considered Lerner's claim that the Paiges and their affiliates breached their fiduciary duties by permitting the Gate Provision to apply to Lerner. Section 8.02(d) of the Partnership Agreement provided the General Partner with the authority to, in its sole discretion, waive or modify conditions relating to withdrawals for certain large or strategic investors. Thus, Lerner argued, if the application of the Gate Provision to Lerner were not justified by a proper purpose, but rather motivated solely by the self-interest of Michele and her affiliates, the General Partner had a fiduciary obligation to waive the Gate Provision and its failure to do so was a breach of fiduciary duty. The Paiges advanced two arguments as to the fiduciary duty claim. First, the Paiges argued that Lerner sought to improperly impose fiduciary duties on persons who do not owe such duties. Second, the Paiges argued that there was no breach of fiduciary duty because the Partnership

Agreement provided the General Partner with the authority to waive or modify the withdrawal conditions in its “sole discretion.” As to whether certain defendants owed fiduciary duties to Lerner, Paige argued that neither Michele, Christopher nor Paige Capital Management LLC (the investment manager) owed any fiduciary duties to the Partnership. The court found that Michelle, in her capacity as the managing member of the general partner of the Hedge Fund, exerted sufficient control over the General Partner to owe fiduciary duties to the Hedge Fund and its limited partners under the *In re USACafes, LP Litig.* line of cases, which hold that a director, member or officer of an entity serving as a general partner of a limited partnership owes fiduciary duties directly to such partnership and its limited partners. With respect to Christopher, who was not an officer, director or member of the general partner, the court declined to extend the *USACafes* principle. Similarly, the court refused to find that Paige Capital Management LLC owed fiduciary duties to the Hedge Fund.

The Paiges also argued that Michele and the General Partner did not owe any fiduciary duties to the Hedge Fund because the decision to apply the Gate Provision presented a conflict of interest for the Paiges. Michele argued that because the General Partner and those who controlled it owed fiduciary duties to the General Partner and its members and because a decision to waive the Gate Provision would injure the General Partner and its members, Michele and the General Partner were in an impossible position. The court rejected this argument and reasoned that a decision by a fiduciary in a conflicted situation is subjected to a more searching form of judicial review, not less, and, accordingly, the court concluded that fiduciary duties would apply to the Paiges’ decision to apply the Gate Provision to Lerner.

The Paiges also argued that there was no breach because the Partnership Agreement permitted the General Partner to act in its sole discretion. The court rejected this argument and stated that a bare statement of “sole discretion” that does not define the term merely means the person provided with the sole discretion has the singular authority to consider and decide an issue and does not absolve such person of the duty to act for a proper fiduciary purpose. Thus, the court concluded that traditional fiduciary duties applied to the decision to apply the Gate Provision to Lerner and found that it was not a justifiable fiduciary act. An expert at trial testified that a “Gate” provision is typically used to prevent a “run on the bank,” which would require a hedge fund to sell off assets, possibly at a discount, and reduce the value of the interests of those investors left behind. In this case, Michele was the only other investor in the Hedge Fund and the court found that satisfying Lerner’s withdrawal request would not affect her investment. Further, the economics of the deal supported the conclusion that Michele was motivated by self-interest because if the Gate Provision were applied to Lerner, the Paiges would collect over $400,000 in fees the following year.

The Paiges also argued that even if the decision to apply the Gate Provision to Lerner was self-interested, they were statutorily exculpated under Section 17-1101(e) of the DRULPA, which provides: “Unless otherwise provided in a partnership agreement, a partner or other person shall not be liable to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for the partner’s or other person’s good faith reliance on the provisions of the partnership agreement.” The court rejected this argument stating that Section 17-1101(e) is best read “as ensuring that fiduciaries who take action to advance a proper partnership purpose but do so based on a good faith misreading of the agreement are not tagged for liability for a breach of fiduciary duty.” Thus, because the court did not believe the Paiges’ interpretation of the Partnership Agreement was a good faith interpretation, but rather a pretext for self-enrichment, they were not entitled to the protections of Section 17-1101(e) and the court concluded they had breached their fiduciary duties by failing to waive the Gate Provision for Lerner.

Lerner had also argued that certain conduct by the Paiges triggered its right under Section 6.4 to withdraw all of its capital prior to the expiration of the three year lock-up period in the Seeder Agreement. Specifically, Lerner argued that the Paiges breached certain information rights set forth in the Seeder Agreement thereby triggering its rights under Section 6.4. Although the court found that the information rights provisions contained in the Seeder Agreement had been breached, it found that Section 6.4 was not triggered because Lerner failed to provide the Paiges with proper notice and an opportunity to cure under New York law. Lerner also argued that the March 2010 Letter was part of an "extortionate scheme" on the part of the Paiges to use their role as a fiduciary to control Lerner's capital, which triggered its right to withdraw capital immediately under Section 6.4. The court concluded that the letter was a "heated settlement letter" that expressed an intent to commit a breach of fiduciary duty at a later date, but the letter itself did not constitute a breach of fiduciary duty. Thus, the court rejected Lerner's claim that it had a right to withdraw prior to the expiration of the three-year lock-up period.

The court rejected the Paiges' claim that Lerner violated the implied covenant of good faith and fair dealing by engaging in a course of conduct that caused the Paiges not to be able to pursue their investment strategy or attract new investors. The court found that Lerner's conduct—in making clear to the Paiges that it would withdraw its capital at the expiration of the three year lock-up period was an exercise of a contractual right—and the exercise of such a right could not be a violation of the implied covenant of good faith and fair dealing.

The court also rejected the Paiges' defamation claim in which the Paiges argued they were defamed (i) by the filing of the summons with Notice in New York that listed fraud among its allegations and (ii) due to Lerner's counsel making statements to the media that Lerner did not know where the Hedge Fund was investing its money, which statements ended up on a website that covered hedge funds. The court agreed with the arguments made by Lerner that the summons was covered by a litigation privilege in New York. Further, as to the report on the website, the court found that the statements were "substantially accurate" and "substantially true" and therefore the defamation claims were not valid.

Finally, the Paiges also sought a declaratory judgment that they would be entitled to indemnification for the expenses of the litigation and any losses suffered as a result of the litigation. The Paiges argued that although they initially initiated the suit, Lerner substantially expanded the scope of the litigation with its counterclaims. The court disagreed, finding that the counterclaims were compulsory and had to be filed in response to the initial claim. The Paiges also argued that they should be entitled to indemnification because they did not engage in "willful misconduct, gross negligence, or violation of applicable laws." The court rejected this claim because it did not believe that the decision not to raise the Gates was made in good faith but rather was made to advance the Paiges' selfish ends. Thus, based on all of the foregoing, the court ordered the Paiges to return Lerner's capital with appropriate pre-judgment interest and the court concluded that all of the Paiges' claims failed.

d. *Venhill Ltd. P'ship. v. Hillman,* C.A. No. 1866-VCS (Del. Ch. June 3, 2008)

Plaintiffs were Venhill Limited Partnership ("Venhill"), a Delaware limited partnership created to serve as an investment vehicle for the benefit of the families of Howard Hillman ("Howard") and Tatnall Hillman ("Tatnall"), and two trusts (the "Trusts") that were limited partners in Venhill. Howard, the principal defendant, served as general partner of Venhill, and Howard, Tatnall and Joe Hill ("Joe"), a cousin, were the three trustees for the Trusts. The litigation related to the substantial investments Howard had caused the Trusts, through Venhill, to make in Auto-trol ("Auto-trol"), a portfolio company owned by Venhill. Howard was effectively on both sides of the Auto-trol transactions because he was CEO and controlled Auto-tel when, as general partner of Venhill, he caused Venhill to make investments in Auto-trol. Although Auto-trol experienced some success following Venhill's acquisition in 1973, the company only survived due to substantial investments by Venhill. By July of 2005, Howard had caused Venhill to make 186 loans to, and invest $85.4 million in, Auto-trol. As early as 1990, Auto-trol began to exhibit strong signs of failure. Consequently, Howard began to cause Venhill to make loans to Auto-trol at rates and upon terms that would not have been available to Auto-trol in the marketplace. Tatnall and Joe were aware that Howard, in his capacity as general partner of Venhill, was causing Venhill to invest substantial sums of money in Auto-trol and expressed their reservations as early as 1994. In spite of their reservations, Tatnall and Joe continued to allow Howard to invest Venhill funds in Auto-trol. Although Tatnall and Joe, under Venhill's partnership agreement, had the power to remove Howard, they did not do so and instead limited Howard's ability unilaterally to cause the Trusts to loan money to Venhill to fund Auto-trol. Nevertheless, although Howard could no longer cause the Trusts to invest in Auto-trol through Venhill, Howard used his discretion as general partner of Venhill to fund Auto-trol's operations using Venhill's remaining capital. Additionally, Howard, acting as CEO for Auto-trol on the one hand and general partner of Venhill on the other, caused Venhill to convert much of the Auto-trol debt held by Venhill into equity. In January 2005, Howard, sensing that he would soon be removed as general partner of Venhill, took a number of actions designed to protect Auto-trol from Venhill's control and to benefit himself. Howard transferred the shares of Auto-trol owned by Venhill to a newly created LLC of which Venhill was the sole member but that Howard controlled as manager. Additionally, Howard caused Venhill to (i) loan Auto-trol $2 million, (ii) pay his personal lawyers, and (iii) reimburse him for the out-of-pocket costs he incurred related to litigation involving the Trusts. Following his removal, Howard continued to support Auto-trol by attempting to force Venhill to subscribe to a stock offering to prevent severe dilution of its equity interest in Auto-trol.

Plaintiffs brought actions against Howard alleging he breached his fiduciary duties of loyalty and care. Plaintiffs sought, *inter alia*, damages for all of the losses suffered by Venhill (including the loss of profits that would have been made if funds were invested consistent with Venhill's other investments), rescission of a promissory note that consolidated all of the debt owed to Venhill into a single note that would not come due until 2020, the cancellation of any security interest in Auto-trol's real property and attorneys fees incurred by plaintiffs in connection with their action.

The court first discussed the standard of review relating to Howard's liability for damages to Venhill and the Trusts. Although the court found that the parties agreed the entire fairness standard should apply to the investments in Auto-trol because of their interested character, they disagreed on how that standard should apply. Howard argued that plaintiffs could not challenge the Auto-trol investments because Joe and Tatnall were aware that he was causing Venhill to invest in Auto-trol and they failed to exercise their rights as limited partners in Venhill to remove him as a general partner. In essence Howard argued that plaintiffs acquiesced and ratified his actions. The court was not persuaded and concluded that an equity holder does not have an affirmative duty to exercise its powers of removal if it disagrees with a fiduciary's actions, and the court concluded that the parties did not acquiesce or ratify any of Howard's actions. To the contrary, the court found that "nothing [plaintiffs] did gave Howard any reason to believe that they approved his desire to continue funding Auto-trol." Similarly, the court rejected defendant's ratification argument because neither Joe nor Tatnall consented to any of the relevant investments.

Additionally, Howard argued that the exculpation provision contained in the Venhill partnership agreement modified the entire fairness standard. Based on the exculpation provision, Howard argued that he would only be liable for damages if it could be shown that he (i) engaged in bad faith acts, (ii) made grossly negligent decisions, or (iii) committed acts of willful and wanton misconduct. On this issue, the court reasoned that the entire fairness standard was at its core an inquiry to determine whether a transaction should be set aside. The court went on to state "[the standard] has only a crude and potentially misleading relationship to the liability any particular fiduciary has for involvement in a self-dealing transaction." In this instance, "the exculpation provision prevents [plaintiffs] from recovering from Howard unless he acted in bad faith, with gross negligence, or engaged in willful and wanton misconduct." Thus, an interested transaction could be enjoined if it failed the entire fairness test, but if the transaction were consummated, plaintiffs could only recover damages if Howard acted in the proscribed manner. Interestingly, the court noted that under the applicable standard—a common one in alternative entities—an interested transaction could be substantially unfair and yet not give rise to personal liability. Still, to determine whether Howard would be personally liable, the court found it helpful to analyze the Venhill investments in Auto-trol under the entire fairness standard. The first prong of the entire fairness test required that the court consider the process used to implement the transactions. Finding it impossible "to detail all the ways in which the process fell short of fair" the court highlighted the following points: (i) Howard never conducted a market check; (ii) Howard never engaged or sought the advice of competent professionals; and (iii) Howard did not engage in any analytical process. Thus, the court found the process used by Howard to make investments for Venhill in Auto-trol "grossly deficient." The second prong of the entire fairness test requires a court to review the substantive fairness of a transaction. In this regard, the court found the transaction substantively unfair for the following reasons: (i) the terms and conditions of the investments were not fair to Venhill and Venhill could have obtained better terms and conditions from other borrowers, (ii) Auto-trol did not have a plan to return the company to solvency, (iii) Howard's implicit admission that he believed Auto-trol equity was worth only $1 and his unwillingness to pay off any of the substantial debt owed by Auto-trol "demonstrates that [the] transactions were unfair," and (iv) the imbalance of the Venhill investment portfolio which had over 50% of its assets invested in Auto-trol. Howard argued that the exculpation provision contained in the Venhill partnership agreement protected him from liability because he acted in good faith and subjectively believed that Auto-trol would be a financial success. The court disagreed, however, finding that Howard did not subjectively believe that Auto-trol would be a success as evidenced by his unwillingness to acquire Auto-trol. The court found the case to present a "clear case of fiduciary disloyalty, although Howard's motives were not financial enrichment they were personal." In sum, the court found that Howard acted in bad faith and, additionally, that he engaged in willful misconduct and acted in a grossly negligent manner. Thus the court awarded damages to Venhill. In addition, with respect to the debt that was consolidated into a single note in 2003, the court ordered rescission of that note to allow Venhill to collect on debts based on the obligations owed to it by Auto-trol prior to the consolidation. Finally, the court set aside the security interest granted Howard.

e. *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247 (Del. Ch. Oct. 9, 2007)

Plaintiffs were current or former employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in a Delaware limited partnership operating as a private equity fund (the "Fund") who brought a derivative action against the Fund, its corporate general partner (the "General Partner"), past and present directors of the General Partner, the Fund's investment advisor (the "Investment Advisor"), the Fund's special limited partner (the "Special Limited Partner") and CIBC alleging breach of fiduciary duty, breach of the Fund's partnership agreement and aiding and abetting. Defendants moved to dismiss on the grounds that (i) plaintiffs did not make demand and demand was not excused; (ii) plaintiffs failed to state a claim upon which relief could be granted; (iii) plaintiffs' claims were barred by laches and/or the statute of limitations; and (iv) plaintiffs waived their right to bring suit.

The Fund was created by CIBC to co-invest with CIBC in accordance with the investment criteria set forth in the Fund's partnership agreement and offering documents. Under the Fund's partnership agreement, the General Partner had the sole right to manage and administer the affairs of the Fund but the partnership agreement also provided for the General Partner to delegate certain of its responsibilities and pursuant thereto the General Partner delegated its authority to select and dispose of the Fund's investments to the Special Limited Partner. The General Partner also delegated other investment management and related powers, such as exercising the Fund's voting rights in its investments, to the Investment Advisor which also had the authority to develop investment policies and strategies and to recommend particular investments for the Fund. The Investment Advisor in turn delegated much of this investment decision authority to CIBC's investment committee, which consisted of upper level CIBC executives. The Investment Advisor could also buy investments for the Fund with approval of the Special Limited Partner. Notwithstanding the foregoing delegations, the court found that the General Partner retained supervisory responsibility because under the partnership agreement the exercise of their powers by the delegatees and the performance of their duties was "subject to the oversight of the General Partner." The partnership agreement also provided that the General Partner, Investment Advisor, Special Limited Partner and certain other persons were liable only for actions or omissions resulting from bad faith, willful misconduct, gross negligence or material breach of the partnership agreement.

The Fund lost over 75% of its initial value and over half of its investments were written down or written off. The complaint alleged that these losses resulted from defendants' breaches of fiduciary duties. Specifically, the complaint alleged that the Fund was designed to "co-invest" with CIBC. Under this design, when CIBC's investment committee decided to make a particular investment on behalf of CIBC, the Investment Advisor or Special Limited Partner would then decide if the investment met the Fund's eligibility requirements and, if so, invest alongside CIBC. According to the complaint, however, investments were not made in this way. Rather, the same CIBC senior executives who served on CIBC's investment committee also acted for the Investment Advisor and the Special Limited Partner, and when an investment owned by CIBC lost value, these individuals acting for the Special Limited Partner or Investment Advisor allegedly approved the Fund's purchase of these investments from CIBC at prices equal to CIBC's original cost of investment and also paid CIBC a 7% finders fee. The complaint alleged that CIBC, the Special Limited Partner and the Investment Advisor violated their fiduciary duty to the Fund through this activity and the General Partner violated its duty by failing to oversee these activities.

With regard to plaintiffs' claims against the General Partner and its directors, the court dismissed the claims against two of the directors because they were not on the board when the allegedly improper acts occurred. The court, however, denied the motion to dismiss against the General Partner and the directors of the General Partner at the time of the wrongful acts finding that plaintiffs' allegations of wrongdoing by the Investment Advisor and Special Limited Partner and of the General Partner's complete failure to supervise the conflicted delegatees created a substantial likelihood of the General Partner's liability for gross negligence in discharging its oversight duty or material breach of the partnership agreement and were therefore sufficient to excuse demand also withstood a Rule 12(b)(6) attack. However, plaintiffs' failure to brief their claim that the directors of the General Partner aided and abetted the General Partner's breach of its oversight duties constituted a waiver of this claim and required its dismissal.

f. *Twin Bridges Ltd. P'ship v. Draper*, C.A. No. 2351 (Del. Ch. Sept. 14, 2007)

This case, although involving a dispute over the governance of a family owned limited partnership, raises significant issues of limited partnership law including whether the step transaction principal applied to the analysis of transactions under tax law should be applied to an amendment of a partnership agreement and subsequent merger so that the two are viewed as a single transaction, whether the doctrine of independent legal significance applies to Delaware limited partnerships, whether a supermajority provision in a partnership agreement can be reduced or eliminated by amendment with a lesser vote and whether a general partner can violate its fiduciary duty, and limited partners can aid and abet that violation, by proposing and adopting amendments to a partnership agreement that eliminate the general partners' fiduciary duties in connection with certain interested transactions. The partnership at issue had two general partners, Schutt and Draper, with joint authority to make all major decisions regarding the partnership. As the two general partners disagreed on the management of the partnership's principal asset, the Partnership was effectively in gridlock with respect to the development of that asset. Schutt and limited partners who collectively held 87% of the economic interests and voting power in the partnership decided to pursue a solution without Draper and the two limited partners who were his sons. This they did, without prior notice to Draper or his sons, by executing written consents to amend the partnership agreement to add a provision authorizing the partnership to merge with approval of partners holding two-thirds of the partnership interests and then approving the merger of the partnership into a newly formed limited partnership with a different governing structure. On the same day they effected the merger, Schutt and the limited partners aligned with her filed a declaratory judgment action seeking a declaration of the validity of the amendment to the partnership agreement, the merger of the partnership into another Delaware limited partnership and the merger agreement pursuant to which the merger was effected. Draper and his sons asserted counterclaims for breach of contract, a declaration of invalidity of the amendment and merger, breach of fiduciary duty against Schutt and a claim for aiding and abetting a breach of fiduciary duty against the limited partners aligned with Schutt.

With regard to defendants' claim against Schutt for breach of fiduciary duty, the court defined the issue before it as whether Schutt's involvement in passing the amendment and approving the merger could result in a breach of her fiduciary duty of loyalty to the partnership. Plaintiffs first sought dismissal of that claim on the grounds that any allegation of a self-interested transaction by Schutt was only "hypothetical" and therefore not ripe for decision. In addition to their unripeness claim, plaintiffs argued that because the amendment and merger were valid transactions under the partnership agreement and the

DRULPA, Schutt's voting of her interest was not restricted by her fiduciary obligation as a general partner. With regard to plaintiffs' technical validity defense, the court, citing *Schnell v. Chris-Craft Indus., Inc.*, noted that while the integrated transaction might be valid under the new partnership agreement and the DRULPA, that did not necessarily immunize Schutt from a claim that she breached her fiduciary duty of loyalty to the partnership in spearheading the transaction. The court also rejected plaintiffs' ripeness defense. The court found there was no question that prior to the transactions at issue, Schutt, as a general partner, owed a fiduciary duty of loyalty to the partnership, that under DRULPA Section 1101(d), the elimination of a general partner's fiduciary duties was permissible and that the relevant provision of the new partnership agreement eliminated all fiduciary duties relating to the development and implementation of a development plan. Thus, the court concluded that any future review of a self-dealing transaction by Schutt as part of a development plan would be subject only to the lesser standard of the implied covenant of good faith and fair dealing and, therefore, such a limitation on defendants' right to challenge a development plan would have an immediate and practical impact on them and was ripe for adjudication. The court also noted that it could not rule out the possibility that depriving Draper of notice and an opportunity to address an issue as important as eliminating fiduciary duties constituted a breach of Schutt's fiduciary duty. Finally, with regard to defendants' aiding and abetting a claim against the limited partners aligned with Schutt, the court held that defendants had alleged sufficient facts to support a claim that those limited partners knowingly participated in Schutt's alleged breach of fiduciary duty.

g. *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, C.A. No. 20066-N (Del. Ch. May 24, 2006)

Plaintiffs were limited partners ("LPs") in a Delaware limited partnership operating as a hedge fund (the "Fund") and brought suit against the Fund, its general partner ("GP") and its independent auditors for breach of contract, breach of fiduciary duty and negligence. Both the plaintiffs and defendants moved for summary judgment, and the court granted the defendants' motion. At the center of the dispute were provisions of the limited partnership agreement relating to the deduction, crediting and withdrawal of the GP's incentive fee. The partnership agreement provided that the GP was entitled to a 15% incentive fee on the LPs' net profits, such incentive fee to be deducted from each LP's capital account and credited to the GP's capital account as of the end of the fiscal year. The GP had the right to withdraw funds from its capital account as of the last day of any month. The books and records of the Fund were to be audited by an independent certified accountant as of the end of each fiscal year, and the Fund was to provide copies of the audited financial statements to the LPs after the end of each fiscal year. On December 31, 1999, the incentive fee was deducted from the LPs' capital accounts and credited to the GP's capital account (the "Allocation"). After the close of business on the same day, the incentive fee was withdrawn from the GP's capital account (the "Withdrawal"). The Allocation was reported to the LPs in February of 2000 in the Fund's 1999 fourth quarter financial statement, but the Withdrawal was not. Instead, the Withdrawal was reported in May in the Fund's first quarter statement for the year 2000. Based on the Fund's fourth quarter statement received in February, the plaintiffs withdrew part of their investment, but without regard to whether or not the GP kept its 1999 incentive fee invested in the Fund. After the Withdrawal was disclosed in May, the plaintiffs continued to remain invested in the Fund.

The plaintiffs alleged that the GP breached its fiduciary duties by misstating that it had retained the incentive fee in its capital account when it had actually withdrawn nearly all of it, by not disclosing the Withdrawal as a subsequent event and by not disclosing that the Withdrawal was contrary to the terms of the limited partnership agreement. The court held that the plaintiffs had not established that they relied upon the omitted disclosure of the Withdrawal in the 1999 fourth quarter financial statements. Thus the court refused to consider whether the 1999 statement should have disclosed the Withdrawal or whether the Withdrawal should have been reported in the Subsequent Event footnote of those financials. In so holding, the court rejected the plaintiffs' reliance on federal precedents under Section 10(b) of the Securities Exchange Act of 1934. Specifically, the court reiterated that Delaware does not recognize the "fraud on the market" theory recognized in the federal courts. In breach of fiduciary duty cases based on omissions, reliance may only be presumed when shareholder or partner action is requested. As such action was not requested in the present case, the plaintiffs were required to prove reliance, which they failed to do.

With regard to plaintiffs' disclosure claim, the court emphasized that if the language of a contract is unambiguous, its plain meaning would dictate the outcome, and held that the unambiguous language of the partnership agreement did not impose a duty of disclosure on the defendants in the present circumstances.

The plaintiffs' negligence claim was rejected for several reasons. First, the limited partnership agreement exculpated the defendants from liability for negligent conduct. Second, Section 17-407 of DRULPA shields a general partner from liability when it relies in good faith upon those charged with properly preparing and presenting financial records. Because the GP had relied on the Fund's administrator and independent auditors, Section 17-407 protected it from liability. Finally, the court rejected the plaintiffs' negligence claim because they failed to prove reliance.

Because the plaintiffs failed to prove reliance and failed to prove a breach of fiduciary duty, their claims against the independent auditors for negligent misrepresentation and aiding and abetting a breach of fiduciary duty also failed.

h. *McGovern v. Gen. Holding, Inc.*, C.A. No. 1296-N (Del. Ch. May 18, 2006)

Plaintiffs were limited partners in KX Industries, L.P., a Delaware limited partnership ("KXI"). Defendant Evan Koslow was chief inventor and CEO of KXI and controlled the general partner and owned 90% of KXI's equity. The plaintiffs sued Evan, the general partner and other instrumentalities of Evan for breach of fiduciary duty and breach of the limited partnership agreement.

KXI had developed numerous new technologies that had the potential for lucrative sales over the next several years. As the company's future began to look bright, Evan attempted to squeeze out plaintiffs by claiming that most of the patents for the new technologies were actually owned by one of his wholly-owned companies, Koslow Technologies Corporation ("KT"). He contemplated selling KXI's already established business, cashing out plaintiffs and moving forward to reap the financial rewards of the new technologies on his own.

The court found that Evan breached both the partnership agreement and his fiduciary duties by appropriating the company's valuable technology. It rejected Evan's primary defense which was based on a 1989 License Agreement between KXI and KT that Evan asserted made KT the owner of the new technologies. This license agreement was formed when KXI was a joint venture between Evan and a subsidiary of Exxon, and disagreements as to its scope and validity were part of the reason Exxon left the partnership. The court held that the license agreement did not excuse Evan's behavior for several reasons.

First, the court found that the license agreement was of dubious validity because the limited partnership agreement between Evan and the Exxon subsidiary required that Exxon give prior written consent to any contracts between KXI and KT, and there was no such written consent. Second, the court found that the license was moribund. After Exxon had left the partnership, Evan largely abandoned KT as an operating company and converted it into, what was by all appearances, a patent holding company for KXI. No work was done by KT as an operating company, and it had no employees. The plaintiffs were all led by Evan to believe that KT was merely a patent holding company for KXI and that the new technologies belonged to KXI. KXI had born all the risks and costs of researching and developing the new technologies. Having treated the license as inoperative for nearly 16 years, the court found that Evan could not conveniently assert that it compelled him to appropriate KXI's valuable technology.

The court also held that even if the license agreement were operative, which it was not, Evan breached his fiduciary duties by having KXI pursue costly research from which it could gain no economic value but would instead enrich Evan personally. The court also found that Evan breached the limited partnership agreement which contained clauses stipulating that all property acquired by the partnership was deemed to be owned by the partnership and that the resources of the partnership could be used for partnership purposes only and not for the personal benefit of any of the partners.

Finally, the court held that even if the license agreement were operative, Evan interpreted it in an implausible and inconsistent manner. At most, the license agreement covered improvements that were based upon an older technology and did not cover the broad range of new developments and technologies that KXI had pursued at Evan's behest.

Using its broad equitable powers to grant appropriate relief, the court ordered that KT transfer the patent rights to KXI without payment, that KXI be dissolved, Evan removed as general partner and a receiver be appointed to sell KXI and an affiliate company. It also ordered that Evan be precluded from bidding for KXI and that he be prohibited from competing with KXI for a period of three years. Finally, the court held that Evan's behavior precluded the company from indemnifying him for his litigation expenses (and that he was required to return funds he had received as an advance), and held that because the litigation obviously benefited KXI, the plaintiffs would have their reasonable litigation costs and expenses reimbursed by the company.

i. *Albert v. Alex. Brown Mgmt. Servs., Inc.*, C.A. Nos. 762-N, 763-N (Del. Ch. Aug. 26, 2005)

In a further decision in this case brought by limited partners of two Delaware limited partnerships, the court addressed several issues raised by defendants' motion to dismiss that remained unresolved following an earlier decision, including issues relating to plaintiffs' disclosure claims, plaintiffs' breach of fiduciary duty and contract claims, whether plaintiffs' claims were direct or derivative in nature and whether the court had personal jurisdiction over certain defendants.

With respect to plaintiffs' disclosure claims, the court stated that to survive the motion to dismiss, the court must find that the allegations supported a reasonable inference of materiality. The standard to be applied was whether there existed a substantial likelihood that a reasonable investor would have considered the disclosure of the omitted fact to significantly alter the total mix of information. The court determined that the managers' failure to disclose (i) that hedging, which was believed by the managers to be in the best interests of the funds, was impractical because of the funds' liquidity situation, (ii) information regarding the funds' liquidity problems and (iii) the funds' defaults under credit arrangements were material. The court made clear that there is no independent duty of disclosure, but rather that the disclosure allegations must be tied to a fiduciary or contractual duty to disclose, and, in this case, plaintiffs claimed both.

The court then turned to plaintiffs' breach of fiduciary duty claims, the first of which related to the managers' failure to provide financial statements. The court held that, while financial statements were required to be provided as a contractual matter under the partnership agreements, the failure to provide such financial statements did not amount to a fiduciary duty claim. Similarly, the managers' permitting limited partners to withdraw and redeem their interests pursuant to the partnership agreements did not constitute a breach of fiduciary duty, as there was no personal benefit to the managers to support a breach of the duty of loyalty and there was no gross negligence (which the court stated would require allegations that the managers acted on a "recklessly uninformed" basis or acted "outside the bounds of reason") to support a breach of the duty of care. The partnership agreements' grant of sole discretion to the managers to deny a limited partner's limited contractual right of redemption did not impart a positive duty to exercise such power, regardless of the liquidity issues faced by the funds. Finally, while the court disposed of the related allegations as to the qualifications of the managers, it determined that plaintiffs' allegations regarding the time and attention the managers devoted to the funds and the alleged disclosure violations did state breach of duty of care claims. In this regard, the court explained that adequate management is a fact-intensive question and the answer varies depending on the type of fund and complexity of the issues faced.

With respect to plaintiffs' breach of contract claims, the court set forth the standard to survive a motion to dismiss, which requires proof of (i) the existence of a contract, (ii) breach of a duty imposed by such contract and (iii) damages to plaintiff from such breach. In contrast to the dismissal of the corresponding breach of fiduciary claim, the court found that the failure to provide financial statements did constitute a breach of contract claim. However, plaintiffs' allegations as to the limited partner withdrawals and redemptions were not sufficient to sustain a breach of contract claim. Finally, the court found the managers' failure to provide information due to limited partners under the partnership agreements in good faith and without material misinformation created a breach of contract claim, in addition to the breach of fiduciary duty claim discussed above.

Apart from whether plaintiffs' claims were factually supported, defendants argued that several counts of the complaint were derivative claims for which demand was neither made nor excused. The court first cited the demand requirement in the limited partnership context, as codified in DRULPA Section 17-1001, and observed the substantial similarity to Delaware corporate law, under which the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004)*, set forth a revised test for determining whether a suit is derivative or direct. Under the revised test, the only factors are (i) who suffered the harm and (ii) who would receive the benefit of any recovery or other remedy, in each case looking at the corporation or partnership, as applicable, versus the stockholders or interest holders, as applicable. In this case, the court found that the fiduciary duty and contract claims based on alleged failures to disclose were direct claims (for which demand was not required). The harm was to the interest holders, in their loss of the ability to withdraw or redeem their interests in response to the information that would have been gained, and the remedy, which, at this stage, may be monetary damages, would go to such holders. In contrast, the fiduciary duty claims based on gross negligence and inadequate management were derivative claims. Mismanagement is, according to the court, the paradigm of the derivative claim, as the managers' actions caused losses to the funds and any recovery would go to the funds. While the failure of demand, and absence of allegations as to why demand was excused, forced the court to dismiss these claims, plaintiffs were given leave to replead.

The final issue addressed by the court was a challenge to personal jurisdiction over certain defendants. Two individual defendants, who were the owners and managers of a Tennessee limited liability company that was the general partner of one of the funds, argued that they were residents of Tennessee who performed their duties from such state and had not solicited business from, engaged in regular conduct with, or even traveled to, Delaware. The court explained that upon such a challenge, the burden was on plaintiffs to show the basis for personal jurisdiction, which will then requires the court to determine (i) whether service of process on the nonresident defendant was authorized by the Delaware long-arm statute and (ii) whether the exercise of jurisdiction is consistent with due process. After stating that the Delaware long-arm statute had been interpreted to allow jurisdiction to the fullest extent permitted by the due process clause, the court observed that the funds were formed as Delaware limited partnerships governed by Delaware law and that the entity in which these defendants were managing members and owners was responsible for the day-to-day management of both funds (in its capacity as sub-advisor of each fund, in addition to being the general partner of one fund). The conclusion that the contacts of these defendants constituted "transacting business" within the meaning of the long-arm statute was supported by the facts that the entity that these defendants served (i) participated in the formation of, (ii) was primarily responsible for the management of and (iii) received fees from, the funds. The court then considered whether "minimum contacts" between the nonresident defendants and the state existed—that is, whether these defendants deliberately engaged in conduct that created obligations between themselves and the state, including the protection of the state's laws, such that these defendants should reasonably anticipate action in Delaware courts. In addition to the facts cited with respect to the long-arm statute, these defendants enjoyed the benefits of Delaware law, including limited liability. Further, Delaware's important interest in regulating entities that choose its laws warrants its exercise of jurisdiction over those who manage such entities and avail themselves of the laws of the state that empower them to act. The claims at issue in this case involved corporate power and fiduciary obligations, which are at the heart of the internal affairs and governance issues of special concern for the state, making the exercise of personal jurisdiction over these defendants appropriate.

j. *Bren v. Capital Realty Grp. Senior Hous., Inc.*, C.A. 19902-NC (Del. Ch. Feb. 27, 2004)

Plaintiff was a noteholder of a Delaware limited partnership. Following the partnership's default on the notes, plaintiff brought suit against the partnership and its general partner claiming, among other things, that the partnership and the general partner breached a fiduciary duty to creditors by failing timely to pursue a valuable litigation claim and by making false and misleading statements while soliciting the noteholders for various consents and waivers. Defendants moved for dismissal or summary judgment with respect to plaintiff's claims.

Plaintiff alleged that prior to the default on the notes the partnership engaged in a sham transaction to avoid a restriction in the partnership agreement that precluded the partnership from selling any property to an entity affiliated with the general partner. To circumvent this requirement, James Stroud ("Stroud") and Jeffrey Beck ("Beck"), the owners of the entity that owned the general partner, caused such entity to sell the stock of the general partner to an entity owned by a friend and business associate. The partnership then sold four of its five properties to another entity controlled by Stroud and Beck and paid yet another entity owned by Stroud and Beck a brokerage fee of over $1 million for the sale. A limited partner filed suit challenging the sale of the four properties, which was subsequently settled, and as part of the settlement all claims of the limited partners of the partnership arising out of the transaction were released but the settlement did not expressly release claims brought on behalf of the partnership or the noteholders.

Plaintiff alleged that when the partnership became insolvent between February and July of 2001, the general partner owed a fiduciary duty to the noteholders to preserve and pursue whatever non-operating assets the partnership possessed in an effort to ensure the maximum return to creditors and claimed that the general partner breached this fiduciary duty to the noteholders by failing to bring a claim challenging the sale of the properties before the statute of limitations with respect to such claim expired in September, 2001. Defendants contended that plaintiff's claim was barred by the statute of limitations. Plaintiff argued that the wrong alleged in his complaint was the failure of the general partner to bring a claim challenging the sale of the properties, not the sale itself. The court rejected plaintiff's argument, finding that the claim arose when the sale occurred. Plaintiff further argued that his claim did not arise until the partnership's fiduciary duty to its creditors arose upon the insolvency of the partnership. The court rejected this claim as well but did acknowledge that a fiduciary duty to the creditors of the partnership arose when the partnership became insolvent. While the court did not cite any precedent for its conclusion that a fiduciary duty was owed to creditors of the partnership, it did state that the noteholders did not have standing to allege breach of fiduciary duty prior to the partnership coming within the "vicinity of insolvency," which is an apparent reference to corporate precedent in which the Court of Chancery had held that directors of a Delaware corporation operating "in the vicinity of insolvency" owed their primary fiduciary duty to the corporate enterprise, which encompasses creditors as well as stockholders, rather to stockholders alone. (*See Credit Lyonnais Bank Nederland v. Pathe Commc'ns Corp.*, C.A. 12150 (Del. Ch. Dec. 30, 1991)).

Plaintiff also alleged that the general partner breached its fiduciary duty of disclosure to the noteholders by failing to disclose material information to the noteholders when following the insolvency of the partnership the general partners sought the consent of the noteholders to the sale of the final property owned by the partnership and the noteholders' waiver or release of all claims relating to the notes as a condition to a liquidating distribution by the partnership. The court stated that the general partner presumably was obligated to act with complete candor when seeking noteholder action while the partnership was insolvent and held that the existence of a fiduciary duty to disclose was sufficiently plausible to survive defendants' motion to dismiss. After analyzing the specific aspects of the disclosure claims, the court granted defendants' motion for dismissal or summary judgment with respect to certain aspects of the claims and denied defendant's motion with respect to the other aspects of the claims based on the particular facts associated with each claim.

k. *Zoren v. Genesis Energy, L.P.*, C.A. No. 19694 (Del. Ch. July 28, 2003)

Plaintiff, a public unitholder of a Delaware limited partnership, brought an action on his own behalf and on behalf of the other public unitholders for breach of fiduciary duty against the general partner, the board of directors of the general partner and Salomon Smith Barney, Inc., the parent of the general partner, in connection with a restructuring of the partnership's finances that occurred in 2000. The general partner and its board of directors approved the restructuring based on the recommendation of a special committee and thereafter a majority of the public unitholders of the partnership voted to approve the restructuring. Plaintiff claimed the restructuring was a self-dealing transaction that did not comport with either the fair process or fair price elements of the standard of entire fairness. Defendants moved to dismiss on the grounds that plaintiff's complaint failed to state a claim for breach of fiduciary duty because it did not articulate a theory or basis for finding that the restructuring was unfair to plaintiff or the other unitholders or that the restructuring was even properly the subject of an entire fairness analysis.

The court stated that plaintiff had the burden of rebutting the presumption under the business judgment rule that defendants acted on an informed basis and in the honest belief that their actions were in the best interests of the partnership and the limited partners by pleading sufficient facts showing that defendants appeared on both sides of the restructuring or derived a personal benefit from the restructuring in the sense of self-dealing. The court held that plaintiff's complaint failed to meet this burden because it only made conclusory claims about defendants' interest in the restructuring. Plaintiff claimed that the restructuring would permit Salomon to sell the general partner and therefore cease to provide financial support to the partnership. The court found, however, that Salomon had no legal or equitable duty to provide financial support beyond the contractual terms it had satisfied in the restructuring and that the fact that the restructuring, by stabilizing the partnership's financial situation, might have permitted Salomon to sell the general partner did not form the basis for a claim for breach of the duty of loyalty. Plaintiff also asserted claims that related to the formation of the partnership in 1996 and the management of the partnership from 1996 to the restructuring. The court found that none of these allegations stated a claim for breach of the duty of loyalty in connection with the restructuring, stating that certain of the claims were barred by a judgment of the federal district court in an earlier lawsuit brought by plaintiff and that others of these claims could only be brought derivatively on behalf of the partnership, which plaintiff refused to do. Plaintiff also claimed that the restructuring should have happened years earlier but was delayed by defendants in order to avoid alerting the public unitholders to the fact that the finances of the partnership had been impracticably structured until the limitations governing claims under the federal securities laws had elapsed. The court found this claim also to be either one for mismanagement that was required to be brought derivatively or one barred by the federal district court judgment. The court thus held that plaintiff's complaint did not state a claim upon which relief can be granted in regard to the substance of the restructuring.

Plaintiff also alleged claims for breach of the duty of disclosure in connection with the proxy materials and other public statements relating to the restructuring. While the court stated that a few of the claims had at least colorable merit, the court concluded that these claims must be dismissed as well because no possible relief with respect to such claims was available to plaintiff or the putative class. The court stated that it was too late to provide equitable or injunctive relief in the form of corrective or supplemental disclosure in connection with the vote taken in 2000 and noted that plaintiff had been aware of the disclosure claims well before the vote to approve the restructuring was held. The court also stated that the other possible form of equitable relief – an order of rescission – was impracticable in this setting and had not been requested by plaintiff. The court further stated that it would not award actual or nominal monetary damages to plaintiff or the class because they had not suffered any economic injury as a result of the vote to approve the restructuring. The court thus granted defendants' motion to dismiss.

l. *In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig*., 810 A.2d 351 (Del. Ch. 2002) and C.A. No. 17379 (Del. Ch. Dec. 16, 2002)

Limited partners sued the general partners, which were affiliated with one another, of a Delaware limited partnership for breach of fiduciary duty and breach of contract and sued an affiliate of the general partners for aiding and abetting breaches of fiduciary duty. The plaintiffs' claims stemmed from actions taken by the general partners in connection with an offering of preferred units having superior claims to capital and income distributions, including the amendment of the partnership agreement without limited partner approval to subordinate the contractual distribution rights of the existing limited partners to those new claims and a subsequent sale of partnership property also without limited partner approval. Before the court were cross-motions for partial summary judgment.

The court denied the defendants' motion for summary judgment on the plaintiffs' claim that the general partners' affiliate aided and abetted breaches of fiduciary duty. The court stated that in order to sustain their claim, the plaintiffs must show the existence of a fiduciary relationship, a breach of duty by the general partners, the affiliate's knowing participation in the breach and damages resulting from the concerted action. The court found that because the affiliate was formed by the general partners' parent for the specific purpose of acting as the instrumentality through with the parent carried out its purchase of preferred units and the only other investors in the affiliate were officers and directors of the general partners, the general partners' knowledge regarding the offering could be fairly imputed to the affiliate and a triable issue existed regarding the affiliate's responsibility for the plaintiffs' injuries.

The court ordered the parties to submit an order conforming to the court's denial of all motions for summary judgment, except as to the plaintiffs' claim that the general partners breached the partnership agreement by purporting to amend it without limited partner approval as to which the court granted summary judgment to the plaintiffs as to liability. In a later ruling in the *Nantucket* case that arose from the parties' dispute over the form of such order, the court denied the defendants' request to amend their answer to raise the statutory defense afforded by Section 17-1101(d)(1) of DRULPA. The defendants had argued that the entry of a summary judgment order as to their liability would preclude them from relying on the statutory defense that they believed in good faith that their actions were authorized by the partnership agreement and that they should be exculpated from liability as to the claims for breach of the partnership agreement and breach of fiduciary duty. The defendants had not specifically raised this defense at any prior stage of the proceedings but asserted that the denials of accusations of bad faith contained in their answer and their contention that they acted in conformity with the partnership agreement gave the plaintiffs adequate notice that the statutory defense was present in the case. The court had initially concluded that the defendants should have asserted the statutory defense earlier in the case and upon this renewed request of the defendants to raise the statutory defense at trial, the court again denied the request. The court held that the statutory defense provided by Section 17-1101(d)(1) of DRULPA clearly fell within the ambit of Court of Chancery Rule 8(c), which required a defendant responding to a complaint to set forth any matter constituting an avoidance or affirmative defense, and that on its face Section 17-1101(d)(1) itself seemed to require a showing by the defendant that it acted in good faith reliance on the partnership agreement if it was to avoid liability. The court held that putting the burden on the defendants to assert the statutory defense in the early stages of a case served the interests of fairness and efficiency and permitted the early termination of cases that fall within its protective ambit.

m. *Cantor Fitzgerald, L.P. v. Cantor*, C.A. No. 18101 (Del. Ch. Nov. 5, 2001)

In another action in a series of related cases, Cantor Fitzgerald, L.P., and its general partner, sought a declaratory judgment that an exchange offer with respect to the limited partners' partnership units and a series of amendments to the partnership agreement did not constitute a breach of the general partner's fiduciary duty nor violate Delaware law and that the amendments were valid. This decision addressed a motion to dismiss defendants' counterclaims and a motion for judgment on the pleadings. The court denied the motion to dismiss and entered a declaratory judgment order applicable to this action and certain related actions.

In its analysis of the exchange offer and the amendments, the court noted that the partnership agreement defined the rights and duties owed by one party to another and DRULPA merely provided the default rules with respect to fiduciary duty where the partnership agreement was silent on the matter. Following this principle, the court evaluated the conduct of the partnership and the general partner against the provisions of the partnership agreement.

The exchange offer allowed limited partners to exchange their partnership units for a new class of partnership units that would give the holder a right to a distribution of shares in a subsidiary of the partnership. The court found that the exchange offer was structured as a distribution of partnership property and because the partnership agreement permitted the partnership to distribute partnership property to the limited partners, the exchange offer in concept did not violate the provisions of the partnership agreement and, therefore, was not a breach of the general partner's fiduciary duty of loyalty.

The court also held that the amendments were facially valid and the amendment process did not violate the partnership agreement and did not constitute a violation of the duty of loyalty. The court rejected defendants' argument that the amendments improperly extinguished certain fiduciary duties owed by the general partner by giving the general partner the right to take certain actions in its sole discretion. Noting the established principle that the parties to a partnership agreement may set the duties, or lack thereof, owed by one party to another by contract, the court found that the partnership agreement, as amended, provided that although any particular provision may grant the general partner authority to act in its sole discretion, the general partner's actions remained subject to the requirement that the general partner abide by its duty of loyalty and exercise good faith in making all determinations. With respect to the enactment of amendments, the partnership agreement required a two-thirds vote of all partners in favor of an amendment in the case of an amendment that applied in a substantially similar manner to all classes of partnership units and a two-thirds vote of each affected class in the case of all other amendments. The court found that the amendments approved by the limited partners applied to all the limited partners in a substantially similar manner and, thus, held that a two-thirds vote of all partners was sufficient. The court rejected defendants' contention that conditioning participation in the exchange offer on approving the amendments constituted vote buying or coercion and found that the limited partners were free at all times to weigh the benefits and the costs of the transaction and to reject the exchange offer and vote against the amendments if that result was their best option.

Although the court found the amendments to be facially valid, it withheld ruling on defendants' arguments that one amendment improperly subjected the defendants to violation of the corporate opportunity doctrine and that certain terms of the amendments violated the 1996 settlement agreement reached between the parties in resolution of their prior litigation. The court held that a determination on these arguments would have to await an attempted enforcement of the amendments by plaintiffs because the court could only judge the application of the amendments in specific factual settings, but the court noted that the parties' future conduct must comply with the terms of the partnership agreement and the settlement agreement.

n. *Juran v. Bron,* C.A. No. 16464 (Del. Ch. Oct. 6, 2000)

William Bron ("Bron") and Daniel Villanueva ("Villanueva") joined together to raise a private equity fund (the "Fund"). In establishing the Fund, Bron and Villanueva formed a Delaware limited partnership to serve as the vehicle for the Fund, a Delaware limited partnership to serve as the general partner of the Fund (the "Partnership") and a Delaware corporation to serve as the investment manager of the Fund (the "Management Company"). A few years after establishing the Fund, Bron and Villanueva brought Jan Juran ("Juran") into their business. Bron, Villanueva and Juran entered into an employment agreement (the "Employment Agreement") making Juran an employee of the Management Company and entered an amended and restated partnership agreement of the Partnership (the "Partnership Agreement") giving Juran a general partner interest and a limited partner interest in the Partnership. In addition, Juran became a stockholder of the Management Company with Bron and Villanueva. After working together for a period of time, a personality conflict developed between Bron and Juran. In light of this conflict and the fact that the Employment Agreement required a unanimous vote of Bron and Villanueva to terminate Juran, Bron and Villanueva secretly entered into a stockholders' voting agreement that provided that they would both vote their shares of stock of the Management Company in favor of Juran's termination as an employee of the Management Company if either of them wished to terminate Juran. After a heated argument between Bron and Juran, Bron and Villanueva signed a letter terminating Juran's employment. Upon the termination of his employment, Juran was automatically converted from a general partner in the Partnership to a "special limited partner" and was required to sell his stock in the Management Company back to the Management Company.

Following his termination, Juran brought this action alleging a myriad of claims against Bron and Villanueva and their affiliated entities including fraudulent inducement, breach of fiduciary duties and breach of contract. With respect to Juran's allegation that Bron and Villanueva fraudulently induced him to enter into the Employment Agreement and the Partnership Agreement, the court denied the claims, which were governed by California law, because Juran failed to show that Bron or Villanueva had made a fraudulent misrepresentation or omission that satisfied the elements of either common law fraud or statutory fraud. With respect to Juran's breach of fiduciary duty claims, Juran claimed that Bron and Villanueva breached their fiduciary duties by, among other things, entering into the voting agreement. In evaluating Juran's claims, the court first noted that, under *Riblet Products Corp. v. Nagy*, 683 A.2d 37 (Del. 1996), a shareholder and/or partner who is also an employee is only owed fiduciary duties in his capacity as a shareholder and/or partner and is not owed fiduciary duties in his capacity as an employee. In this case, the court found that the voting agreement between Bron and Villanueva did not constitute culpable conduct and held that no fiduciary duties owed to Juran were violated by Bron and Villanueva in entering into the voting agreement. Juran's breach of contract claims involved the nonpayment of various fees, bonuses and distributions that Juran believed he was owed under the Employment Agreement and the Partnership Agreement. The court made individual rulings regarding the specific disputed amounts. One of the disputed amounts involved an amount retained from a distribution to Juran by the Partnership as a reserve to cover any potential future exercise of the "claw-back" provisions in the Fund's partnership agreement. The defendants argued that they were entitled to retain reserves from distributions in their "sole discretion" under the Partnership Agreement. The court stated that "sole discretion" does not always mean unfettered discretion and found that the defendants' sole discretion had been exercised in bad faith because no bona fide analysis was used to determine the amount of the reserve, Juran was disproportionately affected by the retention of the reserve and no mechanism was instituted for Juran to ever recover the reserved amount. The court consequently held that Juran was entitled to receive the amount that had been reserved by Bron and Villanueva from the partnership distribution.

o. *In re Boston Celtics Ltd. P'ship Shareholders Litig.*, C.A. No. 16511 (Del. Ch. Aug. 6, 1999)

Plaintiff limited partners filed suit challenging the reorganization of a Delaware limited partnership into two new limited partnerships, contending that the corporate general partner and its directors engaged in a self-interested transaction and breached their fiduciary duty of loyalty by approving the reorganization which was the result of an unfair process and produced unfair terms. The defendants filed a motion to dismiss for failure to state a claim.

The court applied the law regarding the fiduciary duties of a general partner and the business judgment rule to the actions of the defendants challenged by plaintiffs in each of their claims. In its discussion of fiduciary duties, the court confirmed the well settled principle that, unless limited by the partnership agreement, a general partner and the directors of a corporate general partner who control the partnership owe fiduciary duties to the limited partners of the partnership they control, similar to those duties that a corporate director owes to shareholders. The court also noted, however, that the actions of a general partner are generally protected by the business judgment rule. The plaintiffs had the burden of rebutting the presumption created by the business judgment rule—that the defendants acted on an informed basis and in the honest belief that they acted in the best interest of the partnership and the limited partners. According to the court, when alleging a breach of the duty of loyalty, plaintiffs must sufficiently plead that the general partner appeared on both sides of a transaction or derived an improper personal benefit from a transaction, i.e. engaged in self-dealing, to rebut the presumption afforded by the business judgment rule. Also, when asserting a claim regarding the unfairness of a transaction, a plaintiff must also plead specific examples of misconduct that demonstrate the alleged unfairness. If a plaintiff satisfies this burden, then the general partner must prove the "entire fairness" of the challenged transaction by establishing that it was the result of both fair dealing and fair price.

Upon application of the foregoing principles, the court ruled that the unfairness of the reorganization and defendants' self-interest therein as alleged by plaintiffs as well as plaintiffs' allegation of a breach of fiduciary duties owed by the general partner and its directors to the limited partners were sufficiently pleaded. However, the court dismissed certain claims made by plaintiffs relating to the alleged dilution of the plaintiffs' equity interests and the alleged "freeze out" purpose of the reorganization due to insufficient pleading.

p. *RJ Assocs., Inc. v. Health Payors' Org. Ltd. P'ship*, C.A. No. 16873 (Del. Ch. July 16, 1999)

Plaintiff, a limited partner of a Delaware limited partnership, brought suit against the partnership's only other limited partner and its general partner charging that the other limited partner controlled the general partner and that both defendants, acting together, had breached their contractual and fiduciary duties to the plaintiff by causing the partnership to make improper deductions for certain expenses from plaintiff's partnership distributions. The Court of Chancery's opinion was rendered in connection with defendants' motion to dismiss the complaint for lack of personal jurisdiction, failure to join indispensable parties and failure to state a claim. This summary focuses on the court's ruling as to whether the plaintiff stated a claim for breach of fiduciary duty.

With respect to the breach of fiduciary duty claim against the general partner, the court observed that the partnership agreement expressly stated that the general partner "shall be under a fiduciary duty to conduct and manage the affairs for the Partnership in a prudent, businesslike and lawful manner." The court stated that such a broad contractual undertaking incorporated and encompassed the traditional fiduciary duties recognized under Delaware law and concluded that the plaintiff's allegation that the general partner breached its fiduciary duty by failing to adhere to the express contractual undertakings contained in the partnership and other relevant agreements stated a claim for breach of fiduciary duty against the general partner.

As to the claims relating to the limited partner, the court noted that fiduciary duty claims regarding limited partners were more complex than those regarding general partners and looked first to Section 17-1105 of DRULPA, which states that "[i]n any case not provided for in this chapter the Delaware Uniform Partnership Law [DUPL] . . . and the rules of law and equity . . . shall govern." Based on the foregoing language, the court concluded that "[b]ecause the DRULPA contained no provision governing the accountability of limited partners for breaches of fiduciary duty, the [c]ourt must look to the DUPL to determine what fiduciary duties are owed by and to limited partners in the limited partnership." The court then turned to Section 1521(a) of DUPL and quoted the following language from that section: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the . . . conduct . . . of the partnership or from any use by him of its property." The court stated that unless modified by the partnership agreement at issue, the fiduciary duty set forth in Section 1521 of the DUPL applies to a limited partner.

As authority for this proposition, the court cited two Delaware cases, *James River-Pennington Inc. v. CRSS Capital, Inc.* and *Sonet v. Timber Co., L.P.* The relevant portion of the *James River-Pennington* case stands for two propositions: First, that the traditional fiduciary duties of partners in a Delaware limited partnership may be modified by contract; and second, that a limited partner of a Delaware limited partnership that controlled the general partner owed a duty of loyalty to the partnership and the other partners. The portion of the *Sonet* case cited by the court also stands for the proposition that the terms of a partnership agreement may preempt otherwise applicable fiduciary principles. Also relevant to this analysis are two cases cited by the *James River-Pennington* court, namely *KE Prop. Mgmt., Inc. v. 275 Madison Mgmt. Corp.* and *In re USACafes, L.P. Litig.* The court in *USACafes*, based on a trust law analysis, held that the directors of a corporate general partner owe fiduciary duties to the limited partnership and its limited partners. The *KE Prop.* court considered the issue of limited partner fiduciary duties in the context of a limited partner acting to remove a general partner pursuant to the terms of the partnership agreement. Significantly, the *KE Prop.* court also relied on Section 17-1105 of DRULPA as a basis to resort to the DUPL for the determination of a limited partner's fiduciary duties. Citing Section 1521(a) of the DUPL as well as case law and commentary, the court noted that under DUPL all partners owe fiduciary obligations and on that basis held that "to the extent that a partnership agreement empowers a limited partner discretion to take actions affecting the governance of the limited partnership, the limited partner may be subject to the obligations of a fiduciary. . . ." However, the *KE Prop.* court ultimately found that the objective nature of the removal provision, only for fraud or willful conduct injurious to the partnership, circumscribed the limited partner's discretion so that, under the facts, a fiduciary duty would not attach. Thus, the holding of the court in *RJ Associates* continues the development of Delaware law relating to the fiduciary obligations of a limited partner based on the interplay between Section 17-1105 of DRULPA and Section 1521(a) of DUPL and the principle that control may carry with it a fiduciary responsibility.

q. *Dean v. Dick,* C.A. No. 16566 (Del. Ch. June 10, 1999)

Notwithstanding the fact that the court found that demand was excused in connection with defendant's derivative claims, the court dismissed all breach of fiduciary duty counterclaims brought by the defendant limited partner against plaintiff, the sole owner of the general partner of a limited partnership. The court analyzed each counterclaim to determine whether the protections of the business judgment rule applied to the general partner's actions and whether each counterclaim survived scrutiny upon application of the rule. In regard to defendant's claim that the general partner's sale of the limited partnership's primary asset for a price below market value amounted to gross negligence, the court stated that the decision when to sell and at what price was well within the general partner's business judgment and it did not find the general partner's decision so egregious as to warrant second-guessing that judgment in contravention of the business judgment rule. Similarly, the court held the general partner's actions regarding the maintenance of the property's value and vacancy levels represented decisions protected by the business judgment rule. The court also dismissed defendant's claim that the general partner's decision to refinance partnership debt was a breach of fiduciary duty because the court found defendant's allegation that the terms of new financing secured by defendant for the partnership were more favorable to be improperly vague.

r. *Cantor Fitzgerald, L.P. v. Cantor,* C.A. No. 16297-NC (Del. Ch. Mar. 23, 1999)

In one of a series of related cases that arose in connection with disputes between Cantor Fitzgerald, L.P., a leading inter-dealer and institutional broker of United States Treasury securities and other governmental securities, and several of its partners, the court addressed, on cross motions for summary judgment, the construction of a transfer restriction in the limited partnership agreement. The provision at issue provided, in relevant part, that no partner could transfer any of its units other than by a sale to the partnership in accordance with the partnership agreement unless the partner had received the written consent of the managing general partner "which consent may be withheld for any reason (or no reason whatsoever) in the sole and absolute discretion of the managing general partner." In interpreting the transfer restriction, the court first noted that it provided a reasonable restraint on transfer of shares for the purpose of protecting the interest of the partnership and its limited partners' partnership common interests. It continued, however, that, as a matter of equity, the managing general partner could not use, adversely to the interests of a partner seeking to transfer shares, the power to restrict such a transfer for the sole purpose of protecting or advancing the interests of certain limited partners or general partners in matters unrelated to their partnership interests. The court based its holding on the implied covenant of good faith and fair dealing inherent in every contract and observed that a self-interested invocation of the transfer restriction would constitute a violation by the managing general partner of such covenant. The court concluded that the language at issue removed the burden from the general partner of showing good cause when a genuine dispute arose, but added that where the managing general partner favored the interest of one partner over another for reasons unrelated to the partnership such action would be "contrary to the managing general partner's duty of loyalty to all limited partners equally and to all partners and their common interest in the partnership itself."

s. *Davenport Grp. MG, L.P. v. Strategic Inv. Partners, Inc.,* C.A. No. 14426 (Del. Ch. Jan. 23, 1996)

In sanctioning the removal of a general partner by the limited partners in accordance with the partnership agreement, the court expounded on the general partner's relationship to the limited partnership and the limited partners, stating "[t]he gravamen of the General Partner's duty to the Limited Partners and to [the partnership] itself is the obligation of loyalty to the enterprise. This duty, absent contractual modification parallels that of a corporation's director."

t. *Snyder v. Butcher & Co.*, C.A. No. 91C-04-0289 (Del. Super. Ct. Sept. 15, 1992)

In dismissing a breach of fiduciary duty claim brought by the limited partners against the general partners in Superior Court for lack of subject matter jurisdiction, the court held that "[t]he duties of general to limited partners are directly analogous to the fiduciary duties arising in a corporate organization."

u. *Trustees of Gen. Elec. Pension Trust v. Levenson*, C.A. No. 12014 (Del. Ch. Mar. 3, 1992)

A limited partner brought suit challenging the conversion of the limited partnership into a corporation, contending the two general partners of the limited partnership breached their fiduciary duties in the course of the restructuring. A plan proposed by one general partner to convert the limited partnership into a corporation was approved by an independent committee and judged to be fair to all parties by an independent financial analyst, even though the analyst's opinion was based on unverified assumptions and projections provided by the other general partner. The limited partners approved the plan at a subsequent special meeting.

In response to a motion to dismiss by the defendants for failure to state a claim, the court ruled that the apparent unfairness and self-interest in the transaction alleged by the plaintiff were sufficient to state a claim for breach of the fiduciary duties of loyalty and fair dealing but that the plaintiff had failed to adequately state a claim for breach of the duty of care since its allegations did not approach the requisite gross negligence standard.

v. *Boxer v. Husky*, 429 A.2d 995 (Del. Ch. 1981)

The court held that under the Uniform Partnership Act and the Uniform Limited Partnership Act (both of which had been adopted in Colorado and Delaware), it was clear that the general partners in a Colorado limited partnership owed a fiduciary duty to the limited partners and that this duty was comparable to the fiduciary duty owed by corporate directors to shareholders.

2. Fiduciary Duties of Limited Partners and Others

a. *Lewis v. AimCo Properties, L.P.*, C.A. No. 9934-VCP (Del. Ch. Feb. 10, 2015)

Plaintiffs in this matter were minority owners of limited partnership interests in four Delaware limited partnerships (the "LP Defendants"). Each LP Defendant had a corporate entity as its general partner (the "GP Defendant") and each such corporate general partner was indirectly owned by non-party Apartment Investment and Management Company, a Maryland real estate investment trust ("AimCo"); AimCo indirectly held a majority of the limited partnership interests in each LP Defendant. What gave rise to this action was the merger of the LP Defendants into a subsidiary of Aimco Properties, L.P., a Delaware limited partnership and an affiliate of Aimco ("Aimco OP"), without obtaining a vote from the minority limited partners of the LP Defendants. Plaintiffs asserted that the GP Defendants, Aimco OP and certain officers and directors of AimCo and the GP Defendants breached their fiduciary duties because the mergers were allegedly self-dealing transactions and were not entirely fair. Several defendants moved to dismiss the complaint against them for (i) lack of subject matter jurisdiction because two of the LP Defendants' partnership agreements contained a mandatory arbitration clause and (ii) failure to state a claim upon which relief could be granted because neither Aimco OP nor the officer-defendant of AimCo owed fiduciary duties to plaintiffs.

In ruling on the motion to dismiss for lack of subject matter jurisdiction, the court held that the relevant partnership agreements contained broad, mandatory arbitration clauses. According to binding Delaware precedent, the issue of substantive arbitrability was left to the arbitrator if the parties clearly and unmistakably agreed to submit that issue to the arbitrator. This "clear and unmistakable evidence" standard was met when the arbitration clause provided for arbitration of all disputes and incorporated a set of arbitration rules that allow arbitrators to decide arbitrability. The arbitration clauses of the partnership agreements of the relevant LP Defendants applied to the widest array of potential claims and provided that arbitration would be conducted in accordance with the rules of the

American Arbitration Association, which empowered arbitrators to rule on their jurisdiction. The court therefore held that the partnership agreements required that the issue of substantive arbitrability be left to the arbitrator.

With respect to the motion to dismiss for failure to state a claim upon which relief could be granted, the court held that the moving defendants did not owe fiduciary duties to plaintiffs. Plaintiffs claimed that Aimco OP owed fiduciary duties to the limited partners of the LP Defendants because it controlled the LP Defendants and exercised that control to acquire unaffiliated minority interests held by the minority limited partners. The court restated plaintiffs' argument as follows: AimCo owned majority stakes in the LP Defendants through its affiliates; Aimco OP was an affiliate of AimCo; therefore, Aimco OP may have been liable for a breach of fiduciary duty as to one of the LP Defendants. The court, however, pointed out that this reasoning erroneously imposed on limited partnerships the corporate law concept of fiduciary duties owed by a controlling stockholder to the minority stockholders. The court disagreed with this assertion. The management and control of a limited partnership is vested with the general partner, and, even with a majority interest, a limited partner would not have the power to manage the business and affairs of the limited partnership without subjecting itself to personal liability as a general partner. Thus, the court did not find that AimCo's indirect majority interest in the LP Defendants supported a reasonable inference that AimCo or Aimco OP owed a fiduciary duty to the LP Defendants or their limited partners. Additionally, since plaintiffs named the GP Defendants and their directors as parties to this action, the complaint implicitly recognized that those GP Defendants were the controllers of the LP Defendants, not Aimco OP. The court explained that according to the In re USACafes, L.P. Litigation line of cases, the proper defendants for these alleged breaches of fiduciary duties may be the GP Defendants and their officers and directors, but not Aimco OP or its officers. The complaint was therefore dismissed as to the moving defendants.

b. *DiRienzo v. Lichtenstein*, C.A. No. 7094-VCP (Del. Ch. Sept. 30, 2013)

This case involved a series of transactions in which a hedge fund formed as a Delaware limited partnership merged with a publicly traded portfolio company that was a Delaware corporation with a minority interest held by the public, which was converted in connection with such merger to a publicly traded limited partnership (the "Partnership"). Plaintiff was a minority shareholder of the portfolio company and brought claims based on both pre-merger actions by the board of the portfolio company and others and post-merger actions by the general partner of the Partnership (the "General Partner"), the managing member of the General Partner and the directors of the General Partner. With respect to the claims involving conduct after the merger, plaintiff's main allegations were (i) direct claims against a special committee of the portfolio company, arguing that they functioned as the board of the General Partner post-merger and breached their fiduciary duties in taking certain actions related to the merger, (ii) derivative claims against the General Partner, its managing member and the board of the General Partner for alleged breaches of fiduciary and contractual duties by having the Partnership assume a deferred fee liability that was owed by an affiliate of the hedge fund pre-merger, granting investors in the hedge fund that desired to exit their investment units in the Partnership in addition to cash and distributions in-kind of portfolio securities (the "Partial Unwind") and allowing the managing member of the General Partner to purchase "corporate opportunity units" in the Partnership and (iii) derivate claims against the General Partner for alleged breaches of its express and implied contractual duties under the partnership agreement of the Partnership by disposing of substantially all of the Partnership's assets in connection with the Partial Unwind and acting without a board in place for a certain period of time. The court granted the special committee's motion for dismissal for failing to state a direct claim upon which relief could be granted. The court also granted defendants' motion to dismiss the derivative claims for failure to make a demand.

With respect to the direct claims against the special committee, plaintiff alleged that the special committee impermissibly took actions for which they should be held liable at a time when the General Partner did not constitute a board of directors. Plaintiff claimed the special committee served as the General Partner's de facto board during this time. The court disagreed, ruling that because the special committee had said only that it would "not refuse to grant consent" to proposed actions, it had neither actual nor de facto authority.

With respect to the derivative claims, the court first addressed whether demand was futile. Plaintiff argued that demand was futile because, in the limited partnership context, whether demand would be futile should only be considered from the perspective of the general partner. The court noted that although there is Delaware case authority supporting this position where limited partners had no say in how a general partner was governed, in the instant case, the partnership agreement provided that the limited partners had the right to elect directors of the General Partner. The court held that because the limited partners elected the board of the General Partner and because the members of the board owed fiduciary duties to the limited partners, demand should have been directed to the board of the General Partner and not the General Partner itself. Plaintiff also argued that the exculpatory provisions in the partnership agreement were unenforceable and the board of the General Partner was therefore threatened with liability, rendering demand futile. The court noted that where directors are exculpated contractually or otherwise from liability for certain conduct, such as in a partnership agreement, then a serious threat of liability may only be found to exist if plaintiff pleads a non-exculpated claim against the directors based on particularized facts. Thus, whether a partnership agreement is enforceable is important to a determination of whether demand is excused. The court found the exculpatory provisions in the partnership agreement to be enforceable because the merger was validly consummated in accordance with the DGCL and organizational documents of the portfolio company to which plaintiff was bound by becoming a stockholder thereof. Plaintiff then argued that the exculpation provisions in the partnership agreement were ambiguous and failed to eliminate fiduciary duties. The partnership agreement provided in relevant part that, except as otherwise provided in the partnership agreement, each director shall have the same fiduciary duties as a director of a corporation incorporated under the DGCL. However, the partnership agreement also provided that, notwithstanding anything to the contrary set forth therein, no general partner, board member thereof or other indemnitee would be liable except for bad faith, fraud, willful misconduct or gross negligence. Further, the partnership agreement expressly approved transactions contemplated by the merger and waived any conflicts of interest in connection therewith. The court found that these provisions were not ambiguous and that in cases in which the General Partner executed, delivered or performed any agreement authorized or permitted under the partnership agreement, the General Partner contractually eliminated its liability to limited partners to the greatest extent allowed by law. Because of this, the court dismissed several of plaintiff's claims involving breaches of the partnership agreement because demand was not made and defendants were exculpated for the alleged actions under the terms of the partnership agreement. In addition, with respect to claims involving actions taken by the General Partner during the period of time in which there was no board of the General Partner, because any and all of such actions related to the merger, the court found that demand was also required for those claims. In its analysis as to whether demand was excused, the court last addressed whether a majority of the board members were independent. The court found that each director that met the NYSE test for independence also satisfied the Delaware test for independence. In this finding, the court noted that although a director that qualifies for independence under the NYSE rules does not necessarily mean they are independent as a matter of Delaware law, the NYSE rules are a "useful source" for this determination. Accordingly, the court found that demand was not excused with respect to the derivative claims.

Plaintiff also apparently argued in briefing and at argument that these derivative claims were both direct and derivative under *Tri-Star* and *Gentile*, which required a showing, applying corporate law by analogy, that (i) a stockholder had majority or effective control and caused the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value and (ii) the exchange caused an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) stockholders. Based on the facts in this case, the court found that plaintiff failed to satisfy both of these prongs with respect to each of the claims—assumption of deferred liability fee and purchase by the managing member of the General Partner of corporate opportunity units. The court accordingly treated the claims as derivative, stating that because plaintiff had failed to make a demand upon the General Partner's board, the court would dismiss unless demand could be excused as being futile.

The court next considered whether demand was excused with respect to claims involving the deferred liability fee. The court noted that the *Rales* test applied where (i) a business decision was made by the board of a company but a majority of the directors making the decision was replaced, (ii) where the subject of the derivative suit was not a business decision of the board and (iii) where the decision being challenged was made by the board of a different corporation. In this case, the board applied the *Rales* test to determine whether demand was futile with respect to the claim involving the assumption by the Partnership of the deferred fee liability. Under the *Rales* test, demand is excused only where particularized factual allegations create a reasonable doubt that, as of the time the complaint was filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. A board exercises its independent and disinterested business judgment when it responds to a demand free of personal financial interest and improper extraneous influences, which include domination by a controlling shareholder and a substantial risk of personal liability. The court found that demand was not excused as plaintiff failed to demonstrate this.

The court then addressed whether demand was excused with respect to a separate claim relating to payment of the deferred liability fee. Because *Rales* did not apply to this question, the court applied the *Aronson* test. To succeed under this test, the court noted that plaintiff must plead particularized facts that create a reasonable doubt that (i) the directors are disinterested and independent or (ii) the challenged transaction was otherwise the product of a valid exercise of business judgment. With respect to the first prong, which the court noted was virtually identical to the *Rales* test, the court indicated that, to succeed, plaintiff must have alleged that the board of the General Partner faced a substantial likelihood of personal liability for their decision to change the deferred fee agreement. The court looked to the partnership agreement, which limited liability to, in relevant part for this case, gross negligence, bad faith and willful misconduct. The court found that gross negligence requires pleading and proving that a defendant was recklessly uninformed or acted outside the bounds of reason. The court found that the deferred liability fee agreement had certain benefits to the Partnership and was therefore, among other reasons, not outside the bounds of reason. With respect to bad faith and willful misconduct, the court noted that a fiduciary’s conduct is in bad faith if the fiduciary acted with a purpose other than advancing shareholder interests (i.e., the best interests of the corporation), intentionally violated relevant positive law, intentionally failed to respond to a known duty, or exhibited a conscious disregard of a known duty. In this regard, the court noted that to overcome the presumption that a fiduciary acted in good faith and state a claim for bad faith, a plaintiff must show that the fiduciary’s actions were so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. The court noted that even if this were a bad business decision, it was approved by independent directors that had a reasonable basis for their decisions and thus plaintiff did not demonstrate bad faith. Turning to the second prong of *Aronson*, the court noted that this would also require a showing of bad faith or gross negligence. For the above reasons, plaintiff did not satisfy this “heavy burden.” The court applied the same analysis under the *Aronson* test for the claim relating to the corporate opportunity units and similarly found that plaintiff’s claim was deficient.

Finally, plaintiff alleged that certain underlying offenses articulated in its complaint breached the implied covenant of good faith and fair dealing. Because, pursuant to *Gerber v. Enterprise Products Holding, LLC*, only parties to a contract may breach this covenant, the court held that only the General Partner could be liable and not the members of its board. Therefore, plaintiff was required to demonstrate that the General Partner had breached the covenant and that the General Partner’s board had facilitated such breach to show that demand was excused. Because the court found that the board of the General Partner did not act in bad faith or with gross negligence, the court held that demand was not excused. The court then dismissed the last claim of aiding and abetting because all underlying claims had been dismissed.

c. *Hite Hedge LP v. El Paso Corp.*, C.A. No. 7117-VCG (Oct. 9, 2012)

Plaintiffs, common unitholders of El Paso Pipeline Partners, L.P., a master limited partnership (the “Partnership”), brought a class action and derivative suit against the Partnership’s controlling unitholder, El Paso Corporation (“El Paso”), alleging that El Paso breached its fiduciary duty by agreeing to a merger that allegedly led to a decline in market price of the units in the Partnership.

The asset base of the Partnership was derived from "drop down" transactions whereby the Partnership would acquire, often at a favorable price, pipeline and other energy assets from El Paso. However, El Paso merged with and into Kinder Morgan, Inc. ("KMI"), with KMI as the surviving entity. KMI had its own master limited partnership and following the merger, KMI engaged in "drop down" transactions with its master limited partnership to the exclusion of the Partnership. As a result, the market price of Partnership units declined by more than 15%. Plaintiffs alleged that El Paso, as controlling unitholder, had a duty to represent minority unitholders' interests in merger negotiations and that, by agreeing to the merger, El Paso extracted value from the Partnership at the expense of minority unitholders. El Paso moved to dismiss and the court granted El Paso's motion on the following grounds: (1) the partnership agreement of the Partnership validly and expressly eliminated any fiduciary duties that the controlling unitholder owed to minority unitholders; (2) the controlling unitholder did not use its control over the Partnership to harm minority unitholders because the merger did not involve the Partnership and the partnership agreement of the Partnership permitted El Paso to compete with the Partnership and disclaimed any liability of El Paso arising under the corporate opportunity doctrine; and (3) the controlling unitholder had not extracted value from the Partnership at the expense of the minority unitholders because nothing in the partnership agreement of the Partnership granted the minority unitholders the right to continued drop-down transactions.

d. *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, C.A. No. 5501-CS (Del. Ch. Aug. 8, 2011)

Defendant, Lerner Master Fund, LLC ("Lerner"), provided a $40,000,000 seed investment to Paige Opportunity Partners, L.P., a Delaware limited partnership (the "Hedge Fund"), a new hedge fund formed by one of the plaintiffs, Michele Paige ("Michele"). In connection with Lerner's investment in the Hedge Fund, Lerner entered into a Revenue Sharing Agreement to govern the relationship between Lerner and the Hedge Fund's Manager (the "Seeder Agreement"). Pursuant to the Seeder Agreement, Lerner had the right to share in the fees generated by the Hedge Fund, and, in return, Lerner agreed that it would not withdraw its capital for at least three years, except that Lerner could withdraw its capital immediately if Paige GP, LLC, the general partner of the Hedge Fund (the "General Partner"), committed certain proscribed actions set forth in Section 6.4 of the Seeder Agreement. Under Section 8.02 of the limited partnership agreement of the Hedge Fund (the "Partnership Agreement" and together with the Seeder Agreement, the "Agreements") limited partners were permitted to withdraw capital only on certain dates and in certain amounts, and depending upon the date of withdrawal, the withdrawal would be subject to penalties. The general withdrawal scheme set forth in Section 8.02 of the Partnership Agreement included Section 8.02(b) of the Partnership Agreement, the so-called "Gate Provision," which limited capital withdrawals to 20% of the total amount in the Hedge Fund in any given six-month period. Section 8.02(d) of the Partnership Agreement, however, provided that the General Partner could waive or modify the conditions relating to withdrawals for certain large or strategic investors. The central issue before the court was whether the Hedge Fund could use the Gate Provision to prevent Lerner from withdrawing all of its capital upon the expiration of the three year lock-up period.

The only investor in the Hedge Fund, other than Lerner, was Michele, who invested $40,000 in the Hedge Fund. Nearly two years after the formation of the Hedge Fund, the Hedge Fund had yet to make any investments in the distressed and special situation investments it was set up to invest in. Eventually, Lerner determined that it was not going to receive any fees under the Seeder Agreement and decided to cut its losses and withdraw its capital on October 31, 2010, the third anniversary of its investment. To this end, Lerner informed Michele and Christopher Paige, general counsel of the Hedge Fund ("Christopher," and together with Michele, the "Paiges"), of its decision and requested that the Paiges be mindful of the liquidity required to redeem Lerner's interest in the Hedge Fund. In response to Lerner's withdrawal request, Christopher sent Lerner a "hostile" nine-page single-spaced letter (the "March 2010 Letter") suggesting that the Paiges would take unilateral action harmful to Lerner if it did not agree to their settlement demands. In the March 2010 Letter, the Paiges suggested that Lerner could withdraw immediately (on

March 1, 2010, six months prior to the expiration of the three year lock-up period) if Lerner agreed to pay 5% of its total capital balance plus legal and accounting fees. Also, the Paiges suggested that they would use the Gate Provision to lock up Lerner's capital. Following receipt of the March 2010 Letter, Lerner sought to obtain certain information from the Hedge Fund. The information requested was never provided to Lerner. Two months later, the Paiges filed this action, seeking a declaratory judgment that (i) the Gate Provision allowed the General Partner to restrict Lerner's ability to withdraw all of its capital on October 31, 2010 notwithstanding the Seeder Agreement and (ii) they were entitled to indemnification from the Hedge Fund for pursuing the action. Prior to answering the Paiges' complaint, Lerner filed an action in a New York state court seeking damages for, among other things, fraud and breach of fiduciary duty. On July 30, 2010, Lerner filed its answer and counterclaim. The counterclaim contained the following four counts: (1) breach of contract against the Paiges for failing to allow Lerner to withdraw all of its investment, violating their fiduciary duties, and not honoring Lerner's information rights, (2) a declaratory judgment count to enforce its right to withdraw all of its capital without application of the withdrawal restrictions contained in the Partnership Agreement, (3) breach of fiduciary duty against the Paiges, and (4) a claim for judicial dissolution under Section 17-802 of the DRULPA.

The court addressed the parties' contractual claims first and stated that the claims come down to two main issues: (1) whether the withdrawal provisions in the Partnership Agreement applied to Lerner at all in light of the Seeder Agreement and (2) whether the Paiges breached the Seeder Agreement in a way that would have allowed Lerner to withdraw immediately without penalty. The court stated that the resolution of the foregoing issues were governed by New York law. The Paiges argued that the Seeder Agreement did not amend the Partnership Agreement and therefore the Gate Provision would apply to Lerner. In support of their position, the Paiges pointed to (1) Section 9.8 of the Seeder Agreement, which states that it does not amend the Partnership Agreement, (2) the negotiating history of Section 9.8 of the Seeder Agreement, which, according to the Paiges, showed that they refused Lerner's request to add language stating that the Seeder Agreement amended the Partnership Agreement and (3) the fact that the Seeder Agreement does not conflict with the Partnership Agreement. In response, Lerner argued that the Seeder Agreement trumped the Partnership Agreement. In support of its position, Lerner pointed to (1) a principle under New York contract law that provides that if two documents govern the relationship between parties and one is "specifically prepared for the transaction and the other is a general form," the specific document takes precedence over the general, (2) the overall structure of the Partnership Agreement and the Seeder Agreement, because the Partnership Agreement provides for three specific instances in which the General Partner can modify the Partnership Agreement for certain investors, each of which was addressed by the Seeder Agreement, (3) the unreasonableness of reading the two agreements as suggested by the Paiges because after three years the Paiges could run the Hedge Fund however they wanted and Lerner would be trapped by the Gate Provision and (4) the negotiation history among the parties, which, according to Lerner, supported its reading of the Agreements.

The court stated that the Agreements were ambiguous as to the applicability of the Gate Provision to Lerner but found that the reading suggested by Lerner was the more reasonable reading based on the text of the Agreements. The court based its conclusion on the following: (1) because the Partnership Agreement specifically contemplated that the General Partner could modify the Partnership Agreement's terms for certain large investors, the Seeder Agreement did not need to specifically amend the Partnership Agreement, (2) based on the Paiges' reading, if Lerner violated the withdrawal provisions, it would be liable for damages under both Agreements, (3) reading the Agreements as suggested by the Paiges lead to unreasonable results because even if Lerner were entitled to withdraw under Section 6.4 of the Seeder Agreement due to a proscribed action by the General Partner, Lerner could still be held liable for a withdrawal fee under the Partnership Agreement, and after the three year period, when the Seeder Agreement terminated, Lerner would be deprived of the protections of Section 6.4 and yet could not withdraw without penalty even if Michele or the General Partner committed a proscribed action. Since both parties' readings were reasonable, the court also examined the negotiating history to try to determine which meaning was intended. In reviewing the negotiating history, the court concluded that the negotiating history supported Lerner's position. The court pointed to Michele's own statement that the Seeder Agreement operated much like a side letter and therefore it was not necessary to add contractual language acknowledging the amendment of the Partnership Agreement. Thus, the court concluded that Lerner's withdrawal rights were governed by the Seeder Agreement, consequently following the expiration of the three-year lock up period, Lerner was entitled to an immediate return of its invested capital and the Paiges' refusal to do so constituted a breach of contract.

The court also considered Lerner's claim that the Paiges and their affiliates breached their fiduciary duties by permitting the Gate Provision to apply to Lerner. Section 8.02(d) of the Partnership Agreement provided the General Partner with the authority to, in its sole discretion, waive or modify conditions relating to withdrawals for certain large or strategic investors. Thus, Lerner argued, if the application of the Gate Provision to Lerner were not justified by a proper purpose, but rather motivated solely by the self-interest of Michele and her affiliates, the General Partner had a fiduciary obligation to waive the Gate Provision and its failure to do so was a breach of fiduciary duty. The Paiges advanced two arguments as to the fiduciary duty claim. First, the Paiges argued that Lerner sought to improperly impose fiduciary duties on persons who do not owe such duties. Second, the Paiges argued that there was no breach of fiduciary duty because the Partnership Agreement provided the General Partner with the authority to waive or modify the withdrawal conditions in its "sole discretion." As to whether certain defendants owed fiduciary duties to Lerner, Paige argued that neither Michele, Christopher nor Paige Capital Management LLC (the investment manager) owed any fiduciary duties to the Partnership. The court found that Michelle, in her capacity as the managing member of the general partner of the Hedge Fund, exerted sufficient control over the General Partner to owe fiduciary duties to the Hedge Fund and its limited partners under the In re USACafes, LP Litigation line of cases, which hold that a director, member or officer of an entity serving as a general partner of a limited partnership owes fiduciary duties directly to such partnership and its limited partners. With respect to Christopher, who was not an officer, director or member of the general partner, the court declined to extend the USACafes principle. Similarly, the court refused to find that Paige Capital Management LLC owed fiduciary duties to the Hedge Fund.

The Paiges also argued that Michele and the General Partner did not owe any fiduciary duties to the Hedge Fund because the decision to apply the Gate Provision presented a conflict of interest for the Paiges. Michele argued that because the General Partner and those who controlled it owed fiduciary duties to the General Partner and its members and because a decision to waive the Gate Provision would injure the General Partner and its members, Michele and the General Partner were in an impossible position. The court rejected this argument and reasoned that a decision by a fiduciary in a conflicted situation is subjected to a more searching form of judicial review, not less, and, accordingly, the court concluded that fiduciary duties would apply to the Paiges' decision to apply the Gate Provision to Lerner.

The Paiges also argued that there was no breach because the Partnership Agreement permitted the General Partner to act in its sole discretion. The court rejected this argument and stated that a bare statement of "sole discretion" that does not define the term merely means the person provided with the sole discretion has the singular authority to consider and decide an issue and does not absolve such person of the duty to act for a proper fiduciary purpose. Thus, the court concluded that traditional fiduciary duties applied to the decision to apply the Gate Provision to Lerner and found that it was not a justifiable fiduciary act. An expert at trial testified that a "Gate" provision is typically used to prevent a "run on the bank," which would require a hedge fund to sell off assets, possibly at a discount, and reduce the value of the interests of those investors left behind. In this case, Michele was the only other investor in the Hedge Fund and the court found that satisfying Lerner's withdrawal request would not affect her investment. Further, the economics of the deal supported the conclusion that Michele was motivated by self-interest because if the Gate Provision were applied to Lerner, the Paiges would collect over $400,000 in fees the following year.

The Paiges also argued that even if the decision to apply the Gate Provision to Lerner was self-interested, they were statutorily exculpated under Section 17-1101(e) of the DRULPA, which provides: "Unless otherwise provided in a partnership agreement, a partner or other person shall not be liable to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for the partner's or other person's good faith reliance on the provisions of the partnership agreement." The court rejected this argument stating that Section 17-1101(e) is best read "as ensuring that fiduciaries who take action to advance a proper partnership purpose but do so based on a good faith misreading of the agreement are not tagged for liability for a breach of fiduciary duty." Thus, because the court did not believe the Paiges' interpretation of the Partnership Agreement was a good faith interpretation, but rather a pretext for self-enrichment, they were not entitled to the protections of Section 17-1101(e) and the court concluded they had breached their fiduciary duties by failing to waive the Gate Provision for Lerner.

Lerner had also argued that certain conduct by the Paiges triggered its right under Section 6.4 to withdraw all of its capital prior to the expiration of the three year lock-up period in the Seeder Agreement. Specifically, Lerner argued that the Paiges breached certain information rights set forth in the Seeder Agreement thereby triggering its rights under Section 6.4. Although the court found that the information rights provisions contained in the Seeder Agreement had been breached, it found that Section 6.4 was not triggered because Lerner failed to provide the Paiges with proper notice and an opportunity to cure under New York law. Lerner also argued that the March 2010 Letter was part of an "extortionate scheme" on the part of the Paiges to use their role as a fiduciary to control Lerner's capital, which triggered its right to withdraw capital immediately under Section 6.4. The court concluded that the letter was a "heated settlement letter" that expressed an intent to commit a breach of fiduciary duty at a later date, but the letter itself did not constitute a breach of fiduciary duty. Thus, the court rejected Lerner's claim that it had a right to withdraw prior to the expiration of the three-year lock-up period.

The court rejected the Paiges' claim that Lerner violated the implied covenant of good faith and fair dealing by engaging in a course of conduct that caused the Paiges not to be able to pursue their investment strategy or attract new investors. The court found that Lerner's conduct—in making clear to the Paiges that it would withdraw its capital at the expiration of the three year lock-up period was an exercise of a contractual right—and the exercise of such a right could not be a violation of the implied covenant of good faith and fair dealing.

The court also rejected the Paiges' defamation claim in which the Paiges argued they were defamed (i) by the filing of the summons with Notice in New York that listed fraud among its allegations and (ii) due to Lerner's counsel making statements to the media that Lerner did not know where the Hedge Fund was investing its money, which statements ended up on a website that covered hedge funds. The court agreed with the arguments made by Lerner that the summons was covered by a litigation privilege in New York. Further, as to the report on the website, the court found that the statements were "substantially accurate" and "substantially true" and therefore the defamation claims were not valid.

Finally, the Paiges also sought a declaratory judgment that they would be entitled to indemnification for the expenses of the litigation and any losses suffered as a result of the litigation. The Paiges argued that although they initially initiated the suit, Lerner substantially expanded the scope of the litigation with its counterclaims. The court disagreed, finding that the counterclaims were compulsory and had to be filed in response to the initial claim. The Paiges also argued that they should be entitled to indemnification because they did not engage in "willful misconduct, gross negligence, or violation of applicable laws." The court rejected this claim because it did not believe that the decision not to raise the Gates was made in good faith but rather was made to advance the Paiges' selfish ends. Thus, based on all of the foregoing, the court ordered the Paiges to return Lerner's capital with appropriate pre-judgment interest and the court concluded that all of the Paiges' claims failed.

e. *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.,* 2007 WL 2982247 (Del. Ch. Oct. 9, 2007)

Plaintiffs were current or former employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in a Delaware limited partnership operating as a private equity fund (the "Fund") who brought a derivative action against the Fund, its corporate general partner (the "General Partner"), past and present directors of the General Partner, the Fund's investment advisor (the "Investment Advisor"), the Fund's special limited partner (the "Special Limited Partner") and CIBC alleging breach of fiduciary duty, breach of the Fund's partnership agreement and aiding and abetting. Defendants moved to dismiss on the grounds that (i) plaintiffs did not make demand and demand was not excused; (ii) plaintiffs failed to state a claim upon which relief could be granted; (iii) plaintiffs' claims were barred by laches and/or the statute of limitations; and (iv) plaintiffs waived their right to bring suit.

The Fund was created by CIBC to co-invest with CIBC in accordance with the investment criteria set forth in the Fund's partnership agreement and offering documents. Under the Fund's partnership agreement, the General Partner had the sole right to manage and administer the affairs of the Fund but the partnership agreement also provided for the General Partner to delegate certain of its responsibilities and pursuant thereto the General Partner delegated its authority to select and dispose of the Fund's investments to the Special Limited Partner. The General Partner also delegated other investment management and related powers, such as exercising the Fund's voting rights in its investments, to the Investment Advisor which also had the authority to develop investment policies and strategies and to recommend particular investments for the Fund. The Investment Advisor in turn delegated much of this investment decision authority to CIBC's investment committee, which consisted of upper level CIBC executives. The Investment Advisor could also buy investments for the Fund with approval of the Special Limited Partner. Notwithstanding the foregoing delegations, the court found that the General Partner retained supervisory responsibility because under the partnership agreement the exercise of their powers by the delegatees and the performance of their duties was "subject to the oversight of the General Partner." The partnership agreement also provided that the General Partner, Investment Advisor, Special Limited Partner and certain other persons were liable only for actions or omissions resulting from bad faith, willful misconduct, gross negligence or material breach of the partnership agreement.

The Fund lost over 75% of its initial value and over half of its investments were written down or written off. The complaint alleged that these losses resulted from defendants' breaches of fiduciary duties. Specifically, the complaint alleged that the Fund was designed to "co-invest" with CIBC. Under this design, when CIBC's investment committee decided to make a particular investment on behalf of CIBC, the Investment Advisor or Special Limited Partner would then decide if the investment met the Fund's eligibility requirements and, if so, invest alongside CIBC. According to the complaint, however, investments were not made in this way. Rather, the same CIBC senior executives who served on CIBC's investment committee also acted for the Investment Advisor and the Special Limited Partner, and when an investment owned by CIBC lost value, these individuals acting for the Special Limited Partner or Investment Advisor allegedly approved the Fund's purchase of these investments from CIBC at prices equal to CIBC's original cost of investment and also paid CIBC a 7% finders fee. The complaint alleged that CIBC, the Special Limited Partner and the Investment Advisor violated their fiduciary duty to the Fund through this activity and the General Partner violated its duty by failing to oversee these activities.

With regard to plaintiffs' claims against the General Partner and its directors, the court dismissed the claims against two of the directors because they were not on the board when the allegedly improper acts occurred. The court, however, denied the motion to dismiss against the General Partner and the directors of the General Partner at the time of the wrongful acts finding that plaintiffs' allegations of wrongdoing by the Investment Advisor and Special Limited Partner and of the General Partner's complete failure to supervise the conflicted delegatees created a substantial likelihood of the General Partner's liability for gross negligence in discharging its oversight duty or material breach of the partnership agreement and were therefore sufficient to excuse demand also withstood a Rule 12(b)(6) attack. However, plaintiffs' failure to brief their claim that the directors of the General Partner aided and abetted the General Partner's breach of its oversight duties constituted a waiver of this claim and required its dismissal.

f. *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955 (Del. Ch. 2004)

Defendants were co-portfolio managers and limited partners of an investment fund formed as a Delaware limited partnership. The fund was operated by two subsidiaries of Lazard Frères & Co. LLC, one of which was the general partner of the fund and the other of which was the investment manager of the fund. Defendants severed their relations with the investment fund very abruptly by terminating their employment without prior notice and then allegedly put pressure on Lazard to transfer the assets of the fund to a new fund that defendants intended to form at a competitor of Lazard. In the period in which defendants were contemplating their departure, defendants continued to function on behalf of the fund, did not disclose they were thinking about leaving and made general statements about the high quality of Lazard as an employer and that they enjoyed their jobs. Following defendants' departure, Lazard was unable to replace defendants as portfolio managers in a sufficiently timely manner and, instead of acceding to defendants' wishes and transferring the assets of the fund to defendants' new fund, Lazard elected to dissolve the fund. The fund and its general partner and investment manager then sued defendants for, among other things, breach of fiduciary duty owed to the fund and the partners who invested in the fund, breach of the partnership agreement of the fund and breach of the investment management agreement between the fund and the investment manager. Defendants moved to dismiss for failure to state a claim upon which relief upon which relief could be granted.

The court first addressed the breach of fiduciary duty claim. While the court acknowledged that defendants owed fiduciary duties to the fund and its investors in connection with the investment discretion entrusted to defendants, the court held that these fiduciary duties did not extend to a duty not to resign and begin a competing business without providing adequate prior notice to allow the fund to replace defendants. The court refused to impose a fiduciary duty on defendants not to leave the fund without suitable replacements where defendants were not contractually restricted from doing so. The court stated that to impose such a duty would inequitably grant plaintiffs' with an important right that they did not bargain and pay for. The court thus dismissed this claim.

The court also dismissed several of plaintiffs' claims of breach of the partnership agreement and the investment management agreement. Plaintiffs' claims included a claim that defendants assumed the same duties as the general partner of the partnership by signing subscription agreements to invest in the fund as limited partners and a claim that defendants were bound to act in accordance with the standard of care in the indemnification provision of the partnership agreement because they fell within the coverage of the indemnification provision as members of the general partner. The court did not dismiss, however, plaintiffs' claim that defendants breached the confidentiality provision of the partnership agreement, which they were subject to as limited partners, by using confidential information in establishing the competing fund and granted plaintiffs' request for discovery to determine if defendants had misused such confidential information.

g. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, C.A. No. 15754 (Del. Ch. Sept. 27, 2000); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 795 A.2d 1 (Del. Ch. 2001), *aff'd in part, rev'd in part*, 817 A.2d 160 (Del. 2002), *on remand*, (Del. Ch. July 8, 2003)

Plaintiff limited partner brought a derivative suit claiming that a series of unit purchases in a Delaware limited partnership by the corporate parent of the general partner and other related persons were unfair to the partnership and were designed to entrench the general partner. In this opinion, the court considered the merits of several motions for summary judgment brought by the various defendants. (In other related proceedings, the court considered a number of other actions including requirements for bringing a derivative suit and the scope of actions under Section 17-305 of DRULPA which are discussed under those topics in the survey.) The court ruled on the merits of the following claims: breach of contract claim against the defendants arising from an alleged breach of the partnership agreement; breach of fiduciary duty claims against the general partner relating to the same transactions as challenged in the breach of contract claim; and breach of fiduciary duty or aiding and abetting claims against two classes of defendants (1) those who were directors of the general partner and also affiliated with its parent corporation and (2) those who were directors of the general partner but not affiliated with its parent corporation as well as both classes of defendants' alleged defense on the basis of the exculpatory provisions of Section 17-1101(d)(1) of DRULPA and the partnership agreement. In their breach of contract claims, plaintiffs alleged that certain requirements of the partnership agreement that apply to sales of units had not been followed in the sales to the general partner's affiliates. The general partner countered that other provisions of the partnership agreement were applicable to the sales at issue which allowed the general partner broad discretion and entitled it to summary judgment under the facts at issue. In support of their motion, the defendants relied on (1) Section 17-1101(d) of DRULPA which provides that any partner acting under a partnership agreement shall not be liable to the limited partnership or any other partner for its good faith reliance on the provisions of such partnership agreement, (2) an alleged modification of fiduciary duties under Section 17-1101(d)(2) of DRULPA and (3) upon a provision of the partnership agreement that provided immunity to the general partner for any action taken in reliance on a legal opinion. With respect to the question of the proper interpretation of the partnership agreement, the court concluded it could properly deny summary judgment if it decided that a more thorough development of the record would clarify the law or its application and did so on this basis. It also found that there was a triable issue of fact as to the good faith of certain of the defendants and that a finding of lack of good faith would prevent them from relying on any of the provisions that they cited as affirmative defenses. With respect to the alleged breach of fiduciary duty claims against the general partner relating to the same actions supporting the breach of contract claims, however, the court granted the defendants' motion for summary judgment. It did so based on a finding that Section 17-1101(d)(2) of DRULPA authorized the elimination, modification or enhancement of fiduciary duties and that the partnership agreement had set forth the duties owed by the general partner in self-dealing transactions between the partnership and the general partner affiliates in a comprehensive matter which left no room for the application of common law fiduciary duty principles. With respect to the other claims against the defendants who controlled the corporate parent of the general partner, the court concluded, based on the teaching of cases like *In re USA Cafes, L.P. Litig.* that the defendants could be liable for breach of fiduciary duty or as aiders or abettors if they intentionally caused the general partner to violate the partnership agreement and therefore denied summary judgment as to those claims. Finally, with respect to the directors of the general partner who were unrelated to the general partner's corporate parent, the court concluded that since these directors did not have any special tie to the corporate parent of the general partner but were only required to balance their fiduciary duties to the shareholders of the general partner on one hand and to the limited partners of the partnership on the other, they would be entitled to the benefit of the exculpatory provisions of the partnership agreement even if they unintentionally struck a contractually improper balance between those competing interests so long as they acted in good faith and the court found that there was no record evidence that these directors acted in other than good faith.

In an appeal of the Court of Chancery's decision in a related proceeding in this case, the Delaware Supreme Court stated that notwithstanding the fact that the scope of Section 17-1101(d)(2) of DRULPA was not before it in such related proceeding, it felt compelled to note that the Court of Chancery's dictum in this decision that Section 17-1101(d)(2) of DRULPA expressly authorizes the elimination of fiduciary duties in a partnership agreement was not a correct statement of law. Rather, the Supreme Court pointed out that neither Section 17-1101(d)(2) nor any other provision of DRULPA explicitly provides that a limited partnership agreement may eliminate the fiduciary duties or liabilities of a general partner and that the underlying general principle in Delaware is that scrupulous adherence to fiduciary duties is normally expected. The Supreme Court also noted the historic cautionary approach of Delaware courts that efforts by a fiduciary to escape a fiduciary duty, whether by a corporate director or officer or other type of trustee, should be scrutinized searchingly.

h. *Bigelow/Diversified Secondary P'ship Fund 1990 v. Damson/Birtcher Partners*, C.A. No. 16630 (Del. Ch. Dec. 4, 2001)

A limited partner filed class and derivative claims for breach of fiduciary duty and breach of contract against the general partners of three Delaware limited partnerships and certain "upstream" entities and individuals affiliated with such general partners. The partnerships were formed for the purposes of acquiring, operating and eventually selling commercial and industrial real estate. In 1993, the general partners sought the consent of the limited partners for certain amendments to the partnership agreements that allowed the partnerships to continue holding all of their real estate investments rather than liquidating such holdings by 1993 as the partnership agreement contemplated. In 1997, the general partners sought a consent for approval of dissolution of the partnerships from the limited partners. Under the terms of the consent solicitations, if the limited partners consented to the dissolutions, they also would be deemed to have consented to any transaction undertaken to accomplish the liquidation and winding up of the partnerships and would not be entitled to disapprove of any such transactions, including any that involved the participation or involvement of the general partners. Plaintiff instituted a suit in Pennsylvania to enjoin the 1997 consent solicitations. However, a majority of the limited partners approved them and the general partners began to seek purchasers for the partnership's properties. In the present action, plaintiff alleged various injuries to itself and other similarly situated limited partners resulting from the general partners' efforts to sell the partnership's properties.

This decision involved a motion to dismiss plaintiff's claims against the "upstream" entities and individuals affiliated with the general partners. The moving defendants asserted that they were not in a fiduciary relationship with the partnerships or their limited partners and, therefore, did not owe them any fiduciary duties. In denying the motion with respect to the breach of fiduciary duty claims, the court stated that while mere ownership of a general partner does not result in the establishment of a fiduciary relationship, affiliates of a general partner who exercise control over the partnership's property may find themselves owing fiduciary duties to both the partnership and its limited partners. The court held that plaintiff's allegations of self-dealing and control over the partnerships and their properties satisfied the standards set forth in *Wallace v. Wood* for imposing potential fiduciary liability on the moving defendants.

Because the moving defendants were not parties to the consent solicitations on which plaintiff based its breach of contract claim but merely executed such solicitations in their capacities as representatives of a signatory, the court separately dismissed the breach of contract claim against them.

i. *Cantor Fitzgerald, L.P. v. Cantor*, C.A. No. 16297 (Del. Ch. June 16, 1998), (Del. Ch. July 12, 1998) and (Del. Ch. Mar. 13, 2000)

A series of related cases arose in connection with disputes between Cantor Fitzgerald, L.P. ("plaintiff" or the "partnership"), a leading inter-dealer and institutional broker of United States Treasury Securities and other government securities, and several of its partners and other entities. The thrust of plaintiff's complaint alleged that the defendants, who included three of plaintiff's limited partners, working through a Delaware corporation under their control that was formerly a department of plaintiff, had breached their fiduciary duty of loyalty to the partnership and engaged in competitive activity in violation of the applicable limited partnership agreement. The court initially addressed the claims raised by plaintiff on a motion to dismiss and denied the motion as to various claims including fiduciary duty and contract claims. Plaintiff had also sought a preliminary injunction. The court initially reserved on that application until the record could be supplemented on certain issues relating to imminent and irreparable harm and the balancing of the equities. After such supplementation, the court found that plaintiff had a reasonable likelihood of establishing at trial on the merits that the defendant limited partners had breached their fiduciary duty of loyalty to the general partner and the partnership, but denied the preliminary injunction because it found that the record did not support the finding of imminent irreparable harm if the injunction were not granted. The court based its holding on the provisions of the partnership agreement whereby each partner, including each limited partner, acknowledged a duty of loyalty to the partnership and agreed to take no action to harm (or that would reasonably be expected to harm) the partnership. In addition, each of the partners, including the limited partners, agreed not to engage in competitive activities. The court found that the proposed new business venture of the limited partners would be competitive with the partnership and therefore was likely to result in a breach by the limited partner defendants of their contractually agreed upon fiduciary duty of loyalty and agreement not to compete. However, the court explicitly expressed no opinion as to whether a duty of loyalty might have existed in the absence of the express provisions of the partnership agreement.

After a trial on the merits of the case, the court held that partners of a Delaware limited partnership may agree in their partnership agreement that partners, including limited partners who do not participate in the management or operation of the partnership, are subject to a fiduciary duty of loyalty. Defendants argued that the language of DRULPA Section 17-1101(d), which provides that "[t]o the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited partnership or to another partner . . . (2) the partner's or other person's duties and liabilities may be expanded or restricted by provisions in a partnership agreement," precludes partners from creating duties that do not exist separately at law or in equity. The court disagreed with defendants' argument, citing the policy of the DRULPA to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements set forth in DRULPA Section 17-1101(c) and the lack of an express prohibition in the DRULPA against providing in a partnership agreement that limited partners are subject to duties that the common law or equity does not independently impose upon them. The court found support for its holding in its opinion in *Kahn v. Icahn*, in which it held that "Delaware law permits partners to agree on their rights and obligations to each other and to the partnership. This is so even when Delaware law might impose different rights and obligations absent such agreement." Notably, in determining the scope of the duty of loyalty, the court stated that "[t]he duty of loyalty proclaimed in the [partnership agreement] requires no dependency upon a default concept to a narrow definition derived from corporate common law. The scope of the duties owed by the parties must be determined by reference to the nature of this particular business enterprise." The court reformed the partnership agreement to remove the provision by which plaintiff claimed that defendants agreed not to engage in competitive activities, finding that such provision was the result of a mistake in the amendment of the partnership agreement. The court went on to find that defendants breached their contractually imposed duty of loyalty and that defendants' corporate vehicle aided and abetted in the fiduciary duty breach and tortiously interfered with the partnership agreement. Because the court did not find that plaintiff faced the threat of imminent, irreparable injury and could not quantify the monetary damages from defendants' wrongdoing, it did not grant plaintiff's request for equitable relief or monetary damages. The court did, however, grant plaintiff declaratory relief and an award of attorneys fees based on the egregious nature of the defendants' actions.

j. *Wallace v. Wood*, C.A. No. 15731 (Del. Ch. Oct. 12, 1999)

Limited partners brought suit alleging, among other things, that the corporate general partner of a Delaware limited partnership, as well as its parent corporations and affiliates and officers of the general partner, breached fiduciary duties owed to the limited partners and the limited partnership. Plaintiffs claimed that the defendants used partnership funds to establish business entities which defendants wrongfully used to circumvent a provision in the partnership agreement prohibiting the limited partnership from incurring debt in excess of a specified amount. In denying defendants' motion to dismiss, the court rejected defendants' argument that the parent corporations, affiliates and officers of the corporate general partner did not owe fiduciary duties to the limited partners and the limited partnership and applied the parameters of fiduciary duties owed by the directors of a general partner enunciated in *In re USACafes, L.P. Litig.* to plaintiffs' claims. The court found that plaintiffs alleged adequate specific facts to support their claims that all defendants utilized partnership assets which they controlled to enrich themselves at the expense of plaintiffs and noted that precedent existed in Delaware for the extension of fiduciary duties to defendants similarly situated to the parent corporations and affiliates of the general partner. The court also declined to dismiss plaintiffs' claim that defendants aided and abetted the general partner's breach of its fiduciary duties. The court determined that it was more appropriate to carefully address this alternative argument, which on its face seems inconsistent with the claim that the general partners' officers, parents and affiliates breached fiduciary duties themselves because it assumes they are "non-fiduciaries," after fact finding had occurred rather than at the stage of proceedings involving a pre-trial dispositive motion.

k. *In re Boston Celtics Ltd. P'ship Shareholders Litig.*, C.A. No. 16511 (Del. Ch. Aug. 6, 1999)

Plaintiff limited partners filed suit challenging the reorganization of a Delaware limited partnership into two new limited partnerships, contending that the corporate general partner and its directors engaged in a self-interested transaction and breached their fiduciary duty of loyalty by approving the reorganization which was the result of an unfair process and produced unfair terms. The defendants filed a motion to dismiss for failure to state a claim.

The court applied the law regarding the fiduciary duties of a general partner and the business judgment rule to the actions of the defendants challenged by plaintiffs in each of their claims. In its discussion of fiduciary duties, the court confirmed the well settled principle that, unless limited by the partnership agreement, a general partner and the directors of a corporate general partner who control the partnership owe fiduciary duties to the limited partners of the partnership they control, similar to those duties that a corporate director owes to shareholders. The court also noted, however, that the actions of a general partner are generally protected by the business judgment rule. The plaintiffs had the burden of rebutting the presumption created by the business judgment rule—that the defendants acted on an informed basis and in the honest belief that they acted in the best interest of the partnership and the limited partners. According to the court, when alleging a breach of the duty of loyalty, plaintiffs must sufficiently plead that the general partner appeared on both sides of a transaction or derived an improper personal benefit from a transaction, i.e. engaged in self-dealing, to rebut the presumption afforded by the business judgment rule. Also, when asserting a claim regarding the unfairness of a transaction, a plaintiff must also plead specific examples of misconduct that demonstrate the alleged unfairness. If a plaintiff satisfies this burden, then the general partner must prove the "entire fairness" of the challenged transaction by establishing that it was the result of both fair dealing and fair price.

Upon application of the foregoing principles, the court ruled that the unfairness of the reorganization and defendants' self-interest therein as alleged by plaintiffs as well as plaintiffs' allegation of a breach of fiduciary duties owed by the general partner and its directors to the limited partners were sufficiently pleaded. However, the court dismissed certain claims made by plaintiffs relating to the alleged dilution of the plaintiffs' equity interests and the alleged "freeze out" purpose of the reorganization due to insufficient pleading.

l. *RJ Assocs., Inc. v. Health Payors' Org. Ltd. P'ship*, C.A. No. 16873 (Del. Ch. July 16, 1999)

Plaintiff, a limited partner of a Delaware limited partnership, brought suit against the partnership's only other limited partner and its general partner charging that the other limited partner controlled the general partner and that both defendants, acting together, had breached their contractual and fiduciary duties to the plaintiff by causing the partnership to make improper deductions for certain expenses from plaintiff's partnership distributions. The Court of Chancery's opinion was rendered in connection with defendants' motion to dismiss the complaint for lack of personal jurisdiction, failure to join indispensable parties and failure to state a claim. This summary focuses on the court's ruling as to whether the plaintiff stated a claim for breach of fiduciary duty.

With respect to the breach of fiduciary duty claim against the general partner, the court observed that the partnership agreement expressly stated that the general partner "shall be under a fiduciary duty to conduct and manage the affairs for the Partnership in a prudent, businesslike and lawful manner." The court stated that such a broad contractual undertaking incorporated and encompassed the traditional fiduciary duties recognized under Delaware law and concluded that the plaintiff's allegation that the general partner breached its fiduciary duty by failing to adhere to the express contractual undertakings contained in the partnership and other relevant agreements stated a claim for breach of fiduciary duty against the general partner.

As to the claims relating to the limited partner, the court noted that fiduciary duty claims regarding limited partners were more complex than those regarding general partners and looked first to Section 17-1105 of DRULPA, which states that "[i]n any case not provided for in this chapter the Delaware Uniform Partnership Law [DUPL] . . . and the rules of law and equity . . . shall govern." Based on the foregoing language, the court concluded that "[b]ecause the DRULPA contained no provision governing the accountability of limited partners for breaches of fiduciary duty, the [c]ourt must look to the DUPL to determine what fiduciary duties are owed by and to limited partners in the limited partnership." The court then turned to Section 1521(a) of DUPL and quoted the following language from that section: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any transaction connected with the . . . conduct . . . of the partnership or from any use by him of its property." The court stated that unless modified by the partnership agreement at issue, the fiduciary duty set forth in Section 1521 of the DUPL applies to a limited partner.

As authority for this proposition, the court cited two Delaware cases, *James River-Pennington Inc. v. CRSS Capital, Inc.* and *Sonet v. Timber Co., L.P.* The relevant portion of the *James River-Pennington* case stands for two propositions: First, that the traditional fiduciary duties of partners in a Delaware limited partnership may be modified by contract; and second, that a limited partner of a Delaware limited partnership that controlled the general partner owed a duty of loyalty to the partnership and the other partners. The portion of the *Sonet* case cited by the court also stands for the proposition that the terms of a partnership agreement may preempt otherwise applicable fiduciary principles. Also relevant to this analysis are two cases cited by the *James River-Pennington* court, namely *KE Prop. Mgmt., Inc. v. 275 Madison Mgmt. Corp.* and *In re USACafes, L.P. Litig.* The court in *USACafes*, based on a trust law analysis, held that the directors of a corporate general partner owe fiduciary duties to the limited partnership and its limited partners. The *KE Prop.* court considered the issue of limited partner fiduciary duties in the context of a limited partner acting to remove a general partner pursuant to the terms of the partnership agreement. Significantly, the *KE Prop.* court also relied on Section 17-1105 of DRULPA as a basis to resort to the DUPL for the determination of a limited partner's fiduciary duties. Citing Section 1521(a) of the DUPL as well as case law and commentary, the court noted that under DUPL all partners owe fiduciary obligations and on that basis held that "to the extent that a partnership agreement empowers a limited partner discretion to take actions affecting the governance of the limited partnership, the limited partner may be subject to the obligations of a fiduciary. . . ." However, the *KE Prop.* court ultimately found that the objective nature of the removal provision, only for fraud or willful conduct injurious to the partnership, circumscribed the limited partner's discretion so that, under the facts, a fiduciary duty would not attach. Thus, the holding of the court in *RJ Associates* continues the development of Delaware law relating to the fiduciary obligations of a limited partner based on the interplay between Section 17-1105 of DRULPA and Section 1521(a) of DUPL and the principle that control may carry with it a fiduciary responsibility.

m. *Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*, C.A. No. 15202 (Del. Ch. Dec. 23, 1996)

In a declaratory judgment action relating to the removal of the general partner of a Delaware limited partnership by the limited partners, the limited partners alleged they could remove the general partner at will and the general partner countered that the limited partners had breached their fiduciary duties to the partnership in connection with the removal. Without deciding that the limited partners were subject to a fiduciary duty in taking this action, the court held that where the limited partners' rights and duties were expressly set forth in the partnership agreement, compliance by the limited partners with the provisions of the partnership agreement was sufficient to satisfy any fiduciary obligation that may be owed, provided the limited partners acted reasonably and in good faith.

n. *KE Prop. Mgmt. Inc. v. 275 Madison Mgmt. Corp.*, C.A. No. 12683 (Del. Ch. July 21, 1993)

In finding that a limited partner was justified in removing the general partner under the terms of the partnership agreement, the court discussed whether the limited partner owed a fiduciary duty to the general partner. The court held that "to the extent that a partnership agreement empowers a limited partner discretion to take actions affecting the governance of the limited partnership, the limited partner may be subject to the obligations of a fiduciary . . . ." However, in this instance no fiduciary duty was owed by the limited partner because no discretion was left to the limited partner under the partnership agreement.

o. *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991)

The court applied principles of trust law to hold that the directors of a corporate general partner owed fiduciary duties to the limited partnership and its limited partners. The court went on to hold that the duties owed to the partnership were in the nature of the duty of loyalty.

3. Contractual Modification of Fiduciary Duties

a. *Ellis v. OTLP GP, LLC*, C.A. No. 10495-VCN (Del. Ch. Jan. 30, 2015)

Plaintiffs, limited partner unitholders of Oiltanking Partners, L.P. ("Oiltanking"), brought an action to challenge the proposed merger of Oiltanking with defendant Enterprise Products Partners L.P. ("Enterprise"), which owned about two-thirds of Oiltanking's limited partner interests. Before the court was plaintiffs' motion to expedite the action in order to seek a preliminary injunction to halt the upcoming merger vote.

In June 2014, Enterprise approached Marquard & Bahls AG ("M&B"), which owned all of Oiltanking's general partner, OTLP GP, LLC ("GP") along with a two-thirds interest in Oiltanking, about purchasing M&B's interest in Oiltanking and acquiring all of Oiltanking. M&B was open to selling its interest, but did not want to participate in any deal that would require the support of the unaffiliated common unitholders, a class which included the plaintiffs. Under Oiltanking's Limited Partnership Agreement (the "Agreement"), the majority of common unitholders (excluding the general partner and its affiliates) were required to approve any merger during the "subordination period," which was expected to end mid-November 2014. After the subordination period ended, the unaffiliated common unitholders were not entitled to a class vote on any merger. The Agreement also purported to eliminate all fiduciary duties save for those defined in the Agreement.

During negotiations for the sale of its ownership interests, M&B advised Enterprise that it should wait until the end of the subordination period to acquire the publicly held common units if it wanted to avoid a class vote on the merger. M&B then agreed to sell its interest in GP and its two-thirds interest in Oiltanking to Enterprise, a deal which closed on October 1. Shortly before closing, Enterprise notified Oiltanking of its intention to acquire the remainder of Oiltanking's limited partner interests at a price below what it paid M&B for its units. GP referred the consideration issue to the conflicts committee established under the Agreement, which negotiated a price that was increased but still lower than that paid to M&B. The subordination period subsequently ended and Enterprise proposed a vote on the merger by a simple majority of the common units, the outcome of which was preordained given its two-thirds interest.

Plaintiffs' first argument for an injunction was that since Enterprise's acquisition was announced during the subordination period, the class voting standard applicable during that period should apply to the upcoming merger vote. They alleged the Agreement was ambiguous on this issue, since it did not specify the voting standard that would apply with respect to when an item for voting is announced, and that defendants breached the implied covenant of good faith and fair dealing in determining no class vote was required. The court found the Agreement to be unambiguous, since plaintiffs gave no reason why the voting standard should not be determined by reference to the time of the vote. Further, the failure of the Agreement's drafters to subject announcements of merger, as opposed to votes on a merger, to certain requirements did not implicate the implied covenant. The implied covenant supplies terms to fill gaps in express provisions of an agreement, but the voting provisions of the Agreement were clear and nothing about the timing of the announcement of the acquisition or merger vote defeated the common unitholders' expectations under the Agreement.

Plaintiffs further contended that M&B's sale of its interest and Enterprise's pursuit of a merger should be treated as a single transaction under the step-transaction doctrine. They argued that M&B breached its fiduciary duties to them by telling Enterprise that it would not participate in a transaction requiring a class vote, in an attempt to bypass its obligations to provide a class vote on the merger. The court found the step-transaction doctrine inapplicable. M&B was not a party to the merger and did not structure the merger – Enterprise decided to purchase M&B's interest and then took advantage of the timeline espoused in the Agreement. M&B had every right to tell Enterprise that it wanted no involvement with a class vote, and GP could not be deemed to have breached fiduciary duties because its affiliate M&B made a decision it was entitled to make. In addition, the court found that even if the step-transaction doctrine were applicable, M&B, GP and Enterprise did nothing out of the ordinary to defeat the class vote, merely allowing the subordination period to expire. When Enterprise obtained M&B's interest on October 1st, it was bound to honor the class vote requirement until the subordination period expired, which it did. The fact that the merger announcement occurred during the subordination period did not trigger a class vote.

Finally, plaintiffs challenged GP's handling of Enterprise's merger offer, suggesting either that GP should not have told Enterprise in June about the consequences of the expiration of the subordination period or that it was not exculpated under the Agreement because it did not seek the best possible merger price for the common unitholders. The court rejected these arguments, since the plaintiffs failed to explain how GP violated its fiduciary duties through its disclosure to Enterprise and since GP abided by the Agreement in determining the merger consideration. The lesser consideration plaintiffs received was merely an inevitable consequence of how the Agreement was drafted. Having rejected each of the plaintiffs' claims, the court denied their motion to expedite.

b. *Allen v. El Paso Pipeline GP Co., L.L.C.*, C.A. No. 7520-VCL (Del. Ch. June 20, 2014)

This decision follows the Court of Chancery's prior decision granting plaintiffs' motion to certify a class consisting of all the limited partners (the "Unitholders") of El Paso Pipeline Partners, L.P., a publicly traded Delaware master limited partnership (the "Partnership"), wherein the court also found that plaintiffs' claims were not exclusively derivative and could support a direct characterization.

After completion of discovery, the court heard this case on defendants' motion for summary judgment. Plaintiffs had challenged whether a "drop-down" transaction (the "Drop-Down") between the Partnership and El Paso Corporation, the parent of the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"), violated the express terms of the Partnership's limited partnership agreement (the "LPA") and the implied covenant of good faith and fair dealing, or in the alternative, aided and abetted those breaches. The crux of plaintiffs' argument was that although the LPA eliminated all fiduciary duties of the General Partner and replaced them with contractual duties, the General Partner breached the LPA by not considering the best interests of the Unitholders when approving the Drop-Down; specifically, plaintiffs alleged that certain incentive distribution rights (the "IDRs") owned by the General Partner caused the Drop-Down to be economically dilutive to Unitholders. Thus, the court analyzed whether the manner by which the Drop-Down was approved was either an express breach of the LPA or a breach of the implied covenant of good faith and fair dealing.

In basic terms, the General Partner's contractual duties were divided into three categories: when it was acting in its individual capacity, when it was acting as general partner in a non-conflict of interest transaction and when it was acting as general partner in a conflict of interest transaction. When in a conflicted transaction, the General Partner had several options by which such a conflicted transaction could be approved without breaching the LPA, one of which was by special approval. Special approval could be obtained by a majority vote of the members of a conflicts committee—in this case, three outside members of the board of directors of the General Partner—acting in good faith. The LPA defined "good faith" for such purposes as the members' subjective belief that the conflict of interest transaction was in the best interest of the Partnership. The court noted, however, that it could only infer a party's subjective intent from external indications and, therefore, objective factors necessarily informed the court's analysis. With respect to the best interest prong of this contractual good faith standard, the court found that the LPA only required the conflicts committee to believe subjectively that the Drop-Down was in the best interest of the Partnership—leaving the conflicts committee free to consider the full universe of entity constituencies and not consider only the equity owners of the Partnership (which would be the case if traditional fiduciary duties applied).

The court went on to grant summary judgment on plaintiffs' LPA breach claim even under the plaintiff-friendly summary judgment standard of review, for the following reasons: (i) plaintiffs had conceded that the Partnership was not harmed by, or paid an excessive price for, the Drop-Down; (ii) all members of the conflicts committee testified that they subjectively believed the Drop-Down benefited the Partnership as an entity; (iii) the conflicts committee met formally six times and had consulted with financial and legal advisors familiar with the industry and the Partnership (with the financial advisor present at each meeting and presenting at three of the meetings); and (iv) the conflicts committee investigated the IDRs as they related to the Drop-Down and still determined that the Drop-Down was in the best interest of the Partnership, and ultimately conferred some benefit to the Unitholders (although not as great a benefit as received by the General Partner). The court noted that, at best, the evidence supported an inference that the conflicts committee performed its job poorly, not that it did not subjectively believe that the Drop-Down was in the best interest of the Partnership. Accordingly, there was no breach of the LPA.

Next, the court addressed plaintiffs' claim that the General Partner breached the implied covenant of good faith and fair dealing in approving the Drop-Down because the conflicts committee relied on a fairness opinion that did not value the consideration Unitholders actually received. The court began its analysis by explaining that the implied covenant does not create a free-floating duty of good faith, but is a cautiously applied gap-filler to ensure parties' reasonable expectations are fulfilled. In applying the implied covenant, a court must follow a three-step analysis. First, contract construction: the court must examine the contract to determine whether a gap exists and if the contract speaks directly on an issue, there is no gap. Second, even if a gap exists, the court should avoid filling intentional gaps (i.e., a term that the parties rejected ex ante or after negotiations decided should be omitted) and only fill unintentional gaps (i.e., a term that parties failed to consider during negotiations or was so fundamental did not need to be expressed) so as to avoid rewriting a contract that a party deems unfair in hindsight. Third, if the gap should be filled (a cautious enterprise that should be rarely used) the court must look to the past to determine what the parties would have agreed to themselves had they considered the issue in their original bargaining position, not what the court deems to be fair at the time of the wrong.

Here, plaintiffs' implied covenant claim relied heavily on Gerber v. Enter. Prods. Hldgs., LLC, a Delaware Supreme Court case. In brief, the Gerber court faced a situation where a master limited partnership agreement replaced traditional fiduciary duties with contractual duties and limited partners challenged a general partner's approval of a conflicted transaction. Notably, the limited partnership agreement provided that the general partner would be conclusively presumed to have acted in good faith if it relied on a fairness opinion from a financial advisor without detailing what such fairness opinion should include. The general partner relied on a fairness opinion with respect to the challenged transaction, however, the fairness opinion failed to fully evaluate important aspects of the transaction and their effects on the consideration received by limited partners. The Supreme Court held that had the parties at the time of contracting addressed the specific standards required of a fairness opinion they would have agreed that any fairness opinion needed to fully evaluate whether the consideration was fair to the limited partners. Thus, the general partner was not entitled to the conclusive presumption of good faith because its reliance on the inadequate fairness opinion violated the implied covenant.

Plaintiffs' contended that, similarly, the fairness opinion obtained by the conflicts committee here did not consider all the elements of the consideration from the standpoint of the Unitholders because the dilutive effects of the IDRs were omitted from the financial advisor's fairness opinion calculus. The court, however, rejected this contention and found that Gerber did not control this case because there was no such conclusive presumption requirement for the Drop-Down approval; rather, what was required under the LPA was approval by the conflicts committee in their subjective belief that the Drop-Down was in the best interest of the Partnership.

The court began its implied covenant analysis with the contract construction step, which is where the court also concluded its analysis because the special approval process had no fairness opinion related gap, as was the case in Gerber. In so ruling, the court found that deploying the implied covenant to impose on the parties a fairness opinion requirement similar to Gerber would fundamentally rewrite the LPA by changing the conflict committee's inquiry from best interests of the Partnership to fairness to the Unitholders and expanding the scope of judicial review from subjective good faith of the conflicts committee to compliance with an obligation to obtain a fairness opinion that would satisfy a court after the fact. Because the LPA's special approval process did not require a fairness opinion there was no gap to fill.

Moreover, for illustrative purposes only, the court proceeded through the next steps of the implied covenant analysis and considered what the parties would have agreed to at the time of contracting. Examining the LPA in terms of the Partnership's prospectus from its initial public offering the court concluded that the drafters of the LPA anticipated numerous conflict of interest transactions and created a dispute resolution method that would limit potential litigation and after-the-fact judicial review. Therefore, assuming the question had been raised during negotiations whether the Unitholders should have the ability to challenge the special approval process by litigating whether the conflicts committee obtained a fairness opinion that satisfied a test of reasonableness, met certain requirements, or otherwise complied with some form of objective standard, the record before the court suggested that such a provision would have been rejected. That being the case, summary judgment was granted for defendants' on the implied covenant claim.

Finally, the court granted summary judgment with respect to plaintiffs' aiding and abetting claim. The court held that since the LPA eliminated all fiduciary duties this was a pure breach of contract claim and the general rule in Delaware is that there is no claim available for aiding and abetting claim a breach of contract. In sum, defendants' motion for summary judgment was granted in toto.

c. *In re El Paso Pipeline Partners, L.P. Derivative Litig*., C.A. No. 7141-VCL (Del. Ch. June 12, 2014) and (Del. Ch. Apr. 20, 2015)

This case involved a master limited partnership drop-down transaction. El Paso Corporation ("El Paso Parent"), the sponsor and indirect controlling entity of El Paso Pipeline Partners, L.P. (the "MLP") sold part of its interest in two entities to the MLP in a transaction that constituted a conflict of interest. Plaintiffs sued defendants alleging, among other things, breach of the MLP's limited partnership agreement (the "MLP LPA"), breach of the implied covenant of good faith and fair dealing and aiding and abetting. The court previously dismissed the additional allegations in a bench ruling. Plaintiffs and defendants each moved for summary judgment.

In 2010, El Paso Parent offered to sell the MLP 51% of its interest in an entity ("Southern LNG") that owned a liquefied natural gas ("LNG") terminal and the entity ("Elba Express") that owned the natural gas pipeline that connected the LNG terminal to interstate pipelines (the "Drop-Down"). At the time of the Drop-Down proposal, shale gas discoveries had led to higher levels of production and lower gas prices, weakening the market for imported LNG. However, Southern LNG and Elba Express maintained services agreements ("Services Agreements") that provided revenue regardless of any actual storage or transport of LNG. The plaintiffs focused on two issues with regard to the Service Agreements: (i) the counterparties were judgment-proof special purpose entities with no assets and (ii) the Services Agreements were backed by guarantees that only covered roughly 20% of the revenue that the Services Agreements might generate (collectively, the "Risks").

After the Drop-Down was proposed, the MLP determined that the transaction posed a conflict of interest for the general partner of the MLP and sought "Special Approval" by way of a conflicts committee, as contemplated by the MLP LPA. The conflicts committee met five times over the course of two months and received input from a financial advisor, then unanimously approved the Drop-Down proposal. Unbeknownst to the conflicts committee, El Paso Parent turned down a right of first refusal option to purchase LNG assets for itself at the time the Drop-Down was proposed. El Paso Parent and the members of the general partner's board who know about the right of first refusal offer did not disclose its existence to the conflicts committee.

The court first addressed plaintiffs' claim that the defendants breached the express terms of the MLP LPA and granted defendants' motion to dismiss. The court determined that

Section 7.9(a) of the MLP LPA required the general partner to proceed in one of four contractually specified ways (including seeking "Special Approval") when faced with making a decision that involved a conflict of interest. Because the Drop-Down implicated a conflict of interest, Section 7.9(a) controlled, and the general partner had sought Special Approval, defined by the MLP LPA as "approval by a majority of the members of the Conflicts Committee acting in good faith." Under settled Delaware law, the standard for good faith is a subjective, not objective, belief that the determination or action is in the best interests of the company. The record supported the fact that the conflicts committee understood the state of the LNG market, was informed about the terms of the Service Agreements and guarantees and considered the revenue risk involved in the Drop-Down proposal. While reasonable minds could differ on the weight that the conflicts committee should have placed on the Risks, the court found that the conflict committee's judgment and process was not so extreme or egregious that it could support a potential finding of bad faith. Further, the conflicts committee had no knowledge of El Paso Parent's failure to consummate its right of first refusal to purchase LNG assets and, therefore, could not have acted in bad faith based on facts it did not know.

The court then addressed the plaintiffs' claims that the general partner breached the implied covenant of good faith and fair dealing by "intentionally" concealing the information about El Paso Parent's refusal to purchase LNG assets and, again, granted defendants' motion to dismiss. The court initially clarified that the MLP LPA's "good faith" standard did not override the implied covenant, noting that the implied covenant is intended to be a gap-filler. In applying the implied covenant, the court stated that it must determine (i) whether there was a gap to be filled, (ii) whether the implied covenant should be used to fill the gap and (iii) how to fill the gap. Here, the court determined a gap existed because the MLP LPA was silent on whether the general partner was required to volunteer information to the conflicts committee. However, the court declined to use the implied covenant to infer an affirmative disclosure obligation. The court recognized that the Supreme Court in *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400 (Del. 2013) had stated that a failure to volunteer information could constitute a breach of the implied covenant, but noted that statement was dictum. In this case, the MLP LPA expanded the general partner's freedom to act, specifically eliminated all fiduciary duties of the general partner (which would traditionally include disclosure obligations), did not include a contractual duty to disclose information and affirmatively renounced the traditional corporate opportunity doctrine. The court coupled these facts with plaintiffs' failure to identify any indication that the parties to the MLP LPA believed that the general partner would volunteer information to the conflicts committee and declined to permit plaintiffs to use the implied covenant to create a disclosure requirement.

The court dismissed the aiding and abetting claims, noting that secondary liability could not exist when the underlying causes of action had been dismissed.

In the post-trial opinion, the court addressed plaintiffs' challenge to a "dropdown" transaction whereby the parent corporation in a master limited partnership structure, El Paso Corporation ("El Paso Parent"), sold interests in two of its subsidiaries to El Paso Pipeline Partners, L.P. (the "MLP"). The court found that the MLP's general partner, in engaging in the transaction with El Paso Parent, had violated the MLP's limited partnership agreement. The court held that members of a committee of independent members of the general partner's board (the "Committee") who approved the transaction via "special approval" failed to form the requisite subjective belief that the dropdown transaction was in the best interests of the MLP.

Plaintiffs originally challenged two dropdown transactions, which the court referred to as the "Spring Dropdown" and the "Fall Dropdown." The court previously had granted defendants' motion for summary judgment as to the Spring Dropdown and partially denied defendants' motion for summary judgment as to the Fall Dropdown, finding that questions of material fact existed requiring a trial as to the state of mind of the members of the Committee when approving the Fall Dropdown. The court noted that it expected that the Committee members and their financial advisor would provide a credible account of how they evaluated the Fall Dropdown, negotiated with El Paso Parent and ultimately determined that the transaction was in the best interests of the MLP. However, that is not what the court found. Rather, the court found that the Committee members went against their better judgment and did what El Paso Parent wanted and not what they believed was in the best interests of the MLP. The court rejected trial testimony of the Committee members that they believed the transaction was in the best interests of the MLP, finding that the testimony was rehearsed, not credible, and inconsistent with their contemporaneous emails and deposition testimony. Specifically, the court pointed to various internal assessments by Committee members suggesting they believed that the actual value of the assets was lower than the price proposed by El Paso Parent – and accepted by the Committee – and also that it was not in the best interest of the MLP to acquire additional interests in the subsidiary, which related to the importation of liquefied natural gas, a market that appeared to be in decline. Consequently, the court determined that the MLP had paid $171 million more for one of the assets that it acquired than it would have if the general partner had not breached the limited partnership agreement.

The court also expressed concern regarding the process followed, and the work product generated, by the Committee's banker. Specifically, the court noted that the banker met with El Paso Parent's management before meeting with the Committee, did not emphasize certain relevant information in their presentation and failed either to follow the same approach in the Fall Dropdown as in the Spring Dropdown or bring the inconsistency to the Committee's attention, all in an effort to make the Spring Dropdown look as attractive as possible. The court noted that the banker's entire fee was contingent on delivering a fairness opinion, suggesting that the banker did what it could to justify the Fall Dropdown, get to closing and collect its contingent fee.

The court also found that the Committee was unduly focused on accretion of distributable cash to the holders of the common units, when they should have been focused on carrying out their known contractual obligation to determine whether the Fall Dropdown was in the best interests of the MLP. In its prior opinion, the court had noted that the contractual standard under the limited partnership agreement was whether a proposed transaction was in the best interests of the MLP, which meant that the Committee could consider constituencies including employees, creditors, suppliers, customers, the general partner, IDR holders and "of course" the limited partners. In this post-trial opinion, however, the court made clear that in considering the interests of the limited partners, it was not sufficient for the Committee members to focus only on whether a proposed transaction was accretive to cash distributions. Rather, the Committee and its banker should have engaged in a rigorous valuation analysis that took into account prior transactions involving the same assets. The court noted that the Fall Dropdown related to two separate assets that the Committee should have evaluated separately, and had it done so, it would have realized that it was paying more than it agreed to pay for one of the assets when it was the only asset in the proposed transaction.

Based on these findings, the court held that the Committee members did not conclude that the Fall Dropdown was "in the best interests of [the MLP]" as required by the MLP's limited partnership agreement and, therefore, the MLP's general partner breached the MLP's limited partnership agreement by engaging in the Fall Dropdown. The court awarded damages in the amount that the MLP paid for the interest acquired in the Fall Dropdown that exceeded what it would have paid had the general partner not breached the MLP's limited partnership agreement.

d. *Allen v. Encore Energy Partners, L.P.*, C.A. No. 534, 2012 (Del. July 22, 2013)

This was an appeal of the Court of Chancery's dismissal of a class action complaint by former unitholders of Encore Energy Partners LP (the "Partnership") who challenged the use of a "Special Approval" process that was employed by the general partner of the Partnership to approve a conflict transaction pursuant to which Vanguard Natural Resources, LLC ("Vanguard") acquired all of the outstanding common units of the Partnership in a unit-for-unit exchange (the "Merger"), where Vanguard's indirect subsidiary was the Partnership's general partner. Plaintiffs argued that the general partner of the Partnership, its board of directors and Vanguard (collectively, the "Defendants") breached their duties under the partnership agreement by proposing, approving and consummating the Merger. The Delaware Supreme Court affirmed the Court of Chancery's decision.

In its analysis, the court first addressed what duties were owed by the Defendants. Like the Court of Chancery, the court found that the partnership agreement eliminated all fiduciary duties of the board members of the general partner and Vanguard except as expressly set forth in the partnership agreement. However, the partnership agreement did establish a contractual duty to act in good faith when the general partner or its affiliates made a determination or took an action. The court also referred to a provision in the partnership agreement requiring the general partner to consent before the Partnership could merge with another entity and concluded that when determining to consent to a merger, the general partner and its affiliates must act in accordance with this contractual duty of good faith. "Good faith" was defined as a "belie[f] that the determination or other action is in the best interests of the Partnership." However, the partnership agreement also provided a "safe harbor" for resolution of conflict transactions, which essentially provided that action taken by the general partner or its affiliates would not constitute a breach of the partnership agreement or of any duty if it received "Special Approval," which consisted of approval by a majority of the members of the Conflicts Committee acting in good faith. Further, if "Special Approval" were sought, the partnership agreement provided that "it shall be presumed that, in making its decision, the Conflicts Committee acted in good faith . . . [and] the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption . . . ."

The court then turned to the question of whether plaintiff sufficiently pled that the Defendants breached their contractual duty of good faith. The court applied well-settled contract interpretation principles to give meaning to a contractual duty requiring a "belie[f] that the determination or other action is in the best interests of the Partnership." According to *Black's Law Dictionary*, the court noted that "believe" means to "feel certain about the truth of; to accept as true." The court contrasted this with "reasonably believe" which was defined therein to mean to believe "under circumstances in which a reasonable person would believe." Because some partnership agreements use "believe" while others use "reasonably believe," the court discerned that the parties intentionally distinguished these two standards. Therefore, the court confirmed the Court of Chancery's decision in finding that this required subjective belief.

The court then addressed the Court of Chancery's holding that plaintiff must have shown that the Defendants subjectively believed that they were acting *against* the Partnership's interests to adequately plead a breach of the contractual duty to act in good faith. Plaintiff argued that, to the contrary, it is possible for a person to breach a subjective good faith standard without subjectively believing that his actions were *against* the best interests of the Partnership. The court essentially agreed with plaintiff by finding that it is possible that a defendant may not subjectively believe that an action is in the partnership's best interests, but nonetheless does not subjectively believe that the action is against the partnership's best interests. The court noted that a person who "intentionally fails to act in the face of a known duty to act" neither subjectively believes his decision is in the best interests of the partnership nor subjectively believes he is affirmatively acting against the best interests of the partnership. However, the court continued, to intentionally fail to act in the face of a known duty, there must be a "duty" in the first place and the partnership agreement of the Partnership replaced common law fiduciary duties with a contractual duty of subjective good faith. Therefore, to plead a breach of the contractual duty of subjective good faith under the partnership agreement of the Partnership, the court indicated that plaintiff had to plead facts that would enable a court reasonably to infer that the Conflicts Committee members did not subjectively believe that the Merger was in the Partnership's best interests, which could be accomplished by showing either that they believed they were acting *against* the Partnership's best interests when approving the Merger or that they consciously disregarded their duty to form a subjective belief that the merger was in the Partnership's best interests.

With regard to how a plaintiff could plead a defendant's state of mind, the court determined that the Chancery Court was not correct in finding that the objective reasonableness of the Conflicts Committee's determination was not relevant to a subjective standard. The court cited to prior case law in finding that some actions may objectively be so egregiously unreasonable that they seem essentially inexplicable on any ground other than subjective bad faith. The court highlighted that it may also be reasonable to infer subjective bad faith in less egregious transactions when a plaintiff alleges objective facts indicating that a transaction was not in the best interests of the partnership and that the directors knew of those facts. Although distinct from an objective "reasonable person" standard, the court found that objective factors may inform an analysis of a defendant's subjective belief to the extent they bear on defendant's credibility when asserting that belief. In this case, plaintiff merely alleged facts that showed that the Conflicts Committee members may have negotiated poorly and that the counteroffer made by the Conflicts Committee was below the median of the investment banker's analysis but his claims did not permit a reasonable inference that they subjectively believed they were acting against the Partnership's best interests. The court also found that the complaint did not allege any facts from which the court could reasonably infer that the Conflicts Committee members consciously disregarded their contractual duty. In this regard, allegations that the Conflicts Committee should have made a higher counteroffer or negotiated better did not support a reasonable inference that they consciously disregarded a duty to form a subjective belief that the transaction was in the Partnership's best interests.

Finally, the court addressed plaintiff's claim that obtaining Special Approval could not insulate Vanguard from liability for causing the general partner to depress the value of the units in the Partnership in anticipation of the merger. The court found that plaintiff failed to state a claim against the Defendants because plaintiff's complaint only stated a single claim relating to the merger—not that these other actions constituted independent breaches.

e. *Gerber v. Enter. Holdings, LLC,* C.A. No. 5989 (Del. June 10, 2013)

This case involved the purchase in 2007 by Enterprise GP Holdings, L.P., a master limited partnership (the "Partnership"), of Texas Eastern Products Pipeline Company, LLC ("Teppco GP"), the general partner of Teppco Partners, LP ("Teppco LP"). In 2009, defendants caused the Partnership to sell Teppco GP to Enterprise Products Partners, L.P. ("Enterprise Products LP") (the "Transaction"), and then later on the same day caused the Partnership to sell Teppco LP to Enterprise Products LP in a separate transaction (the "Teppco LP Sale"). The consideration received by the Partnership for the 2009 Sale was only 9% of the Partnership's original purchase price. In 2010 the Partnership merged with another limited liability company ("MergeCo") and no longer exists (the "2010 Merger").

Plaintiff, a former limited partner of the Partnership and current holder of interests in the parent of MergeCo, challenged the Transaction and the 2010 Merger on behalf of the Partnership as unfair to the Partnership, claiming defendants breached fiduciary duties in approving the Transaction and the 2010 Merger. The limited partnership agreement of the Partnership (the "LPA") eliminated common law fiduciary duties of Enterprise Products Holdings, LLC, the general partner of the Partnership (the "General Partner"), and its board of directors, as permitted by Section 17-1101(d) of DRULPA. Under the LPA, a conflict of interest between the General Partner and the Partnership would be permitted, deemed approved by all partners of the Partnership, and not constitute a breach of the LPA or any duty if the course of action was approved by "Special Approval" of a majority of members of the Partnership's Audit and Conflicts Committee (the "Committee"). The Committee was a committee of the Board of Directors of the General Partner composed of three or more directors meeting the independence, qualification and experience requirements established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by the New York Stock Exchange (the "NYSE"). Further, a provision in the LPA created a "conclusive presumption" that the General Partner acted in "good faith" when acting or not acting in reliance upon an opinion of experts as to matters the General Partner reasonably believed were within the expert's professional or expert competence.

The Court of Chancery held that plaintiff failed to state a claim and granted defendants' motion to dismiss under Rule 12(b)(6). Plaintiff appealed and the Supreme Court of Delaware affirmed in part, reversed in part, and remanded.

The court held that the Court of Chancery erred in determining that the contractual "conclusive presumption" of good faith barred a claim under the implied covenant of good faith and fair dealing. The court adopted the Court of Chancery's reasoning in *ASB Allegiance Real Estate Fund v. Scion Breckenridge Mgmt. Member, LLC,* 50 A.3d 434

(Del. Ch. 2012), holding that the contractual duty of "good faith" looked to the parties as situated at the time of the wrong, while the implied covenant looks to the past and what the parties would have agreed to themselves if they had considered the issue at the time of contracting. Moreover, Section 17-1101(d) of DRULPA explicitly prohibits a provision in a partnership agreement that eliminates the implied covenant.

Because the conclusive presumption only applied to the contractual duty of good faith, and not the implied covenant, the court considered whether plaintiff pled sufficient facts that, if true, would establish the General Partner breached the implied covenant when approving the Transaction or the 2010 Merger. Although the Committee obtained a fairness opinion regarding the Transaction, the opinion did not address whether holders of the Partnership's limited partnership interests received fair consideration for their Teppco GP interest, but instead only addressed the total consideration paid in both the Transaction and the Teppco LP Sale. The court held that, had the parties addressed the issue when contracting, they would have agreed that a fairness opinion must address whether the consideration received specifically for Teppco GP was fair in order for the conclusive presumption to apply to approval of the Transaction.

The General Partner received a fairness opinion for the 2010 Merger as well. However, the Vice Chancellor held that the complaint pled that a principal purpose of the 2010 Merger was to terminate claims relating to the 2007 transaction and the Transaction, and the fairness opinion did not independently value these claims in assessing the fairness of the consideration. The court held that had the parties addressed the issue when contracting, they would have agreed that in order for the conclusive presumption to apply to approval of the 2010 Merger, a fairness opinion must address the value of derivative claims when terminating such claims was a principal purpose of the merger.

Although the conclusive presumption did not apply, if the General Partner satisfied the Special Approval process there would be no breach of the LPA. Because the Committee obtained a fairness opinion for the Transaction and for the 2010 Merger, the contractual duty of good faith was satisfied, but the implied covenant independently applied to the Special Approval process as well. The Court of Chancery held that the complaint sufficiently alleged that the General Partner selected the Special Approval process for the Transaction in bad faith in breach of the implied covenant because plaintiff would not have agreed that the Committee could rely on a flawed fairness opinion to grant Special Approval. That holding stands as law because defendants did not cross-appeal from that determination. The court similarly held that the limited partnership interest holders would not have agreed to allow the General Partner to terminate their interest through a merger intended to eliminate valuable claims without considering the value of such claims. The court held that with respect to both the Transaction and the 2010 Merger, the complaint stated a cognizable claim that the General Partner breached the implied covenant, and the Court of Chancery reversibly erred in dismissing the claims. The court remanded for the Court of Chancery to consider the secondary liability claims for tortious interference with contract rights and aiding and abetting the General Partner's breach of contract.

f. *Gerber v. Enter. Holdings, LLC, n/k/a Enter. Products Holdings, LLC,* C.A. No. 3543-VCN (Del. Ch. Jan. 18, 2013)

This case involved the purchase by Enterprise GP Holdings, L.P., a master limited partnership (the "Partnership"), of Texas Eastern Products Partners, LLC ("Teppco GP") from affiliates of Dan L. Duncan ("Duncan"), who indirectly owned the general partner (the "General Partner") of the Partnership and controlled the Partnership. In 2005, Duncan caused an affiliate of the General Partner to purchase Teppco GP. Twenty-seven months later, the Partnership purchased Teppco GP for the same purchase price but after certain assets worth almost half the transaction price were stripped and retained by Duncan (the "Transaction"). The Partnership later merged with another limited liability company ("MergeCo") and no longer exists. Defendants' motion to dismiss under Rule 12(b)(6) was granted because plaintiff failed to state a claim.

Plaintiff, a former limited partner of the Partnership and current holder of interests in the parent of MergeCo, challenged the Transaction on behalf of the Partnership as unfair to the Partnership, claiming the defendants breached fiduciary duties in approving the

Transaction. The limited partnership agreement of the Partnership (the "LPA") eliminated common law fiduciary duties of the General Partner and its board of directors, as permitted by Section 17-1101(d) of DRULPA. Under the LPA, a conflict of interest between the General Partner and the Partnership would be permitted, deemed approved by all partners of the Partnership, and not constitute a breach of the LPA or any duty if the course of action was approved by "Special Approval" of a majority of members of the Partnership's Audit and Conflicts Committee (the "Committee"). The Committee was a committee of the Board of Directors of the General Partner composed of three or more directors meeting the independence, qualification and experience requirements established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by the New York Stock Exchange (the "NYSE").

Plaintiff claimed the Committee failed to meet the LPA's independence standards under the NYSE's rules and regulations and failed to act in good faith in considering the Transaction. The NYSE Listed Company Manual provided that a director qualifies as independent if the board "affirmatively determines that the director has no material relationship with the listed company" and none of the disqualifying conditions apply. The court found that the Partnership made the affirmative determination required and that none of the disqualifying conditions applied, and, therefore, the NYSE Listed Company Manual requirements were satisfied. It did not matter that members of the Committee owned units in limited partnerships controlled by Duncan because the NYSE Listed Company Manual explicitly provided that ownership of stock does not, by itself, bar an independence finding.

Plaintiff further contended that the Committee failed to act in good faith in considering the Transaction. The LPA eliminated common law fiduciary duties and contained a specific mechanism for resolving conflicts of interest—approval by a majority of the members of the Committee—which did not include an express duty to act in good faith. The court found that, even if a separate provision in the LPA requiring good faith applied, the Committee did not violate such duty. The LPA defined "good faith" as a belief "that the determination or other action is in the best interests of the Partnership." Courts have interpreted similar language to mean the actor subjectively believed the act was in the best interests of the limited partnership, requiring a complaint to allege defendants had a subjective belief that the act was not in the best interests of the limited partnership. The inquiry focuses on conduct evidencing an "intent to harm the company." The court held that a run-up in the price of Teppco GP over more than a 2-year period alone was not sufficient to trigger a reasonable inference that defendants lacked a subjective belief that the Transaction was in the Partnership's best interests, and the court would not "speculate or guess as to whether the price paid was appropriate under market conditions at the time." Because the Transaction was granted Special Approval, the defendants satisfied their express obligations under the LPA and plaintiff failed to state a claim.

The court also considered whether defendants breached the implied covenant of good faith and fair dealing, which a limited partnership agreement cannot contractually eliminate pursuant to Section 17-1101(d) of DRULPA. The court held that, because the LPA did not require consideration of any particular factors in granting Special Approval, exculpated defendants from liability absent bad faith, fraud, willful misconduct, or knowledge that conduct was criminal, and expressly waived fiduciary duties, a judicially-imposed requirement that Special Approval be objectively fair and reasonable could not be read into or reconciled with the LPA's framework. Plaintiff's claim against other defendants for aiding and abetting a breach of fiduciary duty similarly failed because plaintiff failed to state a claim for breach of fiduciary duty.

Defendants also challenged plaintiff's standing to bring the claims because plaintiff did not make a demand on the General Partner to bring the action. Although the court found that plaintiff's claims failed to state a claim and, therefore, should be dismissed, it also addressed defendants' claim that plaintiff lacked standing because he failed to make a pre-suit demand, noting that standing is a threshold question. The court looked to the corporate law test found in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), for determining whether a claim is direct or derivative, which asks (1) who suffered the alleged harm and (2) who would receive the benefit of the recovery or remedy. The court noted the difficulties of applying corporate law derivative rules to partnership-related claims, but nonetheless applied the established principles of the *Tooley* analysis. The court determined that all of plaintiff's claims were derivative. In a derivative action, Section 17-1003 of DRULPA requires a complaint set forth with particularity plaintiff's efforts to secure initiation of the action by the general partner or the reasons for not making such efforts. Plaintiff claimed that the Partnership paid too much for Teppco GP and thus, if successful, any recovery would be paid to the Partnership, or MergeCo as the Partnership's successor. Plaintiff claimed that the General Partner was controlled by Duncan's interests and therefore could not have independently and fairly assessed whether to pursue the action. Although the General Partner acts through its board of directors, because DRULPA refers to the general partner of the limited partnership and not to the general partner's governing body, the General Partner's independent board would not overcome Duncan's control over the General Partner for purposes of determining whether demand was futile. Therefore, the court held that demand was excused and plaintiff had standing to bring the action.

g. *In re Encore Energy Partners LP Unitholder Litig.,* C.A. No. 6347-VCP (Del. Ch. Aug. 31, 2012)

This case involved a class action by former unitholders of Encore Energy Partners LP (the "Partnership") who challenged the use of a "Special Approval" process that was employed by the general partner of the Partnership to approve a conflict transaction pursuant to which Vanguard Natural Resources, LLC ("Vanguard") acquired all of the outstanding common units of the Partnership in a unit-for-unit exchange (the "Merger"), where Vanguard's indirect subsidiary was the Partnership's general partner. Plaintiffs argued that the general partner of the Partnership, its board of directors and Vanguard breached their duties under the partnership agreement by proposing, approving and consummating the Merger. The defendants moved to dismiss.

In its analysis, the court first addressed what duties were owed by the defendants. The court referred to the partnership agreement of the Partnership, which essentially provided that none of the defendants had any duties or liabilities, including fiduciary duties, to the Partnership or any limited partner except as expressly set forth in the partnership agreement. The partnership agreement expressly provided that any actions taken by the general partner or any of its affiliates shall be made in "good faith." Thus, the court found that the defendants owed a contractual duty of good faith. However, the court also noted a specific mechanism in the partnership agreement for resolution of conflict transactions, which provided in relevant part that in the event there was a potential conflict of interest, any course of action by the general partner or its affiliates would be permitted and deemed approved by all partners, and would not constitute a breach of the partnership agreement or of any duty stated or implied by law or equity, if the course of action in respect of such conflict of interest was approved by "Special Approval." "Special Approval" was defined in the partnership agreement as "approval by a majority of the members of the Conflicts Committee acting in good faith." In turn, "good faith" was defined to require that the person taking the action "believe that the determination or other action is in the best interests of the Partnership." Based on prior cases, the court interpreted this language as requiring plaintiffs to allege facts from which one could reasonably infer that the defendants subjectively believed that they were acting against the Partnership's interests. The court held that because the alleged wrongdoing related to the conflicted transaction—the Merger—and the partnership agreement provided a mechanism for approving a conflicted transaction, a determination that the Merger received valid Special Approval would compel a finding that no defendant breached the partnership agreement. Thus, the relevant question was whether the conflicts committed approved the Merger acting in subjective good faith.

The complaint alleged facts essentially in support of an argument that the conflicts committee was an ineffectual negotiator and did not get a good price for the units in the Partnership. Although the court acknowledged that the complaint alleged that the conflicts committee ran a "shoddy negotiation process," the court found that it did not allege sufficient facts from which one could reasonably infer that the conflicts committee subjectively believed they were acting contrary to the Partnership's interests by approving the Merger. In its finding, the court highlighted that the conflicts committee retained and relied on the advice of independent legal counsel and a competent financial advisor before approving the final merger agreement. On these basis, the court found that the approval by the conflicts committee of the Merger satisfied the definition of "good faith," thus immunizing the defendants' actions from challenge under the terms of the partnership agreement.

The court next turned to plaintiffs' claim that the defendants violated the implied covenant and that plaintiffs' allegations of ineffective bargaining demonstrated that the conflicts committee did not exercise its discretion in good faith in conducting negotiations with Vanguard. The court noted that although the plaintiffs were correct that the defendants' discretionary use of Special Approval implicated the implied covenant, the plaintiffs incorrectly suggested that the implied covenant required a duty of objective fairness or effectiveness. The court indicated that, to have a successful claim, the plaintiffs would have to demonstrate that the allegedly "feckless" negotiations frustrated the fruits of the bargain that the parties reasonably expected. The court held that it could not infer from the terms of the partnership agreement that the use of Special Approval would be conditioned on achieving an objectively "fair and reasonable" value for plaintiffs' units.

The court also found an alternative and independent reason why the plaintiffs did not state a valid claim under the implied covenant. The court noted that the implied covenant would only apply to the general partner of the Partnership, which was the party to the agreement, and the general partner was given an express right under the partnership agreement to rely on the opinions of investment bankers. The court held that it could reasonably be inferred that the general partner relied on the fairness opinion provided by the investment bankers engaged by the conflict committee.

h. *In re Cencom Cable Income Partners, L.P. Litig.*, C.A. No. 14634 (Del. Ch. Feb. 15, 1996), (Del. Ch. Oct. 15, 1997, *amend. and reh'g denied*, Del. Ch. Nov. 26, 1997), (Del. Ch. May 5, 2000), (Del. Ch. Nov. 26, 2008), (June 6, 2011) and (May 24, 2012), *aff'd* (Del. July 31, 2012).

Plaintiff limited partner claimed the general partner breached its fiduciary duty to the partnership by electing to purchase the assets of the partnership upon the liquidation of the partnership under the terms of an appraisal process in the limited partnership agreement. The court, in denying the plaintiff's motion to enjoin the sale, held that the general partner's actions were not a breach of its fiduciary duty because the parties to a limited partnership agreement, which is primarily contractual in nature, are permitted to expressly modify traditional concepts of fiduciary duty by allowing the fiduciary to deal directly with the limited partnership and to define the parameters of due care within the structure of the partnership.

In a later ruling in the Cencom case on the general partner's motion for summary judgment, the court dismissed the limited partners' claim that the general partner was obligated to fulfill a common-law fiduciary duty, beyond the bargained-for terms of the partnership agreement, showing the "entire fairness" of the sale of the partnership's assets to the general partner, stating that it would not subject the sale process set forth in the partnership agreement to "some court-approved, after-the-fact, moralistic 'entirely-fair' standard, when the parties defined the desired process in the Partnership Agreement." The court denied a subsequent motion by plaintiffs to alter, amend or reconsider the decision based on the alleged failure of the court to address certain of the plaintiffs' claims. The court found no clear error of law in its decision and concluded that it had not overlooked a controlling principle of law or misapprehended the law or material facts.

In a further proceeding in the Cencom case, the general partner again moved for summary judgment with respect to the claims that (i) it breached its voluntary, contractually assumed fiduciary duty to assure the fairness of the sale, (ii) it did not have the authority to terminate certain distributions to the limited partners and (iii) it breached its fiduciary duties of loyalty and candor in connection with the appraisals of the partnership's assets. The court granted the general partner's motion with respect to one sub-issue of the breach of fiduciary duties of loyalty and candor claim, holding that the general partner had supplied equal information to each appraiser. Because the court found that genuine issues of material fact existed with respect to the other claims at issue, the court denied the remaining parts of the general partner's motion for summary judgment.

In its fourth opinion in the Cencom case, the court considered the general partner's motion for summary judgment on the three claims that remained after the prior proceedings and the limited partner's cross-motion for partial summary judgment on the claim with respect to the termination of distributions. As to the claim with respect to the scope and potential breach of the general partner's voluntarily-assumed duty in confirming the fairness of the sale, the general partner argued that the limited partner's rights to enforce such a duty were based in promissory estoppel, making lack of reliance by the limited partner fatal to its claim. The court rejected the general partner's promissory estoppel argument, with its basis in contractual principles, given that the duty voluntarily assumed by the general partner was a common law fiduciary duty and therefore denied the motion for summary judgment. The general partner also advanced a new argument with respect to the claim arising from its termination of distributions prior to the closing of the sale, namely, that the cash held by the partnership between the effective date of the sale and the closing date of the sale was for the benefit of the purchasers and not available for distribution. Because title to the partnership's assets was not transferred until the closing date, the court rejected this argument and denied summary judgment to the general partner. The court noted, however, that in a trial it could be determined that the interest paid on the purchase price between the effective date and the closing date compensated the limited partner for the loss of the distribution, rendering it unable to prove damages. (The court also rejected the limited partner's cross-motion for summary judgment on this claim, deeming it the equivalent of a motion to reconsider.) On the third claim relating to the appraisal of the partnership's assets, the court as it had in the two prior proceedings found the record inadequate to support summary judgment on the question of the valuation of the assets individually or in the aggregate. In addition, the court denied summary judgment on the general partner's newly advanced argument that because the purchase price exceeded the value of the assets regardless of the method of calculation, the limited partner was without damages, stating it to be a question of fact not law. Finally, the disclosure issue with respect to the appraisal claim was split into the sub-issues of whether the general partner's presentation of the appraisals conformed to standard techniques and whether such presentation adequately disclosed all material facts, with the court granting summary judgment to the general partner on the first, but not the second.

In a post-trial opinion in this case, the court addressed plaintiffs' claims that (i) defendants breached their voluntarily assumed duty that a law firm would assure the fairness of the sale, (ii) the general partner breached the partnership agreement by terminating priority distributions before the termination of the partnership and (iii) defendants breached the partnership agreement and their fiduciary duties by driving the valuation process to an appraisal of the assets of the partnership individually without properly including the synergistic benefits of the assets. In analyzing plaintiffs' first claim, the court stated that substantive rights of the limited partners are determined by reference to the provisions of the partnership agreement and that one sentence in a disclosure statement stating that a law firm would assure that the dissolution process would be "fair" should not change those rights. The court found that no reasonable limited partner would believe that its rights were being expanded beyond those included in the partnership agreement by reason of that one sentence. The court thus declined to apply an "entire fairness" standard to the sale process and held that defendants complied with their duties under the partnership agreement as regards the sale. With respect to plaintiffs' arguments regarding the premature termination of the priority distributions, the court noted that the partnership agreement did in fact provide for those payments to be made until the termination of the partnership agreement. The effective date of the sale of the partnership's assets to the general partner was July 1, 1995, but the closing of the sale (and resulting termination of the partnership) did not take place until January of 1996. The disclosure statement was abundantly clear, however, that the last priority distribution would be made in August, 1995 and that in place of those distributions, the limited partners would receive interest payments on the sale proceeds from the effective date until closing. The court held that by approving the sale, the limited partners demonstrated their agreement with that approach and had through acquiescence and/or waiver relinquished their rights to the priority distributions. The court further determined that the interest payments received by the limited partners were greater than the priority distributions the limited partners would have received so that even if plaintiffs' position had been correct, plaintiffs would not have been damaged. Finally, as to plaintiffs' arguments regarding the valuation of the partnership's assets, the court found that the appraisal process had been conducted in compliance with the standards set forth under the partnership agreement. Thus, the court entered judgment in favor of defendants and dismissed this action.

Following an appeal of court's post-trial opinion, the Delaware Supreme Court remanded the case to the court with directions to answer the following questions: (1) since there was no amendment to the partnership agreement, on what legally authorized basis could the sale transaction have been structured to preclude limited partners from receiving quarterly distributions without the consent of all limited partners; and (2) if the partnership agreement gave all limited partners a contract right to quarterly distributions that was indefeasible without their consent, why, as a matter of contract or statutory law, would the non-consenting limited partners not be entitled to receive both interest payments and quarterly distributions during the period between the effective date of the sale and the termination of the partnership.

With respect to the first question, the court noted that the partnership agreement conferred upon the general partner the right to determine the terms of any sale of the assets of the partnership as part of partnership's liquidation process. Based on this authority, the court found that the manner in which the general partner structured the sale transaction was within its discretion. Further, the sale transaction was subject to approval by a majority of the limited partners, which approval was knowingly and voluntarily given by such majority. The court noted that the right to quarterly distributions could not be terminated without a unanimous vote to amend the partnership agreement, but found that such right was not terminated. Rather, following the sale transaction, the partnership had no cash available to pay these distributions because the sale transaction was structured to provide the purchasing affiliates with the operating income from the assets subject to the sale transaction from and after the effective date of the sale, which left the partnership with no cash to make the required distributions.

With respect to the second question, the court found that pursuant to the terms of the sale transaction, the partnership surrendered its rights to operating income generated from the assets it sold, but in lieu of quarterly distributions, the purchasing affiliates agreed to make interest payments to the limited partners. According to the court, these covenants were mutual and could not be separated because the purchasing affiliates' promise to make interest payments to the limited partners was in consideration for their right to receive operating income from the purchased assets. The court held that even if the failure to make quarterly distributions was a breach of the partnership agreement, that would still not support double payment to the limited partners -- payment of interest and quarterly distributions to limited partners -- because the limited partners' entitlement to damages would be limited to damages that would put them in the "same place as . . . [they] would have been if the contract had been performed."

i. *Brinckerhoff v. Enbridge Energy Co., Inc.*, C.A. No. 5526-VCN (Del. Ch. Sept. 30, 2011) and (Del. Ch. May 25, 2012)

This case involved a challenge to a transaction between Enbridge Energy Partners, L.P. (the "Partnership") and Enbridge, Inc. ("Enbridge"), the entity that controlled the Partnership's general partner. The case was before the Court of Chancery on a motion to dismiss and, finding that the partnership agreement of the Partnership effectively shielded the general partner and its affiliates from liability for an interested transaction as long as they acted in good faith and finding that plaintiff had not alleged actions constituting bad faith on the part of any defendant, the court dismissed all of the claims. The challenged transaction was a joint venture between the Partnership and Enbridge involving the construction and operation of a pipeline which the Partnership had originally conceived. After the Partnership had taken various steps to advance the project including negotiating and obtaining permits and tariff agreements, Enbridge approached the Partnership to discuss obtaining an interest in the project through a joint venture. Enbridge proposed that it would contribute to the cost of the project and that the Partnership and Enbridge would share in the project's profits based solely upon their relative capital contributions. Thus, under Enbridge's proposal, the Partnership would not receive any compensation in return for already owning the project, the work it had already put into it and the money it had already expended. Enbridge suggested that it would contribute 75% of the cost of the project and the Partnership would contribute 25% and so the project would be owned in these proportions. After receiving this proposal, the Partnership's general partner formed a special committee consisting of three independent members of the general partner's board. The special committee was asked to determine whether the joint venture was "fair and reasonable to the Partnership and its unitholders" and to make a recommendation to the board on behalf of the Partnership with respect to the proposed transaction. The special committee hired legal and financial advisors. Its banker's retainer letter stated that it was retained to render an opinion as to whether the terms of the joint venture were "representative of an arm's length transaction." The special committee met several times and was advised by its banker that the terms of the joint venture were "representative, in all material respects, of those that would have been obtained by the Partnership in an arm's length transaction." The banker also opined that the Partnership should retain as much equity in the project as possible. In light of the banker's findings, the special committee approved the joint venture agreement, provided that the Partnership would hold a 1/3 equity stake rather than 25%. Plaintiff challenged the transaction on four counts, both derivatively and directly. Count one alleged that defendants breached their express and implied duties under the partnership agreement by causing the Partnership to enter into an agreement that was financially unfair to the Partnership. Count two alleged that defendants other than the general partner aided and abetted the general partner's breach of its duties. Count three alleged that defendants breached the implied covenant of good faith and fair dealing, and Count four alleged that two defendants, to the extent they were not liable for breaching their duties under the partnership agreement, tortiously interfered with the partnership agreement and were thereby unjustly enriched. Defendants responded that the partnership agreement expressly permitted the general partner to enter into a transaction with a related entity, such as Enbridge, as long as the terms of that transaction were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties." Defendants argued that the joint venture met that standard, that their investment banker opined that the joint venture was representative of an arm's length transaction and further that under the partnership agreement, the general partner was allowed to rely conclusively on the banker's opinion. Defendants further argued that there was no cause of action for aiding and abetting a breach of contractually imposed duties, that the implied covenant of good faith and fair dealing was inapplicable because the partnership agreement expressly addressed the duties of defendants and, finally, since none of defendants breached their duties under the partnership agreement, there could be no tortious interference claim. In its analysis, the court first concluded that the Tooley test should apply to a partnership claim and that under that test, because any benefit would go to the partnership rather than to the individual partners, the claims were derivative in nature. However, the court also concluded that a demand would have been futile since a majority of the general partner's board was not independent. Turning to the specific claims, the court first held that defendant who supplied all the employees to the general partner and the Partnership but had no control over the general partner or the Partnership owed no fiduciary duties to those entities. The court therefore dismissed all claims against that entity. In analyzing the remaining claims, the court focused on the provisions of the partnership agreement that permitted related party transactions as long as they were on terms "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties," that provided that no Indemnitee (which included all defendants) would have any liability to any partner or other person as a result of any act or omission if such Indemnitee acted in good faith and that authorized the general partner to rely on investment bankers as to matters that the general partner reasonably believed to be within their professional or expert competence and provided that any action taken by the general partner in reliance on their advice would be conclusively presumed to have been done in good faith. Based on these provisions and the facts alleged, the court concluded that plaintiff had not alleged facts indicating bad faith. The general partner was protected through its good faith reliance on the investment banker's finding. Similarly, the court also found plaintiff had failed to plead facts indicating that the general partner's board acted in bad faith. They established an independent committee, hired independent counsel and bankers, met several times and negotiated a higher percentage participation for the Partnership than that which was originally offered.

With regard to plaintiffs' challenge to the work of the banker, the court noted that the valuation methodology and comparable transaction analyses that an investment banker undertakes are properly within the discretion of the banker. The court also noted that at the time of the joint venture it would be reasonable for the general partner's board to conclude that it did not want to put a large majority of the Partnership's capital into a single venture and thus it was better to participate in the project with Enbridge. With regard to Enbridge, the court held that it could not have been said to have negotiated in bad faith since it negotiated with the general partner's special committee. The court then noted that claims for aiding and abetting, as well as tortious interference, require an underlying breach. As there was none, these claims were also dismissed. Finally, the court rejected plaintiff's implied covenant claim finding that, even if it were possible to plead breach of the implied covenant where a plaintiff had failed to plead a bad faith claim, plaintiff had failed to do so here. In this regard, the court noted that the implied covenant addresses "only events that could not reasonably have been anticipated at the time the parties contracted." In contrast, the court found that the parties to the partnership agreement thought about related party transactions and the general partner's reliance upon investment banker opinions and explicitly addressed those issues.

On remand by order of the Delaware Supreme Court to determine the sufficiency of the plaintiff's claims for reformation or rescission on a motion to dismiss, the Court of Chancery first concluded that the plaintiff's request for reformation or rescission was waived because the plaintiff failed to raise any arguments with respect to either remedy in his briefs or at oral arguments. Nevertheless, because of uncertainty surrounding the scope of the remand order, the Court of Chancery also addressed the substance of the plaintiff's claim for reformation or rescission.

Turning to the plaintiff's claim for reformation, the court found that the plaintiff stated a claim that was potentially remediable through reformation. The partnership agreement permitted conflicted transactions that were "fair and reasonable" to the Partnership, and the partnership agreement deemed transactions that were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties" to be fair and reasonable. The court noted that it has previously interpreted similar language to require something akin, if not equivalent to, entire fairness review. Because the entire fairness standard cannot be satisfied by reliance on an investment banker's opinion on a motion to dismiss, the court concluded that the plaintiff had adequately plead that the joint venture was not fair to the Partnership.

The court noted, however, that the reformation that the plaintiff sought—a reduction in Enbridge's share in the joint venture—was rarely sought and obtained. The court expressed hesitation because, by reducing Enbridge's share in the joint venture, the reformation remedy sought would reduce the cash flow Enbridge would receive and essentially redirect it to the Partnership, a result the court likened to garnishment. Despite its misgivings, the court concluded that because the partnership agreement only provided exculpation against money damages, and because the plaintiff adequately plead entitlement to an equitable remedy, the plaintiff's claim for reformation should survive a motion to dismiss.

Next, the court held that the plaintiff had not stated a claim for rescission. The court noted that the plaintiff made no arguments in favor of rescission and its counsel conceded at oral argument that reformation was the crux of this remand. In addition, the court found that the plaintiff failed to meet its burden of demonstrating that all parties to the transaction could be restored to the positions they occupied prior to the transaction. The plaintiff offered no explanation regarding how the court could rescind a joint venture agreement to construct a pipeline once such construction was complete. The court therefore dismissed the plaintiff's claim for rescission.

j. *Dawson v. Pittco Capital Partners, L.P.,* C.A. No. 3148-VCN (Del. Ch. Apr. 30, 2012)

Plaintiffs ("Plaintiffs") were minority holders of preferred membership interests (the "Preferred Interests") in LaneScan, LLC, a Delaware limited liability company ("LaneScan"), who brought various claims related to a merger (the "Merger") by LaneScan with Vehicle Safety and Compliance, LLC ("VSAC"), pursuant to which their Preferred

Interests were severely diluted. Plaintiffs also held secured notes in LaneScan (the "Notes"). Defendants consisted of other preferred members of LaneScan (the "Investor Defendants") and directors appointed by such members (the "Director Defendants" and together with the Investor Defendants, "Defendants"). The Merger was proposed to the members of LaneScan by a letter (the "Letter") which explained LaneScan's dire financial circumstances and included a written consent to be executed by the members consenting to the Merger (the "Consent"). The Letter also stated that each LaneScan member would be required to contribute their Notes to VSAC (the "Compelled Contribution"). Further, the Consent included an amendment to the LLC agreement of LaneScan whereby the Return of Capital Provision (as defined below) would be eliminated in its entirety (the "Amendment"). The Director Defendants and the Investor Defendants, consisting of a majority of the board members and a majority of the holders of the Preferred Interests, as required under the terms of the LLC agreement of LaneScan, approved the Merger and, in connection therewith, the Compelled Contribution and the Amendment. Plaintiffs (1) claimed that Defendants did not have the power to effect the Compelled Contribution, (2) claimed that Defendants breached the LLC agreement of LaneScan in adopting the Amendment and breached certain duties to Plaintiffs in adopting the Amendment and approving the Compelled Contribution and (3) brought intentional misconduct and gross negligence claims relating to the Merger, the Compelled Contribution and the Amendment. It is important to note with respect to all of these claims that the court found that Defendants' motivation in approving the Merger, the Amendment and the Compelled Contribution was to salvage value from LaneScan, which according to the court, may have become insolvent if the Merger was not consummated.

Before addressing each of the foregoing claims by Plaintiffs, the court first rejected Plaintiffs' claim that the Investor Defendants constituted a control group, which could result in the Investor Defendants owing fiduciary duties to the minority equity holders of LaneScan. The court noted that a number of equity holders can collectively form a control group where those equity holders are connected in some legally significant way—e.g., by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal, but found that Plaintiffs had not proven there was a legally significant connection between the Investor Defendants sufficient to establish a control group.

With respect to the Notes, Plaintiffs argued that Defendants did not have the power to effect the Compelled Contribution. Defendants countered that the Compelled Contribution could be effected in connection with the Merger without regard as to whether that power was express in the LLC agreement because a Merger may eliminate "vested rights" of equity holders of pre-merger entities, including those rights in the nature of debt. The court indicated that the cases cited by Defendants for this argument all involved rights related to equity interests (e.g., voting, options, preferences and dividends). The court said that parties to contracts are free to provide that contractual rights and obligations will not survive a merger, but they must do so in "clear and unambiguous terms." The court held that Plaintiffs had two separate relationships with LaneScan, one as holders of Preferred Interests and another as holders of the Notes, and that the Notes conferred a separate set of rights from those related to the Preferred Interests. The court found that neither the LLC agreement of LaneScan nor the Notes stated in "clear and unambiguous terms" that the Notes could be eliminated in connection with a merger. Although the Director Defendants argued that the LLC agreement of LaneScan gave them broad authority to manage LaneScan, the court found that such grant of broad authority did not constitute "clear and unambiguous" authority to eliminate the Notes. Similarly, the court found that a drag-along provision requiring members to "execute all documents containing the same terms and conditions as those executed by holders of Preferred Interests and as reasonably directed" in connection with a "Company Sale" (and Plaintiffs conceded that the Merger was a Company Sale) also was not "clear and unambiguous" so as to permit the Compelled Contribution. Defendants lastly argued with respect to the Notes that the Compelled Contribution was appropriate and permissible because LaneScan was approaching insolvency and the Notes would not have had any value if the Merger was not consummated. The court found that while this argument may be relevant in a fiduciary duty context, a company's financial distress does not grant its directors and owners powers they do not otherwise possess. Accordingly, the court granted Plaintiffs' request for a declaratory judgment that the Notes remain valid, enforceable and outstanding following the Merger.

The court next turned to the Amendment, which removed a provision providing in relevant part that "[n]otwithstanding anything to the contrary" in the LLC agreement of LaneScan, in the event of a Company Sale, the buyer shall cause LaneScan to distribute in cash to the holders of Preferred Interests an amount equal to their unreturned capital contribution (the "Return of Capital Provision"). The amendment provision of the LLC agreement provides that the LLC agreement could be amended by written instrument adopted by a majority of the board of directors of LaneScan (the "Amendment Provision"). Plaintiffs argued that Defendants breached the LLC agreement of LaneScan by eliminating the Return of Capital Provision in adopting the Amendment, essentially arguing that, because of the "notwithstanding" language in the Return of Capital Provision, the Amendment Provision did not apply to the Return of Capital Provision. The court held that this claim failed because the Amendment Provision was not inconsistent with the Return of Capital Provision and thus the board had the authority to amend the Return of Capital Provision pursuant to the Amendment Provision. Plaintiffs further argued that Defendants breached the implied covenant of good faith and fair dealing by adopting the Amendment. In citing prior implied covenant cases, the court stated that the implied covenant requires contracting parties to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to a contract from receiving the fruits of the bargain. The court indicated that even discretionary rights must be exercised in good faith. Further, the court mentioned that the implied covenant also acts to import terms into a contract to analyze unanticipated developments or to fill gaps. However, if the contract speaks directly to an issue in dispute, the court noted that the contract terms would control and the implied covenant would not apply. The court found that in this case there was no gap to fill in that the Amendment Provision granted broad power to the board to amend the LLC agreement of LaneScan. The court found that Plaintiffs' bad faith claim also failed because the directors were motivated to approve the Merger, the Amendment and the Compelled Contribution by the threat of LaneScan's insolvency.

The court next addressed Plaintiffs' claims that Defendants committed intentional misconduct in consenting to the Merger, the Compelled Contribution and the Amendment and that the Director Defendants were grossly negligent in approving the Merger. With respect to these claims, the court first assessed whether Defendants had any such duties. The LLC agreement of LaneScan provided that "[n]o Member, Director or Officer shall have any duty to any Member or [LaneScan], except as expressly set forth herein . . . . Except as expressly set forth herein . . . no Member, Director or Officer of [LaneScan] shall be liable to [LaneScan] or to any Member for any loss or damage sustained by [LaneScan] or any Member, unless the loss or damage shall have been the result of gross negligence, fraud or intentional misconduct of such Member, Director or Officer . . . ." The court referred to the *Fisk Ventures v. Segal*, C.A. No. 3017-CC (Del. Ch. May 7, 2008), case, which involved similar provisions, and found that the first sentence eliminated all duties that could be eliminated under the LLC Act and that the second sentence would apply only if other provisions in the LLC agreement created fiduciary or contractual duties, but the second sentence did not operate so as to create any duties. Thus, the court indicated, the second sentence was a "just in case" measure. In any case, the court found that even if Defendants were subject to a duty not to act with gross negligence and to refrain from intentional misconduct, those claims would fail because Plaintiffs did not properly plead a gross negligence claim and because intentional misconduct requires an examination of Defendants' state of mind and even assuming Defendants were conflicted and the deal process fell short of best practices, this was not direct proof of intentional misconduct. As noted above, the court found that Defendants' motivation for the Merger, the Amendment and the Compelled Contribution was to salvage value for LaneScan. Plaintiffs also brought fiduciary duty claims against an officer of LaneScan. However, although a provision in the LLC agreement of LaneScan expressly provided that the officers owed certain duties to LaneScan, the court found that those duties were owed to LaneScan only and not to the holders of Preferred Interests. Because Plaintiffs did not bring any derivative claims, these claims also failed.

Lastly, the court addressed Defendants' argument that the doctrine of laches should deny all of Plaintiffs' claims. The court stated that to prevail on this argument the court must find (i) that a plaintiff had knowledge of a claim, (ii) that the plaintiff had unreasonably delayed in bringing the claim and (iii) that prejudice resulted. Because Defendants failed to demonstrate any prejudice, the court denied Defendants' request.

k. *In re K-Sea Trans. Partners L.P. Unitholders Litig.*, C.A. No. 6301-VCP (Del. Ch. June 10, 2011) and (Del. Ch. Apr. 4, 2012)

Plaintiffs, holders of common units in K-Sea Transportation Partners L.P. ("K-Sea"), moved to expedite discovery in their application for an injunction to escrow a portion of the consideration to be paid in connection with a merger in which K-Sea would be acquired for cash or a mix of cash and the acquirer's stock. The court noted that a motion to expedite should be granted only if the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury to justify imposing on defendants and the public the extra costs of an expedited proceeding. After reviewing each of plaintiffs' claims, the court concluded that although the complaint asserted at least one sufficiently colorable claim, plaintiffs failed to demonstrate a sufficient threat of irreparable harm.

In late 2010, representatives of K-Sea and the acquirer, Kirby Corporation, met to discuss a potential strategic transaction. Because K-Sea sought an offer that specifically accounted for the controlling interest and incentive distribution rights ("IDRs") of K-Sea's general partner, K-Sea's board of directors (the "Board") submitted the proposed transaction for "Special Approval" by the K-Sea conflicts committee (the "Committee") pursuant to the terms of the K-Sea partnership agreement. After consulting with financial and legal advisors, the Committee gave the transaction "Special Approval" and the Board followed with its own approval. A majority of K-Sea unitholders then entered into support agreements pursuant to which they agreed to vote in favor of the transaction.

Non-employee, independent directors comprised the Committee. Shortly before negotiation of the transaction at issue commenced in late 2010, the Board approved a grant of 15,000 phantom common units to each member of the Committee. The phantom units, which were set to vest over a period of five years, vested immediately in the case of a change in control.

In support of their motion to expedite, plaintiffs made three primary arguments. First, plaintiffs argued that the Committee had a duty to consider, in isolation, the fairness of the portion of the transaction consideration that accounted for the IDRs. Defendants countered that the Committee only had to consider the fairness of the transaction as a whole. The K-Sea partnership agreement required resolution of conflicts to be "fair and reasonable" and "Special Approval" by the Committee was conclusively deemed under the K-Sea partnership agreement to be fair and reasonable so long as K-Sea's general partner disclosed all known material facts to the Committee.

The court concluded that plaintiffs failed to allege facts sufficient to state a colorable claim that the Committee had a duty to consider the fairness of the transaction other than with respect to the transaction as the whole. In support of its conclusion, the court noted that plaintiffs failed to allege a failure to disclose any material facts on the part of the general partner and that the actions of the Committee went above and beyond the requirements of the K-Sea partnership agreement, the Committee having obtained a fairness opinion from its financial advisor. The court also found that plaintiffs failed to present a convincing argument that the K-Sea partnership agreement required the Committee to consider anything other than the fairness of the transaction as a whole.

Second, plaintiffs argued that the Committee members lacked independence because the phantom units granted to such members would vest in the event of a change of control transaction thereby increasing the incentive to provide "Special Approval." Defendants, on the other hand, argued that the vesting of the phantom units aligned the interests of Committee members and common unitholders in obtaining the best price. The court concluded that plaintiffs had stated at least a colorable claim in this instance. In doing so, the court distinguished prior precedent stating that the vesting of options aligns the interests of shareholders and directors in obtaining the highest price. First, the court noted, because the number of phantom units, upon vesting, nearly doubled the number of common units already held by the Committee members, it was possible that the prospect of the immediate vesting of the phantom units may have biased the Committee. Moreover, the court concluded, the timing of the phantom units grant supported an inference that it was made with intent to influence the Committee.

Third, plaintiffs contended that disclosures provided to common unitholders in the relevant registration statement were materially misleading. Preliminarily, plaintiffs argued that the K-Sea partnership agreement did not modify defendants' traditional duty of disclosure. The court, however, rejected this preliminary argument, noting that the K-Sea LP agreement set forth a procedure for merger approval that included provision to the common unitholders of a copy or summary of the merger agreement along with notice of the special meeting or written consent. The court read this provision as reflecting the parties' intent to preempt traditional fiduciary duties of disclosure. Moreover, the court found that even if a traditional duty of disclosure had applied, plaintiffs had not demonstrated that the disclosures about which they complained were misleading.

Because plaintiffs stated at least one colorable claim, the court then turned to whether plaintiffs had demonstrated that they would suffer irreparable harm if expedition was not granted. The court concluded that plaintiffs had not. In doing so, the court found that plaintiffs had not refuted defendants' argument that money damages would be sufficient. First, the court noted its reluctance to enjoin a premium transaction where there was no superior bid and stated that money damages repeatedly have been held to be sufficient to remedy a claim of inadequate transaction price. With these points in mind, the court concluded that because no other offers were reasonably available to K-Sea and because plaintiffs claim focused on the portion of the transaction consideration allocated to the IDRs, money damages were an adequate remedy.

The court also rejected plaintiffs' argument that they were at risk of irreparable harm because nearly all of the economic interest in K-Sea's general partner and the IDRs was owned by single-purpose entities that would essentially be judgment-proof after consummation of the transaction at issue. The court concluded that plaintiffs' claims were too speculative and unsupported by facts that could lead to a reasonable inference that no defendant or those associated with them could satisfy a judgment.

In a subsequent decision pertaining to K-Sea's merger with Kirby Corporation, the Court of Chancery addressed the defendants' motion to dismiss the plaintiffs' complaint. The court first turned to the plaintiffs' claims that the Committee, the Board, K-Sea's general partner and the general partner of K-Sea's general partner breached their fiduciary duties and the K-Sea partnership agreement by approving the merger without evaluating the fairness or reasonableness of the payment for the IDRs and by relying on the "Special Approval" of the Committee, which was comprised of members who improperly held phantom units.

The court noted that the exculpation provisions of the K-Sea partnership agreement required the plaintiffs to demonstrate both that the defendants had breached the K-Sea partnership agreement or their fiduciary duties and, in doing so, acted in bad faith. Turning to the provisions of the K-Sea partnership agreement pertaining to mergers to determine what duties were owed, the court found that the agreement established only one contractual duty with respect to mergers: that K-Sea's general partner must exercise its discretion. The K-Sea partnership agreement permitted K-Sea's general partner to consider whatever factors it chose in exercising its discretion and imposed no requirement to determine that a merger be fair and reasonable. The court further noted that the K-Sea partnership agreement displaced traditional fiduciary duties that ordinarily would constrain K-Sea's general partner in exercising its discretion with a narrower duty not to exercise its discretion in a manner inconsistent with the best interests of K-Sea as a whole, which, according to the court, essentially amounted to a duty not to exercise its discretion in bad faith.

The court then turned to the K-Sea partnership agreement provisions pertaining to "Special Approval." The court rejected the plaintiffs' claim that if the phantom units granted to the members of the Committee rendered the "Special Approval" defective, then the defendants breached their fiduciary duties and the K-Sea partnership agreement by approving the merger in reliance on the defective "Special Approval." In the court's view, a failure to qualify for the "Special Approval" safe harbor did not make the defendants' conduct improper unless the defendants also failed to satisfy the otherwise controlling standard of review—namely, whether K-Sea's general partner exercised its discretion in good faith.

With respect to whether K-Sea's general partner exercised its discretion in good faith, the court found that the complaint alleged facts that could support a finding of bad faith. Specifically, the plaintiffs alleged that the Board caused K-Sea's general partner to refuse to consent to any transaction that did not include a separate payment for the IDRs and that the Board incentivized the Committee to approve the merger by granting the phantom units on the eve of negotiations. The court noted, however, that the K-Sea partnership agreement entitled K-Sea's general partner to a conclusive presumption of good faith whenever it acted in reliance on an expert opinion. The Committee relied on a fairness opinion and the court concluded that it would be unreasonable to infer that K-Sea's general partner did not also rely on the same opinion. Therefore, the court found, K-Sea's general partner was conclusively presumed to have acted in good faith. The court also noted that the implied covenant of good faith and fair dealing could not be used to infer language that contradicts a clear exercise of an express contractual right. As a result, the court dismissed the plaintiffs' claims of breach of fiduciary duty and the K-Sea partnership agreement in connection with approval of the merger.

The court next turned to the plaintiffs' remaining claim alleging breach of the fiduciary duty of disclosure. The court noted that, because of the exculpation provision of the K-Sea partnership agreement, to state a claim the plaintiffs needed to allege facts to support a reasonable inference that the defendants, in authorizing a materially misleading disclosure, acted in bad faith. The plaintiffs first claimed that a statement in the Form S-4 that the consideration to be exchanged in the merger represented a 9.56% increase over the amount originally offered was misleading because a significant portion of that increase was allocated to the IDR payment. The court rejected this argument, noting that the Form S-4 contained a detailed discussion regarding the increase in the amount of consideration. The plaintiffs next contended that a statement in the Form S-4 that the members of the Committee would not personally benefit from the merger in a manner different from unitholders was materially misleading. The court rejected this argument and in doing so relied on its prior opinion, in which the court found this statement to be generally true and noted that the Form S-4 disclosed the grant of the phantom units. The court therefore dismissed the plaintiffs' disclosure claim.

l. *Norton v. K-Sea Transp. Partners, L.P.*, C.A. No. 6301 (Del. May 28, 2013)

In this decision of the Delaware Supreme Court pertaining to K-Sea Transportation Partners L.P.'s ("K-Sea") merger with Kirby Corporation ("Kirby"), the court addressed the Court of Chancery's grant of defendants' motion to dismiss plaintiffs' complaint, reviewing that decision de novo and affirming it.

At the core of the dispute, plaintiffs alleged that K-Sea's general partner, K-Sea General Partner L.P. ("K-Sea GP"), received excessive consideration for certain incentive distribution rights that it held when K-Sea was purchased by Kirby (the "IDR Payment"), thereby breaching its fiduciary duties under the K-Sea limited partnership agreement (the "LPA"). Plaintiffs did not allege that K-Sea GP breached the implied covenant of good faith and fair dealing.

The court found that the LPA established contractual fiduciary duties regarding mergers that displaced traditional fiduciary duties. K-Sea GP was required to exercise its discretion in approving any proposed merger and could consider any factors it chose in exercising that discretion. Additionally, K-Sea GP was indemnified under the LPA if it acted in "good faith," which, under the LPA, meant that K-Sea GP had to reasonably believe that its actions were in the best interests of, or not inconsistent with, the best interests of K-Sea.

The LPA also provided a permissive "safe harbor" for transactions that included potential conflicts of interest, including a permissive special approval process using a conflicts committee (the "Conflicts Committee") and also indicated that, if K-Sea GP's resolution of a conflict of interest was fair and reasonable or deemed to be fair and reasonable, then the resolution of the conflict would not breach the LPA. Finally, the LPA provided a conclusive presumption that K-Sea GP acted in good faith if it relied on a competent expert's opinion.

The court addressed whether plaintiffs' complaint established a breach of the LPA's "good faith" standard, stating that it would not need to address whether a grant of phantom units to the members of the Conflicts Committee invalidated the permissive special approval process if plaintiffs could not establish a breach of the good faith standard. The court found that the Conflicts Committee obtained an expert's opinion that stated that the consideration paid by Kirby to K-Sea's common unitholders was financially fair. No party challenged the expert's competence. Under the terms of the LPA, the expert was not required to address Kirby's IDR Payment to K-Sea GP separately from whether the overall merger was fair to K-Sea as a whole. The court found that the expert's opinion indirectly addressed the fairness of the IDR Payment by opining that the overall merger consideration paid was financially fair. K-Sea GP relied on that fairness opinion. Therefore, the court found that K-Sea GP was conclusively presumed to have acted in good faith when it approved the merger and sent it to the unitholders for a vote and affirmed the Court of Chancery's grant of defendant's motion to dismiss.

m. *Gerber v. Enter. Prods. Holdings, LLC*, C.A. No. 5989-VCN (Del. Ch. Jan. 6, 2012)

Plaintiff brought a purported class action challenging two transactions: the sale by Enterprise GP Holdings, L.P. ("EPE") of Texas Eastern Products Pipeline Company, LLC ("TEPPCO GP") to Enterprise Products Partners, L.P. ("Enterprise Products") (the "2009 Sale") and the merger of EPE into a wholly owned subsidiary of Enterprise Products (the "Merger"). Plaintiff alleged that in 2007, EPE had purchased TEPPCO GP for approximately $1.9 billion (the "2007 Purchase") and that under the terms of the 2009 Sale EPE received approximately $100 million in compensation. In accordance with the procedure in the EPA partnership agreement, the 2009 Sale had been submitted to the Audit, Conflict and Governance Committee (the "ACG Committee") of EPE's general partner ("EPE GP"). In connection with its review of the 2009 Sale, the ACG Committee hired Morgan Stanley & Co. who opined that the consideration to be paid pursuant to the 2009 Sale was fair from a financial point of view to EPE and to the public limited partners of EPE. The ACG Committee approved the 2009 Sale and recommended it to the full Board which subsequently approved the 2009 Sale. Morgan Stanley was also hired by the ACG Committee to render an opinion on the Merger and they opined that the Merger exchange ratio was fair from a financial point of view. In his complaint, plaintiff alleged that defendants breached their express and implied duties under EPE's partnership agreement by causing EPE to undertake the 2009 Sale and also by causing EPE to enter into the Merger without valuing legal claims relating to the 2007 Purchase or the 2009 Sale (the "Claims"). Plaintiff also alleged that various controlling persons of Enterprise Products tortiously interfered with the EPE partnership agreement by causing EPE to undertake the 2009 Sale and the Merger and that those defendants were thereby unjustly enriched. In addition, plaintiff alleged that all defendants other than EPE GP aided and abetted the breaches of express and implied duties by EPE GP. Defendants moved to dismiss all claims. The court began by considering whether certain of plaintiff's claims were direct or derivative, noting that claims that an entity has entered into a transaction that was essentially "a bad deal" are typically derivative and also that a merger will typically deprive the merged entity's former equity holders of standing to pursue derivative claims. The court recognized, however, that when a principal purpose of a merger is the inequitable termination of derivative claims, those claims may be brought as direct claims following consummation of the merger, and the court held that plaintiff had met its burden of pleading facts from which the court could infer that a principal purpose of the Merger was the termination of the Claims. The court then turned to defendants' motion to dismiss all claims for failure to state a claim. In analyzing defendants' motion to dismiss, the court began with the proposition that absent contractual modification, a general partner and certain persons affiliated with the general partner such as the general partner's board of directors and controller each owe fiduciary duties to the limited partnership. The court noted, however, that the EPE partnership agreement modified the fiduciary duties of EPE GP and its affiliates. Specifically, the partnership agreement provided that if a conflict transaction were approved by the ACG Committee ("Special Approval"), then it would be deemed approved by all partners and not constitute a breach of the partnership agreement or any law. Based on this provision, the court held that plaintiff's first count did not state a claim for breach of an express fiduciary duty against any defendant. However, the court also noted that the implied covenant of good faith and fair dealing constrained the Special Approval process. Under the implied covenant, the court found that EPE GP was required to act in good faith if it exercised its discretionary authority to use the Special Approval process to take advantage of the contractual duty limitation provided by the partnership agreement, and the court found that the complaint could fairly be read to allege that EPE GP acted in bad faith when it choose to use the Special Approval process. However, the court found that in connection with the 2009 Sale the ACG Committee had received a fairness opinion from Morgan Stanley and that EPE GP had relied on the Morgan Stanley fairness opinion in deciding whether to use the Special Approval process. The court also found that the EPE partnership agreement provided that when EPE GP relied on an expert report such as the Morgan Stanley fairness opinion, it was conclusively presumed to have acted in good faith. The court held that a plaintiff could not plead that a defendant has breached the implied covenant when defendant was conclusively presumed by the terms of a contract to have acted in good faith. The court therefore dismissed the claims relating to the 2009 Sale. For the same reason, it dismissed the claims relating to the Merger, which had also received Special Approval in reliance upon a Morgan Stanley fairness opinion. Finally, because it found no underlying breach, it dismissed the secondary liability claims as well resulting in the dismissal of all of plaintiff's claims.

n. *In re Inergy L.P. Unitholder Litig.,* Cons. C.A. No. 5816-VCP (Del. Ch. Oct. 29, 2010)

In this case, unitholders of Inergy L.P., a Delaware master limited partnership ("Inergy"), sought to enjoin a merger between Inergy Holdings L.P., the owner of Inergy's general partner and also a Delaware master limited partnership ("Holdings"), and a wholly-owned subsidiary of Holdings' general partner. Inergy had a two-tiered capital structure consisting of common units held primarily by public investors and Incentive Distribution Rights ("IDRs") held exclusively by Holdings. Inergy was not a constituent party to the merger, but was a party to the merger agreement pursuant to which it would issue new common units to Holdings. In exchange, Holdings was to transfer the IDRs to Inergy to be cancelled. In the final step, Holdings was to exchange the Inergy units for its own units held by its unitholders. As a result, former Holdings unitholders would become Inergy unitholders owning 39.6% of outstanding Inergy units and Holdings would become a private entity.

The plaintiffs sought a preliminary injunction on two bases. First, they claimed a breach of Inergy's limited partnership agreement because no vote of Inergy unitholders was sought with respect to the merger. Second, plaintiffs contended that an unfair and unreasonable process to select an unfair and dilutive transaction price constituted a breach of the LP agreement and the fiduciary duties of the directors of Inergy's general partner.

The Inergy LP agreement gave Inergy the power to "merge or consolidate" subject to the consent of a majority of Inergy unitholders. The court concluded that whether Inergy unitholders were entitled to vote turned on whether Inergy was actively "merging" or "consolidating" with another entity. Although Inergy was a party to the merger agreement, it was not a constituent party to the proposed merger. Therefore, the court concluded it was not merging or consolidating and Inergy unitholders were not entitled to vote. In addition, the court analogized the proposed merger to a triangular merger in the corporate context and noted that in such a scenario Delaware law did not require a vote by shareholders of the non-merging parent corporation. The court also invoked the doctrine of independent legal significance to support its conclusion, noting that the fact that Inergy could have completed the transaction in a manner that conferred the right to vote on its unitholders did not mean it had to do so.

On the second claim, the court noted that the Inergy LP agreement provided a number of potentially relevant standards of care. Section 7.6(e) of the agreement prohibited transfers of property from Inergy to Inergy's general partner (or an affiliate of its general partner) unless such transfers were "fair and reasonable." Section 7.9(a) likewise provided that any resolution of a conflict of interest between Inergy and its general partner (or an affiliate of its general partner) did not breach the LP agreement if such resolution were "fair and reasonable." Section 7.9(a) further provided, however, that actions taken by Inergy's general partner, if taken “in the absence of bad faith,” did not breach the LP agreement. Finally, section 7.10(d) modified, waived or limited any standard of care imposed by the LP agreement or applicable law to permit Inergy’s general partner to act under the LP agreement, provided that such action was “reasonably believed . . . to be in, or not inconsistent with, the best interests of” Inergy.

The plaintiffs argued section 7.6(e)’s “fair and reasonable” standard governed. The defendants countered that section 7.9(a) and its “bad-faith” carve out applied. Alternatively, the defendants argued that any standard set forth in the LP agreement must be applied in light of section 7.10(d)’s “reasonable belief” standard. The court agreed with defendant’s last argument, concluding that section 7.10(d) “expressly and unambiguously” limited any duty imposed by the Inergy LP agreement. The court declined to decide which standard, section 7.6(e) or 7.9(a), controlled because it concluded that in light of section 7.10(d), under either, the plaintiffs failed to demonstrate a likelihood of success on the merits.

In support of their fiduciary claim, plaintiffs argued that the independent special committee (the “ISC”) appointed to negotiate the transaction on behalf of Inergy unitholders lacked proper procedural safeguards because it was comprised of only one member. Moreover, plaintiffs argued, the sole ISC member did not properly understand his responsibilities. The court rejected both arguments. First, the court stated that there was no requirement that a body such as the ISC have more than one member and, with respect to this particular transaction, noted that only one member of the board of Inergy’s general partner was truly independent of the transaction. The court then cited numerous facts demonstrating that the ISC member understood his role.

The plaintiffs next contended that the ISC chose conflicted legal and financial advisors who were unable to render independent advice. Specifically, the plaintiffs focused on a financial advisor having extensive prior dealings with Inergy and its CEO. The court noted several factors that supported the conclusion that the ISC’s selection was both reasonable and in Inergy’s best interests. The plaintiffs also complained of a meeting between the ISC member and Inergy’s CEO during the negotiations, but the court found there to be a legitimate reason for the meeting. Finally, the plaintiffs argued that the ISC’s decision to pursue a transaction that did not require a unitholder vote evidenced bad faith. In rejecting this argument, the court relied on its earlier discussion of unitholder voting rights and also noted that the ISC relied on legal advice in making the decision.

Finally, the plaintiffs attacked the transaction price in a number of respects. First, they alleged the transaction required Inergy to pay an excessive exchange premium. The court first noted that an exchange premium was to be expected in a transaction of this type in light of the benefit to Inergy from the cancellation of the IDRs. The plaintiffs argued that the exchange ratio should be more favorable. The court, however, accorded little weight to the testimony on this subject by the plaintiff’s expert because such expert did not conduct his own independent analysis, conducted his work in a rushed manner, and raised minor quibbles rather than pointing to major flaws. Noting that the transaction arose out of serious, arms-length negotiations over a number of weeks, the court concluded the plaintiffs failed to demonstrate a likelihood of success in their challenge to the transaction price.

o. *Lonergan v. EPE Holdings LLC*, C.A. No. 5856-VCL (Del. Ch. Oct. 11, 2010)

Plaintiff, a holder of LP units in defendant Enterprise GP Holdings, L.P. (“Holdings”), sought to expedite the hearing on his application for a preliminary injunction to enjoin the merger of Holdings with a subsidiary of Enterprise Products Partners, L.P. (“EPD”). The court noted that a motion to expedite should only be granted if the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra costs of an expedited preliminary injunction proceeding. After reviewing each of the plaintiff’s claims, the court concluded that the complaint failed to assert a sufficiently colorable claim.

EPD is, and Holdings was, a publicly-traded Delaware master limited partnership. Holdings controlled EPD through its one-hundred percent ownership of EPD’s general partner. Distributions to Holdings unitholders derived primarily from Holdings’ ownership of all the incentive distribution rights ("IDRs") in EPD. IDRs are a form of pay for performance whereby the percentage of cash received by holders of IDRs increases as distributions from the partnership increase. IDRs' claim to partnership cash flow, however, can reduce the trading price of LP units and thereby make such LP units a less attractive source of new money or acquisition currency.

To address the negative effect of the IDRs and implications arising from proposed federal tax legislation, EPD proposed the merger to the Holdings Audit, Conflicts and Governance Committee (the "Audit Committee"). As a result of the merger, Holdings LP units would be converted into EPD LP units, the IDRs would be cancelled, and control of EPD would remain essentially unchanged, with Holdings' general partner becoming general partner of EPD. The Audit Committee had full power to negotiate and accept or reject any deal. Over the course of two months of negotiations, the initial exchange ratio of 1.377 EPD units for each Holdings unit rose to 1.50. As part of the merger, EPCO, an affiliated entity and beneficial owner of seventy-six percent of Holdings LP units and twenty-seven percent of EPD LP units, also waived a percentage of distributions to which it was entitled for a period of five years following consummation of the transaction. After the Audit Committee's financial advisor opined that the transaction was fair from a financial perspective, the Audit Committee gave "Special Approval" for purposes of the Holdings LP agreement.

The court found that the Holdings LP agreement eliminated all fiduciary duties leaving only the contractual standards set forth therein and the implied covenant of good faith and fair dealing. The court also found that the complaint did not identify any provision of the Holdings LP agreement that the merger might violate, but rather relied solely on the implied covenant of good faith and fair dealing. Plaintiff's claims fell essentially into two categories: (1) *Revlon*-type claims alleging failure to seek an alternative transaction; and (2) *Lynch*-type claims insisting on majority-of-the-minority approval of the merger. But the court found that "plaintiff [sought] to cloak familiar breach of fiduciary duty theories in the guise of the implied covenant of good faith and fair dealing." The court rejected plaintiff's attempt to do so, concluding that "[t]o use the implied covenant to replicate fiduciary review would vitiate the limited reach of the concept of the implied duty of good faith and fair dealing."

The court further noted that section 7.9(a) of the Holdings LP agreement established "four alternative standards of review" to permit and approve conflict of interest transactions. Because the Holdings LP agreement set forth two other alternative methods of approval in addition to provisions contemplating majority-of-the-minority approval and *Revlon* best-offer-reasonably-available standards of review, the court concluded section 7.9 disposed of plaintiff's claim that the implied covenant of good faith and fair dealing required compliance with either *Revlon* or *Lynch*.

Next, the court addressed plaintiff's claim that the implied covenant constrained the Special Approval process of the Audit Committee. To state a colorable claim under this theory, the court noted, the "plaintiff would need to allege particularized facts from which this Court could infer that the members of the Audit Committee acted arbitrarily or in bad faith." The court concluded plaintiff failed to do so. First, plaintiff did not challenge the disinterestedness or independence of the Audit Committee members. Second, the deal process, the terms negotiated by the Audit Committee, and the financial analyses conducted by the Audit Committee's financial advisor did not indicate arbitrary or bad faith conduct. Finally, section 7.10(b) of the Holdings LP agreement "conclusively presumed" action in reliance on an expert opinion, as was the case here, "to have been done . . . in good faith."

Finally, plaintiff also alleged defendants "violated the implied covenant of good faith and fair dealing by failing to disclose all material information reasonably available in connection with the LP unitholder vote." Ordinarily a general partner of a limited partnership owes fiduciary duties that include a duty of disclosure. Because the Holdings LP agreement eliminated all fiduciary duties, the court found that no fiduciary duty of disclosure remained. The complaint did not identify a contractual duty to disclose material information in connection with the merger, and the court refused to infer a disclosure obligation under the implied covenant of good faith and fair dealing. The court also found nothing inequitable about the level of disclosure provided (a meeting notice and a copy or summary of the merger agreement) and therefore concluded that this was not a situation where "compelling fairness" required it to invoke the implied covenant.

p. *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, C.A. No. 2427-VCL (Del. Ch. Jan. 15, 2010)

In this decision, the Court of Chancery considered a settlement to resolve two representative actions by holders of limited partnership units of Teppco Partners L.P. ("Teppco"). The first action, styled as the "derivative action," challenged two transactions between Teppco and Enterprise Products Partners, L.P. ("Enterprise"). Teppco and Enterprise were under common control and the transactions allegedly unfairly favored Enterprise. The second action, referred to as the "merger action," related to Enterprise's proposal to acquire Teppco by merger.

A series of transactions moving assets from Teppco to Enterprise and relating to a joint venture gave rise to the derivative action. The Teppco audit committee approved the joint venture without obtaining a fairness opinion, and according to the opinion of the financial advisor employed by Enterprise, the deal was more favorable for Enterprise than comparable transactions. In the derivative action, plaintiffs alleged breaches of fiduciary duties and aiding and abetting of such breaches. (In addition, plaintiffs had earlier challenged disclosures made in connection with proposed transactions as inadequate, but the court had previously dismissed such claims. *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*)

During the pendency of the derivative action, defendants decided to pursue the merger between Teppco and Enterprise. The audit committee of Teppco's general partner engaged special legal counsel and considered the effect of the merger on the derivative action. After receipt of Enterprise's initial offer, which was deemed unacceptably low, the Teppco audit committee retained special Delaware legal counsel to advise the committee and independently assess the derivative action and a financial advisor to provide a sensitivity analysis. At this point, independent directors were appointed to the board of Teppco's general partner and the audit committee formed a special committee with the exclusive power to evaluate, negotiate and approve or reject the merger. The financial advisor and legal counsel previously employed by the audit committee were retained by the special committee.

During the course of the merger negotiations, defendants advised plaintiffs of the merger proposal, which would extinguish plaintiffs' standing in the derivative action. Upon the public announcement of the merger, plaintiffs filed the merger action but did not move to expedite the proceedings or enjoin the merger. At this point, the special committee negotiated with both Enterprise over the merger and with plaintiffs' counsel over the derivative action, to ultimately reach an agreement among the three sides. The special committee negotiated the exchange ratio of Teppco units for Enterprise units and then obtained plaintiffs' agreement to a settlement of all litigation in consideration for the merger. The special committee's financial advisor opined that the exchange ratio was fair but did not assign any value to the derivative action. The special committee did, however, receive a separate valuation that considered the derivative action, which was presented as supplemental evidence.

In assessing the settlement agreement as a resolution of both the derivative action and the merger action, the court noted that the claims in the derivative action actually afforded plaintiffs with a derivative right on behalf of Teppco and a direct right as limited partners for breach of the limited partnership agreement. Therefore, the court noted, after the merger, the Teppco unitholders could have pursued the direct claims in the derivative action after the merger as a de facto class action. Further, even in derivative actions, the continuous ownership requirement under Delaware law is suspended in cases in which a principal purpose of a merger is to terminate pending derivative claims. Because the derivative action could have been pursued post-merger in some form, the settlement agreement was properly considered as a resolution of the derivative action as well as the merger action.

Considering the fairness of the settlement, the court noted that in the context of representative litigation, a court must balance the policy favoring settlement with the need to fairly represent the interests of the class of plaintiffs because of the fiduciary nature of the litigation, weighing the value of the claims being compromised against the value to the class of the settlement. The court observed that the plaintiffs' claims in the derivative action seemed to be strong, given the language of Section 6.6(e) of the Teppco limited partnership agreement requiring that affiliate transactions be fair and reasonable to Teppco, considered in the context of all similar or related transactions. Under the limited partnership agreement, this standard would be deemed satisfied if the terms of the subject transaction were no less favorable to Teppco than those provided to or available from unrelated third parties. Defendants attempted to counter the application of this provision with the grant of full power and authority to the general partner to conduct the business of the partnership, including disposition of assets and entry into joint ventures, in its sole discretion under Section 6.1(a) of the limited partnership agreement. The court rejected defendants' argument, as it did not comport with a reading of the limited partnership agreement as a whole or in accordance with its plain meaning. Section 6.1(a) was a general grant of authority, while Section 6.6(e) was a specific provision as to transactions authorized under Section 6.1(a) and involving affiliates, and if Section 6.1(a) were to control, Section 6.6(e) would be read out of the agreement. The court also noted that if there was ambiguity, the agreement would be construed against the general partner who drafted it. With respect to the sole discretion standard, the court explained that *Gelfman v. Weedon Investors, L.P.* does not stand for the proposition that sole discretion language will trump any conflict of interest provision and that such language could not override a provision such as Section 6.6(e), which explicitly barred affiliate transactions that did not satisfy the standard set forth in the agreement. Applying Section 6.6(e) to the challenged transactions, the court found that there was a strong case for plaintiffs' breach claims, given that the transactions undervalued Teppco's assets, were pursued by fiduciaries who were conflicted and had reason to favor Enterprise, were not as favorable as a third party transaction and were unlikely to be fair and reasonable. As to plaintiffs' claims for common law breaches of fiduciary duty, however, the court found that the LP Act allows for a limited partnership agreement to limit or eliminate fiduciary duties and that Section 6.9(b) of the Teppco limited partnership agreement utilized this authority by providing an express standard displacing default fiduciary duties.

In contrast to the derivative action, the merger action was judged under an amended and restated limited partnership agreement. The operative provisions were modified to provide a more flexible standard for affiliate transactions, under which affiliate transactions were deemed to be fair and reasonable if blessed by special approval of a majority of the members of the audit committee. To the court, these provisions provided a weighty defense but not an automatic judgment for defendants. When such provisions are employed, the special approval remains subject to the implied covenant of good faith and fair dealing, which cannot be eliminated by a partnership agreement. Further, these particular provisions did not grant authority to the audit committee in its sole discretion and some form of reasonableness standard would likely apply. In the view of the court, the claims in the merger action were weaker but still a meaningful litigation threat.

The court then assessed the value of plaintiffs' claims and plaintiffs' and defendants' contentions as to potential damages in the derivative action and noted that both plaintiffs and defendants, as well as the special committee, had given the derivative action real value. The court questioned the premium obtained on the exchange ratio of units, and noted that there were no appraisal rights in the merger, that the majority of the minority votes were based on units voting rather than units outstanding, that plaintiffs did not challenge the merger and that the fees defendants agreed to were among the largest awarded by the court. However, the transaction was at a premium and negotiated by a special committee of independent, outside directors without ties to the controlling company who appeared to have acted in good faith and retained experienced financial and legal advisors. As to plaintiffs, the court found that they engaged in real work and created a substantial litigation risk. Balancing these factors, the court approved the settlement as fair and reasonable.

q. *Gelfman v. Weeden Inv'rs, L.P.*, C.A. No. 18519 (Del. Ch. Aug. 23, 2001) and (Del. Ch. July 12, 2004)

This case involved defendants' motion to dismiss a complaint filed against the general partner and certain members of its board of directors and top management alleging breach of the partnership agreement and breach of the fiduciary duty of loyalty. Plaintiffs were certain former employees and outside investors who owned partnership units and alleged that the general partner took a series of actions designed to concentrate ownership of the partnership in the hands of employees and management. The challenged actions included creation of a new class of callable partnership units, payment of various distributions of capital to enable certain favored investors to exercise an option to subscribe for additional callable units at book value, a proposed amendment to the partnership agreement that would cause the conversion of all original partnership units to callable units and give the general partner discretion to cash out certain units at book value, and institution of a compelled redemption program whereby callable units held by outside investors would be subject to redemption.

In analyzing plaintiffs' claims, the court noted that the drafters of the partnership agreement clearly recognized the right afforded by Section 1101(d) of DRULPA to restrict the fiduciary duties that, as a default matter, govern the general partner and its directors in managing the partnership. However, the court found that the drafters had not swept away all default fiduciary duties but rather had eliminated some and kept others. Specifically, the court found that one provision of the partnership agreement provided that where the general partner was permitted or required to take action in its sole discretion, in good faith or under any other express standard, the general partner was to act under such express standard and would not be subject to any other conflicting standard imposed by the partnership agreement or agreements contemplated therein and further provided that any default standard of care or duty imposed under applicable law (including DRULPA) would be modified, waived or limited as required to permit the general partner to act in accordance with the authority granted to it under the partnership agreement. However, this same provision also included additional language limiting the waiver of default principles of fiduciary duty to actions taken by the general partner that did not constitute gross negligence or willful or wanton misconduct and were not reasonably believed by the general partner to be inconsistent with the overall purposes of the partnership. The court determined that while these provisions did not remove all of the fiduciary duties of the general partner, they did preclude the application of the traditional entire fairness standard that would otherwise apply to a conflict transaction and substituted a scienter-based standard of loyalty that required a showing of gross negligence, wanton or willful misconduct or action in bad faith. Based upon such analysis, the court found that while the payment of the capital distributions was proper under the terms of the partnership agreement, the facts as pled by plaintiffs supported an inference that the general partner's decision to implement the unit subscription plans was made in bad faith and violated the retained fiduciary duties. The sheer magnitude of the subscription plans, the book value offering price and the heavy concentration of ownership of partnership units placed in affiliates of the general partner led the court to reach this conclusion.

The court also rejected defendants' motion to dismiss plaintiffs' challenge to the conversion amendment and the compelled redemption program finding that they involved a clear conflict between affiliates of the general partner and outside investors who held partnership units and were not governed by the sole discretion standard. Rather, they were subject to the partnership agreement's requirement that when resolving a conflict of interest the general partner was required to consider various factors affecting the partnership and the parties to the conflict and act in good faith in reaching a resolution. The court also found that the retained fiduciary duties referenced above applied to the general partner's decision and held that the general partner's acts supported an inference that the general partner acted in bad faith to transfer wealth from non-employee unitholders to its control persons and to grant power to itself to determine which unitholders would be deprived of their partnership interests at less than fair market value. Finally, the court held that the general partner's decision to make the conversion amendment subject to the approval of all holders of the original partnership units did not provide a ratification safe harbor because the vote was controlled by the employee unitholders.

In a subsequent disposition of this case, the court found for the defendants on several claims, but the plaintiffs prevailed on their claims regarding dilution related to certain units bought by the outside directors of the corporate general partner and the forced redemption at book value of their units.

Plaintiff bought claims regarding the alleged losses they had suffered by virtue of dilution of their ownership interest in connection with additional unit sales to employees, former employees and outside directors. The court noted that in an earlier decision it had held that the general partner's decision to issue additional units was governed by the "sole discretion" standard subject to the proviso that the general partner's exercise of the sole discretion could give rise to liability or injunctive relief if the general partner's actions constituted gross negligence, willful or wanton misconduct, or were reasonably believed to be inconsistent with the overall purposes of the Partnership. The court found that this standard was generally very deferential to the general partner and, consequently, held that all of the issuances of units to both employees and former employees had sufficient rational justification to come within the scope of the general partner's discretion. However, the court came to a different conclusion with respect to the majority of unit purchases by the outside directors holding that "[b]y deciding to permit the general partner's outside directors to acquire new units at a favorable price and by denying the same opportunity to Outside Investors, the defendants breached their contractual duties. This decision…was not undertaken in good faith but instead as quid pro quo for the outside directors' willing assent to the issuance of a large number of new units to management and employees." Overall, "[a] conscious decision to enrich the outside directors in order to facilitate their support for issuances of large numbers of new units to employees amounts to conduct that the General Partner must have reasonably known was inconsistent with the purposes of the Partnership." Thus, the plaintiffs prevailed on their dilution claim with respect to the issuance of most of the new units to the outside directors. (With respect to a subsequent issuance to the outside directors of a relatively small amount of units, the court concluded that it could be considered a fair part of the outside directors' compensation). The plaintiffs received as a remedy a damage award reflecting the increased distributions they would have received had the outside directors not been permitted to reinvest their returned capital in the new unit purchases.

As to the involuntary redemption of the plaintiffs' partnership units, the court held that a different section of the partnership agreement and therefore a different contractual standard applied since, by the admission of the parties, in considering and effecting the redemption, the general partner and its directors faced a conflict between their own personal interests and those of the plaintiff limited partners. The court noted that settled principles of Delaware law require not only that any restriction on the fiduciary duties of a general partner be clearly stated in the partnership agreement but also that "the general partner comply with the substitute contractual standard of conduct as a prerequisite to taking advantage of the contractual alleviation of his fiduciary duties." Here, "the cursory and uninformed process by which they [the general partner and its directors] reached their decisions did not comply with the requirements of the partnership agreement governing the resolution of conflicts of interest by the general partner, and therefore the default fiduciary standard of entire fairness applied to their conduct, a standard that the defendants do not come close to satisfying." Even if the defendants had complied with the requirements of the partnership agreement, Vice Chancellor Strine indicated that he could arguably rest his decision on the grounds of gross negligence alone under the contractual terms of the partnership agreement: "For the defendants to have consciously chosen to deprive unit holders of their property at a price they knew to be below fair market value, but to have made no exploration at all of precisely how far below fair market value the book value in fact was is a failure in care that is extraordinary and can be fairly characterized as gross in nature." "What emerges from the record is a process in which a group of insiders (managers and directors) place their own personal self-interest above their contractual duty to refrain from bad faith conduct towards the partnership." Moreover, "if the future of the firm as a profit-generating entity requires the departure of some owners, the minimally acceptable standard of good faith action would seem to require, in the absence of a contractual right to force out certain owners at a different price, that the firm pay any equity owner being forced out fair market value for their equity share." The court also rejected defendants' claim that the vote of the unit holders cured any procedural defects. The court found that the vote process used was an "illusory protection at best" and tainted by disclosures that were materially deficient. The court noted that Delaware's law of ratification requires that there be an "informed vote of the relevant class that is untainted by material conflicts." Thus, the plaintiffs prevailed on their redemption claim, and they received as a remedy the fair market value of their units before the redemption schedule was implemented.

r. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, C.A. No. 15754 (Del. Ch. Sept. 27, 2000); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 795 A.2d 1 (Del. Ch. 2001), *aff'd in part, rev'd in part*, 817 A.2d 160 (Del. 2002), *on remand*, (Del. Ch. July 8, 2003)

Plaintiff limited partner brought a derivative suit claiming that a series of unit purchases in a Delaware limited partnership by the corporate parent of the general partner and other related persons were unfair to the partnership and were designed to entrench the general partner. In this opinion, the court considered the merits of several motions for summary judgment brought by the various defendants. (In other related proceedings, the court considered a number of other actions including requirements for bringing a derivative suit and the scope of actions under Section 17-305 of DRULPA which are discussed under those topics in the survey.) The court ruled on the merits of the following claims: breach of contract claim against the defendants arising from an alleged breach of the partnership agreement; breach of fiduciary duty claims against the general partner relating to the same transactions as challenged in the breach of contract claim; and breach of fiduciary duty or aiding and abetting claims against two classes of defendants (1) those who were directors of the general partner and also affiliated with its parent corporation and (2) those who were directors of the general partner but not affiliated with its parent corporation as well as both classes of defendants' alleged defense on the basis of the exculpatory provisions of Section 17-1101(d)(1) of DRULPA and the partnership agreement. In their breach of contract claims, plaintiffs alleged that certain requirements of the partnership agreement that apply to sales of units had not been followed in the sales to the general partner's affiliates. The general partner countered that other provisions of the partnership agreement were applicable to the sales at issue which allowed the general partner broad discretion and entitled it to summary judgment under the facts at issue. In support of their motion, the defendants relied on (1) Section 17-1101(d) of DRULPA which provides that any partner acting under a partnership agreement shall not be liable to the limited partnership or any other partner for its good faith reliance on the provisions of such partnership agreement, (2) an alleged modification of fiduciary duties under Section 17-1101(d)(2) of DRULPA and (3) upon a provision of the partnership agreement that provided immunity to the general partner for any action taken in reliance on a legal opinion. With respect to the question of the proper interpretation of the partnership agreement, the court concluded it could properly deny summary judgment if it decided that a more thorough development of the record would clarify the law or its application and did so on this basis. It also found that there was a triable issue of fact as to the good faith of certain of the defendants and that a finding of lack of good faith would prevent them from relying on any of the provisions that they cited as affirmative defenses. With respect to the alleged breach of fiduciary duty claims against the general partner relating to the same actions supporting the breach of contract claims, however, the court granted the defendants' motion for summary judgment. It did so based on a finding that Section 17-1101(d)(2) of DRULPA authorized the elimination, modification or enhancement of fiduciary duties and that the partnership agreement had set forth the duties owed by the general partner in self-dealing transactions between the partnership and the general partner affiliates in a comprehensive matter which left no room for the application of common law fiduciary duty principles. With respect to the other claims against the defendants who controlled the corporate parent of the general partner, the court concluded, based on the teaching of cases like *In re USA Cafes, L.P. Litig.* that the defendants could be liable for breach of fiduciary duty or as aiders or abettors if they intentionally caused the general partner to violate the partnership agreement and therefore denied summary judgment as to those claims. Finally, with respect to the directors of the general partner who were unrelated to the general partner's corporate parent, the court concluded that since these directors did not have any special tie to the corporate parent of the general partner but were only required to balance their fiduciary duties to the shareholders of the general partner on one hand and to the limited partners of the partnership on the other, they would be entitled to the benefit of the exculpatory provisions of the partnership agreement even if they unintentionally struck a contractually improper balance between those competing interests so long as they acted in good faith and the court found that there was no record evidence that these directors acted in other than good faith.

In an appeal of the Court of Chancery's decision in a related proceeding in this case, the Delaware Supreme Court stated that notwithstanding the fact that the scope of Section 17-1101(d)(2) of DRULPA was not before it in such related proceeding, it felt compelled to note that the Court of Chancery's dictum in this decision that Section 17-1101(d)(2) of DRULPA expressly authorizes the elimination of fiduciary duties in a partnership agreement was not a correct statement of law. Rather, the Supreme Court pointed out that neither Section 17-1101(d)(2) nor any other provision of DRULPA explicitly provides that a limited partnership agreement may eliminate the fiduciary duties or liabilities of a general partner and that the underlying general principle in Delaware is that scrupulous adherence to fiduciary duties is normally expected. The Supreme Court also noted the historic cautionary approach of Delaware courts that efforts by a fiduciary to escape a fiduciary duty, whether by a corporate director or officer or other type of trustee, should be scrutinized searchingly.

s. *Werner v. Miller Tech. Mgmt., L.P.*, C.A. No. 19721 (Del. Ch. Feb. 13, 2003)

In this case involving certain defendants' motion to dismiss for failure to state a claim upon which relief can be granted, the court addressed the defendants' claim that the plaintiff's claims for breach of fiduciary duty were time barred by a limitations provision in the partnership agreement. The limitations provision in the partnership agreement provided that an action could not be commenced under the partnership agreement unless the action was brought within six months after actions or circumstances giving rise to the cause of action occurred. The defendants argued that this provision included any claims brought by a limited partner including fiduciary duty claims. The court disagreed and found that the provision applied only to actions arising under the partnership agreement and not to actions for breach of fiduciary duty. The court found this reading consistent with the other provisions of the section of the partnership agreement that contained the limitations provision, which provisions were plainly related to the interpretation and enforcement of the partnership agreement and did not regulate the general partner's duties. The court also held that even if the limitations provision were to be deemed ambiguous, the principle of *contra preferentum* would apply, and the court would resolve the ambiguities in favor of the plaintiff. Furthermore, the court held that while partners of a Delaware limited partnership are free to limit their fiduciary duties by contract, the parties must make plain their intention to do so and where there is no clear contractual language that preempts default fiduciary duty rules, courts will continue to apply such default rules. The court found no clear intention to so limit fiduciary duties in the partnership agreement in this case.

t. *Miller v. Am. Real Estate Partners, L.P.*, C.A. No. 16788 (Del. Ch. Sept. 6, 2001)

This case represents, as the court noted, yet another in which a general partner of a limited partnership contended that the partnership agreement eliminated any applicable default principles of fiduciary duty. Plaintiffs had alleged that one of the defendants, Carl Icahn, had acquired the general partner, used the general partner to make a rights offering to enable another related defendant to acquire a majority of the partnership's units to insulate the general partner from removal, cut off all distributions so that Icahn could devote available cash to investments in which other Icahn entities were interested, placed pressure on other unitholders to sell out, amended the partnership agreement to broaden the purposes of the partnership furthering his plan to use it as a financing agency for the investment goals of his other entities and bought out additional unitholders at an allegedly unfair price through a tender offer. According to plaintiffs, the effect of these actions was to leave the public unitholders of the partnership in a profitable partnership that paid no distributions so it could instead serve as a pool of available capital that Icahn could use for his own personal purposes and traded at a corresponding low value because the capital markets had recognized Icahn's scheme. Defendants had countered that they acted in conformity with the contractually specified standards of conduct in the partnership agreement which displaced any default fiduciary duties and that, even if they had not, the complaint did not state a claim and in either case should be dismissed. First, the court noted that several claims were time barred. It then turned to defendants' argument on the partnership agreement. To support their claim that the partnership agreement preempted default fiduciary duties, defendants noted that the partnership agreement provided that when the general partner was permitted to make a decision in its "sole discretion" it was entitled to consider only such interest and factors as it desired and had no duty or obligation to give any consideration to any interest of or factors affecting the partnership, the operating partnership or the record holders, and when the general partner was required to make a decision in good faith, it was to act under that express standard and not be subject to any other or different standards imposed by the partnership agreement or any other agreement contemplated therein. Defendants argued that the foregoing language was "utterly inconsistent" with the default duty of loyalty which would require that the general partner treat the limited partners fairly in any conflict situation. The court noted that the language at issue was similar to the contractual provisions interpreted in two recent cases *Gotham Partners L.P. v. Hallwood Realty Partners, L.P.* and *Gelfman v. Weeden Investors, L.P.* However, the court further noted that each of the agreements in those cases contained critical additional language providing that when the sole discretion standard applied, any other conflicting standard in the agreements, other contracts or under law (including the DRULPA) were to give way if it would interfere with the general partner's freedom of action under the sole discretion standard. The court observed that this explicit override of default fiduciary duties existing under law was conspicuously absent from the partnership's agreement and concluded that the omission was of legal significance. The court reaffirmed that it would not be "tempted by the piteous pleas of limited partners who were seeking to escape the consequences of their own decisions to become investors in a partnership whose general partner has clearly exempted itself from traditional fiduciary duties" but added that just as investors must use due care, so must the drafter of a partnership agreement which was to supplant the operation of traditional fiduciary duties, and, given the great freedom afforded to such drafters and the reality that most publicly traded limited partnerships were governed by agreements drafted exclusively by the original general partner, it was fair to expect that restrictions on fiduciary duties be set forth clearly and unambiguously—"not addressed coyly." Applying this standard, the court concluded that the partnership agreement failed to preclude the operation of the fiduciary duty of loyalty with sufficient clarity, even in situations where the general partner had the contractual power to act in its sole discretion. The court bolstered its conclusion by noting that other provisions of the agreement implied that concepts of fiduciary duty would apply except where the agreement clearly modified them. Finally, the court noted that its interpretation was consistent with the disclosure provided to investors when the partnership was first formed. Nevertheless, the court granted defendants' motion to dismiss because plaintiffs had failed to make non-conclusory allegations of fact that, if true, would support an inference that defendants breached their fiduciary duty of loyalty. However, the court dismissed plaintiffs' claim without prejudice suspecting a viable claim could be pled.

u. *Brickell Partners v. Wise*, C.A. No. 18145 (Del. Ch. Aug. 20, 2001)

Plaintiff, a limited partner in the defendant partnership, brought suit challenging an acquisition by the partnership. The target company was owned by the same company that owned and controlled the general partner of the partnership. Plaintiff alleged that the transaction was substantively unfair to the partnership. The defendants moved to dismiss the complaint because the transaction had been approved pursuant to the terms of the partnership agreement which, they argued, supplanted the traditional default fiduciary duties which would otherwise apply to the challenged transaction. The court noted that the partnership agreement contained a provision on resolution of conflicts of interest and that provision provided that whenever a potential conflict of interest existed between the general partner or any of its affiliates on the one hand and the partnership, the operating companies or any partner on the other hand, any resolution of such conflict would be deemed permitted and would not constitute a breach of the partnership agreement or any duty stated or implied by law or equity if such transaction received "Special Approval." Under the partnership agreement, "Special Approval" meant the approval of a majority of the members of the partnership's conflict committee and the court noted that such approval was obtained for the challenged transaction. The court observed that it had previously articulated the standard that "principles of contract preempt fiduciary principles where the parties to a limited partnership have made their attentions to do so plain" and concluded that the plain and unambiguous language of the conflict section of the partnership agreement displaced traditional fiduciary duty principles. The court acknowledged plaintiff's argument that the members of the conflict committee had an inherent conflict of interest since as directors of the partnership's general partner they owed fiduciary duties both to the shareholders of the general partner and the limited partners of the partnership. The court noted, however, that this on-going conflict was inherent in a corporate general partner and therefore "dissipate[d] the force of plaintiff's argument." The court also rejected plaintiff's argument that the conflicts committee should be comprised of members with no relationship at all to the corporate general partner because it was intended to be a committee of the general partner's board. Finding that neither member of the conflicts committee was beholden to the corporate parent of the general partner for material, personal reasons separate and apart from the structural conflict each inherently faced as a director of the corporate general partner, the court dismissed the complaint with prejudice.

v. *R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, C.A. No. 17449 (Del. Ch. Apr. 10, 2001)

Plaintiffs challenged an already consummated reorganization of a limited partnership which separated the ownership of a single public limited partnership into the old public limited partnership and a new privately-traded limited partnership. Plaintiffs challenged the reorganization on several grounds: first, that it did not receive the requisite approval by the public unitholders; second, that defendants breached their fiduciary duties in structuring the reorganization in an unfair manner; and third, that the defendants made materially misleading disclosures. Plaintiffs' first claim was based on the fact that the defendants needed to amend the partnership agreement of the existing limited partnership in order to implement the reorganization and the defendants presented the proposed amended and restated partnership agreement containing all of the proposed amendments to the public unitholders for their approval in a single vote and provided that it would be approved if it received the affirmative vote of a majority of the public unitholders. Plaintiff argued, however, that one provision of the proposed restatement of the partnership agreement could only be accomplished by a unanimous vote and that therefore the entirety of the proposed amendment, including all the remaining provisions which could otherwise have been approved by a majority vote of the public unitholders, was never validly adopted and must be declared void. The court agreed with plaintiffs that one provision of the amendment could only be put into effect by unanimous vote. However, the court rejected plaintiffs' argument that the entirety of the amendment was therefore void. The court cited several bases for this decision including the "severability" provisions of both the original partnership agreement and the proposed amendment and restatement and the fact that the general partner removed the one provision that required unanimous approval from the final restated and amended partnership agreement. With respect to the severability issue, the court cited several legislative cases supporting the proposition that if part of one legislative bill required a majority vote and another part a supermajority vote and only the majority vote were obtained, so long as the matters were of a severable nature, the part that received the requisite approval would be valid notwithstanding the fact that the remaining part would be void. The court also rejected plaintiffs attempt to limit that principle to the legislative context finding that it applied equally in the private contract context and was consistent with the approach Delaware has historically taken to the regulation of economic activity which rests on "flexibility and efficiency, not unjustified rigidity." In their fiduciary duty claim, plaintiffs had argued that the reorganization was motivated solely to advantage the majority unitholder and corporate parent of the general partner without conferring any benefit on the public unitholders. The defendants moved to dismiss this claim on the grounds that the public unitholders had approved the transaction in accordance with the criteria set forth in the original limited partnership agreement which displaced any default fiduciary duties that would otherwise have applied to the transaction. Plaintiffs countered that the requirements of the limited partnership agreement including the vote requirement were in addition to, not in substitution for, the general partner's common law fiduciary obligations and pointed to the absence of any language expressly restricting the operation of default fiduciary duties in the operative section of the partnership agreement. The court held that in deciding whether default fiduciary duties were preempted by contractual provisions it was required to determine whether the application of default fiduciary duties could be reconciled with the practical and efficient operation of the terms of the limited partnership agreement; where such a reconciliation was possible, the court would apply default fiduciary duties in the absence of clear language disclaiming their applicability. "But where the use of default fiduciary duties would intrude upon the contractual rights or expectations of the general partner or be insensible in view of the contractual mechanisms governing the transactions under consideration, the court will eschew fiduciary concepts and focus on a purely contractual analysis of the dispute." However, the court held that it did not need to answer that question for the present case because, based on corporate law principles, it concluded that if the challenged transactions received an informed, uncoerced majority vote of the public unitholders that vote would obviate any generalized fairness inquiry and insulate the general partner from contractual or fiduciary liability. Thus, the court held that plaintiffs' fiduciary claim turned on the adequacy of the general partner's disclosures. Plaintiffs had challenged a number of the general partner's disclosures as false or misleading. The court dismissed a number of these claims. However, it held that certain of the claims were sufficient to withstand a motion to dismiss. Thus, the court denied defendants' motion to dismiss those disclosure claims and the fiduciary duty claim which turned on the adequacy of the disclosure.

w. *Continental Ins. Co. v. Rutledge & Co., Inc.*, C.A. No. 15539 (Del. Ch. Jan. 10, 2000) and (Del. Ch. Feb. 15, 2000)

In this case involving cross-motions for summary judgment, the court addressed a limited partner's claim that the general partner of a Delaware limited partnership breached its fiduciary duty of loyalty by accepting consulting or advisory fees directly from entities in which the limited partnership invested its funds. While the partners agreed that the terms of the partnership agreement modified the fiduciary duties of the general partner, they disagreed as to the scope of such alteration. Determining that it need not look beyond the plain language of the partnership agreement, the court found that while the partners' modification of the general partner's duty of loyalty permitted the general partner to participate in other business activities usually prohibited by the partnership opportunity doctrine, it did not remove the prohibition on engaging in self-dealing transactions. The court asked the parties to further develop facts at a trial regarding whether the actions taken by the general partner for which it received fees constituted permissible "other business activities" or self-dealing. The court also rejected the general partner's argument that DRULPA Section 17-1101(d)(1) provided a safe harbor for its actions. The court held that while this statutory provision bars a fiduciary duty claim against a partner that acted in good faith reliance on the provisions of a partnership agreement, it does not apply when a partner relies on its own misinterpretation of an unambiguous contract clause.

x. *Sonet v. Timber Co., L.P.*, 722 A.2d 319 (Del. Ch. 1998)

This case arose from the plan of a publicly traded Delaware limited partnership to convert to a REIT through a merger. Under the terms of the merger agreement, partnership units would be converted into shares of the REIT on a one-to-one basis. The general partner of the partnership, however, in lieu of the 2% interest and certain incentive distribution rights it had in the partnership, would receive REIT shares equal to 27% of the total shares outstanding. The partnership agreement provided that the general partner had the power to structure mergers in its sole discretion, subject, however, to the requirement that a supermajority of unitholders must approve any merger. Plaintiff unitholder claimed that the general partner, in addition to complying with the terms of the partnership agreement, was required to exercise common law fiduciary duties, namely the duty of loyalty, to unitholders in structuring the merger.

In dismissing the plaintiff's claims for failure to state a claim upon which relief can be granted, the court stated that, in the limited partnership context, "principles of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain." According to the court, "under limited partnership law a claim of breach of fiduciary duty must first be analyzed in terms of the operative governing instrument—the partnership agreement—and only where that document is silent or ambiguous, or where principles of equity are implicated, will a [c]ourt begin to look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence." Because the court found that the partnership agreement clearly modified the common law fiduciary duties otherwise applicable to the general partner in structuring a merger, the court concluded that the partnership had "plainly opted out of the statutory default scheme" of traditional fiduciary duties and therefore limited its review of the general partner's conduct to an examination of the compliance of the general partner with the terms of the partnership agreement.

The plaintiff also argued, in the alternative, that the general partner had voluntarily assumed fiduciary duties outside of the partnership agreement by appointing a special committee to oversee the merger, presumably in an effort to gain the support of the partners in the vote on the merger by creating the appearance of fair dealing. In presenting this argument, the plaintiff relied on the court's holding in the *Cencom* case, in which the court held that a general partner, by circulating a disclosure statement that informed limited partners that an independent counsel had been retained to assure the integrity of a transaction, voluntarily assumed a duty to ensure that the limited partners could rely on the general partner's representations with respect to the independent counsel. The court distinguished this case from the *Cencom* case by the fact that the general partner in this case had not made affirmative disclosures to the unitholders regarding the fairness and independence of the special committee. The court characterized the alternative claim of the plaintiff as a "potential disclosure claim" and, in the absence of affirmative disclosures, dismissed the claim as not being ripe for adjudication.

In a subsequent proceeding in which the plaintiff challenged the disclosures in the proxy statement soliciting unitholder approval of the REIT conversion, the court held that because the unitholders had contracted away their right to seek judicial review of the REIT conversion based upon substantive fiduciary duty principles and had contracted for, in place of such a right, the protection of a supermajority approval of the transaction, the court would apply a most stringent disclosure standard, enforced by careful judicial scrutiny, to assure that the unitholders' vote had meaning.

y. *Kahn v. Icahn,* C.A. No. 15916 (Del. Ch. Nov. 12, 1998)

Plaintiffs, holders of depository units representing limited partnership interests of a Delaware limited partnership, brought a derivative action against the partnership's general partner, the general partner's sole shareholder and chief executive officer and certain entities affiliated with the general partner, claiming that the sole shareholder and chief executive officer of the general partner breached his fiduciary duties to the partnership and usurped for himself opportunities of the partnership by failing to make certain investments completely available to the partnership and, instead, dividing the investments between the partnership and entities owned or controlled by the general partner. The partnership agreement provided that the general partner "may compete, directly or indirectly, with the business of the [p]artnership . . . and neither the [p]artnership nor any of the Partners or Record Holders shall have any right to participate in such other business interests or ventures or to receive or share in any income derived therefrom."

Defendants moved to dismiss for failure to state a claim and the court granted defendants' motion. The court, citing Section 17-1101(d) of DRULPA, stated that traditional fiduciary duties among and between parties are default duties that may be modified by partnership agreements and noted that Delaware case law suggests that partnership agreements may act as safe harbors for partners' actions that may otherwise violate traditional fiduciary duties. The court found that the defendants' conduct had been in compliance with the provisions of the partnership agreement and refused to hold that the general partner's actions were subject to the traditional fiduciary duty of loyalty irrespective of the clear and unambiguous modification of such duty provided in the partnership agreement. Addressing plaintiffs' claim that defendants had usurped opportunities of the partnership, the court, relying on the reasoning developed in cases dealing with the usurpation of corporate opportunities, concluded that the partnership could not have had a legitimate interest or expectancy in the relevant investments because the partnership agreement put the partnership on notice that the partners intended to compete directly with the partnership, and, in addition, the plaintiffs had failed to allege facts that provided a reasonable inference that information or proprietary investment research had been misappropriated or that partnership resources had been unlawfully redirected.

z. *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497 (Del. 1996)

The Supreme Court affirmed the Court of Chancery's dismissal of a limited partner's breach of fiduciary duty claim against the general partner, holding that under the DRULPA "a general partner acting in good faith reliance on the provisions of the partnership agreement is shielded from liability for breach of fiduciary duty." Thus, because the limited partner's complaint failed to assert a knowing breach of the agreement by the general partner, it was not a sufficient allegation of bad faith to support a breach of fiduciary duty claim.

aa. *James River-Pennington Inc. v. CRSS Capital, Inc.*, C.A. No. 13870 (Del. Ch. Mar. 6, 1995)

Plaintiff and defendant were limited partners in a partnership formed to own a chemical recovery and cogeneration facility. They also shared control of the corporate general partner with each limited partner naming three of the general partner's six directors. Pursuant to a principal's agreement to which plaintiff and defendant were parties, plaintiff had an option to buy-out defendant's limited partnership interest. Upon giving notice of its intent to exercise its option, plaintiff filed an action for a declaration that it was entitled to exercise the option, and defendant filed a countersuit alleging, among other claims, that the plaintiff's decision to exercise the option breached a fiduciary duty to the defendant and the partnership to act in good faith and in the best interests of the partnership. Defendant argued that its exercise of a bargained-for contractual right could not constitute a breach of a fiduciary duty and filed a motion to dismiss plaintiff's countersuit.

In denying plaintiff's motion to dismiss the fiduciary duty claim, the court held that plaintiff owed a fiduciary duty of loyalty to the defendant and the partnership "because it controls the general partner through the votes of its three of the six directors." The court acknowledged that the "[DRULPA] expressly recognizes partners may modify their fiduciary duties through contract." The court reserved judgment, however, on whether plaintiff's fiduciary duty had been sufficiently modified by the principal's agreement to negate the alleged breach until the disputed terms of the agreement could be resolved at trial. It should be noted that in reference to plaintiff's alleged fiduciary duty, the court cited *KE Prop. Mgmt. Inc.* The *KE Prop.* decision noted that a limited partner with governance responsibility may assume a related fiduciary obligation. It is unclear, however, whether the court in *James River-Pennington* would have held a fiduciary obligation could attach to the limited partner solely by virtue of its option if it had not shared control of the general partner.

4. Aiding and Abetting

a. *Allen v. El Paso Pipeline GP Co., L.L.C.*, C.A. No. 7520-VCL (Del. Ch. June 20, 2014)

This decision follows the Court of Chancery's prior decision granting plaintiffs' motion to certify a class consisting of all the limited partners (the "Unitholders") of El Paso Pipeline Partners, L.P., a publicly traded Delaware master limited partnership (the "Partnership"), wherein the court also found that plaintiffs' claims were not exclusively derivative and could support a direct characterization.

After completion of discovery, the court heard this case on defendants' motion for summary judgment. Plaintiffs had challenged whether a "drop-down" transaction (the "Drop-Down") between the Partnership and El Paso Corporation, the parent of the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"), violated the express terms of the Partnership's limited partnership agreement (the "LPA") and the implied covenant of good faith and fair dealing, or in the alternative, aided and abetted those breaches. The crux of plaintiffs' argument was that although the LPA eliminated all fiduciary duties of the General Partner and replaced them with contractual duties, the General Partner breached the LPA by not considering the best interests of the Unitholders when approving the Drop-Down; specifically, plaintiffs alleged that certain incentive distribution rights (the "IDRs") owned by the General Partner caused the Drop-Down to be economically dilutive to Unitholders. Thus, the court analyzed whether the manner by which the Drop-Down was approved was either an express breach of the LPA or a breach of the implied covenant of good faith and fair dealing.

In basic terms, the General Partner's contractual duties were divided into three categories: when it was acting in its individual capacity, when it was acting as general partner in a non-conflict of interest transaction and when it was acting as general partner in a conflict of interest transaction. When in a conflicted transaction, the General Partner had several options by which such a conflicted transaction could be approved without breaching the LPA, one of which was by special approval. Special approval could be obtained by a majority vote of the members of a conflicts committee—in this case, three outside members of the board of directors of the General Partner—acting in good faith. The LPA defined "good faith" for such purposes as the members' subjective belief that the conflict of interest transaction was in the best interest of the Partnership. The court noted, however, that it could only infer a party's subjective intent from external indications and, therefore, objective factors necessarily informed the court's analysis. With respect to the best interest prong of this contractual good faith standard, the court found that the LPA only required the conflicts committee to believe subjectively that the Drop-Down was in the best interest of the Partnership—leaving the conflicts committee free to consider the full universe of entity constituencies and not consider only the equity owners of the Partnership (which would be the case if traditional fiduciary duties applied).

The court went on to grant summary judgment on plaintiffs' LPA breach claim even under the plaintiff-friendly summary judgment standard of review, for the following reasons: (i) plaintiffs had conceded that the Partnership was not harmed by, or paid an excessive price for, the Drop-Down; (ii) all members of the conflicts committee testified that they subjectively believed the Drop-Down benefited the Partnership as an entity; (iii) the conflicts committee met formally six times and had consulted with financial and legal advisors familiar with the industry and the Partnership (with the financial advisor present at each meeting and presenting at three of the meetings); and (iv) the conflicts committee investigated the IDRs as they related to the Drop-Down and still determined that the Drop-Down was in the best interest of the Partnership, and ultimately conferred some benefit to the Unitholders (although not as great a benefit as received by the General Partner). The court noted that, at best, the evidence supported an inference that the conflicts committee performed its job poorly, not that it did not subjectively believe that the Drop-Down was in the best interest of the Partnership. Accordingly, there was no breach of the LPA.

Next, the court addressed plaintiffs' claim that the General Partner breached the implied covenant of good faith and fair dealing in approving the Drop-Down because the conflicts committee relied on a fairness opinion that did not value the consideration Unitholders actually received. The court began its analysis by explaining that the implied covenant does not create a free-floating duty of good faith, but is a cautiously applied gap-filler to ensure parties' reasonable expectations are fulfilled. In applying the implied covenant, a court must follow a three-step analysis. First, contract construction: the court must examine the contract to determine whether a gap exists and if the contract speaks directly on an issue, there is no gap. Second, even if a gap exists, the court should avoid filling intentional gaps (i.e., a term that the parties rejected ex ante or after negotiations decided should be omitted) and only fill unintentional gaps (i.e., a term that parties failed to consider during negotiations or was so fundamental did not need to be expressed) so as to avoid rewriting a contract that a party deems unfair in hindsight. Third, if the gap should be filled (a cautious enterprise that should be rarely used) the court must look to the past to determine what the parties would have agreed to themselves had they considered the issue in their original bargaining position, not what the court deems to be fair at the time of the wrong.

Here, plaintiffs' implied covenant claim relied heavily on Gerber v. Enter. Prods. Hldgs., LLC, a Delaware Supreme Court case. In brief, the Gerber court faced a situation where a master limited partnership agreement replaced traditional fiduciary duties with contractual duties and limited partners challenged a general partner's approval of a conflicted transaction. Notably, the limited partnership agreement provided that the general partner would be conclusively presumed to have acted in good faith if it relied on a fairness opinion from a financial advisor without detailing what such fairness opinion should include. The general partner relied on a fairness opinion with respect to the challenged transaction, however, the fairness opinion failed to fully evaluate important aspects of the transaction and their effects on the consideration received by limited partners. The

Supreme Court held that had the parties at the time of contracting addressed the specific standards required of a fairness opinion they would have agreed that any fairness opinion needed to fully evaluate whether the consideration was fair to the limited partners. Thus, the general partner was not entitled to the conclusive presumption of good faith because its reliance on the inadequate fairness opinion violated the implied covenant.

Plaintiffs' contended that, similarly, the fairness opinion obtained by the conflicts committee here did not consider all the elements of the consideration from the standpoint of the Unitholders because the dilutive effects of the IDRs were omitted from the financial advisor's fairness opinion calculus. The court, however, rejected this contention and found that Gerber did not control this case because there was no such conclusive presumption requirement for the Drop-Down approval; rather, what was required under the LPA was approval by the conflicts committee in their subjective belief that the Drop-Down was in the best interest of the Partnership.

The court began its implied covenant analysis with the contract construction step, which is where the court also concluded its analysis because the special approval process had no fairness opinion related gap, as was the case in Gerber. In so ruling, the court found that deploying the implied covenant to impose on the parties a fairness opinion requirement similar to Gerber would fundamentally rewrite the LPA by changing the conflict committee's inquiry from best interests of the Partnership to fairness to the Unitholders and expanding the scope of judicial review from subjective good faith of the conflicts committee to compliance with an obligation to obtain a fairness opinion that would satisfy a court after the fact. Because the LPA's special approval process did not require a fairness opinion there was no gap to fill.

Moreover, for illustrative purposes only, the court proceeded through the next steps of the implied covenant analysis and considered what the parties would have agreed to at the time of contracting. Examining the LPA in terms of the Partnership's prospectus from its initial public offering the court concluded that the drafters of the LPA anticipated numerous conflict of interest transactions and created a dispute resolution method that would limit potential litigation and after-the-fact judicial review. Therefore, assuming the question had been raised during negotiations whether the Unitholders should have the ability to challenge the special approval process by litigating whether the conflicts committee obtained a fairness opinion that satisfied a test of reasonableness, met certain requirements, or otherwise complied with some form of objective standard, the record before the court suggested that such a provision would have been rejected. That being the case, summary judgment was granted for defendants' on the implied covenant claim.

Finally, the court granted summary judgment with respect to plaintiffs' aiding and abetting claim. The court held that since the LPA eliminated all fiduciary duties this was a pure breach of contract claim and the general rule in Delaware is that there is no claim available for aiding and abetting claim a breach of contract. In sum, defendants' motion for summary judgment was granted in toto.

b. *Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, C.A. No. 7092-VCP (Del. Ch. Dec. 20, 2012)

In this case, the Delaware Court of Chancery was presented with a motion to dismiss numerous claims by certain limited partners of Tremont Opportunity Fund II, L.P., a Delaware limited partnership (the "Fund"), against Tremont Partners, Inc., a Connecticut corporation and the general partner of the Fund (the "General Partner"), Tremont Group Holdings, Inc., a Delaware corporation and the parent of the General Partner (the "Parent"), and certain individuals that were officers, directors, managers and principal decision makers of the General Partner and the Parent (the "Individual Defendants"). The claims were all related to losses connected with an investment by the Fund in a hedge fund (the "Hedge Fund") that invested most of its assets in Bernard Madoff's ponzi scheme. The General Partner was also the general partner of the Hedge Fund. In the context of this motion to dismiss, the court addressed, among other things, whether (i) the court had jurisdiction over the Individual Defendants, (ii) an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims, (iii) certain claims were derivative or direct and whether the derivative claims should be permitted notwithstanding a settlement in an action involving similar claims filed by other limited partners of the Fund in the United States District Court for the Southern District of New York (the "New York Case"), (iv) plaintiffs could maintain a valid breach of contract claim under the partnership agreement of the Fund and a private placement memorandum (the "PPM") relating to interests in the Fund on which plaintiffs' allegedly relied, (v) defendants' breached the implied covenant of good faith and fair dealing and (vi) whether the Parent could be liable for aiding and abetting the General Partner's alleged breach of fiduciary duty.

The court first addressed whether it could exercise personal jurisdiction over the Individual Defendants. The partnership agreement of the Fund included a clause pursuant to which the parties thereto consented to the exclusive jurisdiction of the Delaware courts. However, the court observed that the Individual Defendants were not parties to the partnership agreement of the Fund simply by virtue of being directors, officers, managers or decision makers of the General Partner and thus they were not bound by such provision. Plaintiffs' further claimed that the court had jurisdiction under Delaware's long-arm statute, but the court granted the Individual Defendants' motion to dismiss on this issue, finding that participation in the formation of the Fund and having management positions in the Fund did not cause the Individual Defendants to have contacts with the State of Delaware so extensive and continuing that exercising personal jurisdiction would be fair and consistent with state policy. The court also found that the alleged wrongs did not arise out of conduct that occurred within the State of Delaware, and therefore, the court did not have personal jurisdiction on that basis under the Delaware long-arm statute.

The court next turned to defendants' argument that an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims for breach of contract, breach of fiduciary duty, negligent misrepresentation and unjust enrichment. This provision essentially exculpated the General Partner and the Parent for any losses or expenses except those resulting from gross negligence, willful misfeasance, bad faith or reckless disregard of duties under the partnership agreement of the Fund. Plaintiffs claimed that they adequately pled facts that would support a finding of gross negligence. The court referred to the definition of "gross negligence" in the civil context as "a higher level of negligence representing an extreme departure from the ordinary standard of care." The court further indicated that gross negligence is a decision "so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion." The court stated that, under the law of entities, gross negligence "involves a devil-may-care attitude or indifference to duty amounting to recklessness." In order to prevail on a claim of gross negligence, the court stated that a plaintiff must plead and prove that the defendant was "recklessly uninformed" or acted "outside the bounds of reason." Plaintiffs' generally claimed that defendants committed gross negligence by failing to supervise, monitor and manage investments by the Hedge Fund in the Madoff ponzi scheme and instead blindly and recklessly handed over their responsibility to Madoff without performing any due diligence. The court observed that while no Delaware case has addressed whether failure to heed "warning signs" can constitute gross negligence in the partnership context, the analysis in *Forsythe v. ESC Fund Mgmt. Co. (U.S.)* was instructive. The court noted that in *Forsythe*, a motion to dismiss that accused the general partner of failing to oversee an affiliate that was delegated management responsibility for the subject limited partnership was denied. The court found that in this case, defendants' conduct was arguably more egregious than that at issue in *Forsythe*, and therefore, the court denied the motion to dismiss based on the exculpation provision.

The court next addressed whether plaintiffs' breach of fiduciary duty and unjust enrichment claims were derivative or direct claims. The court applied the test set forth in the corporate case of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, which requires answering two questions in making this determination: (1) who suffered the alleged harm; and (2) who would receive the benefit of any recovery or other remedy. The court noted that these claims related to a diminution in the value of the Fund and the Hedge Fund resulting from the Madoff ponzi scheme. According to the court, these injuries were suffered by the Fund and the Hedge Fund, and only indirectly by plaintiffs, and thus, they were derivative in nature. With respect to these claims and all other derivative claims asserted by plaintiffs, including, among others, claims of negligent misrepresentation and intentional misrepresentation, plaintiffs argued that their claims must have been direct because they elected to opt-out of the settlement in the New York Case. The court found, however, that opting-out of a settlement cannot convert a derivative claim to a direct claim. The court further held that because the settlement released defendants with respect to derivative claims, the court was bound by res judicata and thus granted the motion to dismiss.

Plaintiffs alternatively argued that principles of equity warranted disregarding the distinction between their direct and derivative claims. Although the court acknowledged that there was some authority under the *Cencom* and the *Anglo American* limited partnership cases that principles of equity could warrant disregarding a distinction between direct and derivative claims, the court found that those cases involved unique circumstances and there were no similar circumstances in the present case that warranted disregarding the derivative nature of plaintiffs' claims.

The court then discussed defendants' motion to dismiss plaintiffs' claim that defendants breached the partnership agreement of the Fund and the PPM because they allegedly failed to analyze, evaluate and monitor the Madoff-related investments in any manner whatsoever and failed to perform any meaningful due diligence or to monitor the Hedge Fund's investments. The court looked to the PPM, which expressly provided that the General Partner would monitor the Fund's investments and evaluate information regarding the personnel, history and background of professional investment management firms in selecting managers of the Fund. The court also assessed the partnership agreement of the Fund, which provided that the General Partner and its affiliates were not obligated to do or perform any act or thing in connection with the business of the Fund not expressly set forth in the partnership agreement of the Fund. The court found that this provision conflicted with another provision in the partnership agreement of the Fund, which provided that the PPM did not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading. In applying well settled Delaware principles of contract interpretation, the court found that because of this conflict, the partnership agreement of the Fund was ambiguous as to whether it incorporated the promises made in the PPM that were allegedly breached. Because any ambiguity must be resolved in favor of the nonmoving party, the court denied defendants' motion to dismiss the breach of contract claim.

With respect to plaintiffs' claim that defendants' breached the implied covenant of good faith and fair dealing, the court stated that plaintiffs' must have alleged (1) a specific obligation implied in the partnership agreement of the Fund, (2) a breach of that obligation, and (3) resulting damages. Plaintiffs alleged that the General Partner had an obligation to refrain from unreasonable conduct and had an implied contractual obligation to collect, analyze and evaluate information when selecting investment managers and to monitor their performance after any such selection. The court held that this allegation was conclusory and did not amount to pleading a specific implied contractual obligation as required to survive a motion to dismiss. Accordingly, the court granted defendants' motion to dismiss this claim.

Finally, the court addressed plaintiffs' claim that the Parent aided and abetted the General Partner's alleged breach of fiduciary duty. To make a valid aiding and abetting claim, the court indicated that plaintiffs must demonstrate: (1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) that damages to plaintiffs resulted from the concerted action of the fiduciary and the nonfiduciary. The court noted that the General Partner undoubtedly owed fiduciary duties to the limited partners of the Fund. With respect to the third element, the court indicated that, under Delaware law, the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal. In this case, the court found that the General Partner could be considered the Parent's agent, and the General Partner's knowledge could be imputed to the Parent. Thus, the court found that the third element was satisfied. The court did not address the fourth element and denied defendants' motion to dismiss this claim.

c. *Twin Bridges Ltd. P'ship v. Draper*, C.A. No. 2351 (Del. Ch. Sept. 14, 2007)

This case, although involving a dispute over the governance of a family owned limited partnership, raises significant issues of limited partnership law including whether the step transaction principal applied to the analysis of transactions under tax law should be applied to an amendment of a partnership agreement and subsequent merger so that the two are viewed as a single transaction, whether the doctrine of independent legal significance applies to Delaware limited partnerships, whether a supermajority provision in a partnership agreement can be reduced or eliminated by amendment with a lesser vote and whether a general partner can violate its fiduciary duty, and limited partners can aid and abet that violation, by proposing and adopting amendments to a partnership agreement that eliminate the general partners' fiduciary duties in connection with certain interested transactions. The partnership at issue had two general partners, Schutt and Draper, with joint authority to make all major decisions regarding the partnership. As the two general partners disagreed on the management of the partnership's principal asset, the Partnership was effectively in gridlock with respect to the development of that asset. Schutt and limited partners who collectively held 87% of the economic interests and voting power in the partnership decided to pursue a solution without Draper and the two limited partners who were his sons. This they did, without prior notice to Draper or his sons, by executing written consents to amend the partnership agreement to add a provision authorizing the partnership to merge with approval of partners holding two-thirds of the partnership interests and then approving the merger of the partnership into a newly formed limited partnership with a different governing structure. On the same day they effected the merger, Schutt and the limited partners aligned with her filed a declaratory judgment action seeking a declaration of the validity of the amendment to the partnership agreement, the merger of the partnership into another Delaware limited partnership and the merger agreement pursuant to which the merger was effected. Draper and his sons asserted counterclaims for breach of contract, a declaration of invalidity of the amendment and merger, breach of fiduciary duty against Schutt and a claim for aiding and abetting a breach of fiduciary duty against the limited partners aligned with Schutt.

With regard to defendants' claim against Schutt for breach of fiduciary duty, the court defined the issue before it as whether Schutt's involvement in passing the amendment and approving the merger could result in a breach of her fiduciary duty of loyalty to the partnership. Plaintiffs first sought dismissal of that claim on the grounds that any allegation of a self-interested transaction by Schutt was only "hypothetical" and therefore not ripe for decision. In addition to their unripeness claim, plaintiffs argued that because the amendment and merger were valid transactions under the partnership agreement and the DRULPA, Schutt's voting of her interest was not restricted by her fiduciary obligation as a general partner. With regard to plaintiffs' technical validity defense, the court, citing *Schnell v. Chris-Craft Indus., Inc.*, noted that while the integrated transaction might be valid under the new partnership agreement and the DRULPA, that did not necessarily immunize Schutt from a claim that she breached her fiduciary duty of loyalty to the partnership in spearheading the transaction. The court also rejected plaintiffs' ripeness defense. The court found there was no question that prior to the transactions at issue, Schutt, as a general partner, owed a fiduciary duty of loyalty to the partnership, that under DRULPA Section 1101(d), the elimination of a general partner's fiduciary duties was permissible and that the relevant provision of the new partnership agreement eliminated all fiduciary duties relating to the development and implementation of a development plan. Thus, the court concluded that any future review of a self-dealing transaction by Schutt as part of a development plan would be subject only to the lesser standard of the implied covenant of good faith and fair dealing and, therefore, such a limitation on defendants' right to challenge a development plan would have an immediate and practical impact on them and was ripe for adjudication. The court also noted that it could not rule out the possibility that depriving Draper of notice and an opportunity to address an issue as important as eliminating fiduciary duties constituted a breach of Schutt's fiduciary duty. Finally, with regard to defendants' aiding and abetting a claim against the limited partners aligned with Schutt, the court held that defendants had alleged sufficient facts to support a claim that those limited partners knowingly participated in Schutt's alleged breach of fiduciary duty.

d. *In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig*., 810 A.2d 351 (Del. Ch. 2002) and C.A. No. 17379 (Del. Ch. Dec. 16, 2002)

Limited partners sued the general partners, which were affiliated with one another, of a Delaware limited partnership for breach of fiduciary duty and breach of contract and sued an affiliate of the general partners for aiding and abetting breaches of fiduciary duty. The plaintiffs' claims stemmed from actions taken by the general partners in connection with an offering of preferred units having superior claims to capital and income distributions, including the amendment of the partnership agreement without limited partner approval to subordinate the contractual distribution rights of the existing limited partners to those new claims and a subsequent sale of partnership property also without limited partner approval. Before the court were cross-motions for partial summary judgment.

The court denied the defendants' motion for summary judgment on the plaintiffs' claim that the general partners' affiliate aided and abetted breaches of fiduciary duty. The court stated that in order to sustain their claim, the plaintiffs must show the existence of a fiduciary relationship, a breach of duty by the general partners, the affiliate's knowing participation in the breach and damages resulting from the concerted action. The court found that because the affiliate was formed by the general partners' parent for the specific purpose of acting as the instrumentality through with the parent carried out its purchase of preferred units and the only other investors in the affiliate were officers and directors of the general partners, the general partners' knowledge regarding the offering could be fairly imputed to the affiliate and a triable issue existed regarding the affiliate's responsibility for the plaintiffs' injuries.

The court ordered the parties to submit an order conforming to the court's denial of all motions for summary judgment, except as to the plaintiffs' claim that the general partners breached the partnership agreement by purporting to amend it without limited partner approval as to which the court granted summary judgment to the plaintiffs as to liability. In a later ruling in the *Nantucket* case that arose from the parties' dispute over the form of such order, the court denied the defendants' request to amend their answer to raise the statutory defense afforded by Section 17-1101(d)(1) of DRULPA. The defendants had argued that the entry of a summary judgment order as to their liability would preclude them from relying on the statutory defense that they believed in good faith that their actions were authorized by the partnership agreement and that they should be exculpated from liability as to the claims for breach of the partnership agreement and breach of fiduciary duty. The defendants had not specifically raised this defense at any prior stage of the proceedings but asserted that the denials of accusations of bad faith contained in their answer and their contention that they acted in conformity with the partnership agreement gave the plaintiffs adequate notice that the statutory defense was present in the case. The court had initially concluded that the defendants should have asserted the statutory defense earlier in the case and upon this renewed request of the defendants to raise the statutory defense at trial, the court again denied the request. The court held that the statutory defense provided by Section 17-1101(d)(1) of DRULPA clearly fell within the ambit of Court of Chancery Rule 8(c), which required a defendant responding to a complaint to set forth any matter constituting an avoidance or affirmative defense, and that on its face Section 17-1101(d)(1) itself seemed to require a showing by the defendant that it acted in good faith reliance on the partnership agreement if it was to avoid liability. The court held that putting the burden on the defendants to assert the statutory defense in the early stages of a case served the interests of fairness and efficiency and permitted the early termination of cases that fall within its protective ambit.

e. *Cantor Fitzgerald, L.P. v. Cantor*, C.A. No. 16297 (Del. Ch. June 16, 1998), (Del. Ch. July 12, 1998) and (Del. Ch. Mar. 13, 2000)

A series of related cases arose in connection with disputes between Cantor Fitzgerald, L.P. ("plaintiff" or the "partnership"), a leading inter-dealer and institutional broker of United States Treasury Securities and other government securities, and several of its partners and other entities. The thrust of plaintiff's complaint alleged that the defendants, who included three of plaintiff's limited partners, working through a Delaware corporation under their control that was formerly a department of plaintiff, had breached their fiduciary duty of loyalty to the partnership and engaged in competitive activity in violation of the applicable limited partnership agreement. The court initially addressed the claims raised by plaintiff on a motion to dismiss and denied the motion as to various claims including fiduciary duty and contract claims. Plaintiff had also sought a preliminary injunction. The court initially reserved on that application until the record could be supplemented on certain issues relating to imminent and irreparable harm and the balancing of the equities. After such supplementation, the court found that plaintiff had a reasonable likelihood of establishing at trial on the merits that the defendant limited partners had breached their fiduciary duty of loyalty to the general partner and the partnership, but denied the preliminary injunction because it found that the record did not support the finding of imminent irreparable harm if the injunction were not granted. The court based its holding on the provisions of the partnership agreement whereby each partner, including each limited partner, acknowledged a duty of loyalty to the partnership and agreed to take no action to harm (or that would reasonably be expected to harm) the partnership. In addition, each of the partners, including the limited partners, agreed not to engage in competitive activities. The court found that the proposed new business venture of the limited partners would be competitive with the partnership and therefore was likely to result in a breach by the limited partner defendants of their contractually agreed upon fiduciary duty of loyalty and agreement not to compete. However, the court explicitly expressed no opinion as to whether a duty of loyalty might have existed in the absence of the express provisions of the partnership agreement.

After a trial on the merits of the case, the court held that partners of a Delaware limited partnership may agree in their partnership agreement that partners, including limited partners who do not participate in the management or operation of the partnership, are subject to a fiduciary duty of loyalty. Defendants argued that the language of DRULPA Section 17-1101(d), which provides that "[t]o the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited partnership or to another partner . . . (2) the partner's or other person's duties and liabilities may be expanded or restricted by provisions in a partnership agreement," precludes partners from creating duties that do not exist separately at law or in equity. The court disagreed with defendants' argument, citing the policy of the DRULPA to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements set forth in DRULPA Section 17-1101(c) and the lack of an express prohibition in the DRULPA against providing in a partnership agreement that limited partners are subject to duties that the common law or equity does not independently impose upon them. The court found support for its holding in its opinion in *Kahn v. Icahn*, in which it held that "Delaware law permits partners to agree on their rights and obligations to each other and to the partnership. This is so even when Delaware law might impose different rights and obligations absent such agreement." Notably, in determining the scope of the duty of loyalty, the court stated that "[t]he duty of loyalty proclaimed in the [partnership agreement] requires no dependency upon a default concept to a narrow definition derived from corporate common law. The scope of the duties owed by the parties must be determined by reference to the nature of this particular business enterprise." The court reformed the partnership agreement to remove the provision by which plaintiff claimed that defendants agreed not to engage in competitive activities, finding that such provision was the result of a mistake in the amendment of the partnership agreement. The court went on to find that defendants breached their contractually imposed duty of loyalty and that defendants' corporate vehicle aided and abetted in the fiduciary duty breach and tortiously interfered with the partnership agreement. Because the court did not find that plaintiff faced the threat of imminent, irreparable injury and could not quantify the monetary damages from defendants' wrongdoing, it did not grant plaintiff's request for equitable relief or monetary damages. The court did, however, grant plaintiff declaratory relief and an award of attorneys fees based on the egregious nature of the defendants' actions.

f. *Wallace v. Wood,* C.A. No. 15731 (Del. Ch. Oct. 12, 1999)

Limited partners brought suit alleging, among other things, that the corporate general partner of a Delaware limited partnership, as well as its parent corporations and affiliates and officers of the general partner, breached fiduciary duties owed to the limited partners and the limited partnership. Plaintiffs claimed that the defendants used partnership funds to establish business entities which defendants wrongfully used to circumvent a provision in the partnership agreement prohibiting the limited partnership from incurring debt in excess of a specified amount. In denying defendants' motion to dismiss, the court rejected defendants' argument that the parent corporations, affiliates and officers of the corporate general partner did not owe fiduciary duties to the limited partners and the limited partnership and applied the parameters of fiduciary duties owed by the directors of a general partner enunciated in *In re USACafes, L.P. Litig.* to plaintiffs' claims. The court found that plaintiffs alleged adequate specific facts to support their claims that all defendants utilized partnership assets which they controlled to enrich themselves at the expense of plaintiffs and noted that precedent existed in Delaware for the extension of fiduciary duties to defendants similarly situated to the parent corporations and affiliates of the general partner. The court also declined to dismiss plaintiffs' claim that defendants aided and abetted the general partner's breach of its fiduciary duties. The court determined that it was more appropriate to carefully address this alternative argument, which on its face seems inconsistent with the claim that the general partners' officers, parents and affiliates breached fiduciary duties themselves because it assumes they are "non-fiduciaries," after fact finding had occurred rather than at the stage of proceedings involving a pre-trial dispositive motion.

5. Entire Fairness

a. *In re Cencom Cable Income Partners, L.P. Litig.*, C.A. No. 14634 (Del. Ch. Feb. 15, 1996), (Del. Ch. Oct. 15, 1997, *amend. and reh'g denied*, Del. Ch. Nov. 26, 1997), (Del. Ch. May 5, 2000), (Del. Ch. Nov. 26, 2008), (June 6, 2011) and (May 24, 2012), *aff'd* (Del. July 31, 2012)

Plaintiff limited partner claimed the general partner breached its fiduciary duty to the partnership by electing to purchase the assets of the partnership upon the liquidation of the partnership under the terms of an appraisal process in the limited partnership agreement. The court, in denying the plaintiff's motion to enjoin the sale, held that the general partner's actions were not a breach of its fiduciary duty because the parties to a limited partnership agreement, which is primarily contractual in nature, are permitted to expressly modify traditional concepts of fiduciary duty by allowing the fiduciary to deal directly with the limited partnership and to define the parameters of due care within the structure of the partnership.

In a later ruling in the Cencom case on the general partner's motion for summary judgment, the court dismissed the limited partners' claim that the general partner was obligated to fulfill a common-law fiduciary duty, beyond the bargained-for terms of the partnership agreement, showing the "entire fairness" of the sale of the partnership's assets to the general partner, stating that it would not subject the sale process set forth in the partnership agreement to "some court-approved, after-the-fact, moralistic 'entirely-fair' standard, when the parties defined the desired process in the Partnership Agreement." The court denied a subsequent motion by plaintiffs to alter, amend or reconsider the decision based on the alleged failure of the court to address certain of the plaintiffs' claims. The court found no clear error of law in its decision and concluded that it had not overlooked a controlling principle of law or misapprehended the law or material facts.

In a further proceeding in the Cencom case, the general partner again moved for summary judgment with respect to the claims that (i) it breached its voluntary, contractually assumed fiduciary duty to assure the fairness of the sale, (ii) it did not have the authority to terminate certain distributions to the limited partners and (iii) it breached its fiduciary duties of loyalty and candor in connection with the appraisals of the partnership's assets. The court granted the general partner's motion with respect to one sub-issue of the breach of fiduciary duties of loyalty and candor claim, holding that the general partner had supplied equal information to each appraiser. Because the court found that genuine issues of material fact existed with respect to the other claims at issue, the court denied the remaining parts of the general partner's motion for summary judgment.

In its fourth opinion in the Cencom case, the court considered the general partner's motion for summary judgment on the three claims that remained after the prior proceedings and the limited partner's cross-motion for partial summary judgment on the claim with respect to the termination of distributions. As to the claim with respect to the scope and potential breach of the general partner's voluntarily-assumed duty in confirming the fairness of the sale, the general partner argued that the limited partner's rights to enforce such a duty were based in promissory estoppel, making lack of reliance by the limited partner fatal to its claim. The court rejected the general partner's promissory estoppel argument, with its basis in contractual principles, given that the duty voluntarily assumed by the general partner was a common law fiduciary duty and therefore denied the motion for summary judgment. The general partner also advanced a new argument with respect to the claim arising from its termination of distributions prior to the closing of the sale, namely, that the cash held by the partnership between the effective date of the sale and the closing date of the sale was for the benefit of the purchasers and not available for distribution. Because title to the partnership's assets was not transferred until the closing date, the court rejected this argument and denied summary judgment to the general partner. The court noted, however, that in a trial it could be determined that the interest paid on the purchase price between the effective date and the closing date compensated the limited partner for the loss of the distribution, rendering it unable to prove damages. (The court also rejected the limited partner's cross-motion for summary judgment on this claim, deeming it the equivalent of a motion to reconsider.) On the third claim relating to the appraisal of the partnership's assets, the court as it had in the two prior proceedings found the record inadequate to support summary judgment on the question of the valuation of the assets individually or in the aggregate. In addition, the court denied summary judgment on the general partner's newly advanced argument that because the purchase price exceeded the value of the assets regardless of the method of calculation, the limited partner was without damages, stating it to be a question of fact not law. Finally, the disclosure issue with respect to the appraisal claim was split into the sub-issues of whether the general partner's presentation of the appraisals conformed to standard techniques and whether such presentation adequately disclosed all material facts, with the court granting summary judgment to the general partner on the first, but not the second.

In a post-trial opinion in this case, the court addressed plaintiffs' claims that (i) defendants breached their voluntarily assumed duty that a law firm would assure the fairness of the sale, (ii) the general partner breached the partnership agreement by terminating priority distributions before the termination of the partnership and (iii) defendants breached the partnership agreement and their fiduciary duties by driving the valuation process to an appraisal of the assets of the partnership individually without properly including the synergistic benefits of the assets. In analyzing plaintiffs' first claim, the court stated that substantive rights of the limited partners are determined by reference to the provisions of the partnership agreement and that one sentence in a disclosure statement stating that a law firm would assure that the dissolution process would be "fair" should not change those rights. The court found that no reasonable limited partner would believe that its rights were being expanded beyond those included in the partnership agreement by reason of that one sentence. The court thus declined to apply an "entire fairness" standard to the sale process and held that defendants complied with their duties under the partnership agreement as regards the sale. With respect to plaintiffs' arguments regarding the premature termination of the priority distributions, the court noted that the partnership agreement did in fact provide for those payments to be made until the termination of the partnership agreement. The effective date of the sale of the partnership's assets to the general partner was July 1, 1995, but the closing of the sale (and resulting termination of the partnership) did not take place until January of 1996. The disclosure statement was abundantly clear, however, that the last priority distribution would be made in August, 1995 and that in place of those distributions, the limited partners would receive interest payments on the sale proceeds from the effective date until closing. The court held that by approving the sale, the limited partners demonstrated their agreement with that approach and had through acquiescence and/or waiver relinquished their rights to the priority distributions. The court further determined that the interest payments received by the limited partners were greater than the priority distributions the limited partners would have received so that even if plaintiffs' position had been correct, plaintiffs would not have been damaged. Finally, as to plaintiffs' arguments regarding the valuation of the partnership's assets, the court found that the appraisal process had been conducted in compliance with the standards set forth under the partnership agreement. Thus, the court entered judgment in favor of defendants and dismissed this action.

Following an appeal of court's post-trial opinion, the Delaware Supreme Court remanded the case to the court with directions to answer the following questions: (1) since there was no amendment to the partnership agreement, on what legally authorized basis could the sale transaction have been structured to preclude limited partners from receiving quarterly distributions without the consent of all limited partners; and (2) if the partnership agreement gave all limited partners a contract right to quarterly distributions that was indefeasible without their consent, why, as a matter of contract or statutory law, would the non-consenting limited partners not be entitled to receive both interest payments and quarterly distributions during the period between the effective date of the sale and the termination of the partnership.

With respect to the first question, the court noted that the partnership agreement conferred upon the general partner the right to determine the terms of any sale of the assets of the partnership as part of partnership's liquidation process. Based on this authority, the court found that the manner in which the general partner structured the sale transaction was within its discretion. Further, the sale transaction was subject to approval by a majority of the limited partners, which approval was knowingly and voluntarily given by such majority. The court noted that the right to quarterly distributions could not be terminated without a unanimous vote to amend the partnership agreement, but found that such right was not terminated. Rather, following the sale transaction, the partnership had no cash available to pay these distributions because the sale transaction was structured to provide the purchasing affiliates with the operating income from the assets subject to the sale transaction from and after the effective date of the sale, which left the partnership with no cash to make the required distributions.

With respect to the second question, the court found that pursuant to the terms of the sale transaction, the partnership surrendered its rights to operating income generated from the assets it sold, but in lieu of quarterly distributions, the purchasing affiliates agreed to make interest payments to the limited partners. According to the court, these covenants were mutual and could not be separated because the purchasing affiliates' promise to make interest payments to the limited partners was in consideration for their right to receive operating income from the purchased assets. The court held that even if the failure to make quarterly distributions was a breach of the partnership agreement, that would still not support double payment to the limited partners -- payment of interest and quarterly distributions to limited partners -- because the limited partners' entitlement to damages would be limited to damages that would put them in the "same place as . . . [they] would have been if the contract had been performed."

b. *Brinckerhoff v. Enbridge Energy Co., Inc.*, C.A. No. 5526-VCN (Del. Ch. Sept. 30, 2011) and (Del. Ch. May 25, 2012)

This case involved a challenge to a transaction between Enbridge Energy Partners, L.P. (the "Partnership") and Enbridge, Inc. ("Enbridge"), the entity that controlled the Partnership's general partner. The case was before the Court of Chancery on a motion to dismiss and, finding that the partnership agreement of the Partnership effectively shielded the general partner and its affiliates from liability for an interested transaction as long as they acted in good faith and finding that plaintiff had not alleged actions constituting bad faith on the part of any defendant, the court dismissed all of the claims. The challenged transaction was a joint venture between the Partnership and Enbridge involving the construction and operation of a pipeline which the Partnership had originally conceived. After the Partnership had taken various steps to advance the project including negotiating and obtaining permits and tariff agreements, Enbridge approached the Partnership to discuss obtaining an interest in the project through a joint venture. Enbridge proposed that it would contribute to the cost of the project and that the Partnership and Enbridge would share in the project's profits based solely upon their relative capital contributions. Thus, under Enbridge's proposal, the Partnership would not receive any compensation in return for already owning the project, the work it had already put into it and the money it had already expended. Enbridge suggested that it would contribute 75% of the cost of the project and the Partnership would contribute 25% and so the project would be owned in these proportions. After receiving this proposal, the Partnership's general partner formed a special committee consisting of three independent members of the general partner's board. The special committee was asked to determine whether the joint venture was "fair and reasonable to the Partnership and its unitholders" and to make a recommendation to the board on behalf of the Partnership with respect to the proposed transaction. The special committee hired legal and financial advisors. Its banker's retainer letter stated that it was retained to render an opinion as to whether the terms of the joint venture were "representative of an arm's length transaction." The special committee met several times and was advised by its banker that the terms of the joint venture were "representative, in all material respects, of those that would have been obtained by the Partnership in an arm's length transaction." The banker also opined that the Partnership should retain as much equity in the project as possible. In light of the banker's findings, the special committee approved the joint venture agreement, provided that the Partnership would hold a 1/3 equity stake rather than 25%. Plaintiff challenged the transaction on four counts, both derivatively and directly. Count one alleged that defendants breached their express and implied duties under the partnership agreement by causing the Partnership to enter into an agreement that was financially unfair to the Partnership. Count two alleged that defendants other than the general partner aided and abetted the general partner's breach of its duties. Count three alleged that defendants breached the implied covenant of good faith and fair dealing, and Count four alleged that two defendants, to the extent they were not liable for breaching their duties under the partnership agreement, tortiously interfered with the partnership agreement and were thereby unjustly enriched. Defendants responded that the partnership agreement expressly permitted the general partner to enter into a transaction with a related entity, such as Enbridge, as long as the terms of that transaction were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties." Defendants argued that the joint venture met that standard, that their investment banker opined that the joint venture was representative of an arm's length transaction and further that under the partnership agreement, the general partner was allowed to rely conclusively on the banker's opinion. Defendants further argued that there was no cause of action for aiding and abetting a breach of contractually imposed duties, that the implied covenant of good faith and fair dealing was inapplicable because the partnership agreement expressly addressed the duties of defendants and, finally, since none of defendants breached their duties under the partnership agreement, there could be no tortious interference claim. In its analysis, the court first concluded that the Tooley test should apply to a partnership claim and that under that test, because any benefit would go to the partnership rather than to the individual partners, the claims were derivative in nature. However, the court also concluded that a demand would have been futile since a majority of the general partner's board was not independent. Turning to the specific claims, the court first held that defendant who supplied all the employees to the general partner and the Partnership but had no control over the general partner or the Partnership owed no fiduciary duties to those entities. The court therefore dismissed all claims against that entity. In analyzing the remaining claims, the court focused on the provisions of the partnership agreement that permitted related party transactions as long as they were on terms "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties," that provided that no Indemnitee (which included all defendants) would have any liability to any partner or other person as a result of any act or omission if such Indemnitee acted in good faith and that authorized the general partner to rely on investment bankers as to matters that the general partner reasonably believed to be within their professional or expert competence and provided that any action taken by the general partner in reliance on their advice would be conclusively presumed to have been done in good faith. Based on these provisions and the facts alleged, the court concluded that plaintiff had not alleged facts indicating bad faith. The general partner was protected through its good faith reliance on the investment banker's finding. Similarly, the court also found plaintiff had failed to plead facts indicating that the general partner's board acted in bad faith. They established an independent committee, hired independent counsel and bankers, met several times and negotiated a higher percentage participation for the Partnership than that which was originally offered.

With regard to plaintiffs' challenge to the work of the banker, the court noted that the valuation methodology and comparable transaction analyses that an investment banker undertakes are properly within the discretion of the banker. The court also noted that at the time of the joint venture it would be reasonable for the general partner's board to conclude that it did not want to put a large majority of the Partnership's capital into a single venture and thus it was better to participate in the project with Enbridge. With regard to Enbridge, the court held that it could not have been said to have negotiated in bad faith since it negotiated with the general partner's special committee. The court then noted that claims for aiding and abetting, as well as tortious interference, require an underlying breach. As there was none, these claims were also dismissed. Finally, the court rejected plaintiff's implied covenant claim finding that, even if it were possible to plead breach of the implied covenant where a plaintiff had failed to plead a bad faith claim, plaintiff had failed to do so here. In this regard, the court noted that the implied covenant addresses "only events that could not reasonably have been anticipated at the time the parties contracted." In contrast, the court found that the parties to the partnership agreement thought about related party transactions and the general partner's reliance upon investment banker opinions and explicitly addressed those issues.

On remand by order of the Delaware Supreme Court to determine the sufficiency of the plaintiff's claims for reformation or rescission on a motion to dismiss, the Court of Chancery first concluded that the plaintiff's request for reformation or rescission was waived because the plaintiff failed to raise any arguments with respect to either remedy in his briefs or at oral arguments. Nevertheless, because of uncertainty surrounding the scope of the remand order, the Court of Chancery also addressed the substance of the plaintiff's claim for reformation or rescission.

Turning to the plaintiff's claim for reformation, the court found that the plaintiff stated a claim that was potentially remediable through reformation. The partnership agreement permitted conflicted transactions that were "fair and reasonable" to the Partnership, and the partnership agreement deemed transactions that were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties" to be fair and reasonable. The court noted that it has previously interpreted similar language to require something akin, if not equivalent to, entire fairness review. Because the entire fairness standard cannot be satisfied by reliance on an investment banker's opinion on a motion to dismiss, the court concluded that the plaintiff had adequately plead that the joint venture was not fair to the Partnership.

The court noted, however, that the reformation that the plaintiff sought—a reduction in Enbridge's share in the joint venture—was rarely sought and obtained. The court expressed hesitation because, by reducing Enbridge's share in the joint venture, the reformation remedy sought would reduce the cash flow Enbridge would receive and essentially redirect it to the Partnership, a result the court likened to garnishment. Despite its misgivings, the court concluded that because the partnership agreement only provided exculpation against money damages, and because the plaintiff adequately plead entitlement to an equitable remedy, the plaintiff's claim for reformation should survive a motion to dismiss.

Next, the court held that the plaintiff had not stated a claim for rescission. The court noted that the plaintiff made no arguments in favor of rescission and its counsel conceded at oral argument that reformation was the crux of this remand. In addition, the court found that the plaintiff failed to meet its burden of demonstrating that all parties to the transaction could be restored to the positions they occupied prior to the transaction. The plaintiff offered no explanation regarding how the court could rescind a joint venture agreement to construct a pipeline once such construction was complete. The court therefore dismissed the plaintiff's claim for rescission.

c. *Venhill Ltd. P'ship. v. Hillman,* C.A. No. 1866-VCS (Del. Ch. June 3, 2008)

Plaintiffs were Venhill Limited Partnership ("Venhill"), a Delaware limited partnership created to serve as an investment vehicle for the benefit of the families of Howard Hillman ("Howard") and Tatnall Hillman ("Tatnall"), and two trusts (the "Trusts") that were limited partners in Venhill. Howard, the principal defendant, served as general partner of Venhill, and Howard, Tatnall and Joe Hill ("Joe"), a cousin, were the three trustees for the Trusts. The litigation related to the substantial investments Howard had caused the Trusts, through

Venhill, to make in Auto-trol ("Auto-trol"), a portfolio company owned by Venhill. Howard was effectively on both sides of the Auto-trol transactions because he was CEO and controlled Auto-tel when, as general partner of Venhill, he caused Venhill to make investments in Auto-trol. Although Auto-trol experienced some success following Venhill's acquisition in 1973, the company only survived due to substantial investments by Venhill. By July of 2005, Howard had caused Venhill to make 186 loans to, and invest $85.4 million in, Auto-trol. As early as 1990, Auto-trol began to exhibit strong signs of failure. Consequently, Howard began to cause Venhill to make loans to Auto-trol at rates and upon terms that would not have been available to Auto-trol in the marketplace. Tatnall and Joe were aware that Howard, in his capacity as general partner of Venhill, was causing Venhill to invest substantial sums of money in Auto-trol and expressed their reservations as early as 1994. In spite of their reservations, Tatnall and Joe continued to allow Howard to invest Venhill funds in Auto-trol. Although Tatnall and Joe, under Venhill's partnership agreement, had the power to remove Howard, they did not do so and instead limited Howard's ability unilaterally to cause the Trusts to loan money to Venhill to fund Auto-trol. Nevertheless, although Howard could no longer cause the Trusts to invest in Auto-trol through Venhill, Howard used his discretion as general partner of Venhill to fund Auto-trol's operations using Venhill's remaining capital. Additionally, Howard, acting as CEO for Auto-trol on the one hand and general partner of Venhill on the other, caused Venhill to convert much of the Auto-trol debt held by Venhill into equity. In January 2005, Howard, sensing that he would soon be removed as general partner of Venhill, took a number of actions designed to protect Auto-trol from Venhill's control and to benefit himself. Howard transferred the shares of Auto-trol owned by Venhill to a newly created LLC of which Venhill was the sole member but that Howard controlled as manager. Additionally, Howard caused Venhill to (i) loan Auto-trol $2 million, (ii) pay his personal lawyers, and (iii) reimburse him for the out-of-pocket costs he incurred related to litigation involving the Trusts. Following his removal, Howard continued to support Auto-trol by attempting to force Venhill to subscribe to a stock offering to prevent severe dilution of its equity interest in Auto-trol.

Plaintiffs brought actions against Howard alleging he breached his fiduciary duties of loyalty and care. Plaintiffs sought, *inter alia*, damages for all of the losses suffered by Venhill (including the loss of profits that would have been made if funds were invested consistent with Venhill's other investments), rescission of a promissory note that consolidated all of the debt owed to Venhill into a single note that would not come due until 2020, the cancellation of any security interest in Auto-trol's real property and attorneys fees incurred by plaintiffs in connection with their action.

The court first discussed the standard of review relating to Howard's liability for damages to Venhill and the Trusts. Although the court found that the parties agreed the entire fairness standard should apply to the investments in Auto-trol because of their interested character, they disagreed on how that standard should apply. Howard argued that plaintiffs could not challenge the Auto-trol investments because Joe and Tatnall were aware that he was causing Venhill to invest in Auto-trol and they failed to exercise their rights as limited partners in Venhill to remove him as a general partner. In essence Howard argued that plaintiffs acquiesced and ratified his actions. The court was not persuaded and concluded that an equity holder does not have an affirmative duty to exercise its powers of removal if it disagrees with a fiduciary's actions, and the court concluded that the parties did not acquiesce or ratify any of Howard's actions. To the contrary, the court found that "nothing [plaintiffs] did gave Howard any reason to believe that they approved his desire to continue funding Auto-trol." Similarly, the court rejected defendant's ratification argument because neither Joe nor Tatnall consented to any of the relevant investments.

Additionally, Howard argued that the exculpation provision contained in the Venhill partnership agreement modified the entire fairness standard. Based on the exculpation provision, Howard argued that he would only be liable for damages if it could be shown that he (i) engaged in bad faith acts, (ii) made grossly negligent decisions, or (iii) committed acts of willful and wanton misconduct. On this issue, the court reasoned that the entire fairness standard was at its core an inquiry to determine whether a transaction should be set aside. The court went on to state "[the standard] has only a crude and potentially misleading relationship to the liability any particular fiduciary has for involvement in a self-dealing transaction." In this instance, "the exculpation provision prevents [plaintiffs] from recovering from Howard unless he acted in bad faith, with gross negligence, or engaged in willful and wanton misconduct." Thus, an interested transaction could be enjoined if it failed the entire fairness test, but if the transaction were consummated, plaintiffs could only recover damages if Howard acted in the proscribed manner. Interestingly, the court noted that under the applicable standard—a common one in alternative entities—an interested transaction could be substantially unfair and yet not give rise to personal liability. Still, to determine whether Howard would be personally liable, the court found it helpful to analyze the Venhill investments in Auto-trol under the entire fairness standard. The first prong of the entire fairness test required that the court consider the process used to implement the transactions. Finding it impossible "to detail all the ways in which the process fell short of fair" the court highlighted the following points: (i) Howard never conducted a market check; (ii) Howard never engaged or sought the advice of competent professionals; and (iii) Howard did not engage in any analytical process. Thus, the court found the process used by Howard to make investments for Venhill in Auto-trol "grossly deficient." The second prong of the entire fairness test requires a court to review the substantive fairness of a transaction. In this regard, the court found the transaction substantively unfair for the following reasons: (i) the terms and conditions of the investments were not fair to Venhill and Venhill could have obtained better terms and conditions from other borrowers, (ii) Auto-trol did not have a plan to return the company to solvency, (iii) Howard's implicit admission that he believed Auto-trol equity was worth only $1 and his unwillingness to pay off any of the substantial debt owed by Auto-trol "demonstrates that [the] transactions were unfair," and (iv) the imbalance of the Venhill investment portfolio which had over 50% of its assets invested in Auto-trol. Howard argued that the exculpation provision contained in the Venhill partnership agreement protected him from liability because he acted in good faith and subjectively believed that Auto-trol would be a financial success. The court disagreed, however, finding that Howard did not subjectively believe that Auto-trol would be a success as evidenced by his unwillingness to acquire Auto-trol. The court found the case to present a "clear case of fiduciary disloyalty, although Howard's motives were not financial enrichment they were personal." In sum, the court found that Howard acted in bad faith and, additionally, that he engaged in willful misconduct and acted in a grossly negligent manner. Thus the court awarded damages to Venhill. In addition, with respect to the debt that was consolidated into a single note in 2003, the court ordered rescission of that note to allow Venhill to collect on debts based on the obligations owed to it by Auto-trol prior to the consolidation. Finally, the court set aside the security interest granted Howard.

d. *In re Boston Celtics Ltd. P'ship Shareholders Litig.*, C.A. No. 16511 (Del. Ch. Aug. 6, 1999)

Plaintiff limited partners filed suit challenging the reorganization of a Delaware limited partnership into two new limited partnerships, contending that the corporate general partner and its directors engaged in a self-interested transaction and breached their fiduciary duty of loyalty by approving the reorganization which was the result of an unfair process and produced unfair terms. The defendants filed a motion to dismiss for failure to state a claim.

The court applied the law regarding the fiduciary duties of a general partner and the business judgment rule to the actions of the defendants challenged by plaintiffs in each of their claims. In its discussion of fiduciary duties, the court confirmed the well settled principle that, unless limited by the partnership agreement, a general partner and the directors of a corporate general partner who control the partnership owe fiduciary duties to the limited partners of the partnership they control, similar to those duties that a corporate director owes to shareholders. The court also noted, however, that the actions of a general partner are generally protected by the business judgment rule. The plaintiffs had the burden of rebutting the presumption created by the business judgment rule—that the defendants acted on an informed basis and in the honest belief that they acted in the best interest of the partnership and the limited partners. According to the court, when alleging a breach of the duty of loyalty, plaintiffs must sufficiently plead that the general partner appeared on both sides of a transaction or derived an improper personal benefit from a transaction, i.e. engaged in self-dealing, to rebut the presumption afforded by the business judgment rule. Also, when asserting a claim regarding the unfairness of a transaction, a plaintiff must also plead specific examples of misconduct that demonstrate the alleged unfairness. If a plaintiff satisfies this burden, then the general partner must prove the "entire fairness" of the challenged transaction by establishing that it was the result of both fair dealing and fair price.

Upon application of the foregoing principles, the court ruled that the unfairness of the reorganization and defendants' self-interest therein as alleged by plaintiffs as well as plaintiffs' allegation of a breach of fiduciary duties owed by the general partner and its directors to the limited partners were sufficiently pleaded. However, the court dismissed certain claims made by plaintiffs relating to the alleged dilution of the plaintiffs' equity interests and the alleged "freeze out" purpose of the reorganization due to insufficient pleading.

6. Special Approval

a. *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, C.A. No. 10093-VCL (Del. Ch. Aug. 20, 2015)

This case arose from allegations by plaintiff that the conflicts committees of certain related entities failed to act in good faith when approving a corporate reorganization (the "Transaction") of publicly traded entities that resulted in Kinder Morgan, Inc. ("Parent") emerging as the sole publicly traded entity and two entities controlled by Parent—Kinder Morgan Energy Partners, L.P. (the "Partnership") and Kinder Morgan Management, LLC ("GP Delegate"), the delegatee of the management authority held by the general partner (the "GP") of the Partnership—becoming indirect subsidiaries of Parent. As part of the Transaction, Parent paid unitholders of the Partnership and shareholders of GP Delegate roughly equivalent consideration with GP Delegate shareholders receiving their consideration tax-free, despite the shares in GP Delegate trading at a discount to the Partnership's common units. Because Parent was acquiring 100% ownership of the Partnership and also controlled the Partnership through the GP, the Transaction created a conflict of interest for the GP. According to the Partnership's limited partnership agreement (the "LPA"), the GP could address this conflict by seeking special approval of a majority of the members of the Partnership's conflicts committee. The conflicts committees of the GP and GP Delegate consisted of members of the board of directors of the GP who were not officers or employees of the GP, GP Delegate or their affiliates.

Plaintiffs alleged that the members of the conflicts committees were conflicted because of their simultaneous roles on both committees and compounded this conflict by only engaging a single financial adviser and single set of legal advisors to assess the Partnership and GP Delegate aspects of the Transaction. As a result of this conflict, the committees allegedly failed to act in good faith by (i) completing the negotiation and evaluation of the Transaction on a compressed timeline, (ii) agreeing to GP Delegate's shareholders receiving greater net consideration (after taxes were calculated) than the Partnership's unitholders despite the historical discount on GP Delegate shares and (iii) focusing on provisions in the merger agreement that were unlikely to have much real-world consequence instead of negotiating a greater premium for the Partnership's unitholders or more relevant unitholder protections.

The court, relying on Delaware Supreme Court precedent interpreting identical limited partnership agreement provisions, held that default fiduciary duties had been eliminated in the LPA and therefore no claim of a breach of fiduciary duties existed. The LPA instead imposed contractual obligations on the GP to act in manner that it reasonably believed to be in, or not inconsistent with, the best interests of the Partnership. The standard imposed by the LPA required the conflicts committee to make a determination as to the fairness of the Transaction to, and the best interests of, the Partnership, and not the Partnership's unitholders. Since plaintiffs' allegations were focused on the effect of the Transaction on the Partnership's unitholders rather than the effect on the Partnership, the court dismissed the claims. The court also dismissed plaintiffs' claim that the GP breached the implied covenant of good faith and fair dealing because the allegations failed to identify a sufficient conflict faced by members of the conflicts committees.

b. *Ellis v. OTLP GP, LLC*, C.A. No. 10495-VCN (Del. Ch. Jan. 30, 2015)

Plaintiffs, limited partner unitholders of Oiltanking Partners, L.P. ("Oiltanking"), brought an action to challenge the proposed merger of Oiltanking with defendant Enterprise Products Partners L.P. ("Enterprise"), which owned about two-thirds of Oiltanking's limited partner interests. Before the court was plaintiffs' motion to expedite the action in order to seek a preliminary injunction to halt the upcoming merger vote.

In June 2014, Enterprise approached Marquard & Bahls AG ("M&B"), which owned all of Oiltanking's general partner, OTLP GP, LLC ("GP") along with a two-thirds interest in Oiltanking, about purchasing M&B's interest in Oiltanking and acquiring all of Oiltanking. M&B was open to selling its interest, but did not want to participate in any deal that would require the support of the unaffiliated common unitholders, a class which included the plaintiffs. Under Oiltanking's Limited Partnership Agreement (the "Agreement"), the majority of common unitholders (excluding the general partner and its affiliates) were required to approve any merger during the "subordination period," which was expected to end mid-November 2014. After the subordination period ended, the unaffiliated common unitholders were not entitled to a class vote on any merger. The Agreement also purported to eliminate all fiduciary duties save for those defined in the Agreement.

During negotiations for the sale of its ownership interests, M&B advised Enterprise that it should wait until the end of the subordination period to acquire the publicly held common units if it wanted to avoid a class vote on the merger. M&B then agreed to sell its interest in GP and its two-thirds interest in Oiltanking to Enterprise, a deal which closed on October 1. Shortly before closing, Enterprise notified Oiltanking of its intention to acquire the remainder of Oiltanking's limited partner interests at a price below what it paid M&B for its units. GP referred the consideration issue to the conflicts committee established under the Agreement, which negotiated a price that was increased but still lower than that paid to M&B. The subordination period subsequently ended and Enterprise proposed a vote on the merger by a simple majority of the common units, the outcome of which was preordained given its two-thirds interest.

Plaintiffs' first argument for an injunction was that since Enterprise's acquisition was announced during the subordination period, the class voting standard applicable during that period should apply to the upcoming merger vote. They alleged the Agreement was ambiguous on this issue, since it did not specify the voting standard that would apply with respect to when an item for voting is announced, and that defendants breached the implied covenant of good faith and fair dealing in determining no class vote was required. The court found the Agreement to be unambiguous, since plaintiffs gave no reason why the voting standard should not be determined by reference to the time of the vote. Further, the failure of the Agreement's drafters to subject announcements of merger, as opposed to votes on a merger, to certain requirements did not implicate the implied covenant. The implied covenant supplies terms to fill gaps in express provisions of an agreement, but the voting provisions of the Agreement were clear and nothing about the timing of the announcement of the acquisition or merger vote defeated the common unitholders' expectations under the Agreement.

Plaintiffs further contended that M&B's sale of its interest and Enterprise's pursuit of a merger should be treated as a single transaction under the step-transaction doctrine. They argued that M&B breached its fiduciary duties to them by telling Enterprise that it would not participate in a transaction requiring a class vote, in an attempt to bypass its obligations to provide a class vote on the merger. The court found the step-transaction doctrine inapplicable. M&B was not a party to the merger and did not structure the merger – Enterprise decided to purchase M&B's interest and then took advantage of the timeline espoused in the Agreement. M&B had every right to tell Enterprise that it wanted no involvement with a class vote, and GP could not be deemed to have breached fiduciary duties because its affiliate M&B made a decision it was entitled to make. In addition, the court found that even if the step-transaction doctrine were applicable, M&B, GP and Enterprise did nothing out of the ordinary to defeat the class vote, merely allowing the subordination period to expire. When Enterprise obtained M&B's interest on October 1st, it was bound to honor the class vote requirement until the subordination period expired, which it did. The fact that the merger announcement occurred during the subordination period did not trigger a class vote.

Finally, plaintiffs challenged GP's handling of Enterprise's merger offer, suggesting either that GP should not have told Enterprise in June about the consequences of the expiration of the subordination period or that it was not exculpated under the Agreement because it did not seek the best possible merger price for the common unitholders. The court rejected these arguments, since the plaintiffs failed to explain how GP violated its fiduciary duties through its disclosure to Enterprise and since GP abided by the Agreement in determining the merger consideration. The lesser consideration plaintiffs received was merely an inevitable consequence of how the Agreement was drafted. Having rejected each of the plaintiffs' claims, the court denied their motion to expedite.

c. *Allen v. El Paso Pipeline GP Co., L.L.C.*, C.A. No. 7520-VCL (Del. Ch. June 20, 2014)

This decision follows the Court of Chancery's prior decision granting plaintiffs' motion to certify a class consisting of all the limited partners (the "Unitholders") of El Paso Pipeline Partners, L.P., a publicly traded Delaware master limited partnership (the "Partnership"), wherein the court also found that plaintiffs' claims were not exclusively derivative and could support a direct characterization.

After completion of discovery, the court heard this case on defendants' motion for summary judgment. Plaintiffs had challenged whether a "drop-down" transaction (the "Drop-Down") between the Partnership and El Paso Corporation, the parent of the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"), violated the express terms of the Partnership's limited partnership agreement (the "LPA") and the implied covenant of good faith and fair dealing, or in the alternative, aided and abetted those breaches. The crux of plaintiffs' argument was that although the LPA eliminated all fiduciary duties of the General Partner and replaced them with contractual duties, the General Partner breached the LPA by not considering the best interests of the Unitholders when approving the Drop-Down; specifically, plaintiffs alleged that certain incentive distribution rights (the "IDRs") owned by the General Partner caused the Drop-Down to be economically dilutive to Unitholders. Thus, the court analyzed whether the manner by which the Drop-Down was approved was either an express breach of the LPA or a breach of the implied covenant of good faith and fair dealing.

In basic terms, the General Partner's contractual duties were divided into three categories: when it was acting in its individual capacity, when it was acting as general partner in a non-conflict of interest transaction and when it was acting as general partner in a conflict of interest transaction. When in a conflicted transaction, the General Partner had several options by which such a conflicted transaction could be approved without breaching the LPA, one of which was by special approval. Special approval could be obtained by a majority vote of the members of a conflicts committee—in this case, three outside members of the board of directors of the General Partner—acting in good faith. The LPA defined "good faith" for such purposes as the members' subjective belief that the conflict of interest transaction was in the best interest of the Partnership. The court noted, however, that it could only infer a party's subjective intent from external indications and, therefore, objective factors necessarily informed the court's analysis. With respect to the best interest prong of this contractual good faith standard, the court found that the LPA only required the conflicts committee to believe subjectively that the Drop-Down was in the best interest of the Partnership—leaving the conflicts committee free to consider the full universe of entity constituencies and not consider only the equity owners of the Partnership (which would be the case if traditional fiduciary duties applied).

The court went on to grant summary judgment on plaintiffs' LPA breach claim even under the plaintiff-friendly summary judgment standard of review, for the following reasons: (i) plaintiffs had conceded that the Partnership was not harmed by, or paid an excessive price for, the Drop-Down; (ii) all members of the conflicts committee testified that they subjectively believed the Drop-Down benefited the Partnership as an entity; (iii) the conflicts committee met formally six times and had consulted with financial and legal advisors familiar with the industry and the Partnership (with the financial advisor present at each meeting and presenting at three of the meetings); and (iv) the conflicts committee investigated the IDRs as they related to the Drop-Down and still determined that the Drop-Down was in the best interest of the Partnership, and ultimately conferred some benefit to the Unitholders (although not as great a benefit as received by the General Partner). The court noted that, at best, the evidence supported an inference that the conflicts committee performed its job poorly, not that it did not subjectively believe that the Drop-Down was in the best interest of the Partnership. Accordingly, there was no breach of the LPA.

Next, the court addressed plaintiffs' claim that the General Partner breached the implied covenant of good faith and fair dealing in approving the Drop-Down because the conflicts committee relied on a fairness opinion that did not value the consideration Unitholders actually received. The court began its analysis by explaining that the implied covenant does not create a free-floating duty of good faith, but is a cautiously applied gap-filler to ensure parties' reasonable expectations are fulfilled. In applying the implied covenant, a court must follow a three-step analysis. First, contract construction: the court must examine the contract to determine whether a gap exists and if the contract speaks directly on an issue, there is no gap. Second, even if a gap exists, the court should avoid filling intentional gaps (i.e., a term that the parties rejected ex ante or after negotiations decided should be omitted) and only fill unintentional gaps (i.e., a term that parties failed to consider during negotiations or was so fundamental did not need to be expressed) so as to avoid rewriting a contract that a party deems unfair in hindsight. Third, if the gap should be filled (a cautious enterprise that should be rarely used) the court must look to the past to determine what the parties would have agreed to themselves had they considered the issue in their original bargaining position, not what the court deems to be fair at the time of the wrong.

Here, plaintiffs' implied covenant claim relied heavily on Gerber v. Enter. Prods. Hldgs., LLC, a Delaware Supreme Court case. In brief, the Gerber court faced a situation where a master limited partnership agreement replaced traditional fiduciary duties with contractual duties and limited partners challenged a general partner's approval of a conflicted transaction. Notably, the limited partnership agreement provided that the general partner would be conclusively presumed to have acted in good faith if it relied on a fairness opinion from a financial advisor without detailing what such fairness opinion should include. The general partner relied on a fairness opinion with respect to the challenged transaction, however, the fairness opinion failed to fully evaluate important aspects of the transaction and their effects on the consideration received by limited partners. The Supreme Court held that had the parties at the time of contracting addressed the specific standards required of a fairness opinion they would have agreed that any fairness opinion needed to fully evaluate whether the consideration was fair to the limited partners. Thus, the general partner was not entitled to the conclusive presumption of good faith because its reliance on the inadequate fairness opinion violated the implied covenant.

Plaintiffs' contended that, similarly, the fairness opinion obtained by the conflicts committee here did not consider all the elements of the consideration from the standpoint of the Unitholders because the dilutive effects of the IDRs were omitted from the financial advisor's fairness opinion calculus. The court, however, rejected this contention and found that Gerber did not control this case because there was no such conclusive presumption requirement for the Drop-Down approval; rather, what was required under the LPA was approval by the conflicts committee in their subjective belief that the Drop-Down was in the best interest of the Partnership.

The court began its implied covenant analysis with the contract construction step, which is where the court also concluded its analysis because the special approval process had no fairness opinion related gap, as was the case in Gerber. In so ruling, the court found that deploying the implied covenant to impose on the parties a fairness opinion requirement similar to Gerber would fundamentally rewrite the LPA by changing the conflict committee's inquiry from best interests of the Partnership to fairness to the Unitholders and expanding the scope of judicial review from subjective good faith of the conflicts committee to compliance with an obligation to obtain a fairness opinion that would satisfy a court after the fact. Because the LPA's special approval process did not require a fairness opinion there was no gap to fill.

Moreover, for illustrative purposes only, the court proceeded through the next steps of the implied covenant analysis and considered what the parties would have agreed to at the time of contracting. Examining the LPA in terms of the Partnership's prospectus from its initial public offering the court concluded that the drafters of the LPA anticipated numerous conflict of interest transactions and created a dispute resolution method that would limit potential litigation and after-the-fact judicial review. Therefore, assuming the question had been raised during negotiations whether the Unitholders should have the ability to challenge the special approval process by litigating whether the conflicts committee obtained a fairness opinion that satisfied a test of reasonableness, met certain requirements, or otherwise complied with some form of objective standard, the record before the court suggested that such a provision would have been rejected. That being the case, summary judgment was granted for defendants' on the implied covenant claim.

Finally, the court granted summary judgment with respect to plaintiffs' aiding and abetting claim. The court held that since the LPA eliminated all fiduciary duties this was a pure breach of contract claim and the general rule in Delaware is that there is no claim available for aiding and abetting claim a breach of contract. In sum, defendants' motion for summary judgment was granted in toto.

d. *In re El Paso Pipeline Partners, L.P. Derivative Litig*., C.A. No. 7141-VCL (Del. Ch. June 12, 2014) and (Del. Ch. Apr. 20, 2015)

This case involved a master limited partnership drop-down transaction. El Paso Corporation ("El Paso Parent"), the sponsor and indirect controlling entity of El Paso Pipeline Partners, L.P. (the "MLP") sold part of its interest in two entities to the MLP in a transaction that constituted a conflict of interest. Plaintiffs sued defendants alleging, among other things, breach of the MLP's limited partnership agreement (the "MLP LPA"), breach of the implied covenant of good faith and fair dealing and aiding and abetting. The court previously dismissed the additional allegations in a bench ruling. Plaintiffs and defendants each moved for summary judgment.

In 2010, El Paso Parent offered to sell the MLP 51% of its interest in an entity ("Southern LNG") that owned a liquefied natural gas ("LNG") terminal and the entity ("Elba Express") that owned the natural gas pipeline that connected the LNG terminal to interstate pipelines (the "Drop-Down"). At the time of the Drop-Down proposal, shale gas discoveries had led to higher levels of production and lower gas prices, weakening the market for imported LNG. However, Southern LNG and Elba Express maintained services agreements ("Services Agreements") that provided revenue regardless of any actual storage or transport of LNG. The plaintiffs focused on two issues with regard to the Service Agreements: (i) the counterparties were judgment-proof special purpose entities with no assets and (ii) the Services Agreements were backed by guarantees that only covered roughly 20% of the revenue that the Services Agreements might generate (collectively, the "Risks").

After the Drop-Down was proposed, the MLP determined that the transaction posed a conflict of interest for the general partner of the MLP and sought "Special Approval" by way of a conflicts committee, as contemplated by the MLP LPA. The conflicts committee met five times over the course of two months and received input from a financial advisor, then unanimously approved the Drop-Down proposal. Unbeknownst to the conflicts committee, El Paso Parent turned down a right of first refusal option to purchase LNG assets for itself at the time the Drop-Down was proposed. El Paso Parent and the members of the general partner's board who know about the right of first refusal offer did not disclose its existence to the conflicts committee.

The court first addressed plaintiffs' claim that the defendants breached the express terms of the MLP LPA and granted defendants' motion to dismiss. The court determined that Section 7.9(a) of the MLP LPA required the general partner to proceed in one of four contractually specified ways (including seeking "Special Approval") when faced with making a decision that involved a conflict of interest. Because the Drop-Down implicated a conflict of interest, Section 7.9(a) controlled, and the general partner had sought Special Approval, defined by the MLP LPA as "approval by a majority of the members of the Conflicts Committee acting in good faith." Under settled Delaware law, the standard for good faith is a subjective, not objective, belief that the determination or action is in the best interests of the company. The record supported the fact that the conflicts committee understood the state of the LNG market, was informed about the terms of the Service Agreements and guarantees and considered the revenue risk involved in the Drop-Down proposal. While reasonable minds could differ on the weight that the conflicts committee should have placed on the Risks, the court found that the conflict committee's judgment and process was not so extreme or egregious that it could support a potential finding of bad faith. Further, the conflicts committee had no knowledge of El Paso Parent's failure to consummate its right of first refusal to purchase LNG assets and, therefore, could not have acted in bad faith based on facts it did not know.

The court then addressed the plaintiffs' claims that the general partner breached the implied covenant of good faith and fair dealing by "intentionally" concealing the information about El Paso Parent's refusal to purchase LNG assets and, again, granted defendants' motion to dismiss. The court initially clarified that the MLP LPA's "good faith" standard did not override the implied covenant, noting that the implied covenant is intended to be a gap-filler. In applying the implied covenant, the court stated that it must determine (i) whether there was a gap to be filled, (ii) whether the implied covenant should be used to fill the gap and (iii) how to fill the gap. Here, the court determined a gap existed because the MLP LPA was silent on whether the general partner was required to volunteer information to the conflicts committee. However, the court declined to use the implied covenant to infer an affirmative disclosure obligation. The court recognized that the Supreme Court in *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400 (Del. 2013) had stated that a failure to volunteer information could constitute a breach of the implied covenant, but noted that statement was dictum. In this case, the MLP LPA expanded the general partner's freedom to act, specifically eliminated all fiduciary duties of the general partner (which would traditionally include disclosure obligations), did not include a contractual duty to disclose information and affirmatively renounced the traditional corporate opportunity doctrine. The court coupled these facts with plaintiffs' failure to identify any indication that the parties to the MLP LPA believed that the general partner would volunteer information to the conflicts committee and declined to permit plaintiffs to use the implied covenant to create a disclosure requirement.

The court dismissed the aiding and abetting claims, noting that secondary liability could not exist when the underlying causes of action had been dismissed.

In the post-trial opinion, the court addressed plaintiffs' challenge to a "dropdown" transaction whereby the parent corporation in a master limited partnership structure, El Paso Corporation ("El Paso Parent"), sold interests in two of its subsidiaries to El Paso Pipeline Partners, L.P. (the "MLP"). The court found that the MLP's general partner, in engaging in the transaction with El Paso Parent, had violated the MLP's limited partnership agreement. The court held that members of a committee of independent members of the general partner's board (the "Committee") who approved the transaction via "special approval" failed to form the requisite subjective belief that the dropdown transaction was in the best interests of the MLP.

Plaintiffs originally challenged two dropdown transactions, which the court referred to as the "Spring Dropdown" and the "Fall Dropdown." The court previously had granted defendants' motion for summary judgment as to the Spring Dropdown and partially denied defendants' motion for summary judgment as to the Fall Dropdown, finding that questions of material fact existed requiring a trial as to the state of mind of the members of the Committee when approving the Fall Dropdown. The court noted that it expected that the Committee members and their financial advisor would provide a credible account of how they evaluated the Fall Dropdown, negotiated with El Paso Parent and ultimately determined that the transaction was in the best interests of the MLP. However, that is not what the court found. Rather, the court found that the Committee members went against their better judgment and did what El Paso Parent wanted and not what they believed was in the best interests of the MLP. The court rejected trial testimony of the Committee members that they believed the transaction was in the best interests of the MLP, finding that the testimony was rehearsed, not credible, and inconsistent with their contemporaneous emails and deposition testimony. Specifically, the court pointed to various internal assessments by Committee members suggesting they believed that the actual value of the assets was lower than the price proposed by El Paso Parent – and accepted by the Committee – and also that it was not in the best interest of the MLP to acquire additional interests in the subsidiary, which related to the importation of liquefied natural gas, a market that appeared to be in decline. Consequently, the court determined that the MLP had paid $171 million more for one of the assets that it acquired than it would have if the general partner had not breached the limited partnership agreement.

The court also expressed concern regarding the process followed, and the work product generated, by the Committee's banker. Specifically, the court noted that the banker met with El Paso Parent's management before meeting with the Committee, did not emphasize certain relevant information in their presentation and failed either to follow the same approach in the Fall Dropdown as in the Spring Dropdown or bring the inconsistency to the Committee's attention, all in an effort to make the Spring Dropdown look as attractive as possible. The court noted that the banker's entire fee was contingent on delivering a fairness opinion, suggesting that the banker did what it could to justify the Fall Dropdown, get to closing and collect its contingent fee.

The court also found that the Committee was unduly focused on accretion of distributable cash to the holders of the common units, when they should have been focused on carrying out their known contractual obligation to determine whether the Fall Dropdown was in the best interests of the MLP. In its prior opinion, the court had noted that the contractual standard under the limited partnership agreement was whether a proposed transaction was in the best interests of the MLP, which meant that the Committee could consider constituencies including employees, creditors, suppliers, customers, the general partner, IDR holders and "of course" the limited partners. In this post-trial opinion, however, the court made clear that in considering the interests of the limited partners, it was not sufficient for the Committee members to focus only on whether a proposed transaction was accretive to cash distributions. Rather, the Committee and its banker should have engaged in a rigorous valuation analysis that took into account prior transactions involving the same assets. The court noted that the Fall Dropdown related to two separate assets that the Committee should have evaluated separately, and had it done so, it would have realized that it was paying more than it agreed to pay for one of the assets when it was the only asset in the proposed transaction.

Based on these findings, the court held that the Committee members did not conclude that the Fall Dropdown was "in the best interests of [the MLP]" as required by the MLP's limited partnership agreement and, therefore, the MLP's general partner breached the MLP's limited partnership agreement by engaging in the Fall Dropdown. The court awarded damages in the amount that the MLP paid for the interest acquired in the Fall Dropdown that exceeded what it would have paid had the general partner not breached the MLP's limited partnership agreement.

e. *Allen v. Encore Energy Partners, L.P.*, C.A. No. 534, 2012 (Del. July 22, 2013)

This was an appeal of the Court of Chancery's dismissal of a class action complaint by former unitholders of Encore Energy Partners LP (the "Partnership") who challenged the use of a "Special Approval" process that was employed by the general partner of the Partnership to approve a conflict transaction pursuant to which Vanguard Natural Resources, LLC ("Vanguard") acquired all of the outstanding common units of the Partnership in a unit-for-unit exchange (the "Merger"), where Vanguard's indirect subsidiary was the Partnership's general partner. Plaintiffs argued that the general partner of the Partnership, its board of directors and Vanguard (collectively, the "Defendants") breached their duties under the partnership agreement by proposing, approving and consummating the Merger. The Delaware Supreme Court affirmed the Court of Chancery's decision.

In its analysis, the court first addressed what duties were owed by the Defendants. Like the Court of Chancery, the court found that the partnership agreement eliminated all fiduciary duties of the board members of the general partner and Vanguard except as expressly set forth in the partnership agreement. However, the partnership agreement did establish a contractual duty to act in good faith when the general partner or its affiliates made a determination or took an action. The court also referred to a provision in the partnership agreement requiring the general partner to consent before the Partnership could merge with another entity and concluded that when determining to consent to a merger, the general partner and its affiliates must act in accordance with this contractual duty of good faith. "Good faith" was defined as a "belie[f] that the determination or other action is in the best interests of the Partnership." However, the partnership agreement also provided a "safe harbor" for resolution of conflict transactions, which essentially provided that action taken by the general partner or its affiliates would not constitute a breach of the partnership agreement or of any duty if it received "Special Approval," which consisted of approval by a majority of the members of the Conflicts Committee acting in good faith. Further, if "Special Approval" were sought, the partnership agreement provided that "it shall be presumed that, in making its decision, the Conflicts Committee acted in good faith . . . [and] the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption . . . ."

The court then turned to the question of whether plaintiff sufficiently pled that the Defendants breached their contractual duty of good faith. The court applied well-settled contract interpretation principles to give meaning to a contractual duty requiring a "belie[f] that the determination or other action is in the best interests of the Partnership." According to *Black's Law Dictionary*, the court noted that "believe" means to "feel certain about the truth of; to accept as true." The court contrasted this with "reasonably believe" which was defined therein to mean to believe "under circumstances in which a reasonable person would believe." Because some partnership agreements use "believe" while others use "reasonably believe," the court discerned that the parties intentionally distinguished these two standards. Therefore, the court confirmed the Court of Chancery's decision in finding that this required subjective belief.

The court then addressed the Court of Chancery's holding that plaintiff must have shown that the Defendants subjectively believed that they were acting *against* the Partnership's interests to adequately plead a breach of the contractual duty to act in good faith. Plaintiff argued that, to the contrary, it is possible for a person to breach a subjective good faith standard without subjectively believing that his actions were *against* the best interests of the Partnership. The court essentially agreed with plaintiff by finding that it is possible that a defendant may not subjectively believe that an action is in the partnership's best interests, but nonetheless does not subjectively believe that the action is against the partnership's best interests. The court noted that a person who "intentionally fails to act in the face of a known duty to act" neither subjectively believes his decision is in the best interests of the partnership nor subjectively believes he is affirmatively acting against the best interests of the partnership. However, the court continued, to intentionally fail to act in the face of a known duty, there must be a "duty" in the first place and the partnership agreement of the Partnership replaced common law fiduciary duties with a contractual duty of subjective good faith. Therefore, to plead a breach of the contractual duty of subjective good faith under the partnership agreement of the Partnership, the court indicated that plaintiff had to plead facts that would enable a court reasonably to infer that the Conflicts Committee members did not subjectively believe that the Merger was in the Partnership's best interests, which could be accomplished by showing either that they believed they were acting *against* the Partnership's best interests when approving the Merger or that they consciously disregarded their duty to form a subjective belief that the merger was in the Partnership's best interests.

With regard to how a plaintiff could plead a defendant's state of mind, the court determined that the Chancery Court was not correct in finding that the objective reasonableness of the Conflicts Committee's determination was not relevant to a subjective standard. The court cited to prior case law in finding that some actions may objectively be so egregiously unreasonable that they seem essentially inexplicable on any ground other than subjective bad faith. The court highlighted that it may also be reasonable to infer subjective bad faith in less egregious transactions when a plaintiff alleges objective facts indicating that a transaction was not in the best interests of the partnership and that the directors knew of those facts. Although distinct from an objective "reasonable person" standard, the court found that objective factors may inform an analysis of a defendant's subjective belief to the extent they bear on defendant's credibility when asserting that belief. In this case, plaintiff merely alleged facts that showed that the Conflicts Committee members may have negotiated poorly and that the counteroffer made by the Conflicts Committee was below the median of the investment banker's analysis but his claims did not permit a reasonable inference that they subjectively believed they were acting against the Partnership's best interests. The court also found that the complaint did not allege any facts from which the court could reasonably infer that the Conflicts Committee members consciously disregarded their contractual duty. In this regard, allegations that the Conflicts Committee should have made a higher counteroffer or negotiated better did not support a reasonable inference that they consciously disregarded a duty to form a subjective belief that the transaction was in the Partnership's best interests.

Finally, the court addressed plaintiff's claim that obtaining Special Approval could not insulate Vanguard from liability for causing the general partner to depress the value of the units in the Partnership in anticipation of the merger. The court found that plaintiff failed to state a claim against the Defendants because plaintiff's complaint only stated a single claim relating to the merger—not that these other actions constituted independent breaches.

f. *Gerber v. Enter. Holdings, LLC*, C.A. No. 5989 (Del. June 10, 2013)

This case involved the purchase in 2007 by Enterprise GP Holdings, L.P., a master limited partnership (the "Partnership"), of Texas Eastern Products Pipeline Company, LLC ("Teppco GP"), the general partner of Teppco Partners, LP ("Teppco LP"). In 2009, defendants caused the Partnership to sell Teppco GP to Enterprise Products Partners, L.P. ("Enterprise Products LP") (the "Transaction"), and then later on the same day caused the Partnership to sell Teppco LP to Enterprise Products LP in a separate transaction (the "Teppco LP Sale"). The consideration received by the Partnership for the 2009 Sale was only 9% of the Partnership's original purchase price. In 2010 the Partnership merged with another limited liability company ("MergeCo") and no longer exists (the "2010 Merger").

Plaintiff, a former limited partner of the Partnership and current holder of interests in the parent of MergeCo, challenged the Transaction and the 2010 Merger on behalf of the Partnership as unfair to the Partnership, claiming defendants breached fiduciary duties in approving the Transaction and the 2010 Merger. The limited partnership agreement of the Partnership (the "LPA") eliminated common law fiduciary duties of Enterprise Products Holdings, LLC, the general partner of the Partnership (the "General Partner"), and its board of directors, as permitted by Section 17-1101(d) of DRULPA. Under the LPA, a conflict of interest between the General Partner and the Partnership would be permitted, deemed approved by all partners of the Partnership, and not constitute a breach of the LPA or any duty if the course of action was approved by "Special Approval" of a majority of members of the Partnership's Audit and Conflicts Committee (the "Committee"). The Committee was a committee of the Board of Directors of the General Partner composed of three or more directors meeting the independence, qualification and experience requirements established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by the New York Stock Exchange (the "NYSE"). Further, a provision in the LPA created a "conclusive presumption" that the General Partner acted in "good faith" when acting or not acting in reliance upon an opinion of experts as to matters the General Partner reasonably believed were within the expert's professional or expert competence.

The Court of Chancery held that plaintiff failed to state a claim and granted defendants' motion to dismiss under Rule 12(b)(6). Plaintiff appealed and the Supreme Court of Delaware affirmed in part, reversed in part, and remanded.

The court held that the Court of Chancery erred in determining that the contractual "conclusive presumption" of good faith barred a claim under the implied covenant of good faith and fair dealing. The court adopted the Court of Chancery's reasoning in *ASB Allegiance Real Estate Fund v. Scion Breckenridge Mgmt. Member, LLC*, 50 A.3d 434 (Del. Ch. 2012), holding that the contractual duty of "good faith" looked to the parties as situated at the time of the wrong, while the implied covenant looks to the past and what the parties would have agreed to themselves if they had considered the issue at the time of contracting. Moreover, Section 17-1101(d) of DRULPA explicitly prohibits a provision in a partnership agreement that eliminates the implied covenant.

Because the conclusive presumption only applied to the contractual duty of good faith, and not the implied covenant, the court considered whether plaintiff pled sufficient facts that, if true, would establish the General Partner breached the implied covenant when approving the Transaction or the 2010 Merger. Although the Committee obtained a fairness opinion regarding the Transaction, the opinion did not address whether holders of the Partnership's limited partnership interests received fair consideration for their Teppco GP interest, but instead only addressed the total consideration paid in both the Transaction and the Teppco LP Sale. The court held that, had the parties addressed the issue when contracting, they would have agreed that a fairness opinion must address whether the consideration received specifically for Teppco GP was fair in order for the conclusive presumption to apply to approval of the Transaction.

The General Partner received a fairness opinion for the 2010 Merger as well. However, the Vice Chancellor held that the complaint pled that a principal purpose of the 2010 Merger was to terminate claims relating to the 2007 transaction and the Transaction, and the fairness opinion did not independently value these claims in assessing the fairness of the consideration. The court held that had the parties addressed the issue when contracting, they would have agreed that in order for the conclusive presumption to apply to approval of the 2010 Merger, a fairness opinion must address the value of derivative claims when terminating such claims was a principal purpose of the merger.

Although the conclusive presumption did not apply, if the General Partner satisfied the Special Approval process there would be no breach of the LPA. Because the Committee obtained a fairness opinion for the Transaction and for the 2010 Merger, the contractual duty of good faith was satisfied, but the implied covenant independently applied to the Special Approval process as well. The Court of Chancery held that the complaint sufficiently alleged that the General Partner selected the Special Approval process for the Transaction in bad faith in breach of the implied covenant because plaintiff would not have agreed that the Committee could rely on a flawed fairness opinion to grant Special Approval. That holding stands as law because defendants did not cross-appeal from that determination. The court similarly held that the limited partnership interest holders would not have agreed to allow the General Partner to terminate their interest through a merger intended to eliminate valuable claims without considering the value of such claims. The court held that with respect to both the Transaction and the 2010 Merger, the complaint stated a cognizable claim that the General Partner breached the implied covenant, and the Court of Chancery reversibly erred in dismissing the claims. The court remanded for the Court of Chancery to consider the secondary liability claims for tortious interference with contract rights and aiding and abetting the General Partner's breach of contract.

g. *Norton v. K-Sea Transp. Partners, L.P.*, C.A. No. 6301 (Del. May 28, 2013)

In this decision of the Delaware Supreme Court pertaining to K-Sea Transportation Partners L.P.'s ("K-Sea") merger with Kirby Corporation ("Kirby"), the court addressed the Court of Chancery's grant of defendants' motion to dismiss plaintiffs' complaint, reviewing that decision de novo and affirming it.

At the core of the dispute, plaintiffs alleged that K-Sea's general partner, K-Sea General Partner L.P. ("K-Sea GP"), received excessive consideration for certain incentive distribution rights that it held when K-Sea was purchased by Kirby (the "IDR Payment"), thereby breaching its fiduciary duties under the K-Sea limited partnership agreement (the "LPA"). Plaintiffs did not allege that K-Sea GP breached the implied covenant of good faith and fair dealing.

The court found that the LPA established contractual fiduciary duties regarding mergers that displaced traditional fiduciary duties. K-Sea GP was required to exercise its discretion in approving any proposed merger and could consider any factors it chose in exercising that discretion. Additionally, K-Sea GP was indemnified under the LPA if it acted in "good faith," which, under the LPA, meant that K-Sea GP had to reasonably believe that its actions were in the best interests of, or not inconsistent with, the best interests of K-Sea.

The LPA also provided a permissive "safe harbor" for transactions that included potential conflicts of interest, including a permissive special approval process using a conflicts committee (the "Conflicts Committee") and also indicated that, if K-Sea GP's resolution of a conflict of interest was fair and reasonable or deemed to be fair and reasonable, then the resolution of the conflict would not breach the LPA. Finally, the LPA provided a conclusive presumption that K-Sea GP acted in good faith if it relied on a competent expert's opinion.

The court addressed whether plaintiffs' complaint established a breach of the LPA's "good faith" standard, stating that it would not need to address whether a grant of phantom units to the members of the Conflicts Committee invalidated the permissive special approval process if plaintiffs could not establish a breach of the good faith standard. The court found that the Conflicts Committee obtained an expert's opinion that stated that the consideration paid by Kirby to K-Sea's common unitholders was financially fair. No party challenged the expert's competence. Under the terms of the LPA, the expert was not required to address Kirby's IDR Payment to K-Sea GP separately from whether the overall merger was fair to K-Sea as a whole. The court found that the expert's opinion indirectly addressed the fairness of the IDR Payment by opining that the overall merger consideration paid was financially fair. K-Sea GP relied on that fairness opinion. Therefore, the court found that K-Sea GP was conclusively presumed to have acted in good faith when it approved the merger and sent it to the unitholders for a vote and affirmed the Court of Chancery's grant of defendant's motion to dismiss.

h. *Gerber v. Enter. Holdings, LLC, n/k/a Enter. Products Holdings, LLC*, C.A. No. 3543-VCN (Del. Ch. Jan. 18, 2013)

This case involved the purchase by Enterprise GP Holdings, L.P., a master limited partnership (the "Partnership"), of Texas Eastern Products Partners, LLC ("Teppco GP") from affiliates of Dan L. Duncan ("Duncan"), who indirectly owned the general partner (the "General Partner") of the Partnership and controlled the Partnership. In 2005, Duncan caused an affiliate of the General Partner to purchase Teppco GP. Twenty-seven months later, the Partnership purchased Teppco GP for the same purchase price but after certain assets worth almost half the transaction price were stripped and retained by Duncan (the "Transaction"). The Partnership later merged with another limited liability company ("MergeCo") and no longer exists. Defendants' motion to dismiss under Rule 12(b)(6) was granted because plaintiff failed to state a claim.

Plaintiff, a former limited partner of the Partnership and current holder of interests in the parent of MergeCo, challenged the Transaction on behalf of the Partnership as unfair to the Partnership, claiming the defendants breached fiduciary duties in approving the Transaction. The limited partnership agreement of the Partnership (the "LPA") eliminated common law fiduciary duties of the General Partner and its board of directors, as permitted by Section 17-1101(d) of DRULPA. Under the LPA, a conflict of interest between the General Partner and the Partnership would be permitted, deemed approved by all partners of the Partnership, and not constitute a breach of the LPA or any duty if the course of action was approved by "Special Approval" of a majority of members of the Partnership's Audit and Conflicts Committee (the "Committee"). The Committee was a committee of the Board of Directors of the General Partner composed of three or more directors meeting the independence, qualification and experience requirements established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by the New York Stock Exchange (the "NYSE").

Plaintiff claimed the Committee failed to meet the LPA's independence standards under the NYSE's rules and regulations and failed to act in good faith in considering the Transaction. The NYSE Listed Company Manual provided that a director qualifies as independent if the board "affirmatively determines that the director has no material relationship with the listed company" and none of the disqualifying conditions apply. The court found that the Partnership made the affirmative determination required and that none of the disqualifying conditions applied, and, therefore, the NYSE Listed Company Manual requirements were satisfied. It did not matter that members of the Committee owned units in limited partnerships controlled by Duncan because the NYSE Listed Company Manual explicitly provided that ownership of stock does not, by itself, bar an independence finding.

Plaintiff further contended that the Committee failed to act in good faith in considering the Transaction. The LPA eliminated common law fiduciary duties and contained a specific mechanism for resolving conflicts of interest—approval by a majority of the members of the Committee—which did not include an express duty to act in good faith. The court found that, even if a separate provision in the LPA requiring good faith applied, the Committee did not violate such duty. The LPA defined "good faith" as a belief "that the determination or other action is in the best interests of the Partnership." Courts have interpreted similar language to mean the actor subjectively believed the act was in the best interests of the limited partnership, requiring a complaint to allege defendants had a subjective belief that the act was not in the best interests of the limited partnership. The inquiry focuses on conduct evidencing an "intent to harm the company." The court held that a run-up in the price of Teppco GP over more than a 2-year period alone was not sufficient to trigger a reasonable inference that defendants lacked a subjective belief that the Transaction was in the Partnership's best interests, and the court would not "speculate or guess as to whether the price paid was appropriate under market conditions at the time." Because the Transaction was granted Special Approval, the defendants satisfied their express obligations under the LPA and plaintiff failed to state a claim.

The court also considered whether defendants breached the implied covenant of good faith and fair dealing, which a limited partnership agreement cannot contractually eliminate pursuant to Section 17-1101(d) of DRULPA. The court held that, because the LPA did not require consideration of any particular factors in granting Special Approval, exculpated defendants from liability absent bad faith, fraud, willful misconduct, or knowledge that conduct was criminal, and expressly waived fiduciary duties, a judicially-imposed requirement that Special Approval be objectively fair and reasonable could not be read into or reconciled with the LPA's framework. Plaintiff's claim against other defendants for aiding and abetting a breach of fiduciary duty similarly failed because plaintiff failed to state a claim for breach of fiduciary duty.

Defendants also challenged plaintiff's standing to bring the claims because plaintiff did not make a demand on the General Partner to bring the action. Although the court found that plaintiff's claims failed to state a claim and, therefore, should be dismissed, it also addressed defendants' claim that plaintiff lacked standing because he failed to make a pre-suit demand, noting that standing is a threshold question. The court looked to the corporate law test found in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), for determining whether a claim is direct or derivative, which asks (1) who suffered the alleged harm and (2) who would receive the benefit of the recovery or remedy. The court noted the difficulties of applying corporate law derivative rules to partnership-related claims, but nonetheless applied the established principles of the *Tooley* analysis. The court determined that all of plaintiff's claims were derivative. In a derivative action, Section 17-1003 of DRULPA requires a complaint set forth with particularity plaintiff's efforts to secure initiation of the action by the general partner or the reasons for not making such efforts. Plaintiff claimed that the Partnership paid too much for Teppco GP and thus, if successful, any recovery would be paid to the Partnership, or MergeCo as the Partnership's successor. Plaintiff claimed that the General Partner was controlled by Duncan's interests and therefore could not have independently and fairly assessed whether to pursue the action. Although the General Partner acts through its board of directors, because DRULPA refers to the general partner of the limited partnership and not to the general partner's governing body, the General Partner's independent board would not overcome Duncan's control over the General Partner for purposes of determining whether demand was futile. Therefore, the court held that demand was excused and plaintiff had standing to bring the action.

i. *In re Encore Energy Partners LP Unitholder Litig.*, C.A. No. 6347-VCP (Del. Ch. Aug. 31, 2012)

This case involved a class action by former unitholders of Encore Energy Partners LP (the "Partnership") who challenged the use of a "Special Approval" process that was employed by the general partner of the Partnership to approve a conflict transaction pursuant to which Vanguard Natural Resources, LLC ("Vanguard") acquired all of the outstanding common units of the Partnership in a unit-for-unit exchange (the "Merger"), where Vanguard's indirect subsidiary was the Partnership's general partner. Plaintiffs argued that the general partner of the Partnership, its board of directors and Vanguard breached their duties under the partnership agreement by proposing, approving and consummating the Merger. The defendants moved to dismiss.

In its analysis, the court first addressed what duties were owed by the defendants. The court referred to the partnership agreement of the Partnership, which essentially provided that none of the defendants had any duties or liabilities, including fiduciary duties, to the Partnership or any limited partner except as expressly set forth in the partnership agreement. The partnership agreement expressly provided that any actions taken by the general partner or any of its affiliates shall be made in "good faith." Thus, the court found that the defendants owed a contractual duty of good faith. However, the court also noted a specific mechanism in the partnership agreement for resolution of conflict transactions, which provided in relevant part that in the event there was a potential conflict of interest, any course of action by the general partner or its affiliates would be permitted and deemed approved by all partners, and would not constitute a breach of the partnership agreement or of any duty stated or implied by law or equity, if the course of action in respect of such conflict of interest was approved by "Special Approval." "Special Approval" was defined in the partnership agreement as "approval by a majority of the members of the Conflicts Committee acting in good faith." In turn, "good faith" was defined to require that the person taking the action "believe that the determination or other action is in the best interests of the Partnership." Based on prior cases, the court interpreted this language as requiring plaintiffs to allege facts from which one could reasonably infer that the defendants subjectively believed that they were acting against the Partnership's interests. The court held that because the alleged wrongdoing related to the conflicted transaction—the Merger—and the partnership agreement provided a mechanism for approving a conflicted transaction, a determination that the Merger received valid Special Approval would compel a finding that no defendant breached the partnership agreement. Thus, the relevant question was whether the conflicts committed approved the Merger acting in subjective good faith.

The complaint alleged facts essentially in support of an argument that the conflicts committee was an ineffectual negotiator and did not get a good price for the units in the Partnership. Although the court acknowledged that the complaint alleged that the conflicts committee ran a "shoddy negotiation process," the court found that it did not allege sufficient facts from which one could reasonably infer that the conflicts committee subjectively believed they were acting contrary to the Partnership's interests by approving the Merger. In its finding, the court highlighted that the conflicts committee retained and relied on the advice of independent legal counsel and a competent financial advisor before approving the final merger agreement. On these basis, the court found that the approval by the conflicts committee of the Merger satisfied the definition of "good faith," thus immunizing the defendants' actions from challenge under the terms of the partnership agreement.

The court next turned to plaintiffs' claim that the defendants violated the implied covenant and that plaintiffs' allegations of ineffective bargaining demonstrated that the conflicts committee did not exercise its discretion in good faith in conducting negotiations with Vanguard. The court noted that although the plaintiffs were correct that the defendants' discretionary use of Special Approval implicated the implied covenant, the plaintiffs incorrectly suggested that the implied covenant required a duty of objective fairness or effectiveness. The court indicated that, to have a successful claim, the plaintiffs would have to demonstrate that the allegedly "feckless" negotiations frustrated the fruits of the bargain that the parties reasonably expected. The court held that it could not infer from the terms of the partnership agreement that the use of Special Approval would be conditioned on achieving an objectively "fair and reasonable" value for plaintiffs' units.

The court also found an alternative and independent reason why the plaintiffs did not state a valid claim under the implied covenant. The court noted that the implied covenant would only apply to the general partner of the Partnership, which was the party to the agreement, and the general partner was given an express right under the partnership agreement to rely on the opinions of investment bankers. The court held that it could reasonably be inferred that the general partner relied on the fairness opinion provided by the investment bankers engaged by the conflict committee.

j. *Brinckerhoff v. Enbridge Energy Co., Inc.*, C.A. No. 5526-VCN (Del. Ch. Sept. 30, 2011) and (Del. Ch. May 25, 2012)

This case involved a challenge to a transaction between Enbridge Energy Partners, L.P. (the "Partnership") and Enbridge, Inc. ("Enbridge"), the entity that controlled the Partnership's general partner. The case was before the Court of Chancery on a motion to dismiss and, finding that the partnership agreement of the Partnership effectively shielded the general partner and its affiliates from liability for an interested transaction as long as they acted in good faith and finding that plaintiff had not alleged actions constituting bad faith on the part of any defendant, the court dismissed all of the claims. The challenged transaction was a joint venture between the Partnership and Enbridge involving the construction and operation of a pipeline which the Partnership had originally conceived. After the Partnership had taken various steps to advance the project including negotiating and obtaining permits and tariff agreements, Enbridge approached the Partnership to discuss obtaining an interest in the project through a joint venture. Enbridge proposed that it would contribute to the cost of the project and that the Partnership and Enbridge would share in the project's profits based solely upon their relative capital contributions. Thus, under Enbridge's proposal, the Partnership would not receive any compensation in return for already owning the project, the work it had already put into it and the money it had already expended. Enbridge suggested that it would contribute 75% of the cost of the project and the Partnership would contribute 25% and so the project would be owned in these proportions. After receiving this proposal, the Partnership's general partner formed a special committee consisting of three independent members of the general partner's board. The special committee was asked to determine whether the joint venture was "fair and reasonable to the Partnership and its unitholders" and to make a recommendation to the board on behalf of the Partnership with respect to the proposed transaction. The special committee hired legal and financial advisors. Its banker's retainer letter stated that it was retained to render an opinion as to whether the terms of the joint venture were "representative of an arm's length transaction." The special committee met several times and was advised by its banker that the terms of the joint venture were "representative, in all material respects, of those that would have been obtained by the Partnership in an arm's length transaction." The banker also opined that the Partnership should retain as much equity in the project as possible. In light of the banker's findings, the special committee approved the joint venture agreement, provided that the Partnership would hold a 1/3 equity stake rather than 25%. Plaintiff challenged the transaction on four counts, both derivatively and directly. Count one alleged that defendants breached their express and implied duties under the partnership agreement by causing the Partnership to enter into an agreement that was financially unfair to the Partnership. Count two alleged that defendants other than the general partner aided and abetted the general partner's breach of its duties. Count three alleged that defendants breached the implied covenant of good faith and fair dealing, and Count four alleged that two defendants, to the extent they were not liable for breaching their duties under the partnership agreement, tortiously interfered with the partnership agreement and were thereby unjustly enriched. Defendants responded that the partnership agreement expressly permitted the general partner to enter into a transaction with a related entity, such as Enbridge, as long as the terms of that transaction were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties." Defendants argued that the joint venture met that standard, that their investment banker opined that the joint venture was representative of an arm's length transaction and further that under the partnership agreement, the general partner was allowed to rely conclusively on the banker's opinion. Defendants further argued that there was no cause of action for aiding and abetting a breach of contractually imposed duties, that the implied covenant of good faith and fair dealing was inapplicable because the partnership agreement expressly addressed the duties of defendants and, finally, since none of defendants breached their duties under the partnership agreement, there could be no tortious interference claim. In its analysis, the court first concluded that the Tooley test should apply to a partnership claim and that under that test, because any benefit would go to the partnership rather than to the individual partners, the claims were derivative in nature. However, the court also concluded that a demand would have been futile since a majority of the general partner's board was not independent. Turning to the specific claims, the court first held that defendant who supplied all the employees to the general partner and the Partnership but had no control over the general partner or the Partnership owed no fiduciary duties to those entities. The court therefore dismissed all claims against that entity. In analyzing the remaining claims, the court focused on the provisions of the partnership agreement that permitted related party transactions as long as they were on terms "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties," that provided that no Indemnitee (which included all defendants) would have any liability to any partner or other person as a result of any act or omission if such Indemnitee acted in good faith and that authorized the general partner to rely on investment bankers as to matters that the general partner reasonably believed to be within their professional or expert competence and provided that any action taken by the general partner in reliance on their advice would be conclusively presumed to have been done in good faith. Based on these provisions and the facts alleged, the court concluded that plaintiff had not alleged facts indicating bad faith. The general partner was protected through its good faith reliance on the investment banker's finding. Similarly, the court also found plaintiff had failed to plead facts indicating that the general partner's board acted in bad faith. They established an independent committee, hired independent counsel and bankers, met several times and negotiated a higher percentage participation for the Partnership than that which was originally offered.

With regard to plaintiffs' challenge to the work of the banker, the court noted that the valuation methodology and comparable transaction analyses that an investment banker undertakes are properly within the discretion of the banker. The court also noted that at the time of the joint venture it would be reasonable for the general partner's board to conclude that it did not want to put a large majority of the Partnership's capital into a single venture and thus it was better to participate in the project with Enbridge. With regard to Enbridge, the court held that it could not have been said to have negotiated in bad faith since it negotiated with the general partner's special committee. The court then noted that claims for aiding and abetting, as well as tortious interference, require an underlying breach. As there was none, these claims were also dismissed. Finally, the court rejected plaintiff's implied covenant claim finding that, even if it were possible to plead breach of the implied covenant where a plaintiff had failed to plead a bad faith claim, plaintiff had failed to do so here. In this regard, the court noted that the implied covenant addresses "only events that could not reasonably have been anticipated at the time the parties contracted." In contrast, the court found that the parties to the partnership agreement thought about related party transactions and the general partner's reliance upon investment banker opinions and explicitly addressed those issues.

On remand by order of the Delaware Supreme Court to determine the sufficiency of the plaintiff's claims for reformation or rescission on a motion to dismiss, the Court of Chancery first concluded that the plaintiff's request for reformation or rescission was waived because the plaintiff failed to raise any arguments with respect to either remedy in his briefs or at oral arguments. Nevertheless, because of uncertainty surrounding the scope of the remand order, the Court of Chancery also addressed the substance of the plaintiff's claim for reformation or rescission.

Turning to the plaintiff's claim for reformation, the court found that the plaintiff stated a claim that was potentially remediable through reformation. The partnership agreement permitted conflicted transactions that were "fair and reasonable" to the Partnership, and the partnership agreement deemed transactions that were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties" to be fair and reasonable. The court noted that it has previously interpreted similar language to require something akin, if not equivalent to, entire fairness review. Because the entire fairness standard cannot be satisfied by reliance on an investment banker's opinion on a motion to dismiss, the court concluded that the plaintiff had adequately plead that the joint venture was not fair to the Partnership.

The court noted, however, that the reformation that the plaintiff sought—a reduction in Enbridge's share in the joint venture—was rarely sought and obtained. The court expressed hesitation because, by reducing Enbridge's share in the joint venture, the reformation remedy sought would reduce the cash flow Enbridge would receive and essentially redirect it to the Partnership, a result the court likened to garnishment. Despite its misgivings, the court concluded that because the partnership agreement only provided exculpation against money damages, and because the plaintiff adequately plead entitlement to an equitable remedy, the plaintiff's claim for reformation should survive a motion to dismiss.

Next, the court held that the plaintiff had not stated a claim for rescission. The court noted that the plaintiff made no arguments in favor of rescission and its counsel conceded at oral argument that reformation was the crux of this remand. In addition, the court found that the plaintiff failed to meet its burden of demonstrating that all parties to the transaction could be restored to the positions they occupied prior to the transaction. The plaintiff offered no explanation regarding how the court could rescind a joint venture agreement to construct a pipeline once such construction was complete. The court therefore dismissed the plaintiff's claim for rescission.

k. *In re K-Sea Trans. Partners L.P. Unitholders Litig.*, C.A. No. 6301-VCP (Del. Ch. June 10, 2011) and (Del. Ch. Apr. 4, 2012)

Plaintiffs, holders of common units in K-Sea Transportation Partners L.P. ("K-Sea"), moved to expedite discovery in their application for an injunction to escrow a portion of the consideration to be paid in connection with a merger in which K-Sea would be acquired for cash or a mix of cash and the acquirer's stock. The court noted that a motion to expedite should be granted only if the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury to justify imposing on defendants and the public the extra costs of an expedited proceeding. After reviewing each of plaintiffs' claims, the court concluded that although the complaint asserted at least one sufficiently colorable claim, plaintiffs failed to demonstrate a sufficient threat of irreparable harm.

In late 2010, representatives of K-Sea and the acquirer, Kirby Corporation, met to discuss a potential strategic transaction. Because K-Sea sought an offer that specifically accounted for the controlling interest and incentive distribution rights ("IDRs") of K-Sea's general partner, K-Sea's board of directors (the "Board") submitted the proposed transaction for "Special Approval" by the K-Sea conflicts committee (the "Committee") pursuant to the terms of the K-Sea partnership agreement. After consulting with financial and legal advisors, the Committee gave the transaction "Special Approval" and the Board followed with its own approval. A majority of K-Sea unitholders then entered into support agreements pursuant to which they agreed to vote in favor of the transaction.

Non-employee, independent directors comprised the Committee. Shortly before negotiation of the transaction at issue commenced in late 2010, the Board approved a grant of 15,000 phantom common units to each member of the Committee. The phantom units, which were set to vest over a period of five years, vested immediately in the case of a change in control.

In support of their motion to expedite, plaintiffs made three primary arguments. First, plaintiffs argued that the Committee had a duty to consider, in isolation, the fairness of the portion of the transaction consideration that accounted for the IDRs. Defendants countered that the Committee only had to consider the fairness of the transaction as a whole. The K-Sea partnership agreement required resolution of conflicts to be "fair and reasonable" and "Special Approval" by the Committee was conclusively deemed under the K-Sea partnership agreement to be fair and reasonable so long as K-Sea's general partner disclosed all known material facts to the Committee.

The court concluded that plaintiffs failed to allege facts sufficient to state a colorable claim that the Committee had a duty to consider the fairness of the transaction other than with respect to the transaction as the whole. In support of its conclusion, the court noted that plaintiffs failed to allege a failure to disclose any material facts on the part of the general partner and that the actions of the Committee went above and beyond the requirements of the K-Sea partnership agreement, the Committee having obtained a fairness opinion from its financial advisor. The court also found that plaintiffs failed to present a convincing argument that the K-Sea partnership agreement required the Committee to consider anything other than the fairness of the transaction as a whole.

Second, plaintiffs argued that the Committee members lacked independence because the phantom units granted to such members would vest in the event of a change of control transaction thereby increasing the incentive to provide "Special Approval." Defendants, on the other hand, argued that the vesting of the phantom units aligned the interests of Committee members and common unitholders in obtaining the best price. The court concluded that plaintiffs had stated at least a colorable claim in this instance. In doing so, the court distinguished prior precedent stating that the vesting of options aligns the interests of shareholders and directors in obtaining the highest price. First, the court noted, because the number of phantom units, upon vesting, nearly doubled the number of common units already held by the Committee members, it was possible that the prospect of the immediate vesting of the phantom units may have biased the Committee. Moreover, the court concluded, the timing of the phantom units grant supported an inference that it was made with intent to influence the Committee.

Third, plaintiffs contended that disclosures provided to common unitholders in the relevant registration statement were materially misleading. Preliminarily, plaintiffs argued that the K-Sea partnership agreement did not modify defendants' traditional duty of disclosure. The court, however, rejected this preliminary argument, noting that the K-Sea LP agreement set forth a procedure for merger approval that included provision to the common unitholders of a copy or summary of the merger agreement along with notice of the special meeting or written consent. The court read this provision as reflecting the parties' intent to preempt traditional fiduciary duties of disclosure. Moreover, the court found that even if a traditional duty of disclosure had applied, plaintiffs had not demonstrated that the disclosures about which they complained were misleading.

Because plaintiffs stated at least one colorable claim, the court then turned to whether plaintiffs had demonstrated that they would suffer irreparable harm if expedition was not granted. The court concluded that plaintiffs had not. In doing so, the court found that plaintiffs had not refuted defendants' argument that money damages would be sufficient. First, the court noted its reluctance to enjoin a premium transaction where there was no superior bid and stated that money damages repeatedly have been held to be sufficient to remedy a claim of inadequate transaction price. With these points in mind, the court concluded that because no other offers were reasonably available to K-Sea and because plaintiffs claim focused on the portion of the transaction consideration allocated to the IDRs, money damages were an adequate remedy.

The court also rejected plaintiffs' argument that they were at risk of irreparable harm because nearly all of the economic interest in K-Sea's general partner and the IDRs was owned by single-purpose entities that would essentially be judgment-proof after consummation of the transaction at issue. The court concluded that plaintiffs' claims were too speculative and unsupported by facts that could lead to a reasonable inference that no defendant or those associated with them could satisfy a judgment.

In a subsequent decision pertaining to K-Sea's merger with Kirby Corporation, the Court of Chancery addressed the defendants' motion to dismiss the plaintiffs' complaint. The court first turned to the plaintiffs' claims that the Committee, the Board, K-Sea's general partner and the general partner of K-Sea's general partner breached their fiduciary duties and the K-Sea partnership agreement by approving the merger without evaluating the fairness or reasonableness of the payment for the IDRs and by relying on the "Special Approval" of the Committee, which was comprised of members who improperly held phantom units.

The court noted that the exculpation provisions of the K-Sea partnership agreement required the plaintiffs to demonstrate both that the defendants had breached the K-Sea partnership agreement or their fiduciary duties and, in doing so, acted in bad faith. Turning to the provisions of the K-Sea partnership agreement pertaining to mergers to determine what duties were owed, the court found that the agreement established only one contractual duty with respect to mergers: that K-Sea's general partner must exercise its discretion. The K-Sea partnership agreement permitted K-Sea's general partner to consider whatever factors it chose in exercising its discretion and imposed no requirement to determine that a merger be fair and reasonable. The court further noted that the K-Sea partnership agreement displaced traditional fiduciary duties that ordinarily would constrain K-Sea's general partner in exercising its discretion with a narrower duty not to exercise its discretion in a manner inconsistent with the best interests of K-Sea as a whole, which, according to the court, essentially amounted to a duty not to exercise its discretion in bad faith.

The court then turned to the K-Sea partnership agreement provisions pertaining to "Special Approval." The court rejected the plaintiffs' claim that if the phantom units granted to the members of the Committee rendered the "Special Approval" defective, then the defendants breached their fiduciary duties and the K-Sea partnership agreement by approving the merger in reliance on the defective "Special Approval." In the court's view, a failure to qualify for the "Special Approval" safe harbor did not make the defendants' conduct improper unless the defendants also failed to satisfy the otherwise controlling standard of review—namely, whether K-Sea's general partner exercised its discretion in good faith.

With respect to whether K-Sea's general partner exercised its discretion in good faith, the court found that the complaint alleged facts that could support a finding of bad faith. Specifically, the plaintiffs alleged that the Board caused K-Sea's general partner to refuse to consent to any transaction that did not include a separate payment for the IDRs and that the Board incentivized the Committee to approve the merger by granting the phantom units on the eve of negotiations. The court noted, however, that the K-Sea partnership agreement entitled K-Sea's general partner to a conclusive presumption of good faith whenever it acted in reliance on an expert opinion. The Committee relied on a fairness opinion and the court concluded that it would be unreasonable to infer that K-Sea's general partner did not also rely on the same opinion. Therefore, the court found, K-Sea's general partner was conclusively presumed to have acted in good faith. The court also noted that the implied covenant of good faith and fair dealing could not be used to infer language that contradicts a clear exercise of an express contractual right. As a result, the court dismissed the plaintiffs' claims of breach of fiduciary duty and the K-Sea partnership agreement in connection with approval of the merger.

The court next turned to the plaintiffs' remaining claim alleging breach of the fiduciary duty of disclosure. The court noted that, because of the exculpation provision of the K-Sea partnership agreement, to state a claim the plaintiffs needed to allege facts to support a reasonable inference that the defendants, in authorizing a materially misleading disclosure, acted in bad faith. The plaintiffs first claimed that a statement in the Form S-4 that the consideration to be exchanged in the merger represented a 9.56% increase over the amount originally offered was misleading because a significant portion of that increase was allocated to the IDR payment. The court rejected this argument, noting that the Form S-4 contained a detailed discussion regarding the increase in the amount of consideration. The plaintiffs next contended that a statement in the Form S-4 that the members of the Committee would not personally benefit from the merger in a manner different from unitholders was materially misleading. The court rejected this argument and in doing so relied on its prior opinion, in which the court found this statement to be generally true and noted that the Form S-4 disclosed the grant of the phantom units. The court therefore dismissed the plaintiffs' disclosure claim.

l. *Gerber v. Enter. Prods. Holdings, LLC*, C.A. No. 5989-VCN (Del. Ch. Jan. 6, 2012)

Plaintiff brought a purported class action challenging two transactions: the sale by Enterprise GP Holdings, L.P. ("EPE") of Texas Eastern Products Pipeline Company, LLC ("TEPPCO GP") to Enterprise Products Partners, L.P. ("Enterprise Products") (the "2009 Sale") and the merger of EPE into a wholly owned subsidiary of Enterprise Products (the "Merger"). Plaintiff alleged that in 2007, EPE had purchased TEPPCO GP for approximately $1.9 billion (the "2007 Purchase") and that under the terms of the 2009 Sale EPE received approximately $100 million in compensation. In accordance with the procedure in the EPA partnership agreement, the 2009 Sale had been submitted to the Audit, Conflict and Governance Committee (the "ACG Committee") of EPE's general partner ("EPE GP"). In connection with its review of the 2009 Sale, the ACG Committee hired Morgan Stanley & Co. who opined that the consideration to be paid pursuant to the 2009 Sale was fair from a financial point of view to EPE and to the public limited partners of EPE. The ACG Committee approved the 2009 Sale and recommended it to the full Board which subsequently approved the 2009 Sale. Morgan Stanley was also hired by the ACG Committee to render an opinion on the Merger and they opined that the Merger exchange ratio was fair from a financial point of view. In his complaint, plaintiff alleged that defendants breached their express and implied duties under EPE's partnership agreement by causing EPE to undertake the 2009 Sale and also by causing EPE to enter into the Merger without valuing legal claims relating to the 2007 Purchase or the 2009 Sale (the "Claims"). Plaintiff also alleged that various controlling persons of Enterprise Products tortiously interfered with the EPE partnership agreement by causing EPE to undertake the 2009 Sale and the Merger and that those defendants were thereby unjustly enriched. In addition, plaintiff alleged that all defendants other than EPE GP aided and abetted the breaches of express and implied duties by EPE GP. Defendants moved to dismiss all claims. The court began by considering whether certain of plaintiff's claims were direct or derivative, noting that claims that an entity has entered into a transaction that was essentially "a bad deal" are typically derivative and also that a merger will typically deprive the merged entity's former equity holders of standing to pursue derivative claims. The court recognized, however, that when a principal purpose of a merger is the inequitable termination of derivative claims, those claims may be brought as direct claims following consummation of the merger, and the court held that plaintiff had met its burden of pleading facts from which the court could infer that a principal purpose of the Merger was the termination of the Claims. The court then turned to defendants' motion to dismiss all claims for failure to state a claim. In analyzing defendants' motion to dismiss, the court began with the proposition that absent contractual modification, a general partner and certain persons affiliated with the general partner such as the general partner's board of directors and controller each owe fiduciary duties to the limited partnership. The court noted, however, that the EPE partnership agreement modified the fiduciary duties of EPE GP and its affiliates. Specifically, the partnership agreement provided that if a conflict transaction were approved by the ACG Committee ("Special Approval"), then it would be deemed approved by all partners and not constitute a breach of the partnership agreement or any law. Based on this provision, the court held that plaintiff's first count did not state a claim for breach of an express fiduciary duty against any defendant. However, the court also noted that the implied covenant of good faith and fair dealing constrained the Special Approval process. Under the implied covenant, the court found that EPE GP was required to act in good faith if it exercised its discretionary authority to use the Special Approval process to take advantage of the contractual duty limitation provided by the partnership agreement, and the court found that the complaint could fairly be read to allege that EPE GP acted in bad faith when it choose to use the Special Approval process. However, the court found that in connection with the 2009 Sale the ACG Committee had received a fairness opinion from Morgan Stanley and that EPE GP had relied on the Morgan Stanley fairness opinion in deciding whether to use the Special Approval process. The court also found that the EPE partnership agreement provided that when EPE GP relied on an expert report such as the Morgan Stanley fairness opinion, it was conclusively presumed to have acted in good faith. The court held that a plaintiff could not plead that a defendant has breached the implied covenant when defendant was conclusively presumed by the terms of a contract to have acted in good faith. The court therefore dismissed the claims relating to the 2009 Sale. For the same reason, it dismissed the claims relating to the Merger, which had also received Special Approval in reliance upon a Morgan Stanley fairness opinion. Finally, because it found no underlying breach, it dismissed the secondary liability claims as well resulting in the dismissal of all of plaintiff's claims.

m. *In re Inergy L.P. Unitholder Litig.,* Cons. C.A. No. 5816-VCP (Del. Ch. Oct. 29, 2010)

In this case, unitholders of Inergy L.P., a Delaware master limited partnership ("Inergy"), sought to enjoin a merger between Inergy Holdings L.P., the owner of Inergy's general partner and also a Delaware master limited partnership ("Holdings"), and a wholly-owned subsidiary of Holdings' general partner. Inergy had a two-tiered capital structure consisting of common units held primarily by public investors and Incentive Distribution Rights ("IDRs") held exclusively by Holdings. Inergy was not a constituent party to the merger, but was a party to the merger agreement pursuant to which it would issue new common units to Holdings. In exchange, Holdings was to transfer the IDRs to Inergy to be cancelled. In the final step, Holdings was to exchange the Inergy units for its own units held by its unitholders. As a result, former Holdings unitholders would become Inergy unitholders owning 39.6% of outstanding Inergy units and Holdings would become a private entity.

The plaintiffs sought a preliminary injunction on two bases. First, they claimed a breach of Inergy's limited partnership agreement because no vote of Inergy unitholders was sought with respect to the merger. Second, plaintiffs contended that an unfair and unreasonable process to select an unfair and dilutive transaction price constituted a breach of the LP agreement and the fiduciary duties of the directors of Inergy's general partner.

The Inergy LP agreement gave Inergy the power to "merge or consolidate" subject to the consent of a majority of Inergy unitholders. The court concluded that whether Inergy unitholders were entitled to vote turned on whether Inergy was actively "merging" or "consolidating" with another entity. Although Inergy was a party to the merger agreement, it was not a constituent party to the proposed merger. Therefore, the court concluded it was not merging or consolidating and Inergy unitholders were not entitled to vote. In addition, the court analogized the proposed merger to a triangular merger in the corporate context and noted that in such a scenario Delaware law did not require a vote by shareholders of the non-merging parent corporation. The court also invoked the doctrine of independent legal significance to support its conclusion, noting that the fact that Inergy could have completed the transaction in a manner that conferred the right to vote on its unitholders did not mean it had to do so.

On the second claim, the court noted that the Inergy LP agreement provided a number of potentially relevant standards of care. Section 7.6(e) of the agreement prohibited transfers of property from Inergy to Inergy's general partner (or an affiliate of its general partner) unless such transfers were "fair and reasonable." Section 7.9(a) likewise provided that any resolution of a conflict of interest between Inergy and its general partner (or an affiliate of its general partner) did not breach the LP agreement if such resolution were "fair and reasonable." Section 7.9(a) further provided, however, that actions taken by Inergy's general partner, if taken "in the absence of bad faith," did not breach the LP agreement. Finally, section 7.10(d) modified, waived or limited any standard of care imposed by the LP agreement or applicable law to permit Inergy's general partner to act under the LP agreement, provided that such action was "reasonably believed . . . to be in, or not inconsistent with, the best interests of" Inergy.

The plaintiffs argued section 7.6(e)'s "fair and reasonable" standard governed. The defendants countered that section 7.9(a) and its "bad-faith" carve out applied. Alternatively, the defendants argued that any standard set forth in the LP agreement must be applied in light of section 7.10(d)'s "reasonable belief" standard. The court agreed with defendant's last argument, concluding that section 7.10(d) "expressly and unambiguously" limited any duty imposed by the Inergy LP agreement. The court declined to decide which standard, section 7.6(e) or 7.9(a), controlled because it concluded that in light of section 7.10(d), under either, the plaintiffs failed to demonstrate a likelihood of success on the merits.

In support of their fiduciary claim, plaintiffs argued that the independent special committee (the "ISC") appointed to negotiate the transaction on behalf of Inergy unitholders lacked proper procedural safeguards because it was comprised of only one member. Moreover, plaintiffs argued, the sole ISC member did not properly understand his responsibilities. The court rejected both arguments. First, the court stated that there was no requirement that a body such as the ISC have more than one member and, with respect to this particular transaction, noted that only one member of the board of Inergy's general partner was truly independent of the transaction. The court then cited numerous facts demonstrating that the ISC member understood his role.

The plaintiffs next contended that the ISC chose conflicted legal and financial advisors who were unable to render independent advice. Specifically, the plaintiffs focused on a financial advisor having extensive prior dealings with Inergy and its CEO. The court noted several factors that supported the conclusion that the ISC's selection was both reasonable and in Inergy's best interests. The plaintiffs also complained of a meeting between the ISC member and Inergy's CEO during the negotiations, but the court found there to be a legitimate reason for the meeting. Finally, the plaintiffs argued that the ISC's decision to pursue a transaction that did not require a unitholder vote evidenced bad faith. In rejecting this argument, the court relied on its earlier discussion of unitholder voting rights and also noted that the ISC relied on legal advice in making the decision.

Finally, the plaintiffs attacked the transaction price in a number of respects. First, they alleged the transaction required Inergy to pay an excessive exchange premium. The court first noted that an exchange premium was to be expected in a transaction of this type in light of the benefit to Inergy from the cancellation of the IDRs. The plaintiffs argued that the exchange ratio should be more favorable. The court, however, accorded little weight to the testimony on this subject by the plaintiff's expert because such expert did not conduct his own independent analysis, conducted his work in a rushed manner, and raised minor quibbles rather than pointing to major flaws. Noting that the transaction arose out of serious, arms-length negotiations over a number of weeks, the court concluded the plaintiffs failed to demonstrate a likelihood of success in their challenge to the transaction price.

n. *Lonergan v. EPE Holdings LLC*, C.A. No. 5856-VCL (Del. Ch. Oct. 11, 2010)

Plaintiff, a holder of LP units in defendant Enterprise GP Holdings, L.P. ("Holdings"), sought to expedite the hearing on his application for a preliminary injunction to enjoin the merger of Holdings with a subsidiary of Enterprise Products Partners, L.P. ("EPD"). The court noted that a motion to expedite should only be granted if the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra costs of an expedited preliminary injunction proceeding. After reviewing each of the plaintiff's claims, the court concluded that the complaint failed to assert a sufficiently colorable claim.

EPD is, and Holdings was, a publicly-traded Delaware master limited partnership. Holdings controlled EPD through its one-hundred percent ownership of EPD's general partner. Distributions to Holdings unitholders derived primarily from Holdings' ownership of all the incentive distribution rights ("IDRs") in EPD. IDRs are a form of pay for performance whereby the percentage of cash received by holders of IDRs increases as distributions from the partnership increase. IDRs' claim to partnership cash flow, however, can reduce the trading price of LP units and thereby make such LP units a less attractive source of new money or acquisition currency.

To address the negative effect of the IDRs and implications arising from proposed federal tax legislation, EPD proposed the merger to the Holdings Audit, Conflicts and Governance Committee (the "Audit Committee"). As a result of the merger, Holdings LP units would be converted into EPD LP units, the IDRs would be cancelled, and control of EPD would remain essentially unchanged, with Holdings' general partner becoming general partner of EPD. The Audit Committee had full power to negotiate and accept or reject any deal. Over the course of two months of negotiations, the initial exchange ratio of 1.377 EPD units for each Holdings unit rose to 1.50. As part of the merger, EPCO, an affiliated entity and beneficial owner of seventy-six percent of Holdings LP units and twenty-seven percent of EPD LP units, also waived a percentage of distributions to which it was entitled for a period of five years following consummation of the transaction. After the Audit Committee's financial advisor opined that the transaction was fair from a financial perspective, the Audit Committee gave "Special Approval" for purposes of the Holdings LP agreement.

The court found that the Holdings LP agreement eliminated all fiduciary duties leaving only the contractual standards set forth therein and the implied covenant of good faith and fair dealing. The court also found that the complaint did not identify any provision of the Holdings LP agreement that the merger might violate, but rather relied solely on the implied covenant of good faith and fair dealing. Plaintiff's claims fell essentially into two categories: (1) *Revlon*-type claims alleging failure to seek an alternative transaction; and (2) *Lynch*-type claims insisting on majority-of-the-minority approval of the merger. But the court found that "plaintiff [sought] to cloak familiar breach of fiduciary duty theories in the guise of the implied covenant of good faith and fair dealing." The court rejected plaintiff's attempt to do so, concluding that "[t]o use the implied covenant to replicate fiduciary review would vitiate the limited reach of the concept of the implied duty of good faith and fair dealing."

The court further noted that section 7.9(a) of the Holdings LP agreement established "four alternative standards of review" to permit and approve conflict of interest transactions.

Because the Holdings LP agreement set forth two other alternative methods of approval in addition to provisions contemplating majority-of-the-minority approval and *Revlon* best-offer-reasonably-available standards of review, the court concluded section 7.9 disposed of plaintiff's claim that the implied covenant of good faith and fair dealing required compliance with either *Revlon* or *Lynch*.

Next, the court addressed plaintiff's claim that the implied covenant constrained the Special Approval process of the Audit Committee. To state a colorable claim under this theory, the court noted, the "plaintiff would need to allege particularized facts from which this Court could infer that the members of the Audit Committee acted arbitrarily or in bad faith." The court concluded plaintiff failed to do so. First, plaintiff did not challenge the disinterestedness or independence of the Audit Committee members. Second, the deal process, the terms negotiated by the Audit Committee, and the financial analyses conducted by the Audit Committee's financial advisor did not indicate arbitrary or bad faith conduct. Finally, section 7.10(b) of the Holdings LP agreement "conclusively presumed" action in reliance on an expert opinion, as was the case here, "to have been done . . . in good faith."

Finally, plaintiff also alleged defendants "violated the implied covenant of good faith and fair dealing by failing to disclose all material information reasonably available in connection with the LP unitholder vote." Ordinarily a general partner of a limited partnership owes fiduciary duties that include a duty of disclosure. Because the Holdings LP agreement eliminated all fiduciary duties, the court found that no fiduciary duty of disclosure remained. The complaint did not identify a contractual duty to disclose material information in connection with the merger, and the court refused to infer a disclosure obligation under the implied covenant of good faith and fair dealing. The court also found nothing inequitable about the level of disclosure provided (a meeting notice and a copy or summary of the merger agreement) and therefore concluded that this was not a situation where "compelling fairness" required it to invoke the implied covenant.

o. *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, C.A. No. 2427-VCL (Del. Ch. Jan. 15, 2010)

In this decision, the Court of Chancery considered a settlement to resolve two representative actions by holders of limited partnership units of Teppco Partners L.P. ("Teppco"). The first action, styled as the "derivative action," challenged two transactions between Teppco and Enterprise Products Partners, L.P. ("Enterprise"). Teppco and Enterprise were under common control and the transactions allegedly unfairly favored Enterprise. The second action, referred to as the "merger action," related to Enterprise's proposal to acquire Teppco by merger.

A series of transactions moving assets from Teppco to Enterprise and relating to a joint venture gave rise to the derivative action. The Teppco audit committee approved the joint venture without obtaining a fairness opinion, and according to the opinion of the financial advisor employed by Enterprise, the deal was more favorable for Enterprise than comparable transactions. In the derivative action, plaintiffs alleged breaches of fiduciary duties and aiding and abetting of such breaches. (In addition, plaintiffs had earlier challenged disclosures made in connection with proposed transactions as inadequate, but the court had previously dismissed such claims. *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*)

During the pendency of the derivative action, defendants decided to pursue the merger between Teppco and Enterprise. The audit committee of Teppco's general partner engaged special legal counsel and considered the effect of the merger on the derivative action. After receipt of Enterprise's initial offer, which was deemed unacceptably low, the Teppco audit committee retained special Delaware legal counsel to advise the committee and independently assess the derivative action and a financial advisor to provide a sensitivity analysis. At this point, independent directors were appointed to the board of Teppco's general partner and the audit committee formed a special committee with the exclusive power to evaluate, negotiate and approve or reject the merger. The financial advisor and legal counsel previously employed by the audit committee were retained by the special committee.

During the course of the merger negotiations, defendants advised plaintiffs of the merger proposal, which would extinguish plaintiffs' standing in the derivative action. Upon the public announcement of the merger, plaintiffs filed the merger action but did not move to expedite the proceedings or enjoin the merger. At this point, the special committee negotiated with both Enterprise over the merger and with plaintiffs' counsel over the derivative action, to ultimately reach an agreement among the three sides. The special committee negotiated the exchange ratio of Teppco units for Enterprise units and then obtained plaintiffs' agreement to a settlement of all litigation in consideration for the merger. The special committee's financial advisor opined that the exchange ratio was fair but did not assign any value to the derivative action. The special committee did, however, receive a separate valuation that considered the derivative action, which was presented as supplemental evidence.

In assessing the settlement agreement as a resolution of both the derivative action and the merger action, the court noted that the claims in the derivative action actually afforded plaintiffs with a derivative right on behalf of Teppco and a direct right as limited partners for breach of the limited partnership agreement. Therefore, the court noted, after the merger, the Teppco unitholders could have pursued the direct claims in the derivative action after the merger as a de facto class action. Further, even in derivative actions, the continuous ownership requirement under Delaware law is suspended in cases in which a principal purpose of a merger is to terminate pending derivative claims. Because the derivative action could have been pursued post-merger in some form, the settlement agreement was properly considered as a resolution of the derivative action as well as the merger action.

Considering the fairness of the settlement, the court noted that in the context of representative litigation, a court must balance the policy favoring settlement with the need to fairly represent the interests of the class of plaintiffs because of the fiduciary nature of the litigation, weighing the value of the claims being compromised against the value to the class of the settlement. The court observed that the plaintiffs' claims in the derivative action seemed to be strong, given the language of Section 6.6(e) of the Teppco limited partnership agreement requiring that affiliate transactions be fair and reasonable to Teppco, considered in the context of all similar or related transactions. Under the limited partnership agreement, this standard would be deemed satisfied if the terms of the subject transaction were no less favorable to Teppco than those provided to or available from unrelated third parties. Defendants attempted to counter the application of this provision with the grant of full power and authority to the general partner to conduct the business of the partnership, including disposition of assets and entry into joint ventures, in its sole discretion under Section 6.1(a) of the limited partnership agreement. The court rejected defendants' argument, as it did not comport with a reading of the limited partnership agreement as a whole or in accordance with its plain meaning. Section 6.1(a) was a general grant of authority, while Section 6.6(e) was a specific provision as to transactions authorized under Section 6.1(a) and involving affiliates, and if Section 6.1(a) were to control, Section 6.6(e) would be read out of the agreement. The court also noted that if there was ambiguity, the agreement would be construed against the general partner who drafted it. With respect to the sole discretion standard, the court explained that *Gelfman v. Weedon Investors, L.P.* does not stand for the proposition that sole discretion language will trump any conflict of interest provision and that such language could not override a provision such as Section 6.6(e), which explicitly barred affiliate transactions that did not satisfy the standard set forth in the agreement. Applying Section 6.6(e) to the challenged transactions, the court found that there was a strong case for plaintiffs' breach claims, given that the transactions undervalued Teppco's assets, were pursued by fiduciaries who were conflicted and had reason to favor Enterprise, were not as favorable as a third party transaction and were unlikely to be fair and reasonable. As to plaintiffs' claims for common law breaches of fiduciary duty, however, the court found that the LP Act allows for a limited partnership agreement to limit or eliminate fiduciary duties and that Section 6.9(b) of the Teppco limited partnership agreement utilized this authority by providing an express standard displacing default fiduciary duties.

In contrast to the derivative action, the merger action was judged under an amended and restated limited partnership agreement. The operative provisions were modified to provide a more flexible standard for affiliate transactions, under which affiliate transactions were deemed to be fair and reasonable if blessed by special approval of a majority of the members of the audit committee. To the court, these provisions provided a weighty defense but not an automatic judgment for defendants. When such provisions are employed, the special approval remains subject to the implied covenant of good faith and fair dealing, which cannot be eliminated by a partnership agreement. Further, these particular provisions did not grant authority to the audit committee in its sole discretion and some form of reasonableness standard would likely apply. In the view of the court, the claims in the merger action were weaker but still a meaningful litigation threat.

The court then assessed the value of plaintiffs' claims and plaintiffs' and defendants' contentions as to potential damages in the derivative action and noted that both plaintiffs and defendants, as well as the special committee, had given the derivative action real value. The court questioned the premium obtained on the exchange ratio of units, and noted that there were no appraisal rights in the merger, that the majority of the minority votes were based on units voting rather than units outstanding, that plaintiffs did not challenge the merger and that the fees defendants agreed to were among the largest awarded by the court. However, the transaction was at a premium and negotiated by a special committee of independent, outside directors without ties to the controlling company who appeared to have acted in good faith and retained experienced financial and legal advisors. As to plaintiffs, the court found that they engaged in real work and created a substantial litigation risk. Balancing these factors, the court approved the settlement as fair and reasonable.

p. *Brickell Partners v. Wise*, C.A. No. 18145 (Del. Ch. Aug. 20, 2001)

Plaintiff, a limited partner in the defendant partnership, brought suit challenging an acquisition by the partnership. The target company was owned by the same company that owned and controlled the general partner of the partnership. Plaintiff alleged that the transaction was substantively unfair to the partnership. The defendants moved to dismiss the complaint because the transaction had been approved pursuant to the terms of the partnership agreement which, they argued, supplanted the traditional default fiduciary duties which would otherwise apply to the challenged transaction. The court noted that the partnership agreement contained a provision on resolution of conflicts of interest and that provision provided that whenever a potential conflict of interest existed between the general partner or any of its affiliates on the one hand and the partnership, the operating companies or any partner on the other hand, any resolution of such conflict would be deemed permitted and would not constitute a breach of the partnership agreement or any duty stated or implied by law or equity if such transaction received "Special Approval." Under the partnership agreement, "Special Approval" meant the approval of a majority of the members of the partnership's conflict committee and the court noted that such approval was obtained for the challenged transaction. The court observed that it had previously articulated the standard that "principles of contract preempt fiduciary principles where the parties to a limited partnership have made their attentions to do so plain" and concluded that the plain and unambiguous language of the conflict section of the partnership agreement displaced traditional fiduciary duty principles. The court acknowledged plaintiff's argument that the members of the conflict committee had an inherent conflict of interest since as directors of the partnership's general partner they owed fiduciary duties both to the shareholders of the general partner and the limited partners of the partnership. The court noted, however, that this on-going conflict was inherent in a corporate general partner and therefore "dissipate[d] the force of plaintiff's argument." The court also rejected plaintiff's argument that the conflicts committee should be comprised of members with no relationship at all to the corporate general partner because it was intended to be a committee of the general partner's board. Finding that neither member of the conflicts committee was beholden to the corporate parent of the general partner for material, personal reasons separate and apart from the structural conflict each inherently faced as a director of the corporate general partner, the court dismissed the complaint with prejudice.

7. Limited Partnership Opportunity Doctrine

a. *Kahn v. Icahn,* C.A. No. 15916 (Del. Ch. Nov. 12, 1998)

Plaintiffs, holders of depository units representing limited partnership interests of a Delaware limited partnership, brought a derivative action against the partnership's general partner, the general partner's sole shareholder and chief executive officer and certain entities affiliated with the general partner, claiming that the sole shareholder and chief executive officer of the general partner breached his fiduciary duties to the partnership and usurped for himself opportunities of the partnership by failing to make certain investments completely available to the partnership and, instead, dividing the investments between the partnership and entities owned or controlled by the general partner. The partnership agreement provided that the general partner "may compete, directly or indirectly, with the business of the [p]artnership . . . and neither the [p]artnership nor any of the Partners or Record Holders shall have any right to participate in such other business interests or ventures or to receive or share in any income derived therefrom."

Defendants moved to dismiss for failure to state a claim and the court granted defendants' motion. The court, citing Section 17-1101(d) of DRULPA, stated that traditional fiduciary duties among and between parties are default duties that may be modified by partnership agreements and noted that Delaware case law suggests that partnership agreements may act as safe harbors for partners' actions that may otherwise violate traditional fiduciary duties. The court found that the defendants' conduct had been in compliance with the provisions of the partnership agreement and refused to hold that the general partner's actions were subject to the traditional fiduciary duty of loyalty irrespective of the clear and unambiguous modification of such duty provided in the partnership agreement. Addressing plaintiffs' claim that defendants had usurped opportunities of the partnership, the court, relying on the reasoning developed in cases dealing with the usurpation of corporate opportunities, concluded that the partnership could not have had a legitimate interest or expectancy in the relevant investments because the partnership agreement put the partnership on notice that the partners intended to compete directly with the partnership, and, in addition, the plaintiffs had failed to allege facts that provided a reasonable inference that information or proprietary investment research had been misappropriated or that partnership resources had been unlawfully redirected.

8. Fiduciary Duties to Creditors

a. *Bren v. Capital Realty Grp. Senior Hous., Inc.,* C.A. 19902-NC (Del. Ch. Feb. 27, 2004)

Plaintiff was a noteholder of a Delaware limited partnership. Following the partnership's default on the notes, plaintiff brought suit against the partnership and its general partner claiming, among other things, that the partnership and the general partner breached a fiduciary duty to creditors by failing timely to pursue a valuable litigation claim and by making false and misleading statements while soliciting the noteholders for various consents and waivers. Defendants moved for dismissal or summary judgment with respect to plaintiff's claims.

Plaintiff alleged that prior to the default on the notes the partnership engaged in a sham transaction to avoid a restriction in the partnership agreement that precluded the partnership from selling any property to an entity affiliated with the general partner. To circumvent this requirement, James Stroud ("Stroud") and Jeffrey Beck ("Beck"), the owners of the entity that owned the general partner, caused such entity to sell the stock of the general partner to an entity owned by a friend and business associate. The partnership then sold four of its five properties to another entity controlled by Stroud and Beck and paid yet another entity owned by Stroud and Beck a brokerage fee of over $1 million for the sale. A limited partner filed suit challenging the sale of the four properties, which was subsequently settled, and as part of the settlement all claims of the limited partners of the partnership arising out of the transaction were released but the settlement did not expressly release claims brought on behalf of the partnership or the noteholders.

Plaintiff alleged that when the partnership became insolvent between February and July of 2001, the general partner owed a fiduciary duty to the noteholders to preserve and pursue whatever non-operating assets the partnership possessed in an effort to ensure the maximum return to creditors and claimed that the general partner breached this fiduciary duty to the noteholders by failing to bring a claim challenging the sale of the properties before the statute of limitations with respect to such claim expired in September, 2001. Defendants contended that plaintiff's claim was barred by the statute of limitations. Plaintiff argued that the wrong alleged in his complaint was the failure of the general partner to bring a claim challenging the sale of the properties, not the sale itself. The court rejected plaintiff's argument, finding that the claim arose when the sale occurred. Plaintiff further argued that his claim did not arise until the partnership's fiduciary duty to its creditors arose upon the insolvency of the partnership. The court rejected this claim as well but did acknowledge that a fiduciary duty to the creditors of the partnership arose when the partnership became insolvent. While the court did not cite any precedent for its conclusion that a fiduciary duty was owed to creditors of the partnership, it did state that the noteholders did not have standing to allege breach of fiduciary duty prior to the partnership coming within the "vicinity of insolvency," which is an apparent reference to corporate precedent in which the Court of Chancery had held that directors of a Delaware corporation operating "in the vicinity of insolvency" owed their primary fiduciary duty to the corporate enterprise, which encompasses creditors as well as stockholders, rather to stockholders alone. (*See Credit Lyonnais Bank Nederland v. Pathe Commc'ns Corp.*, C.A. 12150 (Del. Ch. Dec. 30, 1991))

Plaintiff also alleged that the general partner breached its fiduciary duty of disclosure to the noteholders by failing to disclose material information to the noteholders when following the insolvency of the partnership the general partners sought the consent of the noteholders to the sale of the final property owned by the partnership and the noteholders' waiver or release of all claims relating to the notes as a condition to a liquidating distribution by the partnership. The court stated that the general partner presumably was obligated to act with complete candor when seeking noteholder action while the partnership was insolvent and held that the existence of a fiduciary duty to disclose was sufficiently plausible to survive defendants' motion to dismiss. After analyzing the specific aspects of the disclosure claims, the court granted defendants' motion for dismissal or summary judgment with respect to certain aspects of the claims and denied defendant's motion with respect to the other aspects of the claims based on the particular facts associated with each claim.

B. Inspection of Partnership Books and Records

1. *Glickenhaus & Co. v. Lehman Bros. Real Estate Assocs. II, L.P.*, C.A. No. 5978 (Del. Ch. Apr. 7, 2011)

Plaintiff was a limited partner of the defendant partnership. Plaintiff brought an action against the partnership and the general partner seeking inspection of the books and records of the partnership under Section 17-305 of the DRULPA and the partnership agreement. Defendants argued that the purpose of the requested inspection set forth by plaintiff was improper. The complaint stated that plaintiff desired to inspect the books and records in order to value its interest in the partnership. The court noted that valuation is a proper purpose for inspection. Therefore, the court denied defendant's motion to dismiss.

2. *Brown Inv. Mgmt., L.P. v. Parkcentral Global, L.P.*, C.A. No. 5248-VCL (Del. Ch. May 20, 2010); Parkcentral Global, L.P. v. Brown Inv. Mgmt., L.P., No. 288, 2010 (Del. Aug. 12, 2010)

This case was before the Chancery Court on a motion to stay pending appeal. At trial, the court ordered defendant limited partnership ("Parkcentral") to produce a list of other limited partners to the limited partner plaintiff. Defendant requested a stay of the order pending appeal of the Vice Chancellor's decision, arguing that the Gramm-Leach-Bliley Act of 1999 pre-empted 6 *Del. C.* § 18-305, and thus, the defendant could not turn over the list. Citing *Arbor Place L.P. v. Encore Opportunity Fund, L.L.C.*, (Del. Ch. Jan. 29, 2002) the Vice Chancellor found that (i) such a rule would negate a core right provided by Delaware law, and (ii) defendant did nothing to provide for confidentiality of its investor list other than to issue the periodic privacy notices required under Gramm-Leach-Bliley. Based on the above, and the fact that defendant could not show that providing the list would harm Parkcentral, the Vice Chancellor denied the motion to stay.

In a subsequent decision, the Delaware Supreme Court affirmed the Chancery Court's ruling that allowed a limited partner ("Brown") to demand a list of other limited partners in Parkcentral. Parkcentral's general partner had argued that, in addition to a prohibition in the partnership agreement, applicable law and Parkcentral's privacy policies (which stated that the "General Partner does not otherwise provide any non-public personal information about investors to outside firms, organizations or individuals, except as required by law") prohibited the disclosure of non-public information.

Under DRULPA Section 17-305, limited partners are entitled to access to partnership information and records if they make a reasonable demand for a purpose reasonably related to their interest as a limited partner. As noted by the court, a general partner is permitted, under Sections17-305(a) and 17-305(f), respectively, to establish reasonable standards governing the right to access information and restrict the rights of a limited partner to obtain information. Section 9.1 of Parkcentral's partnership agreement mirrored the language of Section 17-305, permitting each partner, subject to Section 9.1(c) and reasonable standards established by the General Partner, to obtain certain records, including a current list of partners' names and addresses, upon reasonable demand. Section 9.1(c) provided that the General Partner could keep information confidential if it believed in good faith that disclosure was not in the best interest of the Partnership or if the General Partner was bound by law or agreement with a third party to keep such information confidential.

According to the court, Parkcentral could not cite to Section 9.1(c) as a reason to deny Brown access to also the partnership list. Not only did the court find that the general partner failed to demonstrate that it had a good faith belief that disclosure would harm the partnership, but also the court held that no third party agreement existed that required Parkcentral to keep such information confidential from the limited partners—rejecting the notion that each limited partner could be a "third party" in relation to the other limited partners.

Because the partnership agreement expressly granted limited partners the right to access a list of the names and address of each partner, the court held that Parkcentral could not deny Brown's request based on unilaterally issued privacy notices. According to the court, had the General Partner wished to completely bar access to the names and addresses of the partners, it could have done do explicitly in the partnership agreement.

The general partner also argued that the Gramm-Leach-Bliley Financial Modernization Act of 1999, which provides privacy protections for customers of financial institutions, pre-empted Delaware law and prohibited disclosure of the shareholder list to Brown. The privacy regulations, however, included an opt-out requirement whereby a financial institution may disclose non-public personal information in order to comply with state law. As such, the privacy regulations did not preclude Parkcentral from disclosing the list of limited partners' names and addresses to Brown.

3. *Madison Real Estate Immobilien-Anlagegesellschaft Beschränkt Haftende KG v. Kanam USA XIX Ltd. P'ship.*, C.A. No. 2863-VCP (Del. Ch. May 1, 2008)

Plaintiff limited partner, who was in the business of making initial investments in partnerships and then conducting tender offers for additional interests in such partnerships, made a small investment in a Delaware limited partnership and then made several books and records demands on the partnership for detailed information concerning the partnership's principal assets. When the general partner failed to respond, plaintiff brought this action alleging that the general partner, in refusing to make available the requested information, breached plaintiff's rights under Section 17-305 of DRULPA and the partnership agreement.

With respect to plaintiff's statutory claim, the court first analyzed whether plaintiff had a proper purpose for inspecting the information it sought under Section 17-305 of DRULPA. The plaintiff stated two purposes for its demand: (1) to value its existing investment in the partnership; and (2) to value the partnership as a whole in anticipation of making a tender offer. The court stated that a limited partner bears the burden of proving a proper purpose and where a limited partner has more than one purpose, the primary purpose must be proper and any secondary purpose, whether proper or not, is irrelevant. Thus, in determining whether plaintiff had stated a proper purpose, the court held that a critical issue was whether plaintiff's primary purpose was to value its existing investment in the partnership or to value the partnership as a whole in anticipation of making a tender offer. Based on the evidence, which included an admission by plaintiff that valuing the partnership as a whole in anticipation of making a tender had always been the chief purpose for its inspection demand, the court concluded that plaintiff's primary purpose for inspecting the requested information was to determine whether or not to make a tender offer and if so on what terms. The court stated that plaintiff's status in valuing a tender offer is that of a bidder, not of a limited partner valuing its interest in the partnership. The court concluded that plaintiff's primary purpose for inspecting the requested books and records was not reasonably related to its interest as a limited partner and, therefore, was not a proper purpose under Section 17-305 of DRULPA.

The court also noted that Section 17-305(b) of DRULPA provided the general partner with an alternative and independent basis for denying plaintiff's statutory demand to inspect the requested information because (1) the general partner had demonstrated that it was required by law and certain third party confidentiality agreements to keep certain of the requested information confidential and (2) the general partner had established its reasonable belief that the requested information was in the nature of trade secrets. Accordingly, the court concluded that plaintiff did not have a statutory right to inspect the requested information pursuant to Section 17-305 of DRULPA and consequently that the general partner had not breached DRULPA.

The court next addressed plaintiff's claim for breach of contract. Section 10(a) of the partnership agreement required the partnership to make available for examination by the partners its "books of account." The main contention between the parties was whether the various books and records sought by plaintiff constituted "books of account" under Section 10(a) of the partnership agreement. The court determined that the term "books of account" as used in the partnership agreement had a fairly narrow definition and was less expansive than the term "books and records." Central to the court's determination was a provision in the partnership agreement that provided that the partnership's "books of account" shall be closed as of the end of each fiscal year. The court construed the term "books of account" as used in the partnership agreement to refer to a limited range of financial documents of the partnership, such as its general ledger and the financial statements derived from the general ledger. Accordingly, the court held that the books and records sought by plaintiff fell outside the scope of the books of account referred to in Section 10(a) and, thus, plaintiff was not entitled to inspect the requested information pursuant to the provisions of the partnership agreement. Having concluded that plaintiff was not entitled to the requested information under the partnership agreement, the court held that it was unnecessary to rule on the general partner's "improper purpose defense" to plaintiff's breach of contract claim.

4. *Holman v. Nw. Broadcasting, L.P.*, C.A. No. 1572-VCN, (Del. Ch. Mar. 29, 2007)

Plaintiff, a limited partner of the defendant limited partnership, brought a books and records action under DRULPA and the defendant's partnership agreement. Plaintiff's purported purposes were to value his investment and to investigate possible mismanagement of the limited partnership. Prior to this action, plaintiff had been awarded on an ongoing basis a schedule of partnership distributions and audited annual and quarterly financial statements.

Plaintiff's claim for a valuation was based on an 11 year absence of a liquidity opportunity and a buyout potential by the controlling interest holder. The court confirmed that valuation was a proper purpose for seeking an inspection, but noted that such inspection was limited to information that was "essential and sufficient" to accomplish that purpose. The court recognized that in the case of a privately held entity, broader access may be granted since information is less readily available, and in determining what information is "essential and sufficient," the court agreed that "[e]xecutive compensation, in the context of a closely held partnership, is relevant to [a partner's] valuation of his interest." However, the court refused to reexamine the independent auditor's assessment of what constituted material financial information (the information already granted to plaintiff) and held that the evidence of executive compensation, in conjunction with the audited annual and quarterly financial statements already being provided, was all that was "necessary and sufficient" for a valuation without further evidence showing that other omitted information was necessary or essential for completing the valuation.

Plaintiff also identified as a purported purpose his desire to investigate breaches of fiduciary duty and mismanagement. The court rejected this claim noting that a plaintiff must prove that he has some credible evidence of possible wrongdoing sufficient to warrant continued investigation, and distinguished prior cases that involved either self-dealing or far greater financial irregularities. Finally, the court added that a simple allegation that the general partner had an incentive to artificially depress cash flows, without more, was too broad and an insufficient reason to grant an inspection, stating that plaintiff's allegation was nothing more than an assertion that "any time a general partner has control over financial statements he will always have some incentive to game them" which, if accepted, would mean that a proper purpose would always exist.

5. *Forsythe v. CIBC Employee Private Equity Fund (U.S.) I, L.P.*, C.A. No. 657-N (Del. Ch. July 7, 2005)

Plaintiffs, who had been former employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in CIBC Employee Private Equity Fund (U.S.) I, L.P., a Delaware limited partnership (the "Fund") brought an action to inspect certain books and records of the Fund pursuant to Section 17-305 of the DRULPA. The court first considered whether plaintiffs had the required proper purpose under Section 17-305 and concluded that their stated purposes of determining the value of certain assets in the Fund (and thereby, the court assumed, the value of their units) and investigating wrongdoing in the management of the Fund were both proper purposes. The main point of contention in the case was whether the plaintiffs would be entitled to a number of the documents requested that were actually documents of CIBC. The court distinguished this case from the situation in which a defendant attempts to defeat a books and records action simply by having another entity hold the records noting that such a maneuver will not protect records if they would have been subject to the inspection had they been in possession of the defendant entity. In contrast, the court found that the records requested were actually those of CIBC. Plaintiff argued that the records should still be available because CIBC was the "alter ego" of the Fund. However, the court found that there was no factual support for plaintiffs "alter ego" theory and therefore denied plaintiffs' claim to inspect the CIBC records. The court did, however, grant plaintiffs' claim to inspect a number of the books and records of the Fund including those that were maintained by an agent of the Fund.

6. *Madison Avenue Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, C.A. No. 19059 (Del. Ch. July 25, 2002)

Plaintiff limited partners sought various books and records of three limited partnerships for the purpose of valuing their investments therein. When the partnerships failed to furnish plaintiffs with certain of the requested documents, plaintiffs brought suit against the partnerships and their general partners to compel disclosure of the remaining requested documents alleging wrongful denial of access to partnership records that constituted a breach of their inspection rights under both DRULPA Section 17-305 and the partnership agreements and breach of fiduciary duty.

The court first analyzed whether the documents and information sought by plaintiffs were in fact books and records of the partnerships subject to inspection under DRULPA Section 17-305. The section of the partnership agreements dealing with limited partner inspection rights provided that "[t]he partnerships' books and records shall include" and listed various categories of documents. The list of documents subject to inspection was less extensive than the books and records subject to inspection under DRULPA Section 17-305(a) and did not contain a catch-all provision. All of the documents in question fell outside of the scope of the documents listed in the partnership agreement. The defendants argued that the enumeration of documents in the partnership agreements supplanted and limited the plaintiffs rights under Section 17-305(a). The court noted that it was unclear whether Section 17-305(a), which provides that a limited partner's right to obtain information under Section 17-305 is subject to "such reasonable standards (including standards governing what information and documents are to be furnished, at what time and location and at whose expense) as may be set forth in the partnership agreement or otherwise established by the general partners," permits the adoption of standards that substantively restrict a partner's right to obtain information but found it did not have to address the issue because it determined that the partnership agreement did not purport to limit the scope of inspection provided under Section 17-305(a) of DRULPA. The court further noted that the enactment of DRULPA Section 17-305(f), which expressly permits the rights of a limited partner to obtain information under Section 17-305 to be restricted by a partnership agreement, changes this analysis. The court then found that the documents requested by plaintiffs fell within the list of documents subject to inspection under Section 17-305(a).

The court next addressed whether plaintiffs asserted a proper purpose for their request under Section 17-305(e) of DRULPA. Plaintiffs' stated purpose was to properly value their investments in the partnerships. Defendants argued that plaintiffs misstated their true purpose. Specifically, defendants asserted that plaintiffs' stated purpose was not credible for the following reasons: (i) plaintiffs had already valued the investment in one partnership using publicly available information, (ii) plaintiffs were unable to articulate any concrete reason why the requested documents were relevant to a valuation, (iii) plaintiffs' request was made only after the partnerships refused to repurchase plaintiffs' units at a premium, thus suggesting that the request disguised an improper motive and (iv) the small amount of plaintiffs' investment in two of the partnerships made it more likely that plaintiffs were seeking to determine whether to buy additional units rather than trying to value its investments. The court stated that valuation of one's investment is a proper purpose for inspection and that once a proper purpose has been established, a secondary or ulterior motive is irrelevant and thus rejected defendants' arguments. Recognizing defendants' concern that plaintiffs could attempt to gain an unfair informational advantage over other investors, the court stated that its final order would condition the inspection right of plaintiffs on their execution of a satisfactory confidentiality agreement with respect to the treatment of the books and records afforded to them.

The court then addressed the proper scope of plaintiffs' inspection rights. The court stated that plaintiffs' inspection rights were limited to those documents "necessary, essential and sufficient" for their purpose of properly valuing their investments in the partnerships. The court noted that this "necessary, essential and sufficient" standard limits books and records inspections to those documents shown to be reasonably required to satisfy the purpose of the request. Defendants argued, among other things, that since plaintiffs had previously valued their partnership units with publicly available information such information should continue to be sufficient for their stated purpose of inspection. The court rejected this argument, holding that the fact that a plaintiff has previously valued its investment should not limit its ability to seek additional information for a subsequent valuation and that non-public information may come within the ambit of a limited partner's rights of review under Section 17-305. The court went on to grant plaintiffs' inspection request with respect to several of the documents sought by plaintiffs.

7. *Salovaara v. SSP, Inc.*, C.A. No. 18093-NC (Del. Ch. Jan. 10, 2001)

Plaintiff sought to inspect books and records of SSP, Inc. ("SSP"), a Delaware corporation of which he was a stockholder, pursuant to DGCL Section 220 and books and records of SSP Advisors, L.P. and SSP Partners, L.P. (collectively, the "Intermediate Partnerships"), each a Delaware limited partnership of which he was a limited partner, pursuant to DRULPA Section 17-305 and the partnership agreements of the Intermediate Partnerships. He also sought to inspect books and records of South Street Corporate Recovery Fund I, L.P. and South Street Leveraged Corporate Recovery Fund, L.P. (collectively, the "Funds"), each a Delaware limited partnership of which SSP and the Intermediate Partnerships, respectively, served as general partners. Plaintiff was not, however, a partner of the Funds. Plaintiff also sought to inspect documents pertaining to the settlement of two lawsuits to which none of SSP or the Intermediate Partnerships was a party. Although defendants provided access to the books and records of SSP and the Intermediate Partnerships, they refused to provide him with the books and records of the Funds and the documents pertaining to the lawsuits.

In ruling on motion to dismiss by defendants, the court followed established corporate precedent that "a stockholder generally has no right to inspect the books and records of a subsidiary corporation where the stockholder merely owns shares of the parent corporation" in holding that plaintiff had no right inspect the books and records of the Funds or the documents relating to the lawsuits merely because he had a right to inspect the books and records of SSP and the Intermediate Partnerships. The court went on to state, however, that despite the fact that plaintiff had no direct right to inspect the books and records of either the Funds or the documents relating to the lawsuits, he had a right to inspect such books and records if they were in the possession, custody, or control of SSP. The court reached this conclusion based on its decision in *Carapico v. Philadelphia Stock Exchange*, C.A. No. 16764 (Del. Ch. Sept. 27, 2000), in which the court held that a stockholder with rights to examine books of a parent did not also have the right to inspect books of the subsidiary merely because the parent owned the subsidiary but made clear that a stockholder with the right to inspect books of the parent may access the subsidiary's books if the parent controls or possesses them. The court thus denied defendants' motion to dismiss insofar as it related to books and records of the Fund or documents relating to the lawsuits that were in the possession, control or custody of SSP.

8. *In re Am. Tax Credit Props. Ltd. P'ships*, 714 A.2d 87 (Del. Ch. 1997), *aff'd*, 707 A.2d 765 (Del. 1998); *Everest Props. II, L.L.C. v. Am. Tax Credit Props. II, L.P.*, C.A. No. 99C-08-122 (Del. Super. Ct. Jan. 7, 2000)

Plaintiff claimed statutory and contractual rights as a limited partner to access partnership lists of two partnerships in which it owned an interest. The defendant partnerships denied access to the lists, claiming that since the general partners had not consented to the admission of the plaintiff as a substitute limited partner, the plaintiff was not a substitute limited partner but rather an assignee of the economic rights of its transferor and, as such, not entitled to access to the partner lists under either Section 17-305 of the DRULPA and the applicable partnership agreements. The interests in the limited partnerships interests were privately traded through a broker-dealer service using NASD prescribed forms and all transfers of partnership interests and requests for admission as a substitute limited partner were handled for the partnerships by an outside administrative services provider. After trial, the court determined that the general partnerships had delegated their authority to admit substitute limited partners to the outside administrative services provider, that the standard NASD forms used in the transfer constituted a request of the plaintiff for admission as a substitute limited partner and the registration and confirmation of the transfer by the services provider constituted admission of the plaintiff as a substitute limited partner. Consequently, as a substitute limited partner, the plaintiff was statutorily and contractually entitled to the partnership lists.

In a later related proceeding, plaintiff requested damages for, among other things, wrongful interference with economic advantage resulting from the defendants' delay in providing the partnership lists. Defendants moved to dismiss, asserting *res judicata* barred the action. Defendants argued that plaintiff's claim was for damages arising from a breach of the partnership agreement and should have been pursued in the earlier action in the Court of Chancery. The court denied defendants' motion, holding that the claim for wrongful interference with economic advantage was an outside claim that presented collateral issues from a partnership list case under DRULPA Section 17-305. Quoting from the *Gotham Partners, L.P.* case, the court stated that it "will not entertain outside claims or collateral issues within a § 17-305 hearing, but will hear only those matters that pertain to the limited partner's demand to inspect the books." The court held that, because it will not entertain a wrongful interference with economic advantage claim in a DRULPA Section 17-305 action, such a claim cannot be barred by *res judicata* and denied the defendants' motion to dismiss this claim.

9. *Bond Purchase, L.L.C. v. Patriot Tax Credit Props. Ltd. P'ship*, C.A. No. 16643 (Del. Ch. July 23, 1999) and (Del. Ch. Aug. 16, 1999)

In this case, the Court of Chancery again considered the application of Section 17-305 of DRULPA relating to the rights of limited partners to gain access to partnership books and records, as well as a provision in the limited partnership agreement at issue addressing the circumstances under which a limited partner could have access to the books and records of the partnership. The case brings together several issues arising under Section 17-305 of DRULPA as well as the prior Delaware cases addressing separate contractual rights to books and records.

The plaintiff in this case was a beneficial owner in the partnership at issue. Initially, the court concluded that the plaintiff, though not a limited partner, was entitled to exercise the rights of the nominal limited partner in the limited partnership by reason of an assignment of those rights. Thus, the plaintiff was entitled to exercise the limited partner's rights under Section 17-305. Section 17-305 includes the so-called "proper purpose" test, which requires that the requested information be "reasonably related to the limited partner's interest as a limited partner." In this regard, the court concluded that the plaintiff's desire to obtain a list of limited partners and other beneficial owners to conduct a mini-tender offer for 4.9% of the partnership's outstanding partnership units constituted a "proper purpose" under Section 17-305(a). However, Section 17-305(b) of DRULPA gives the general partner of a Delaware limited partnership the right to keep confidential from limited partners information the disclosure of which the general partner in good faith believes is not in the best interests of the limited partnership, and the court found that the general partner had a good faith belief that disclosing the list to the plaintiff was not in the best interests of the partnership. Therefore, the court held that the partnership was entitled to deny plaintiff access to the list of beneficial owners under Section 17-305.

The court then turned to the plaintiff's assertion that it had a contractual right to the beneficial owner list under the terms of the partnership agreement. The court quoted from the partnership agreement, which provided:

> The Partnership's books and records . . . shall be open to inspection, examination and copying by [beneficial owners] or their duly authorized representatives at all times. . . . The [beneficial owners] shall not receive copies of . . . a current list of all Partners in the Partnership unless they request in

> writing a copy from the General Partner and pay any necessary duplication fee. (emphasis in original).

The court rejected the partnership's argument that the foregoing language did not grant a right separate and apart from that granted by Section 17-305 of DRULPA and held that the quoted language created a separate contractual right in beneficial owners to obtain partnership books and records. The court then found, based on the principle of adopting an interpretation that better comports with the remaining contents of the document or gives effect to all words in dispute, that the term "books and records" encompassed a list of the partnership's partners and beneficial owners. Finally, the court addressed the partnership's argument that it was entitled to withhold from the plaintiff access to the investor list under the "improper purpose defense" articulated by the Court of Chancery in *Schwartzberg v. CRITEF Assocs. Ltd. P'ship*.

The court began by noting that:

> Under the "improper purpose defense," this court is warranted in denying a partner's request for access to a partnership's records when (i) neither an explicit contractual provision in a partnership agreement nor statutory language negate the notion that a partner must have a proper purpose and (ii) the partner denying another partner access to the partnership business records can show that the partner seeking access is doing so for a purpose personal to that partner and adverse to the interests of the partnership considered jointly.

The court further stated that the burden of proof required the partnership to show that

> it is more likely than not that if the parties to a partnership agreement had thought to address the subject, they would have agreed that a partner should be denied access to a list of partners when the partner would use the list for a purpose personal to that partner and adverse to the interests of the partnership when considered jointly.

In its analysis of the application of the "improper purpose defense" to the facts present, the court first held that nothing in Section 17-305 of DRULPA nor in the relevant partnership agreement negated the notion of the "improper purpose defense." The court then held, as the partnership alleged, that the plaintiff's purpose—to commence a mini-tender offer for up to 4.9% of the outstanding beneficial interest—was indeed personal to it. Notwithstanding that the partnership had proved by a preponderance of the evidence that the general partner in good faith believed that disclosing the investor list to the plaintiff was not in the best interest of the partnership, the court held that the partnership had failed to prove by a preponderance of the evidence that disclosing the investor list to the plaintiff would in fact be adverse to the interest of the partnership. That is, the partnership had failed to prove that the adverse effect it believed disclosure of the list would have on the partnership was more likely than not to occur if the partnership disclosed the list to the plaintiff. The court noted that this test, which was distinct from, and higher than, the simple "good faith" test under Section 17-305(b) of DRULPA, was appropriate given the unqualified contract language giving beneficial owners a right of inspection. Thus, the court held that the partnership could not deny the plaintiff access to the investor list on the basis of the "improper purpose defense."

In a later ruling in the *Bond Purchase, L.L.C.* case, the court denied the defendants' motion for a stay of the court's July 23, 1999 decision pending the defendants' appeal. In rejecting the defendants' claim that the court's decision eviscerated the application of Section 17-305 of DRULPA because virtually all publicly owned limited partnerships have substantially similar provisions regarding books and records access in their partnership agreements, the court, after making reference to the existence of Delaware Supreme Court case law requiring fiduciaries in disclosure cases to be fair, frank and forthcoming in a good faith effort to keep investors for whom they manage assets informed about those assets, stated that those who draft agreements between fiduciaries and those for whom they act in trust should carefully and explicitly set forth any restrictive limitation by contract on investors' rights to access partnership information about their investment. In light of the policy of freedom of contract that underlies the DRULPA and the policy of the court to apply settled rules of contract construction to the interpretation of partnership agreements, the court stated that if a partnership wants the benefit of the broad power to restrict investor access to partnership books and records in Section 17-305, this intent should be made manifestly clear in the partnership agreement especially where the partnership agreement on its face creates a less restrictive right to such access.

10. *Monterey Invs., Inc. v. Healthcare Props., L.P.*, C.A. No. 15519 (Del. Ch. June 20, 1997)

Plaintiff brought suit against a limited partnership and its general partner alleging a wrongful denial of the plaintiff's request to inspect the partnership list. Both parties moved for summary judgment. The plaintiff, who was not an original limited partner but had purchased and sold numerous units in the defendant limited partnership, claimed that it was contractually entitled to the list under the terms of the partnership agreement. The partnership agreement, which set forth a two-tiered limited partnership participation structure of limited partners and unit holders, provided that the right to demand the partnership list could be assigned in the transfer of a partnership unit if certain prerequisites were satisfied. In granting summary judgment in favor of the defendant limited partnership and general partner, the court found that as a factual matter the plaintiff had not satisfied the applicable prerequisites under the terms of the partnership agreement and thus was not contractually entitled to the partnership list. The court did not address the applicability of a statutory right of the plaintiff to the partnership list under Section 17-305 of the DRULPA because the parties had agreed that if the plaintiff were adjudicated not to have satisfied the prerequisites for obtaining a contractual right to the list, the plaintiff would not constitute a limited partner for purposes of Section 17-305, which by its terms only applies to limited partners.

11. *In re Paine Webber Ltd. P'ships*, C.A. No. 15043 (Del. Ch. Sept. 17, 1996); *In re Paine Webber Qualified Plan Prop. Fund Three, L.P. Litig.*, 698 A.2d 389 (Del. Ch. 1997); *In re Paine Webber Qualified Plan Prop. Fund Three, L.P. Litig.*, C.A. No. 15292 (Del. Ch. Mar. 4, 1997)

In *Paine Webber Ltd. P'ships* and *Paine Webber Qualified Plan*, plaintiff limited partners sought to assert both statutory rights under Section 17-305(a) of the DRULPA and contractual rights under the applicable partnership agreements to lists of limited partners. In each case, the court found that plaintiffs' purpose was to obtain the lists so that a tender offer might be conducted by a separate entity in which plaintiffs' equity participation, if any, would be minimal. The court held that such a purpose did not relate to plaintiffs' interests as limited partners but only to an interest as a potential buyer; therefore, it was not a proper purpose under Section 17-305(a).

While the limited partners thus had no statutory right to the partner lists, one or more of the partnership agreements at issue in both cases provided a separate contractual right for the limited partners to obtain a list of the names and addresses of the limited partners of each partnership without explicitly conditioning that right on the existence of a proper purpose. In the absence of any such requirement, the court declined to incorporate by reference the proper purpose requirement from Section 17-305(a). As the court noted in *Paine Webber Ltd. P'ships*, to read such a requirement into an otherwise unrestricted contractual provision would be inconsistent with the important policy underlying the DRULPA to give maximum effect to the principle of freedom of contract and the enforceability of partnership agreements. In addition, the court noted that to do so would create an anomalous inconsistency with Delaware corporation law where it has been held that a stockholders' agreement may expand the right of contracting stockholders to obtain a stockholder list beyond those rights conferred by Section 220 of the DGCL. Thus, the Court of Chancery in both *Paine Webber Ltd. P'ships* and *Paine Webber Qualified Plan* held that a limited partner's unqualified contractual right to obtain a list of limited partners would not be subject to the proper purpose test of Section 17-305(a).

In each such case, however, the defendant partnerships had asserted that a separate "improper purpose defense" should be inferred into the partnership agreements based on the court's decision in *Schwartzberg v. CRITEF Assocs. Ltd. P'ship*. While the court reaffirmed the holding of *Schwartzberg*, it found that it did not apply to the facts in either *Paine Webber Ltd. P'ships* or *Paine Webber Qualified Plan*. Specifically, in both cases the court held that, since the partnership agreements at issue were adopted in 1985 when Delaware limited partnerships were legally required to include a list of limited partners in their certificate of limited partnership, it could not be argued that had the partners considered the issue they would have agreed to deny access to lists that were already a matter of public record (an element of the *Schwartzberg* test). In addition, the court in *Paine Webber Ltd. P'ships* found that defendants had failed to adduce persuasive evidence that plaintiffs' actions would harm the partners' joint investment (a second element of the *Schwartzberg* test).

In a post-trial motion in *Paine Webber Qualified Plan*, the defendant partnerships sought to enjoin the plaintiffs from exercising their right to access the defendants' partnership lists pending an appeal of the court's decision. The court denied the motion finding that the potential negative effects on the plaintiffs' ability to conduct a successful tender offer that may have resulted from an injunction outweighed any harm that a denial of the injunction would have caused the defendants. The court also suggested that the defendants' true motive in seeking the injunction was to further delay the proceedings rather than to minimize harm.

12. *Schwartzberg v. CRITEF Assocs. Ltd. P'ship*, 685 A.2d 365 (Del. Ch. 1996)

The plaintiff was both a limited and a general partner in one partnership and a limited partner in another partnership. Each of these partnerships was, in turn, the general partner of a publicly held limited partnership, and plaintiff sought lists of the beneficial owners of these two publicly held limited partnerships. The plaintiff's purpose was to solicit the beneficial owners of these partnerships to replace their general partners and install himself as managing general partner.

Although neither the relevant partnership agreements nor DUPL Section 1519 contained an express proper purpose requirement for granting partners access to partnership records (such as is found in Section 17-305 of the DRULPA for limited partners), the court held that an "improper purpose defense" will be inferred when under the circumstances it is more likely than not that if the parties had thought to address the subject, they would have agreed to create such a limitation. The court concluded that plaintiff's access to the records would be denied based on its findings that the plaintiff's purpose would have decreased the value of the partnerships and that all rational investors would have agreed to restrict access to information when it was clearly established that such access would harm the value of the partnership.

C. Removal of General Partners

1. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, No. 547, 2012 (Del. Aug. 26, 2013); *Policemen's Annuity & Benefit Fund of Chicago v. DV Realty Advisors LLC*, C.A. No. 7204-VCN (Del. Ch. Nov. 27, 2013)

In an appeal before the Delaware Supreme Court of a decision by the Court of Chancery validating the removal of the general partner of a Delaware limited partnership (the "Partnership"), the general partner raised two issues: that the Court of Chancery improperly found that the limited partners (the "LPs") believed in good faith that removing the general partner was in the best interests of the Partnership and that certain "red flags" raised by an advisor to the Partnership did not sufficiently support the court's finding that the LPs removed the general partner in good faith. The Delaware Supreme Court affirmed the Court of Chancery's judgment.

The Supreme Court initially stated that reviewing a conclusion of good faith involved both questions of law and fact—the ultimate determination is one of law, while the basis for that determination is factual and must be clearly erroneous to be overturned. In analyzing the definition of good faith, the Supreme Court stated that the term "good faith" was undefined; however, it had never held that the UCC definition of good faith, applied in this case by the Court of Chancery below, applied to limited partnership agreements ("LPAs"). Instead, the Supreme Court held that the application of the definition of good faith utilized in *Brinckerhoff v. Enbridge Energy Company, Inc.* was appropriate in this case. *Brinckerhoff* stated that actions were not taken in good faith if they were "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."

In this case, the partnership agreement required the LPs to determine, in good faith, that removing the general partner was "necessary in the best interest of the [Partnership]." In addressing the first issue, the Supreme Court found the record showed that the general partner repeatedly breached its contractual obligations under the partnership agreement to deliver timely audited financial statements. Therefore, the Supreme Court found that the Court of Chancery was correct in determining that this failure by the general partner provided the LPs with a good faith belief that it was necessary in the best interest of the Partnership to remove the general partner as general partner. However, because the good faith standard in the partnership agreement was "purely subjective," the Supreme Court stated that the Court of Chancery's determination that the standard included elements of objectivity was incorrect. This incorrect determination, however, did not change the outcome. The Supreme Court did not address the second issue because it found that the LPs had a sufficient good faith basis for removing the general partner based on its failure to delivery timely audited financial statements.

In a follow-on decision, the Court of Chancery was presented with the question of whether the general partner became a limited partner of the Partnership upon its removal or, alternatively, retained only an economic interest in the Partnership. In addressing this issue, the court first noted that under DRULPA, unless a partnership agreement provides otherwise, a person may be admitted to a partnership as a limited partner only upon the consent of all of the limited partners. Because none of the limited partners consented to the general partner being admitted as a limited partner upon its removal as general partner, the court found that there was no statutory basis for the former general partner's position that it became a limited partner upon its removal.

Turning to the LPA, the court considered the removal provisions which provided that in the event the general partner was removed, the general partner would retain its capital account with half of such capital account to be distributed within thirty days of removal and the other half to be maintained on the same basis as any other limited partner's capital account. The court found that, for such a major issue in partnership governance, these provisions could not be read to provide that the general partner would become a limited partner upon its removal. Thus, the court held that upon its removal the general partner had only an economic interest in the Partnership. In its holding, the court noted that its interpretation of the LPA was consistent with revenue laws pursuant to which a former partner would be treated as a partner for tax purposes.

The court also addressed whether the proper date for valuing the removed general partner's capital account should be the first valuation date following the general partner's removal or, as argued by the removed general partner, a date that preceded the general partner's removal. The LPA did not provide any express guidance on the timing of valuation, and the court found that the focus must be on reasonableness and that the first valuation date following removal more accurately reflected the economic realities at the time of removal. The removed general partner further sought to add to its capital account a loan for which it was a co-borrower with the Partnership and for a guarantee provided by a principal of the removed general partner. The LPA provided that the capital account of a partner would be increased by the amount of any of the liabilities of the Partnership that were assumed by a partner. Because the removed general partner was a co-borrower on the loan and not ultimately liable (it was entitled to contribution from the Partnership) and because the guarantee was not made by the general partner itself, neither the loan nor the guarantee was determined to have increased the removed general partner's capital account.

2. *Natural Energy Dev., Inc. v. Shakespeare-One Ltd. P'ship*, C.A. No. 4836-CS (Del. Ch. July 26, 2013)

Plaintiff was the managing general partner of Shakespeare-One L.P. ("Shakespeare One"). Under the terms of the Shakespeare One Partnership Agreement (the "Partnership Agreement"), plaintiff was entitled to a share of Shakespeare One's profits (the "GP Interest"). In 2009, the Shakespeare One limited partners purportedly removed plaintiff as Shakespeare One's general partner and refused to pay plaintiff the GP Interest. Subsequently, defendants conceded that plaintiff was never properly removed as the general partner of Shakespeare One.

Plaintiff sought summary judgment and (i) requested a declaratory judgment that it could not be deprived of the GP Interest without its consent, regardless of whether plaintiff remained Shakespeare One's general partner, (ii) sought a declaration that it was not Shakespeare One's general partner, and (iii) requested attorney's fees on the theory of bad faith action by defendants.

The court found that the matter was appropriately subject to review for a declaratory judgment and summary judgment. The court then held that the Partnership Agreement unambiguously vested the GP Interest in plaintiff irrevocably. Specifically, the Partnership Agreement stated that plaintiff "ha[d] received" the GP Interest for services it had provided to Shakespeare One. The court interpreted this provision to mean that plaintiff earned the GP Interest through plaintiff's actions in setting up Shakespeare One. Further, the Partnership Agreement provided that the rights of plaintiff in interests it held as a partner continued even if plaintiff were removed as general partner. Therefore, the limited partners' attempt to divest plaintiff of the GP Interest was invalid.

The court declared that plaintiff was not the general partner of Shakespeare One, as another party had been the de facto general partner for over four years. However, the court denied plaintiff's request for attorneys' fees under its theory that defendants acted in bad faith because there were no "extraordinary circumstances" that warranted providing attorneys' fees to plaintiff under the bad faith exception to the American Rule.

3. *Policemen's Annuity & Benefit Fund of Chicago v. DV Realty Advisors LLC*, C.A. No. 7204-VCN (Del. Ch. Aug. 16, 2012)

In this post-trial opinion, the court granted the limited partners' (the "LPs") request for a declaration that they validly removed a general partner of a Delaware limited partnership (the "Partnership"). The general partner of the Partnership argued that the LPs did not meet the express and implied requirements for removal "without cause" under the partnership agreement of the Partnership. The express requirement as set forth in the partnership agreement required that consenting LPs "in good faith determine that removal of the general partner was necessary for the best interests of the Partnership." The general partner argued that, under the *Wilmington Leasing* and *Desert Equities* cases, this included an implied requirement that the decision of the LPs be "objectively reasonable" under the implied covenant of good faith and fair dealing. The LPs countered that the implied covenant did not apply.

The court first noted that under the general rule for declaratory judgments, the LPs had the burden of proof and this case did not warrant an exception. The court then differentiated *Wilmington Leasing* and *Desert Equities* from the present case by finding that unlike the provisions at issue in those cases, the applicable provision in the partnership agreement of the Partnership as set forth above expressly provided how discretion was to be exercised, and thus, there was no room for the implied covenant. The court next addressed whether the LPs made a determination in good faith that removal was in the best interest of the Partnership. The court observed that the partnership agreement did not define "good faith" and that "good faith" sometimes includes objective as well as subjective elements. The court found that the use of "good faith" in the partnership agreement was ambiguous, noting that the parties to the partnership agreement could have expressly provided for "subjective" good faith or "reasonableness." However, because the partnership agreement by its terms was governed by Delaware law, the court looked to the common law definition in the fiduciary context, finding that it was historically subjective, but that there is some conduct which is so unreasonable that the court will necessarily determine that it could not have been done in good faith. The court cited to a case in a footnote that found that "objective factors could be used as a proxy for determining subjective intent." The court also looked to the UCC's definition of "good faith" for guidance, although it acknowledged that the UCC would not apply in this case, which defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." In collectively applying these standards of good faith to the facts present in this case, the court found that the LPs acted in good faith in determining to remove the general partner of the Partnership. In so doing, the court pointed to reports that the LPs received from third party consultants recommending removal of the general partner, evidence demonstrating that the general partner failed to timely provide financial statements as required by the partnership agreement, the resignation of certain individuals from an advisory committee to the Partnership and other "red flags."

4. *Harris v. RHH Partners, LP*, C.A. No. 1198-VCN (Del. Ch. Jan. 27, 2010)

Robert H. Harris was the sole limited partner of a Delaware limited partnership (the "Partnership"), the sole asset of which was his personal residence. The sole general partner of the Partnership was 1015 Broadway, Inc. ("Broadway"), a corporation owned by Harris's former friend and business partner, Don L. Hartman. Harris brought this action requesting the Court of Chancery to replace Broadway with a new general partner, or alternatively, to judicially dissolve the Partnership.

The court was unable to determine the purpose for which the Partnership was formed but suspected that Harris, who was in some financial distress at the time the Partnership was formed, caused the formation of the Partnership with the intent to shield his personal residence from the claims of his creditors. The Partnership's partnership agreement included a general purpose clause providing that the Partnership was formed "to engage in any activity permitted to be carried out by a Delaware partnership" and neither Harris nor Hartman provided any further explanation for the purpose of the Partnership. The court also could not determine why Broadway became the general partner of the Partnership. Hartman claimed that he acquired ownership of Broadway, the general partner of the Partnership, as a means of securing debts owed by Harris to Hartman. The court, however, found that Hartman had failed to prove that Harris owed any debts to him or that the purpose of Broadway's service as general partner of the Partnership was to provide security to Hartman for Harris's obligations to him.

Harris claimed that Broadway should be removed as general partner because it had failed to meet its obligations as general partner, such as timely filing the Partnership's tax returns. The court stated that Harris's claim presumes that there is the judicial option of replacing a general partner and divesting it of its interest in the Partnership. The court further stated that, even if it assumed that this was a potential viable remedy, Harris had not convinced the court that Broadway's shortcomings, generally minor and ministerial in nature, reached the level of malfeasance that would justify such an extraordinary remedy. The court thus denied Harris's request to replace the general partner.

Turning to Harris's claim for judicial dissolution, the court stated that it was abundantly clear that leaving Harris and Hartman in any kind of business relationship would serve no useful purpose, noting that there was no apparent purpose for the Partnership and that the Partnership holding title to Harris's personal residence had no cognizable relationship to any business purpose for which the Partnership might exist. The court thus held that it was not reasonably practicable for the Partnership to carry on its business in conformity with the partnership agreement and ordered judicial dissolution of the Partnership pursuant to Section 17-802 of DRULPA. With respect to the liquidation of Harris's personal residence as the sole asset of the Partnership upon dissolution, the court determined that Broadway should receive a 1% undivided fee simple interest in the real property and Harris should receive a 99% fee simple interest in the real property. However, because Broadway had failed to make a $1,000 capital contribution as required under the partnership agreement, Broadway's interest in the real property would be subject to a charge for the $1,000.

5. *Hillman v. Hillman*, 2006 WL 2434231 (Nov. 16, 2006)

The plaintiff was general partner of Venhill Limited Partnership L.P., a Delaware limited partnership ("Venhill"). Two trusts served as the limited partners of Venhill. The plaintiff, in his capacity as general partner, invested 1% of the initial capital and each of the trusts contributed 49.5% of the initial capital. The limited partners challenged the plaintiff's actions in causing Venhill to invest a substantial amount of Venhill's assets in Auto-trol ("Auto-trol"), a company founded and controlled by the plaintiff. Unable to resolve the dispute over Venhill's investment in Auto-trol, the limited partners removed the plaintiff as general partner.

The plaintiff filed suit seeking declaratory judgment that upon his removal he had converted his general partner interest into a limited partner interest in Venhill. The suit also alleged that the limited partners breached fiduciary duties owed to him as a limited partner by the actions they took following his removal. The court concluded that Venhill's limited partnership agreement (the "Agreement") did not provide a general partner the right to "elect" to become a limited partner when removed by the limited partners and thus dismissed his claim for a declaratory judgment that he was a limited partner. The court then discussed what rights the plaintiff possessed following his removal.

The court first noted that the Agreement did not provide what a removed general partner would receive in consideration of its interest upon removal. It then reviewed the DRULPA provisions and related legislative history governing the withdrawal of a general partner. Under Section 17-604, a "withdrawing partner" upon withdrawal will be entitled to receive any distribution to which it was entitled under the partnership agreement and if not otherwise provided for in the partnership agreement, the partner shall be entitled to receive the fair value of its partnership interest. The plaintiff argued that Section 17-604 applied to all types of withdrawals by a general partner, while the defendants argued that Section 17-604 was intended to apply only to *voluntary* withdrawals made pursuant to Sections 17-602 and 17-603. The court agreed with the defendants and concluded that the narrower reading of Section 17-604 presented fewer conflicts and was "more consistent with the structure and language of the statute and the legislative history." Thus, Section 17-604 did not apply to the plaintiff because he did not voluntarily withdrawal under Section 17-602.

Having concluded that Section 17-604 did not apply to the plaintiff, the court sought to determine what effect the plaintiff's involuntary withdrawal would have on his economic stake in the partnership. The court noted that under Section 17-1105, if DRULPA is silent on an issue, "an applicable provision of the Delaware Uniform Partnership Law in effect on July 11, 1999 (the "DUPL") and the rules of law and equity… shall govern." Turning to the DUPL, the court first noted that it did not explicitly address the scenario of a partner who is expelled pursuant to a partnership agreement that permits both his expulsion and the continuation of the partnership business thereafter. Rather, the court found that the DUPL confronted this issue obliquely in

Section 1538(a) which entitled an expelled partner to receive the net amounts due from the partnership provided he was discharged from all partnership liabilities by agreement or payment. Turning to the commentary on the uniform act that formed the basis of the DUPL, the court concluded that the amount an expelled partner would be entitled to receive under Section 1538(a) should be equivalent to "fair value." The court thus held that the provisions of the DUPL that were most relevant to the facts before it were best read as pointing to a fair value payout. The court bolstered this conclusion by looking to the Delaware Revised Uniform Partnership Act (the "DRUPA") which generally superseded DUPL except that the DUPL rather than the DRUPA continued to be linked to the DRULPA. The court stated that the DRUPA provided the best indication of what equity as the ultimate default required in the context of the present case and found that under the DRUPA, the plaintiff would also be entitled to the fair value of his economic interest.

Finally, because the plaintiff was removed as a general partner and all of the plaintiff's other claims related to the partnership's conduct following his removal, the plaintiff lacked standing and his other claims for breach of fiduciary and contractual duties were also dismissed.

6. *McGovern v. Gen. Holding, Inc.*, C.A. No. 1296-N (Del. Ch. May 18, 2006)

Plaintiffs were limited partners in KX Industries, L.P., a Delaware limited partnership ("KXI"). Defendant Evan Koslow was chief inventor and CEO of KXI and controlled the general partner and owned 90% of KXI's equity. The plaintiffs sued Evan, the general partner and other instrumentalities of Evan for breach of fiduciary duty and breach of the limited partnership agreement.

KXI had developed numerous new technologies that had the potential for lucrative sales over the next several years. As the company's future began to look bright, Evan attempted to squeeze out plaintiffs by claiming that most of the patents for the new technologies were actually owned by one of his wholly-owned companies, Koslow Technologies Corporation ("KT"). He contemplated selling KXI's already established business, cashing out plaintiffs and moving forward to reap the financial rewards of the new technologies on his own.

The court found that Evan breached both the partnership agreement and his fiduciary duties by appropriating the company's valuable technology. It rejected Evan's primary defense which was based on a 1989 License Agreement between KXI and KT that Evan asserted made KT the owner of the new technologies. This license agreement was formed when KXI was a joint venture between Evan and a subsidiary of Exxon, and disagreements as to its scope and validity were part of the reason Exxon left the partnership. The court held that the license agreement did not excuse Evan's behavior for several reasons.

First, the court found that the license agreement was of dubious validity because the limited partnership agreement between Evan and the Exxon subsidiary required that Exxon give prior written consent to any contracts between KXI and KT, and there was no such written consent. Second, the court found that the license was moribund. After Exxon had left the partnership, Evan largely abandoned KT as an operating company and converted it into, what was by all appearances, a patent holding company for KXI. No work was done by KT as an operating company, and it had no employees. The plaintiffs were all led by Evan to believe that KT was merely a patent holding company for KXI and that the new technologies belonged to KXI. KXI had born all the risks and costs of researching and developing the new technologies. Having treated the license as inoperative for nearly 16 years, the court found that Evan could not conveniently assert that it compelled him to appropriate KXI's valuable technology.

The court also held that even if the license agreement were operative, which it was not, Evan breached his fiduciary duties by having KXI pursue costly research from which it could gain no economic value but would instead enrich Evan personally. The court also found that Evan breached the limited partnership agreement which contained clauses stipulating that all property acquired by the partnership was deemed to be owned by the partnership and that the resources of the partnership could be used for partnership purposes only and not for the personal benefit of any of the partners.

Finally, the court held that even if the license agreement were operative, Evan interpreted it in an implausible and inconsistent manner. At most, the license agreement covered improvements that were based upon an older technology and did not cover the broad range of new developments and technologies that KXI had pursued at Evan's behest.

Using its broad equitable powers to grant appropriate relief, the court ordered that Evan would be removed as general partner pursuant to the KXI partnership agreement which provided for removal of the general partner for "fraud which is material and detrimental to the Partnership or gross negligence." In ordering removal, the court held that it was "clear that Evan's conduct was in bad faith, worse than grossly negligent, and purposely misleading." It therefore held that the removal provision was easily satisfied. As further relief, the court ordered that KXI be dissolved and a receiver appointed to sell KXI and an affiliated company.

7. *Alpine Inv. Partners v. LJM2 Capital Mgmt., L.P.*, 794 A.2d 1276 (Del. Ch. 2002)

Limited partners of a Delaware limited partnership brought suit under Sections 17-110 and 17-111 of DRULPA seeking a determination that they properly removed the general partner. The partnership agreement required that the partnership's advisory committee recommend removal and then two thirds in interest of the limited partners act, by written consent or vote, to remove the general partner. Under the partnership agreement, removal would become effective upon the execution by the new general partner of a counterpart signature page of the partnership agreement and the conversion of the removed general partner's interest to a limited partner interest. While conceding that these steps were complied with, defendant contended that all of the limited partners that executed the written consents removing it as general partner were in default of a capital call made by the general partner and due to the partnership on the date that the general partner was purportedly removed. Because the written consents were not delivered to the general partner prior to the time that the capital call was due, the general partner argued that the limited partners became "defaulting partners" under the partnership agreement and, per the provisions of the partnership agreement, were not entitled to vote for the removal of the general partner.

The court found that neither the partnership agreement nor DRULPA required that partners' written consents be delivered to become legally effective. The court found that the absence of a delivery requirement in DRULPA was particularly noteworthy because the counterpart provision of the DGCL mandated the delivery of written consents. It held that in the case of limited partnerships the legislature intended that the requirement of delivery of written consents be the subject of contract rather than of legislative mandate and found that the parties to the partnership agreement contracted not to require the delivery of written consents to make such consents effective.

The court rejected defendant's argument that the partnership agreement gave the general partner broad "default" authority to make any determinations that were not expressly provided for in the partnership agreement, including a determination that written consents would become effective only upon their delivery to a specified person. The court found that the provision of the partnership agreement on which defendant relied for its argument that the partnership agreement granted the general partner such broad authority addressed the management authority of the general partner only and not control issues that arise outside of the business operational context. Noting that Delaware law distinguishes between "operational" issues, on the one hand, and "ownership" issues on the other, the court held that issues of "control" and related "investor rights" were addressed in a separate provision of the partnership agreement that specified the conditions for removing the general partner and delivery of written consents was not one of the conditions specified in such provision. The court also noted that even if the general partner had the default authority it claimed, absent clear language in the partnership agreement expressly permitting such action, to allow a conflicted fiduciary to exercise its power unilaterally, retroactively and self-interestedly to determine the validity of its own removal would constitute an inequitable use of its power.

The court also rejected defendant's argument that delivery is an implied condition for the written consents to become effective. Defendant argued that without a delivery requirement, the event that triggers the legal effectiveness of a written consent is inherently not objectively verifiable. The court found that defendant's argument failed on both the conceptual and operational levels. On a conceptual level, defendant's argument ignored the established and narrow criteria that govern when a contractual or statutory term may be judicially implied. Absent grounds for reformation, a court may not imply a term into a contract because "it is not the proper role of a court to rewrite or supply omitted provisions to a written agreement." With respect to implication of a statutory requirement of delivery, given that the requirement sought to be implied was expressly included in one statute (DGCL) but omitted from a separate statute (DRULPA) that deals with the identical subject and function, the court found that it was reasonable to assume that the legislature intended its omission. The court held that Section 17-302(e) of DRULPA requires only that written consents be signed by the partners and this conclusion carries with it an implied prohibition against creating any additional requirements for effectiveness, including delivery. Defendant's argument failed on the operational level because it ignored the reality that as a practical matter, no action to remove a general partner by written consent can occur until the general partner is notified of the consent action and any likelihood of abuse is minimized because under recognized doctrines of equity imposed on all contracts such notice must be given within a reasonable time after the action is taken.

8. *Knetzger v. Centre City Corp.*, C.A. No. 16067 (Del. Ch. June 30, 1999)

Plaintiff limited partners filed this action to determine whether they lawfully removed defendant general partner. The partnership agreement contained a provision governing removal of the general partner which stated four distinct grounds for removal--material default under the terms of the partnership agreement, material breach of fiduciary duty, gross negligence or willful misconduct, and fraud. The court reviewed each of the limited partners' five reasons for their removal of the general partner to ascertain whether the removal was in accordance with the criteria set forth in the partnership agreement. The court found that one of the justifications for removal--the general partner's self-interested loan to one of its affiliates using partnership funds—was a material breach of its fiduciary duty of loyalty. Therefore, the court held that the limited partners acted lawfully in removing the general partner.

9. *Cantera v. Marriott Senior Living Servs., Inc.*, C.A. No. 16498 (Del. Ch. Feb. 18, 1999)

The transfer restrictions of a limited partnership agreement of a Delaware limited partnership provided that if the original general partner or its transferee ceased to be members of a "controlled group of corporations" within the meaning of Internal Revenue Code section 1563(a), the interest of the transferee would be subject to redemption upon the unanimous vote of the partners other than the partner whose interest was the subject of the redemption. After a combination of transfers of the general partner's interest within the controlled group of corporations and transfer of the equity in the corporation holding the general partner's interest, the general partner's interest was held by a related entity but not one within the controlled group of corporations. After learning of the dissociation of the general partner's interest and the controlled group of corporations, the limited partners unanimously voted to redeem the general partnership interest and appoint a new general partner. The holder of the general partner's interest challenged the validity of the redemption and the plaintiff limited partners sought an order from the Delaware Court of Chancery validating their exercise of the option to redeem the general partner's interest under the partnership agreement.

In granting the plaintiff limited partners' motion for partial summary judgment, the court applied principles of contract construction to the partnership agreement to find that the provisions of the partnership agreement unambiguously provided the limited partners with a right to redeem the general partner's interest under the circumstances presented. The court found that plaintiffs' proffered interpretation of the disputed language harmonized the different sections of the partnership agreement while the general partner's interpretation would nullify one clause of the partnership agreement, produce an incongruous result and lacked common sense. Consequently, the court concluded that the disputed provisions were not reasonably or fairly susceptible to the interpretation advocated by the general partner and because it found no ambiguity in the construction or interpretation of the language of the contract, the court declined to examine the extrinsic evidence offered by the general partner in support of its rejected interpretation. The court also rejected the general partner's claims that the redemption of its interest were barred by the doctrines of laches, waiver and acquiescence.

10. *Arvida/JMB Partners, L.P. v. Vanderbilt Income and Growth Assocs., L.L.C.*, C.A. No. 15238 (Del. Ch. May 23, 1997), aff'd, 712 A.2d 475 (Del. 1998)

In a case arising from an attempt to remove and replace the general partner of a limited partnership after the plaintiff had acquired approximately a 20% interest in the limited partnership through a tender offer, the court considered (i) whether the plaintiff had acquired voting rights as a subsequent assignee of limited partnership interests and (ii) whether the general partner had breached its contractual or fiduciary duties by refusing to consent to the plaintiff's admission as a limited partner. After trial, the court found the provisions regarding the assignment of voting rights from limited partners and assignees to subsequent assignees to be ambiguous and consequently applied the contractual construction principle of *contra proferentum* to give effect to the parties' reasonable expectations based on the terms of the agreements. In doing so, the court determined that a reasonable investor in the limited partnership could have read the relevant provisions to provide that subsequent assignees would have voting rights. Therefore, the court held that the plaintiff had the right to vote. With respect to the general partner's denial of consent to the admission of the plaintiff as a limited partner, the court held that the plaintiff had failed to demonstrate that the general partner had breached its contractual or fiduciary duties. The partnership agreement permitted the general partner to grant or deny consent to the admission of a limited partner in its "sole and absolute discretion." In light of this standard, the court concluded that the only limitation on the general partner's discretion was the implied contractual covenant of good faith and held that the plaintiff had failed to show bad faith because the general partner had sufficient reasons to conclude that the plaintiff would not be a suitable partner.

11. *Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*, C.A. No. 15202 (Del. Ch. Dec. 23, 1996)

After the court denied the plaintiff limited partners' motion for judgment on the pleadings, a trial was held to determine whether the limited partners' decision to remove the general partner for unsatisfactory performance was reasonable and in good faith. The plaintiffs set forth the following reasons for their dissatisfaction: (i) the partnership had made no cash distributions, (ii) the partnership continued to incur excessive overhead expenses, (iii) the partnership never concluded any significant number of anticipated transactions, and (iv) the limited partners had lost confidence and trust in the general partner.

The court found these grounds to be reasonable and in good faith and held that the limited partners had acted properly in removing the general partner. In so doing, it rejected claims by the general partner that its removal would irreparably damage the partnership or constitute a breach of the limited partners' fiduciary duty to the partnership finding that any such duty would be co-extensive with the requirements of the removal provisions and therefore satisfied.

12. *Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*, C.A. No. 15202 (Del. Ch. Sept. 18, 1996)

Plaintiff limited partners agreed to remove the general partner pursuant to a provision in the partnership agreement granting limited partners the discretion to remove the general partner based upon their determination that the general partner had failed to perform satisfactorily. The limited partners then commenced an action for a declaration that their removal of the general partner was valid and effective, arguing that the contractual right to remove the general partner was unqualified and unreviewable. The general partner argued that the determination by the limited partners that the general partner had failed to perform satisfactorily must be reasonable and in good faith.

In denying the limited partners' motion for judgment on the pleadings, the court held that the limited partners' contractual power to remove the general partner was subject to an implied condition that the determination be made reasonably and in good faith; otherwise the bargained-for subjective standard of "satisfactory performance" would be rendered a nullity.

13. *Davenport Grp. MG, L.P. v. Strategic Inv. Partners, Inc.*, C.A. No. 14426 (Del. Ch. Jan. 23, 1996)

Plaintiff general partner asked the court to invalidate its removal by a vote of the limited partners pursuant to the limited partnership agreement based on the general partner's alleged breach of the agreement. The court denied the general partner's request, finding that the general partner did materially breach the limited partnership agreement by condoning an act not authorized by the limited partnership agreement and by failing to uphold the duty of loyalty of a fiduciary expressly recited in the limited partnership agreement. Further, the court held that the limited partners had adhered to the provisions of the limited partnership agreement providing for the removal of a general partner for a material breach of the limited partnership agreement.

14. *KE Prop. Mgmt. Inc. v. 275 Madison Mgmt. Corp.*, C.A. No. 12683 (Del. Ch. July 21, 1993).

A general partner of a Delaware limited partnership based in New York sought a declaration that the removal of the managing general partner by a limited partner for fraud by the agent of the managing general partner was effective. Both parties agreed that New York law governed whether the agent's fraud could be imputed to the general partner. In granting summary judgment for the plaintiff, the court held that under New York law, fraud by an agent of a general partner is imputed to the general partner, even if the general partner does not have knowledge of the fraud, if the fraud results in a violation of the fiduciary duty of the general partner to the partnership. Therefore, because the fraud by the managing general partner's agent breached the managing general partner's duty to safeguard partnership property, the limited partner was justified in removing the general partner under the terms of the partnership agreement.

D. Partnership Opportunities

1. *Kahn v. Icahn*, C.A. No. 15916 (Del. Ch. Nov. 12, 1998)

Plaintiffs, holders of depository units representing limited partnership interests of a Delaware limited partnership, brought a derivative action against the partnership's general partner, the general partner's sole shareholder and chief executive officer and certain entities affiliated with the general partner, claiming that the sole shareholder and chief executive officer of the general partner breached his fiduciary duties to the partnership and usurped for himself opportunities of the partnership by failing to make certain investments completely available to the partnership and, instead, dividing the investments between the partnership and entities owned or controlled by the general partner. The partnership agreement provided that the general partner "may compete, directly or indirectly, with the business of the [p]artnership . . . and neither the [p]artnership nor any of the [p]artners or [r]ecord [h]olders shall have any right to participate in such other business interests or ventures or to receive or share in any income derived therefrom."

Defendants moved to dismiss for failure to state a claim and the court granted defendants' motion. The court, citing Section 17-1101(d) of DRULPA, stated that traditional fiduciary duties among and between parties are default duties that may be modified by partnership agreements and noted that Delaware case law suggests that partnership agreements may act as safe harbors for partners' actions that may otherwise violate traditional fiduciary duties. The court found that the defendants' conduct had been in compliance with the provisions of the partnership agreement and refused to hold that the general partner's actions were subject to the traditional fiduciary duty of loyalty irrespective of the clear and unambiguous modification of such duty provided in the partnership agreement. Addressing plaintiffs' claim that defendants had usurped opportunities of the partnership, the court, relying on the reasoning developed in cases dealing with the usurpation of corporate opportunities, concluded that the partnership could not have had a legitimate interest or expectancy in the relevant investments because the partnership agreement put the partnership on notice that the partners intended to compete directly with the partnership, and, in addition, the plaintiffs had failed to allege facts that provided a reasonable inference that information or proprietary investment research had been misappropriated or that partnership resources had been unlawfully redirected.

2. *US West, Inc. v. Time Warner Inc.*, C.A. No. 14555 (Del. Ch. June 6, 1996)

Plaintiff limited partner sought an injunction preventing the managing general partner from acquiring a competing corporation outside of its capacity as managing partner. The limited partner claimed, among other things, that the acquisition would breach the managing partner's duty of loyalty to the partnership.

In analyzing whether the acquisition breached a fiduciary duty of loyalty, the court found that the "corporate opportunity" doctrine was generally applicable to limited partnerships based on the similarity of the fiduciary duties present in corporations and limited partnerships. The court held in this instance, however, that the doctrine was not applicable because the opportunity to acquire the competing company did not belong to the partnership. Thus the actions of the general partner did not usurp an opportunity of the partnership, and the limited partner's claim was therefore denied.

E. Indemnification

1. *Connecticut Gen. Life Ins. Co. v. Pinkas*, C.A. No. 5724-VCN (Del. Ch. Nov. 18, 2010) and (Del. Ch. Oct. 28, 2011)

In this case, Third-Party Defendants, who were current or former partners of Brantley Partners IV, L.P., a Delaware limited partnership (the "Fund"), moved to have the Court of Chancery modify a status quo order to permit the Fund to advance Third-Party Defendants' legal fees and expenses. The limited partnership agreement of the Fund provided for advancement to the Fund's general partner, and to the general and limited partners, agents and employees of the Fund's general partner, of "attorneys fees and expenses which arise out of or *in any way relate to* the Partnership . . . or which arise by reason of any of them being the General Partner, or a partner, employee, or Partner." (emphasis added). Third-Party Defendants had been accused by the Fund's general partner of breaching their fiduciary duties to, and of participating in a conspiracy to remove, the Fund's general partner. The court held that although it may be attenuated, the nexus between these claims and the Fund was sufficient to satisfy the very broad "in any way relate to" language of the advancement provision. The right to advancement was subject to another provision of the Fund's partnership agreement that required potential indemnitees to first seek advancement from other available sources. Third-Party Defendants argued that such provision applied only to indemnification and not to advancement, but the court found that the term indemnification was used in the partnership agreement to refer to both advancement and indemnification. Third-Party Defendants also argued that advancement was not available from other sources. The court held that Third-Party Defendants successfully demonstrated that advancement was unavailable from other sources and thus granted Third-Party Defendants' request to modify the status quo order to permit the advancement.

In a subsequent decision in this ongoing limited partnership dispute involving, among other claims, allegations that third-party defendants breached their fiduciary duties to, and participated in a conspiracy to remove, the general partner of Brantley Partners IV, L.P., a Delaware limited partnership (the "Fund"), the court ruled on third-party defendants' motion to dismiss for lack of personal jurisdiction. Third-party plaintiffs asserted several grounds for establishing personal jurisdiction, all of which the court rejected. Among the grounds asserted was that, under 10 Del. C. § 3104(c)(1), the "single act" provision of Delaware's long-arm statute, third-party defendants transacted business in Delaware by participating in the formation of a Delaware entity, which happened to be one of the third-party plaintiffs. Although Papendick v. Bosch, 410 A.2d 148 (Del. 1978), provided that a single act of incorporation done as part of a wrongful scheme was sufficient to confer personal jurisdiction, the court held that "merely participating in the formation of a Delaware entity, without more, does not create a basis for jurisdiction in Delaware." The court also rejected third-party plaintiffs' argument that one of the third-party defendants should be subject to personal jurisdiction because he incorrectly identified himself in the signature blocks of a few documents as a general partner, rather than the controller of a general partner, of one of the third-party plaintiffs. The court also denied third-party plaintiffs' allegation that one of the third-party defendants was the alter-ego of the other third-party plaintiff. The court held that third-party plaintiffs failed to satisfy the criteria of showing that: (i) the out-of-state defendant over whom jurisdiction was sought had no real separate identify from a defendant who was subject to personal jurisdiction and (ii) the existence of acts in Delaware which could be fairly imputed to the out-of-state defendant and which satisfied the long-arm statute and/or federal due process requirements. Finally, the court rejected the argument that one of the third-party defendants had a general presence in the state sufficient to permit personal jurisdiction under 10 Del. C. § 3104(c)(4). His only current connections to Delaware were his ownership interests in five Delaware limited partnerships and membership on the board of one Delaware corporation, as well as his alleged participation in the formation of a Delaware entity (one of the third-party plaintiffs). The court held that these were not sufficient connections to constitute a "persistent course of conduct" in Delaware that would allow the court to exercise personal jurisdiction under Section 3104(c)(4).

2. *Stockman v. Heartland Indus. Partners, L.P. and Heartland Indus. Grp., L.L.C.*, C.A. No. 4227-VCS (Del. Ch. July 14, 2009); Stepp v. Heartland Indus. Partners, L.P., C.A. No. 4427-VCS (Del. Ch. July 14, 2009).

Stockman v. Heartland Indus. Partners L.P. considered the advancement and indemnification provisions in a Delaware limited partnership agreement. Plaintiffs were former officers and directors of both the Heartland partnership and a corporation in which the partnership was the majority investor. The advancement provision at issue stated that reasonable expenses incurred by an indemnitee in defense or settlement of any claim that may be subject to a right of indemnification under the partnership agreement "shall be advanced by the Partnership" prior to the final disposition thereof upon receipt of an appropriate undertaking by the indemnitee. The provision went on to say, however, that "[n]o advances shall be made by the Partnership under this Section 4.4(b)(i) without the prior written approval of the General Partner." The partnership contended that the general partner could withhold its approval at its discretion, but the court rejected this reading holding that the general partner's approval was effectively a ministerial function that was intended to ensure that the prerequisites for advancement were met before any funds were disbursed. Although the court concluded that there was only one reasonable reading of the provision and, therefore, it was not ambiguous, the court went on to state that to the extent there was any ambiguity in the advancement provision, under the doctrine of *contra proferentum,* that ambiguity would have to be resolved against the partnership in favor of the reasonable expectations of the officers seeking advancement.

The plaintiffs' indemnification claims were for expenses they incurred in respect of criminal actions that were brought against them and then dismissed without prejudice. The partnership agreement provided for indemnification "[t]o the fullest extent permitted by law" subject to the requirement that the indemnitee's conduct "(A) was in or was not opposed to the best interests of the Partnership,

(B) in the case of a criminal action or proceeding, the Indemnitee had no reasonable cause to believe his conduct was unlawful, or (C) did not constitute fraud, bad faith, willful misconduct, gross negligence, a violation of applicable securities laws or any material breach of the Agreement or the Advisory Agreement." In support of its motion to dismiss, the partnership asserted that the plaintiffs had to affirmatively plead satisfaction of the three requirements for indemnifiable conduct and that as they had not done so, their complaint should be dismissed. The defendants countered that, consistent with the approach of Section 145(c) of the Delaware General Corporation Law, success in respect of the criminal action entitled them to indemnification or, at most, the three requirements were an affirmative defense that had to be asserted and proved by the partnership. The court agreed with the plaintiffs holding that although "a plaintiff generally bears the burden of pleading all elements of her claim, in the case of a mandatory indemnification provision, the burden rests on the party from whom indemnification is sought to prove the indemnification is not required." Specifically, the court noted that ["b]y imposing a mandatory indemnification obligation on itself in the Partnership Agreement, Heartland undertook to pay all indemnification requests unless Heartland could demonstrate that indemnification was not required." Based on this holding, the court denied Heartland's motion to dismiss.

3. *McGovern v. Gen. Holding, Inc.*, C.A. No. 1296-N (Del. Ch. May 18, 2006)

Plaintiffs were limited partners in KX Industries, L.P., a Delaware limited partnership ("KXI"). Defendant Evan Koslow was chief inventor and CEO of KXI and controlled the general partner and owned 90% of KXI's equity. The plaintiffs sued Evan, the general partner and other instrumentalities of Evan for breach of fiduciary duty and breach of the limited partnership agreement.

KXI had developed numerous new technologies that had the potential for lucrative sales over the next several years. As the company's future began to look bright, Evan attempted to squeeze out plaintiffs by claiming that most of the patents for the new technologies were actually owned by one of his wholly-owned companies, Koslow Technologies Corporation ("KT"). He contemplated selling KXI's already established business, cashing out plaintiffs and moving forward to reap the financial rewards of the new technologies on his own.

The court found that Evan breached both the partnership agreement and his fiduciary duties by appropriating the company's valuable technology. It rejected Evan's primary defense which was based on a 1989 License Agreement between KXI and KT that Evan asserted made KT the owner of the new technologies. This license agreement was formed when KXI was a joint venture between Evan and a subsidiary of Exxon, and disagreements as to its scope and validity were part of the reason Exxon left the partnership. The court held that the license agreement did not excuse Evan's behavior for several reasons.

First, the court found that the license agreement was of dubious validity because the limited partnership agreement between Evan and the Exxon subsidiary required that Exxon give prior written consent to any contracts between KXI and KT, and there was no such written consent. Second, the court found that the license was moribund.

The court also held that even if the license agreement were operative, which it was not, Evan breached his fiduciary duties by having KXI pursue costly research from which it could gain no economic value but would instead enrich Evan personally. The court also found that Evan breached the limited partnership agreement which contained clauses stipulating that all property acquired by the partnership was deemed to be owned by the partnership and that the resources of the partnership could be used for partnership purposes only and not for the personal benefit of any of the partners. Finally, the court held that even if the license agreement were operative, Evan interpreted it in an implausible and inconsistent manner. At most, the license agreement covered improvements that were based upon an older technology and did not cover the broad range of new developments and technologies that KXI had pursued at Evan's behest.

In addition to other relief, the court held that Evan's behavior precluded the company from indemnifying him for his litigation expenses (and that he was required to return funds he had received as an advance), and held that because the litigation obviously benefited KXI, the plaintiffs would have their reasonable litigation costs and expenses reimbursed by the company.

4. *Salovaara v. SSP Advisors, L.P.*, C.A. No. 20288-NC (Del. Ch. Dec. 22, 2003); *South Street v. Salovaara*, C.A. No. 16579-NC (Del. Ch. Dec. 22, 2003)

In these, the last of several related actions brought in Delaware, New Jersey and New York, Mikael Salovaara sought enforcement of the indemnification clauses of several different partnership agreements. Previously, one of Salovaara's partners, Alfred C. Eckert, filed a complaint in the Court of Chancery, asking the court generally to interpret the indemnification provisions of the relevant partnership agreements and specifically to determine whether Salovaara was entitled to indemnification of his legal fees and expenses in connection with suits that Salovaara himself had initiated to obtain personal recovery as a plaintiff. During the pendency of Eckert's initial action, Eckert and Salovaara were involved in related litigation in New Jersey and New York. In the New York litigation, it was determined that one of the partnerships managed by Eckert and Salovaara was an ERISA fund, which could therefore indemnify a person only "for those expenses that are incurred pursuant to his duties with the plan, and that are undertaken for the exclusive benefit of the plan." In the New Jersey litigation, it was determined that Eckert was not entitled to indemnification because he had acted with bad faith and willful misconduct and further that the relevant partnership agreements contemplated the indemnification not of plaintiffs but only of defendants. Nonetheless, several months before the New Jersey court's decision, Eckert sought a voluntary dismissal without prejudice of the action he had originally brought in the Court of Chancery. Salovaara argued in response that (a) it would be inequitable to dismiss the action without prejudice because Eckert had forced the issues of plaintiff indemnification to be litigated in the Chancery Court, (b) the Chancery Court should dismiss the action with prejudice because Eckert had all along asserted that Delaware had a paramount interest in the matter and (c) the Chancery Court should dismiss the action with prejudice because the parties had already expended hundreds of thousands of dollars in legal fees and the case was ready for trial. The Court of Chancery dismissed the action with prejudice, ordering Salovaara to be indemnified for past legal fees and expenses and to receive an advancement against future legal fees and expenses. This order was stayed pending the final disposition of the New York litigation, including any appeals therefrom.

In the present disposition, the court vacated the stay of its earlier order, allowing Salovaara to be indemnified for the legal fees and expenses he had incurred as a plaintiff. The dismissal with prejudice had the effect of conclusively determining that the relevant partnership agreement was drafted to encompass plaintiff indemnification. In outlining this conclusion, Chancellor Chandler emphasized the fact that Eckert had brought this outcome on himself when he moved for the dismissal of his own case without prejudice: "In essence, by asking this Court to dismiss voluntarily the Related Indemnification Action, Eckert stood before this Court and said, 'I admit my claim has no merit. Salovaara is entitled to indemnification….' This Court is a court of equity and Eckert cannot persuade it to disregard the voluntary circumstances under which the June 14 Order was entered, simply in order to avoid a conflict, which is the product of his own actions, in judgments between this Court and a sister court in New Jersey." The New York decision regarding ERISA, however, prevented Salovaara from receiving indemnification from one of the partnerships. Related partnership agreements with identical indemnification clauses were read to provide indemnification for plaintiffs as well as defendants. Finally, the court refused to distinguish between plaintiff indemnification versus defendant indemnification regarding the statute of limitations, upholding the previous ruling of *Scharf v. Edgcomb Corp.*, 1997 WL 762656 (Del. Ch. 1997), that the statute of limitations on an indemnification claim accrues on the date the indemnitee could be confident any claim against him had been resolved with reasonable certainty.

5. *In re Cencom Cable Income Partners, L.P. Litig.*, C.A. No. 14634 (Del. Ch. Jan. 27, 2000)

After a series of legal proceedings relating to the post-dissolution liquidation of a Delaware limited partnership, the court had granted summary judgment to the general partner on all but five of the plaintiff limited partners' claims. The five remaining claims against the general partner included a claim for the breach of duty of loyalty by giving certain information to only one of three appraisers valuing the partnership's assets, allegedly in order to manipulate the ultimate appraisal figures and a claim for breach of the partnership agreement by not valuing the assets on a "going concern" basis, resulting in the partnership receiving less than the assets were worth. In this proceeding, the general partner moved for judgment on the pleadings on the five remaining claims, arguing that the claims were derivative claims and that plaintiffs had not properly pleaded such claims because plaintiffs had not pleaded demand refused or, in the alternative, demand futility. Plaintiffs moved to have a class of all limited partners certified to pursue each of these claims and moved to have the general partner enjoined from advancing itself litigation expenses from partnership funds to pay for the litigation.

The court began its discussion by reference to the corporate common law rules surrounding derivative claims and noting that while it would look to corporate precedent it recognized the need for flexibility in determining its applicability. Turning to plaintiffs' five claims, it first held that three were clearly direct claims because they fell distinctly upon the individual participants in the business association or involved the participants' contractual rights. The court noted that the two remaining claims, which are referenced above, at first appear derivative in nature since the alleged injury devalued the partnership's assets. However, given the current position of the partnership in the final stages of its post-dissolution liquidation, the court found that the "purposes for classifying claims as derivative and, in particular, the reasons for its attendant demand rule, are not present here." The court had identified the two discernable purposes for classifying claims as derivative as first, insuring that injury to a whole association is adjudicated on behalf of that whole and not just for the benefit of the individuals who have undertaken to pursue the claims, and second, carrying out the desired public policy of galvanizing a governing entity within the business association into taking action to address injury on behalf of the business. The court therefore found that "imposing derivative requirements on these two claims would only set up a legal artifice that has no justification and, therefore, put plainly, makes no sense." The court stated the test for determining whether claims were direct or derivative in the partnership's situation as follows:

> If: (1) a business association consists of only two parties in interest, one a putative class of injured plaintiffs and the other the defendant party that controls the business association; and, (2) the business association is effectively ended, but for the winding up of its affairs; and, (3) the two sides oppose each other in the final dispute over the liquidation of that association; then a claim brought in that context is direct.

Applying the foregoing standard, the court held that plaintiffs' claims were direct claims, and therefore denied defendant's motion for judgment on the pleadings. In addition, since defendant's only opposition to plaintiffs' motion for certification of a class of limited partners was on grounds that the claims were derivative in nature, plaintiffs' motion for class certification was granted.

With respect to plaintiffs' motion to have defendant enjoined from advancing itself litigation expenses from the partnership funds, the partnership agreement provided, in relevant part, that "[e]xpenses incurred by an Indemnitee . . . shall be advanced . . . provided that . . . (ii) such legal action is initiated by a third party who is not a Limited Partner." Plaintiffs argued that the limitation in such provision conditioning advances on limited partners not being plaintiffs in the litigation prohibited the payment of advances to defendant with respect to this action. Defendant claimed that the partnership agreement only specified conditions under which advances were mandatory and that, pursuant to defendant's exclusive authority under the partnership agreement to manage the business affairs of the partnership, defendant could in the exercise of its discretion make advances to itself. The court rejected defendant's argument because it would render the limitation on advances in the partnership agreement illusory and because it was contrary to the court's adherence to the principle that general discretionary provisions in contracts do not negate explicit limitations found elsewhere in the contract. After finding that plaintiffs had satisfied the criteria for granting injunctive relief, the court permanently enjoined defendant from advancing itself litigation expenses from partnership funds and required defendant to return any funds it had previously advanced to itself in this action.

6. *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, C.A. No. 15478 (Del. Ch. Sept. 10, 1999)

The general partner filed an action in Delaware seeking a judicial dissolution of a Delaware limited partnership and shortly thereafter the limited partner filed its own action in New York seeking judicial dissolution and an accounting and also asserting claims of breach of fiduciary duty, breach of contract and fraud. Following the entry of a decree of judicial dissolution of the limited partnership by the Delaware Court of Chancery, the limited partner challenged the general partner's advancement of partnership funds to cover the legal expenses of the general partner and its affiliates in the two separate actions. Because the partners had not entered into a written limited partnership agreement and the evidence of their negotiations regarding indemnification issue was limited, the court relied upon the provisions of the DRULPA to determine whether or not it was permissible for the general partner to make the advancement of funds. Noting that no prior Delaware case has decided whether DRULPA Section 17-108 permits a limited partnership to indemnify a partner or other person in the absence of a provision in the partnership agreement, the court held that in the absence of such a provision the best reading of Section 17-108 is that it permits a limited partnership to indemnify a partner or other person although it does not impose a duty to use such power nor create a right of partners or others to indemnification. The court also rejected the general partner's argument that DUPL Section 1518(2) provides a back-up rule in the circumstances where a limited partnership agreement does not include a provision regarding indemnification because DRULPA Section 17-108 speaks directly to the issue of indemnification. The court went on to determine that a limited partnership's power to indemnify also includes the power to advance litigation expenses. Although the court stated that, pursuant to 1518(6) of the DUPL, a general partner who winds up a partnership's affairs has the right to receive reasonable compensation for this task, including the recovery of reasonable litigation expenses, the court noted that all of the general partner's legal expenses were not necessarily recoverable because they did not all appear to be "wind up" expenses. The court held that it was fair and reasonable for the general partner to recover its reasonable core costs related to the winding up of the limited partnership, such as fees and expenses related to the accounting. However, the court found that some of the general partner's expenses related to the retention of pecuniary advantage for the general partner. In regard to the general partner's advancement of such expenses to itself, the court stated that the general partner could not rely on the protections of the business judgment rule in connection with a self-interested decision and found that the general partner failed to meet its burden of proving the fairness of such expenses. Thus, the court held that the general partner improperly advanced the litigation expenses related to its own pecuniary advantage rather than the winding up the limited partnership.

7. *Delphi Easter Partners Ltd. P'ship v. Spectacular Partners, Inc.*, C.A. No. 12409 (Del. Ch. Aug. 6, 1993)

Two limited partners brought an action derivatively and individually against the general partners for improperly advancing legal fees and expenses to themselves to defend a separate claim against them by the limited partners. The court held that under DRULPA Section 17-108 limited partnerships are permitted to contract freely with regard to indemnification and advancement of expenses, unlike the narrower statutory indemnification provisions applicable to general partnerships and corporations. Therefore, because the general partners had satisfied the criterion set forth in the partnership agreement of incurring a loss in connection with the partnership that was not the result of willful misconduct, gross negligence or breach of fiduciary duty, the court held that the general partners were legally entitled to the advancements to cover legal expenses.

F. Contests for Partnership Control

1. *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, C.A. No. 10093-VCL (Nov. 5, 2014)

In this case, plaintiffs sought a preliminary injunction against the closing of a merger (the "Merger") between defendant Kinder Morgan Energy Partners, L.P., a publicly traded Delaware limited partnership (the "Partnership"), and a wholly-owned subsidiary of Kinder Morgan Inc. ("Parent"), whereby certain limited partnership interests (the "Common Units") in the Partnership would be converted in to the right to receive cash, common stock of Parent or mixed consideration of cash and Parent's stock. Defendants believed that the Merger only needed approval from holders of a majority of the Partnership's three classes of limited partner units (collectively, the "Outstanding Units"), voting together as a single class. Plaintiffs' position was that under the Partnership's limited partnership agreement (the "LPA"), the Merger was required to meet more onerous provisions of the LPA's amendment section that required, inter alia, approval from a higher percentage of limited partners (the "LPA Amendment Provisions"). The court denied plaintiffs' motion for preliminary injunction because the plain language of the LPA supported defendants' position.

Other than containing a different vote threshold, the LPA's merger provision was generally consistent with Section 17-211 of the Delaware Revised Uniform Limited Partnership Act (the "Delaware Act"). The LPA authorized the Partnership to merge with other business entities upon receiving the affirmative vote or consent of at least a majority of the Outstanding Units. With respect to mergers, the LPA differed from Delaware Act, providing that if a merger agreement contained any provision which, if contained in an amendment to the LPA, the provisions of the LPA or the Delaware Act would require the vote or consent of a greater percentage of the Outstanding Units or of any class of limited partners, such greater percentage of vote or consent would be required to approve the merger agreement (the "Amendment-By-Merger Exception"). The purpose of the Amendment-By-Merger Exception was to prevent an amendment to the LPA by a majority vote through a merger agreement that would otherwise require a higher voting threshold.

Plaintiffs argued that although the merger agreement was not expressly amending the LPA, the conversion of the Common Units as a result of the Merger was substantially similar to amending the LPA, requiring a vote that would satisfy the LPA Amendment Provisions. The court disagreed, holding that neither the LPA nor the Delaware Act provided for a similar conversion of limited partnership interests by amendment to the LPA. Since an amendment to the LPA could not accomplish what was being done by the merger agreement, the Amendment-By-Merger Exception was not triggered and the LPA Amendment Provisions were not applicable. The court held that since the LPA was not being amended by the Merger, the Merger only needed to receive the affirmative vote of the holders of a majority of the Outstanding Units.

2. *In re Marriott Hotel Props. II Ltd. P'ship Unitholders Litig.*, C.A. No. 14961 (Del. Ch. June 12, 1996), (Del. Ch. Sept. 17, 1997) and (Del. Ch. Jan. 24, 2000)

Plaintiff limited partners sought to enjoin a tender offer by the corporate parent of the general partner for at least a majority of the limited partnership units, claiming, among other things, that the tender offer constituted a change of control that brought about a fiduciary obligation of the general partner to take reasonable steps to achieve the highest price available, i.e. the corporate "Revlon" duty.

In denying injunctive relief, the court held that the general partner had no fiduciary duty to seek a control premium in the acquisition by its corporate parent of a majority of the limited partnership interests because such an acquisition would not constitute a change of control where the partnership agreement deprived the limited partners of any significant control rights. Under the agreement, the limited partners could not manage the partnership or control its assets and could not remove the general partner except for a breach of fiduciary duty. Although the limited partners were entitled to vote on designated matters such as mergers and certain acquisitions and amendments, the court held that this did not amount to control or the ability to command a control premium. Moreover, as further evidence that no control premium was applicable, the court noted that the general partner had absolute discretion to prohibit the transfer of any limited partnership units. Thus the court refused to impose a Revlon duty on the general partner which would effectively undermine the explicit terms of the limited partners' investment as dictated by the partnership agreement.

In a subsequent decision, the court granted the plaintiffs' motion for a voluntary dismissal of this case without prejudice in favor of parallel litigation pending in the United States District Court for the Southern District of Florida, citing judicial economy and the lack of legal prejudice to the defendants.

After the District Court in Florida dismissed the action for want of subject matter jurisdiction as a result of the defection of certain plaintiffs, the action was revived in the Court of Chancery. At this point in time, the tender offer had closed and the corporate parent of the general partner owned 50.4% of the limited partnership units of the partnership. Within months of the closing, defendant general partner, in a change from its prior distribution policy and the projections forecast in the tender offer circular, more than doubled the size of cash distributions to limited partners. Plaintiffs filed an amended class action complaint alleging breach of partnership agreement, breach of fiduciary duties and additional claims relating to the tender offer. Defendants filed a motion to dismiss several of plaintiffs' claims and a motion for summary judgment with respect to plaintiffs' claim that the general partner breached its fiduciary duty of loyalty by limiting pre-closing distributions to limited partners in contemplation of and to facilitate the tender offer. The court denied the defendants' motion to dismiss with respect to the claims that the general partner's disclosures relating to distributions were materially misleading. The court stated that "[w]here, as here, the lone source of disclosure is a fiduciary having a conflicting interest, an obligation of complete candor is imposed on the fiduciary and judicial scrutiny of the disclosure is more exacting" and, based on the timing and dramatic nature of the change in distributions policy, found that plaintiffs were entitled to an inference that defendants did not believe the projections when they made them. The court also denied defendants' motion for summary judgment, finding that material issues of fact were in dispute with respect to the timing, motivation and effect of the general partner's decision to change the distribution policy, noting that "the fortuitous timing of the General Partner's change in distribution policy calls into question the good faith of the General Partner's management decisions in the time period preceding the Offer." The court granted the defendants' motion to dismiss the remaining claims in the complaint. With respect to plaintiffs' claim that the "entire fairness" standard applied to the tender offer, the court disagreed, stating that this was not a situation in which one party stood on both sides of a transaction and could have effectuated changes to the detriment of fellow investors; in this case, defendants made a voluntary tender offer directly to the limited partners. With respect to the claim that defendants breached an implied obligation in the partnership agreement to ensure fairness in any transaction involving the general partner, which obligation the plaintiffs alleged arose from provisions in the partnership agreement that set forth an independent appraisal process designed to ensure that the partnership would receive fair value in a sale of partnership assets to the general partner or its affiliates, the court found no basis for the inference in this situation due to the essentially voluntary nature of the tender offer and refused to imply an intention in the partnership agreement to subject the tender offer to an independent appraisal process. Finally, with respect to plaintiffs' claim that defendants breached fiduciary duties of due care and good faith by not protecting the limited partners from the threat of an unfairly priced offer, the court held that it would be unreasonable and inappropriate to impose such an obligation on the defendants in relation to a voluntary tender offer which involved no act of corporate governance and found that the requirement under Delaware law that the tender offer by the defendants be made with complete disclosure and be non-coercive provided an adequate framework to protect the interests of limited partners.

3. *Arvida/JMB Partners, L.P. v. Vanderbilt Income and Growth Assocs., L.L.C.*, C.A. No. 15238 (Del. Ch. May 23, 1997), *aff'd*, 712 A.2d 475 (Del. 1998)

In a case arising from an attempt to remove and replace the general partner of a limited partnership after the plaintiff had acquired approximately a 20% interest in the limited partnership through a tender offer, the court considered (i) whether the plaintiff had acquired voting rights as a subsequent assignee of limited partnership interests and (ii) whether the general partner had breached its contractual or fiduciary duties by refusing to consent to the plaintiff's admission as a limited partner. After trial, the court found the provisions regarding the assignment of voting rights from limited partners and assignees to subsequent assignees to be ambiguous and consequently applied the contractual construction principle of *contra proferentum* to give effect to the parties' reasonable expectations based on the terms of the agreements. In doing so, the court determined that a reasonable investor in the limited partnership could have read the relevant provisions to provide that subsequent assignees would have voting rights. Therefore, the court held that the plaintiff had the right to vote. With respect to the general partner's denial of consent to the admission of the plaintiff as a limited partner, the court held that the plaintiff had failed to demonstrate that the general partner had breached its contractual or fiduciary duties. The partnership agreement permitted the general partner to grant or deny consent to the admission of a limited partner in its "sole and absolute discretion." In light of this standard, the court concluded that the only limitation on the general partner's discretion was implied contractual covenant of good faith and held that the plaintiff had failed to show bad faith because the general partner had sufficient reasons to conclude that the plaintiff would not be a suitable partner.

4. *Vanderbilt Income and Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, C.A. No. 15238 (Del. Ch. Nov. 4, 1996), rev'd on procedural grounds, C.A. No. 469 (Del. Dec. 12, 1996)

Plaintiffs sought control of a limited partnership through a tender offer for sufficient limited partner interests to remove and replace the general partner. In connection with their tender offer, plaintiffs filed a breach of fiduciary duty claim against the general partner for entering into a loan transaction that plaintiffs alleged was for the primary purpose of entrenching itself as general partner. The general partner filed a motion to dismiss the claim on the pleadings for lack of standing.

The court granted the defendant's motion to dismiss and the plaintiffs subsequently filed a motion for reargument. The court based its ruling to dismiss and subsequent denial of plaintiffs' motion for reargument on its holding that to have standing to pursue a breach of fiduciary duty claim, the plaintiffs were required to have the right to vote to remove and replace the general partner and its finding that plaintiffs did not have such a right. The court, however, based its holding on the disclosure in the partnership prospectus and the Supreme Court reversed on appeal, ruling that the lower court had considered matters outside of the pleadings (i.e., the partnership prospectus) in ruling on the motion to dismiss.

5. *U-H Acquisition Co. v. Barbo*, C.A. No. 13279 (Del. Ch. Jan. 31, 1994)

Plaintiffs commenced a consent solicitation in an attempt to acquire a group of limited partnerships. The general partners of the partnerships responded by adopting amendments to the partnership agreements significantly restricting the ability of the limited partners to act by written consent. The plaintiffs then filed suit to challenge the validity of the amendments to the partnership agreements, alleging that the adoption of the amendments constituted a breach of the general partners' fiduciary duties and seeking a declaratory judgment that the amendments were null and void. None of the plaintiffs were limited partners of any of the partnerships, although one of the plaintiffs had acquired an interest in a partnership as an assignee but had not been admitted as a substituted limited partner.

The court dismissed the claims of the plaintiffs for lack of standing. It held that in order to maintain a claim for breach of fiduciary duty, the plaintiffs must first show that they were owed such a fiduciary duty and because none of the plaintiffs (including the assignee) had a right to vote by written consent, they had no standing to bring a claim alleging breach of a fiduciary duty relating to the exercise of a right to vote by written consent. In addition, certain aspects of the plaintiffs' claims were found to be derivative in nature, which required, among other things, the plaintiffs to be partners at the time of bringing the action under Section 17-1002 of the DRULPA. (DRULPA Sections 17-1001 and 17-1002 were amended in 1998 to specifically authorize an assignee of a partnership interest to bring a derivative action.) Finally, the request for declaratory judgment was dismissed because, after the dismissal of the fiduciary duty breach claim, no independent basis for equitable jurisdiction existed to support a declaratory judgment action in the Court of Chancery. (DRULPA Section 17-111 was adopted later in 1994 to provide jurisdiction in the Court of Chancery for all actions relative to the interpretation or enforcement of partnership agreements.)

G. Dissolution

1. Non-Judicial Dissolution

a. *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, C.A. No. 15478 (Del. Ch. Sept. 10, 1999)

In connection with an action filed by plaintiff general partner seeking judicial dissolution of a Delaware limited partnership, the court had previously entered a decree of dissolution of the limited partnership. This post-trial opinion resulted from a fight between the partners regarding the accounting of the limited partnership's assets. The court had to establish the date of dissolution in order to determine which assets should be included in the accounting. Because the partners had not entered into a formal written limited partnership agreement, the court had to establish the terms of their oral partnership agreement. To the extent that the court could not glean necessary terms from the partners' bargaining history and conduct, the court looked to the provisions of DRULPA, as well as the provisions of DUPL and the rules of law and equity as "gap fillers" for DRULPA pursuant to DRULPA Section 17-1105. Neither party disputed that the latest date of dissolution of the limited partnership would be the date on which the decree of judicial dissolution was entered. However, the general partner argued that the limited partnership was in fact dissolved at an earlier time and asserted that the limited partnership was dissolved when the general partner fired one of the owners of the limited partner from his position with the limited partnership, i.e., the time at which it was no longer "reasonably practicable" for the partners to continue the partnership. The court rejected this argument as well as the limited partner's assertion that the partners had no right to exit the partnership absent judicial intervention. Notwithstanding DRULPA Sections 17-602 and 17-603, which restrict the rights of general partners and limited partners to withdraw from a limited partnership, the court held that in the absence of an agreement limiting the dissolution rights of the partners, the partners retained "walk away" rights. The court further stated that Delaware public policy, as reflected in DUPL, allows partners to dissolve general partnerships by their "express will." The court found that the date of dissolution of the limited partnership was the date on which the general partner gave express notice of its intent to dissolve the partnership to the limited partner and not the later date on which the decree of judicial dissolution was entered.

2. Judicial Dissolution

a. *Steven M. Mizel Roth IRA v. Laurus U.S. Fund, L.P.*, C.A. No. 5566 (Del. Ch. Feb. 25, 2011)

Plaintiff was a limited partner of a Delaware limited partnership that served as a feeder fund (the "Feeder Fund") for a Cayman Islands master fund (the "Master Fund"). Following the Master Fund entering into voluntary liquidation, plaintiff filed this action seeking judicial dissolution of the Feeder Fund under Section 17-802 of the DRULPA and the appointment of a liquidating trustee or receiver to manage its affairs. Plaintiff contended that the principals of the general partner of the Feeder Fund (who also controlled the Master Fund) had an interest in prolonging the dissolution of the Feeder Fund to increase the management fees to which the general partner was entitled and, because some of the Master Fund's asset were being purchased by the principals, the principals were improperly incentivized to liquidate those assets at low prices. This was the court's decision on the Feeder Fund's motion to dismiss and plaintiff's motion for summary judgment.

The court, in evaluating whether it was reasonable practicable to carry on the business of the Feeder Fund in conformity with its partnership agreement (which is the standard for judicial dissolution under Section 17-802), noted that judicial dissolution is "a limited remedy that Delaware courts grant sparingly." The court looked to the purpose clause of the Feeder Fund's partnership agreement to determine whether the business of the Feeder Fund could be carried on in accordance with the partnership agreement notwithstanding the liquidation of the Master Fund. The purpose clause provided that the Feeder Fund's purpose was to "serve as a fund through which the assets of its partners will be utilized to invest, hold and trade in securities and other financial instruments of any name and nature which exist now or are hereafter created and rights and options relating thereto." Plaintiff argued that it was not reasonably practicable to carry on the purpose of the Feeder Fund because the Feeder Fund's only purpose was to invest in the Master Fund. The court held, however, that maintaining a passive investment in the Master Fund during its liquidation was within the purposes as set forth in the Feeder Fund's partnership agreement and therefore granted the Feeder Fund's motion to dismiss the judicial dissolution claim.

With respect to plaintiff's request for the appointment of a liquidating trustee, the court held that because the Feeder Fund had not yet dissolved, there was no basis for the appointment of a liquidating trustee of the Feeder Fund under Section 17-803 or 17-805 of the DRULPA. With respect to plaintiff's request for appointment of a receiver under the court's equitable powers, the court noted that Delaware courts exercise the power to appoint a receiver with great caution because appointing a receiver is an extraordinary remedy. Since plaintiff had not made any specific allegations that the general partner had engaged in fraudulent activity or gross mismanagement of the Feeder Fund's affairs, the court held that there was not plausible basis for the court to appoint a receiver and granted the Feeder Fund's motion to discuss the petition for a liquidating trustee or receiver.

b. *Harris v. RHH Partners, LP*, C.A. No. 1198-VCN (Del. Ch. Jan. 27, 2010)

Robert H. Harris was the sole limited partner of a Delaware limited partnership (the "Partnership"), the sole asset of which was his personal residence. The sole general partner of the Partnership was 1015 Broadway, Inc. ("Broadway"), a corporation owned by Harris's former friend and business partner, Don L. Hartman. Harris brought this action requesting the Court of Chancery to replace Broadway with a new general partner, or alternatively, to judicially dissolve the Partnership.

The court was unable to determine the purpose for which the Partnership was formed but suspected that Harris, who was in some financial distress at the time the Partnership was formed, caused the formation of the Partnership with the intent to shield his personal residence from the claims of his creditors. The Partnership's partnership agreement included a general purpose clause providing that the Partnership was formed "to engage in any activity permitted to be carried out by a Delaware partnership" and neither Harris nor Hartman provided any further explanation for the purpose of the Partnership. The court also could not determine why Broadway became the general partner of the Partnership. Hartman claimed that he acquired ownership of Broadway, the general partner of the

Partnership, as a means of securing debts owed by Harris to Hartman. The court, however, found that Hartman had failed to prove that Harris owed any debts to him or that the purpose of Broadway's service as general partner of the Partnership was to provide security to Hartman for Harris's obligations to him.

Harris claimed that Broadway should be removed as general partner because it had failed to meet its obligations as general partner, such as timely filing the Partnership's tax returns. The court stated that Harris's claim presumes that there is the judicial option of replacing a general partner and divesting it of its interest in the Partnership. The court further stated that, even if it assumed that this was a potential viable remedy, Harris had not convinced the court that Broadway's shortcomings, generally minor and ministerial in nature, reached the level of malfeasance that would justify such an extraordinary remedy. The court thus denied Harris's request to replace the general partner.

Turning to Harris's claim for judicial dissolution, the court stated that it was abundantly clear that leaving Harris and Hartman in any kind of business relationship would serve no useful purpose, noting that there was no apparent purpose for the Partnership and that the Partnership holding title to Harris's personal residence had no cognizable relationship to any business purpose for which the Partnership might exist. The court thus held that it was not reasonably practicable for the Partnership to carry on its business in conformity with the partnership agreement and ordered judicial dissolution of the Partnership pursuant to Section 17-802 of DRULPA. With respect to the liquidation of Harris's personal residence as the sole asset of the Partnership upon dissolution, the court determined that Broadway should receive a 1% undivided fee simple interest in the real property and Harris should receive a 99% fee simple interest in the real property. However, because Broadway had failed to make a $1,000 capital contribution as required under the partnership agreement, Broadway's interest in the real property would be subject to a charge for the $1,000.

c. *McGovern v. Gen. Holding, Inc.*, C.A. No. 1296-N (Del. Ch. May 18, 2006)

Plaintiffs were limited partners in KX Industries, L.P., a Delaware limited partnership ("KXI"). Defendant Evan Koslow was chief inventor and CEO of KXI and controlled the general partner and owned 90% of KXI's equity. The plaintiffs sued Evan, the general partner and other instrumentalities of Evan for breach of fiduciary duty and breach of the limited partnership agreement.

KXI had developed numerous new technologies that had the potential for lucrative sales over the next several years. As the company's future began to look bright, Evan attempted to squeeze out plaintiffs by claiming that most of the patents for the new technologies were actually owned by one of his wholly-owned companies, Koslow Technologies Corporation ("KT"). He contemplated selling KXI's already established business, cashing out plaintiffs and moving forward to reap the financial rewards of the new technologies on his own.

The court found that Evan breached both the partnership agreement and his fiduciary duties by appropriating the company's valuable technology. It rejected Evan's primary defense which was based on a 1989 License Agreement between KXI and KT that Evan asserted made KT the owner of the new technologies. This license agreement was formed when KXI was a joint venture between Evan and a subsidiary of Exxon, and disagreements as to its scope and validity were part of the reason Exxon left the partnership. The court held that the license agreement did not excuse Evan's behavior for several reasons.

First, the court found that the license agreement was of dubious validity because the limited partnership agreement between Evan and the Exxon subsidiary required that Exxon give prior written consent to any contracts between KXI and KT, and there was no such written consent. Second, the court found that the license was moribund. After Exxon had left the partnership, Evan largely abandoned KT as an operating company and converted it into, what was by all appearances, a patent holding company for KXI. No work was done by KT as an operating company, and it had no employees. The plaintiffs were all led by Evan to believe that KT was merely a patent holding company for KXI and that the new technologies belonged to KXI. KXI had born all the risks and costs of researching and developing the new technologies. Having treated the license as inoperative for nearly 16 years, the court found that Evan could not conveniently assert that it compelled him to appropriate KXI's valuable technology.

The court also held that even if the license agreement were operative, which it was not, Evan breached his fiduciary duties by having KXI pursue costly research from which it could gain no economic value but would instead enrich Evan personally. The court also found that Evan breached the limited partnership agreement which contained clauses stipulating that all property acquired by the partnership was deemed to be owned by the partnership and that the resources of the partnership could be used for partnership purposes only and not for the personal benefit of any of the partners.

Finally, the court held that even if the license agreement were operative, Evan interpreted it in an implausible and inconsistent manner. At most, the license agreement covered improvements that were based upon an older technology and did not cover the broad range of new developments and technologies that KXI had pursued at Evan's behest.

Using its broad equitable powers to grant appropriate relief, the court ordered that KXI be dissolved and liquidated as the court found "it [was] impractical for the business to continue given the fractious relations and [one plaintiff partner's] recent death." In addition, the court ordered the appointment of a receiver from recommendations made by one plaintiff that were shared with the principal defendant for comment. The receiver was directed to select an investment bank to auction KXI, in whole or in discrete parts, in order to obtain the highest possible value.

d. *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, C.A. No. 13389 (Del. Ch. Sept. 3, 1996), aff'd, 692 A.2d 411 (Del. 1997)

Plaintiff limited partner sought judicial dissolution of the limited partnership under Section 17-802 of the DRULPA alleging that it was not reasonably practicable to carry on the business of the partnership for its intended purpose and that the general partner had breached its fiduciary duties to the limited partners and committed gross negligence in managing the partnership. As the court noted, the partnership agreement did not provide for removal of the general partner by the limited partners.

The court rejected plaintiff's claims that the partnership was not producing returns as great as anticipated and that the partnership was engaging in direct competition with the business of the plaintiff, holding that the partnership agreement had no set timetable for partnership profitability and did not prohibit competition between the partnership and its partners. The court also rejected plaintiff's claim that the general partner violated its fiduciary duties by refusing to sell the partnership when the plaintiff considered the sale value of the partnership to be greater than its operating value because (i) the sale of the partnership requires the unanimous consent of all of the partners under DUPL Section 1509 and could not be accomplished unilaterally by the general partner and (ii) the general partner owned a majority interest in the partnership and had the right to manage the partnership in accordance with the partnership agreement and was under no duty to abandon the partnership and sell it simply because one partner believed it to be in its own best interests. Finally, with regard to the plaintiff's claims of gross negligence, the court held that under the partnership agreement plaintiff had the burden of proving that the general partner acted in a recklessly uninformed manner and that plaintiff had failed to meet that burden.

e. *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, C.A. No. 12036 (Del. Ch. Oct. 6, 1992) and (Del. Ch. July 28, 1993)

Plaintiff limited partners brought an action for breach of contract and breach of fiduciary duties against the corporate general partner and the general partner's directors and sole stockholder. The plaintiffs sought to require the defendants to perform what plaintiffs considered to be their duties under the partnership agreement and related agreements, or in the alternative, they sought a judicial dissolution of the partnership and damages in an amount that reflected their share of future profits that would have been earned during the term of the partnership. The defendants moved for partial summary judgment seeking dismissal of the plaintiffs' claim for dissolution of the partnership.

The court denied defendants' motion for summary judgment, holding that if the plaintiffs succeeded in proving that there had been material breaches of duties arising from the partnership agreement and that these breaches were such as to make continuation of the business of the limited partnership impracticable, then dissolution of the partnership could be appropriate. However, in the trial that followed, the plaintiffs were unable to support their claims of breach of duty and their motion for dissolution was denied.

f. *PC Tower, Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, C.A. No. 10788 (Del. Ch. June 8, 1989)

The general partner of a limited partnership sought an order directing the judicial dissolution of the partnership under DRULPA Section 17-802 or, in the alternative, a declaration that the general partner could resign from the partnership without liability upon finding itself in a position of irreconcilable conflict between the fiduciary duty owed as a general partner to the limited partners and its duty to its parent with respect to actions it might take to improve the financial conditions of the limited partnership. Because the imminent foreclosure of a plot of real estate had eliminated any reasonable opportunity for the partnership to fulfill its express purpose of using that real estate "for profit and as an investment," the court ordered the dissolution of the limited partnership based on a finding that it was no longer reasonably practicable to carry on the business of the partnership in conformity with the partnership agreement.

3. Winding Up

a. *Techmer Accel Holdings, LLC v. Amer*, C.A. No. 4905-VCN (Del. Ch. Dec. 29, 2010) and (Del. Ch. Feb. 8, 2011)

This case involved a suit by a creditor and certain of its affiliates against Crescent Private Capital L.P., a Delaware limited partnership ("Crescent"), Crescent's general partner ("Crescent GP"), and Crescent GP's managing member. As a result of a transaction in which the creditor acquired Crescent's last portfolio company, the creditor had a potential claim for indemnification against Crescent. Crescent distributed most of the proceeds from the transaction to its partners, but retained funds in excess of the potential indemnification liability. The creditor later made a claim against Crescent for indemnification, and while a related arbitration proceeding was pending, certificates of cancellation were filed on behalf of Crescent and Crescent GP terminating their status as legal entities. Plaintiffs then brought this action alleging that Crescent was wound up in contravention of DRULPA Section 17-804 by failing to make adequate provision for Crescent's liabilities before the filing of its certificate of cancellation and seeking the nullification of its certificate of cancellation and the appointment of a receiver pursuant to DRULPA Section 17-805 to manage the affairs of Crescent. Defendants contended that there was no violation of Section 17-804 because Section 17-804 applies only to distributions following the dissolution of a limited partnership and Crescent made no distributions following its dissolution.

In its decision, the court addressed the parties' cross-motions for summary judgment. The court began its analysis with an interpretation of the statutory language of Section 17-804 to determine whether Section 17-804 only applies to distributions occurring after the dissolution of a limited partnership. The court noted that under the canons of statutory interpretation the threshold question was whether Section 17-804 is ambiguous. The court first looked at whether Section 17-804 is ambiguous based on a susceptibility to alternate interpretations and concluded that Section 17-804 is not ambiguous, pointing to language in Section 17-804 that makes clear that its limitations and requirements apply only to "[a] limited partnership which has dissolved" and "[u]pon the winding up" of a limited partnership's affairs. The court also considered whether ambiguity might exist on the basis that the plain language of Section 17-804 produces unreasonable consequences in light of legislative intent. The court stated that under a literal reading of Section 17-804, a limited partnership could largely avoid the limitations of Section 17-804 by making a distribution to its partners prior to dissolution and, so long as the distribution did not violate Section 17-607 (which governs partner distributions before dissolution), the distribution would fall outside the scope of Section 17-804. The court held that, although a literal reading of Section 17-804 "creates the potential for offensive behavior," Section 17-804 makes clear that the legislature intended different methods of protecting creditors based on the status of the limited partnership—that is, Section 17-804 clearly applies only upon the dissolution of a limited partnership and Section 17-607 affords protection to creditors prior to dissolution.

Having concluded that Section 17-804 applies only upon the dissolution of a limited partnership, the court then turned to the issue of whether Crescent had dissolved prior to the date of the distribution to its partners. Defendants contended that Crescent dissolved on April 30, 2009, which was the expiration date of the ten-year term of Crescent set forth in its partnership agreement. Plaintiffs, on the other hand, argued that Crescent's dissolution and winding up began as early as April 2007 based on other potential events of dissolution. The court concluded that dissolution occurred at the latest on April 21, 2009 when the certificate of cancellation of Crescent GP was filed. The court, however, was unable to determine on the record before it whether Crescent's dissolution had occurred at an earlier point in time. Since the court could not determine whether Crescent had dissolved prior to the partner distribution, it also was unable to determine whether the contested distribution was subject to Section 17-804. Because Crescent had approximately $59,000 in assets left undistributed at the time its certificate of cancellation was filed, the court did conclude, however, that Crescent had not complied with the requirement under DRULPA Section 17-203 that its winding up be completed before the filing of its certificate of cancellation.

The court then addressed plaintiffs' requests to nullify the certificates of cancellation of Crescent and Crescent GP and to appoint a receiver to manage Crescent's affairs. Under DRULPA Section 17-805, a court may appoint a receiver only when a certificate of cancellation has been filed on behalf of a limited partnership and the party requesting appointment shows good cause. In this case, the court concluded that good cause to appoint a receiver existed because Crescent, having outstanding liabilities and retained assets when its certificate of cancellation was filed, failed to settle and close its business properly. The court, however, rejected plaintiffs' request to nullify the certificates of cancellation, finding instead that appointment of a receiver provided the necessary relief under the circumstances.

In a subsequent decision by the court, the court addressed defendants' motion for reargument of the court's appointment of a receiver under DRULPA Section 17-805. In support of their motion, defendants offered evidence that Crescent did not have assets that had not been disposed of at the time of the filing of its certificate of cancellation. The approximately $59,000 in assets that earlier facts had indicated remained in Crescent at the time it certificate of cancellation was filed had in fact been distributed to Crescent's accounting firm in payment for preparation of Crescent's final tax return and to Crescent GP in partial payment of management fees payable. The court stated that even if it accepted the new evidence as true, it would not change the court's conclusion that Crescent had not made a proper settlement of its unfinished business as required by DRULPA Section 17-203 because it had not made reasonable provision under DRULPA Section 17-804 to pay its indemnification obligation to plaintiffs. The court thus rejected defendants' motion for reargument.

b. *In re CC&F Fox Hill Assocs. Ltd. P'ship*, C.A. No. 15430 (Del. Ch. June 12, 1997), *reh'g denied* (Del. Ch. July 7, 1997)

After limited partners questioned certain actions taken, or omitted to be taken, by the limited partnership, the general partner filed a certificate of cancellation of the partnership without notifying the limited partners. The limited partners, without knowledge that the partnership had been terminated, made written demand on the general partner to bring a derivative action and, after failing to receive an adequate response from the general partner, filed a derivative action in Massachusetts. The Massachusetts' courts dismissed the limited partners' action because the limited partnership had not registered to do business in Massachusetts and could not register because it was no longer a legal entity. The plaintiff limited partners then brought suit in the Delaware Court of Chancery requesting that the court nullify the limited partnership's certificate of cancellation. The court held that the certificate of cancellation was improperly filed because the limited partnership had not been dissolved under the terms of the partnership agreement. In addition, the court held that even if the partnership had been properly dissolved, the affairs of the partnership were not wound up in accordance with Section 17-804(b) of the DRULPA, which requires a limited partnership upon dissolution to pay or make reasonable provision to pay all of its claims and obligations, including all contingent, conditional or unmatured claims and obligations. The general partner had been aware of the plaintiff limited partners' claims at the time the certificate of cancellation was filed and had not made any reasonable provisions to provide for such claims. Therefore, the court granted the plaintiffs' motion to nullify the limited partnership's certificate of cancellation. On a motion for rehearing, the court rejected the general partner's argument that Section 17-804(b) only applies to creditors of a limited partnership. The court stated that Section 17-804(b), by its terms, applied to "claimants" and, absent an indication that it was intended to be limited to creditors, should be construed to protect the rights of derivative claimants as well as the rights of creditors and partners.

c. *Boesky v. CX Partners, L.P.*, C.A. Nos. 9739, 9744, 9748 (Del. Ch. Apr. 28, 1988)

Certain limited partners sought to enjoin a non-pro rata liquidating distribution proposed by the partnership's liquidator (who had been appointed upon the withdrawal of the general partner). The proposed distribution sought to exclude the objecting limited partners from receipt of liquidating distributions based on the liquidator's belief that they were involved in wrongdoing and would ultimately be found liable for damages to the partnership. Implementation of the non-pro rata distribution required either the adoption of an amendment of the partnership agreement or a breach of its explicit terms allegedly dictated by the liquidator's fiduciary obligations. However, amendments to the partnership agreement were required to be approved by the "general partner," and the court concluded that under the terms of the partnership agreement the liquidator did not possess the power of a general partner to approve an amendment concerning distributions. Accordingly, the proposed amendment could not properly be adopted. Similarly, the court concluded that although the non-pro rata distribution did not constitute a breach of fiduciary duty, it did constitute an unenforceable breach of the partnership agreement. Consequently, the court preliminarily enjoined the making of liquidating distributions.

The court also addressed certain issues relating to creditors' rights in connection with liquidating distributions. In this regard, it noted that prior to making distributions to partners, the DRULPA allowed a liquidator to pay creditors or establish reserves. In the absence of legislative history amplifying the procedure for establishing reserves, the court looked to the corporate law for guidance and concluded that if the liquidator established reserves, a creditor would be entitled to adequate security and such security could in appropriate cases be afforded by the general assets left in the partnership. However, if the liquidator chose to make a distribution to partners before all creditors had been paid or actually funded, dollar for dollar, in segregated reserves, the liquidator would bear the burden of proving the adequacy of the proposed security. The court also noted that in appropriate cases a promise to repay a distribution by a creditworthy limited partner if required to satisfy creditors' claims, coupled with an undertaking by such limited partner to submit to the jurisdiction of the Delaware Court of Chancery to resolve any related disputes, could constitute adequate security for contingent, unliquidated claims against the partnership.

4. Appointment of Liquidating Trustees and Receivers

a. *Steven M. Mizel Roth IRA v. Laurus U.S. Fund, L.P.,* C.A. No. 5566 (Del. Ch. Feb. 25, 2011)

Plaintiff was a limited partner of a Delaware limited partnership that served as a feeder fund (the "Feeder Fund") for a Cayman Islands master fund (the "Master Fund"). Following the Master Fund entering into voluntary liquidation, plaintiff filed this action seeking judicial dissolution of the Feeder Fund under Section 17-802 of the DRULPA and the appointment of a liquidating trustee or receiver to manage its affairs. Plaintiff contended that the principals of the general partner of the Feeder Fund (who also controlled the Master Fund) had an interest in prolonging the dissolution of the Feeder Fund to increase the management fees to which the general partner was entitled and, because some of the Master Fund's asset were being purchased by the principals, the principals were improperly incentivized to liquidate those assets at low prices. This was the court's decision on the Feeder Fund's motion to dismiss and plaintiff's motion for summary judgment.

The court, in evaluating whether it was reasonable practicable to carry on the business of the Feeder Fund in conformity with its partnership agreement (which is the standard for judicial dissolution under Section 17-802), noted that judicial dissolution is "a limited remedy that Delaware courts grant sparingly." The court looked to the purpose clause of the Feeder Fund's partnership agreement to determine whether the business of the Feeder Fund could be carried on in accordance with the partnership agreement notwithstanding the liquidation of the Master Fund. The purpose clause provided that the Feeder Fund's purpose was to "serve as a fund through which the assets of its partners will be utilized to invest, hold and trade in securities and other financial instruments of any name and nature which exist now or are hereafter created and rights and options relating thereto." Plaintiff argued that it was not reasonably practicable to carry on the purpose of the Feeder Fund because the Feeder Fund's only purpose was to invest in the Master Fund. The court held, however, that maintaining a passive investment in the Master Fund during its liquidation was within the purposes as set forth in the Feeder Fund's partnership agreement and therefore granted the Feeder Fund's motion to dismiss the judicial dissolution claim.

With respect to plaintiff's request for the appointment of a liquidating trustee, the court held that because the Feeder Fund had not yet dissolved, there was no basis for the appointment of a liquidating trustee of the Feeder Fund under Section 17-803 or 17-805 of the DRULPA. With respect to plaintiff's request for appointment of a receiver under the court's equitable powers, the court noted that Delaware courts exercise the power to appoint a receiver with great caution because appointing a receiver is an extraordinary remedy. Since plaintiff had not made any specific allegations that the general partner had engaged in fraudulent activity or gross mismanagement of the Feeder Fund's affairs, the court held that there was not plausible basis for the court to appoint a receiver and granted the Feeder Fund's motion to discuss the petition for a liquidating trustee or receiver.

b. *Techmer Accel Holdings, LLC v. Amer*, C.A. No. 4905-VCN (Del. Ch. Dec. 29, 2010) and (Del. Ch. Feb. 8, 2011)

This case involved a suit by a creditor and certain of its affiliates against Crescent Private Capital L.P., a Delaware limited partnership ("Crescent"), Crescent's general partner ("Crescent GP"), and Crescent GP's managing member. As a result of a transaction in which the creditor acquired Crescent's last portfolio company, the creditor had a potential claim for indemnification against Crescent. Crescent distributed most of the proceeds from the transaction to its partners, but retained funds in excess of the potential indemnification liability. The creditor later made a claim against Crescent for indemnification, and while a related arbitration proceeding was pending, certificates of cancellation were filed on behalf of Crescent and Crescent GP terminating their status as legal entities. Plaintiffs then brought this action alleging that Crescent was wound up in contravention of DRULPA Section 17-804 by failing to make adequate provision for Crescent's liabilities before the filing of its certificate of cancellation and seeking the nullification of its certificate of cancellation and the appointment of a receiver pursuant to DRULPA Section 17-805 to manage the affairs of Crescent. Defendants contended that there was no violation of Section 17-804 because Section 17-804 applies only to distributions following the dissolution of a limited partnership and Crescent made no distributions following its dissolution.

In its decision, the court addressed the parties' cross-motions for summary judgment. The court began its analysis with an interpretation of the statutory language of Section 17-804 to determine whether Section 17-804 only applies to distributions occurring after the dissolution of a limited partnership. The court noted that under the canons of statutory interpretation the threshold question was whether Section 17-804 is ambiguous. The court first looked at whether Section 17-804 is ambiguous based on a susceptibility to alternate interpretations and concluded that Section 17-804 is not ambiguous, pointing to language in Section 17-804 that makes clear that its limitations and requirements apply only to "[a] limited partnership which has dissolved" and "[u]pon the winding up" of a limited partnership's affairs. The court also considered whether ambiguity might exist on the basis that the plain language of Section 17-804 produces unreasonable consequences in light of legislative intent. The court stated that under a literal reading of Section 17-804, a limited partnership could largely avoid the limitations of Section 17-804 by making a distribution to its partners prior to dissolution and, so long as the distribution did not violate Section 17-607 (which governs partner distributions before dissolution), the distribution would fall outside the scope of Section 17-804. The court held that, although a literal reading of Section 17-804 "creates the potential for offensive behavior," Section 17-804 makes clear that the legislature intended different methods of protecting creditors based on the status of the limited partnership—that is, Section 17-804 clearly applies only upon the dissolution of a limited partnership and Section 17-607 affords protection to creditors prior to dissolution.

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In a subsequent decision by the court, the court addressed defendants' motion for reargument of the court's appointment of a receiver under DRULPA Section 17-805. In support of their motion, defendants offered evidence that Crescent did not have assets that had not been disposed of at the time of the filing of its certificate of cancellation. The approximately $59,000 in assets that earlier facts had indicated remained in Crescent at the time it certificate of cancellation was filed had in fact been distributed to Crescent's accounting firm in payment for preparation of Crescent's final tax return and to Crescent GP in partial payment of management fees payable. The court stated that even if it accepted the new evidence as true, it would not change the court's conclusion that Crescent had not made a proper settlement of its unfinished business as required by DRULPA Section 17-203 because it had not made reasonable provision under DRULPA Section 17-804 to pay its indemnification obligation to plaintiffs. The court thus rejected defendants' motion for reargument.

H. Derivative Actions

1. Standing to Bring and Maintain a Derivative Action

a. *Culverhouse v. Paulson & Co. Inc.*, No. 349, 2015 (Del. Jan. 26, 2016)

The Delaware Supreme Court was presented with the following certified question from the U.S. Court of Appeals for the Eleventh Circuit, which it answered in the negative: Does the diminution in the value of a limited liability company, which serves as a feeder fund in a limited partnership, provide a basis for an investor's direct suit against the general partners when the company and the partnership allocate losses to investors' individual capital accounts and do not issue transferrable shares and losses are shared by investors in proportion to their investments?

At issue in this case was the failed investment made by a hedge fund (the "Main Fund") that was a Delaware limited partnership and had a Delaware limited liability company and a Delaware corporation as its general partners and managers (the "Fund Managers"). One of the limited partners in the Main Fund was another limited liability company which acted as a feeder fund (the "Feeder Fund") to the Main Fund. Plaintiff was a member of the Feeder Fund. In response to a failed investment by the Main Fund, plaintiff sued the Fund Managers on behalf of himself and other investors alleging breach of fiduciary duty, gross negligence and unjust enrichment. The district court dismissed the complaint for lack of standing because plaintiff's claims were derivative rather than direct. The question presented to the Delaware Supreme Court arose from the perceived tension between the court's decisions in *Tooley v. Donaldson, Lufkin & Jenrette* and *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*

In *Tooley*, the court established the test by which a court determines whether a claim is direct or derivative. To make that determination, a court must answer the following: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)? A plaintiff must then demonstrate that the duty breached was owed to the plaintiff and that he or she can prevail without showing an injury to the entity. Since *Anglo American* was decided before Tooley, the court in *Anglo American* did not apply this test. In *Anglo American*, which involved a hedge fund, the court denied a general partner's motion to dismiss the direct claim of a limited partner when that limited partner had based its direct claim on a diminution of the value of its investment as a result of the general partner's overdraw of its capital account.

In addressing the certified question in this case, the court applied Tooley and found that although the Fund Managers owed fiduciary duties to the limited partners of the Main Fund, plaintiff was not owed such duties because he was not a limited partner of the Main Fund. As such, plaintiff would not suffer directly from the Main Fund's losses nor benefit from any recovery relating thereto. Plaintiff's recourse was not at the Main Fund level but was limited to his contractual or fiduciary relationship with the Feeder Fund and its managers. The court held that *Tooley* applied despite the structural similarities of the funds in this case and the funds in *Anglo American*¸ because the limited partners in *Anglo American* did not invest through a feeder fund, but rather had a direct relationship with the hedge fund and therefore directly suffered the alleged harm and would receive the benefit of any recovery.

b. *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, C.A. No. 7141-VCL (Del. Ch. Dec. 2, 2015)

In its April 20, 2015 decision, the court held that the sole general partner (the "General Partner") of El Paso Pipeline Partners, L.P. (the "MLP") was liable for over $171 million (the "Liability Award") for a dropdown transaction referred to by the court as the "Fall Dropdown." After that decision, Kinder Morgan, Inc., El Paso Corporation, the MLP and the General Partner consummated a related-party merger that brought an end to the MLP's separate existence as a publicly traded entity. The General Partner then moved to dismiss the litigation, contending that the closing of the merger meant that the case must be dismissed because plaintiff styled his claim as derivative. According to the General Partner, the claim that resulted in the Liability Award was exclusively derivative and belonged to the MLP; therefore, when the merger closed and the MLP's separate existence ended, control over the claim passed to an affiliate of the General Partner and extinguished plaintiff's standing to sue. The court denied the General Partner's motion to dismiss, holding that, to the extent Delaware law required the court to view the claim as "either exclusively derivative or exclusively direct," the court viewed the claim as exclusively direct because the claim that supported the Liability Award was a claim for breach of contract. Therefore, plaintiff could continue to pursue the claim after the merger closed. However, the court noted that it would be more appropriate to view plaintiff's claim as dual-natured, with aspects that were derivative for applying Rule 23.1 and demand requirements and direct for determining whether plaintiff, as sell-side investor, could continue to pursue his claim after the merger. Under this analytical framework, plaintiff could continue to pursue the claim. Under either analysis, the court could implement the Liability Award through a *pro rata* recovery in favor of the limited partners at the time of the merger who were not affiliated with the General Partner, which it ultimately did.

The court began its analysis by reciting the black-letter law: a cause of action that belongs to a corporation is a corporate asset that passes to a surviving entity in a merger.

Therefore, if stockholders were pursuing a derivative claim at the time of a merger, the merger would extinguish the stockholders' claim. However, if those stockholders were pursuing an individual claim at the time of the merger, the claim was theirs and would not be extinguished by the merger. The court quoted then-Vice Chancellor Strine: "the question of whether the plaintiffs' claims are individual or derivative becomes outcome determinative. If the claims are individual, the plaintiffs' claims survive the merger. If not, the plaintiffs' claims are extinguished." *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 82 (Del. Ch. 1999).

Here, the court noted that plaintiff proved at trial that the General Partner breached its contractual obligations under the Limited Partnership Agreement at issue. Therefore, the court stated that if it must choose between categorizing plaintiff's claim as either direct or derivative, then its decision concluded that the claim was direct because plaintiff proved that the General Partner breached a contract to which plaintiff and the other limited partners were parties. Therefore, they "were and remain entitled to enforce the terms of that agreement."

However, the court cited to a "more nuanced reason" why plaintiff should not lose standing to sue, resulting in what the court viewed as a windfall for the General Partner at the expense of the unaffiliated limited partners. That reason was that "Delaware law does not only regard claims as either exclusively derivative or exclusively direct" but regards some claims as having features of both categories, though the court conceded that such decisions were controversial. Viewing the context in which such cases arose, the court stated that this litigation arose in a similar context—where a merger extinguished the separate legal existence of the entity on whose behalf the claim was being pursued. Therefore, the court stated that plaintiff asserted a dual-natured claim that he did not lose standing to pursue after the merger closed. The court then went on to proffer a new development in how Delaware law should address dual natured claims—by characterizing such claims as derivative for purposes of claim initiation and as direct for purposes of claim termination, at least in instances where plaintiff(s) should have the option to pursue a dual-natured claim as direct after a merger.

Finally, the court addressed the General Partner's argument that plaintiff should be estopped from arguing that his claim was anything but derivative. The court found neither ground for estoppel (a representation or promise and prejudicial reliance) present.

The court stated that it would implement the Liability Award through an order requiring the General Partner to pay each limited partner that was unaffiliated with the General Partner at the time of the merger its pro rata share of the Liability Award, plus pre- and post-judgment interest through the payment date, less attorneys' fees and expenses.

c. *Gerber v. Enter. Holdings, LLC, n/k/a Enter. Products Holdings, LLC*, C.A. No. 3543-VCN (Del. Ch. Jan. 18, 2013)

This case involved the purchase by Enterprise GP Holdings, L.P., a master limited partnership (the "Partnership"), of Texas Eastern Products Partners, LLC ("Teppco GP") from affiliates of Dan L. Duncan ("Duncan"), who indirectly owned the general partner (the "General Partner") of the Partnership and controlled the Partnership. In 2005, Duncan caused an affiliate of the General Partner to purchase Teppco GP. Twenty-seven months later, the Partnership purchased Teppco GP for the same purchase price but after certain assets worth almost half the transaction price were stripped and retained by Duncan (the "Transaction"). The Partnership later merged with another limited liability company ("MergeCo") and no longer exists. Defendants' motion to dismiss under Rule 12(b)(6) was granted because plaintiff failed to state a claim.

Plaintiff, a former limited partner of the Partnership and current holder of interests in the parent of MergeCo, challenged the Transaction on behalf of the Partnership as unfair to the Partnership, claiming the defendants breached fiduciary duties in approving the Transaction. The limited partnership agreement of the Partnership (the "LPA") eliminated common law fiduciary duties of the General Partner and its board of directors, as permitted by Section 17-1101(d) of DRULPA. Under the LPA, a conflict of interest between the General Partner and the Partnership would be permitted, deemed approved by all partners of the Partnership, and not constitute a breach of the LPA or any duty if the course of action was approved by "Special Approval" of a majority of members of the Partnership's Audit and Conflicts Committee (the "Committee"). The Committee was a committee of the Board of Directors of the General Partner composed of three or more directors meeting the independence, qualification and experience requirements established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by the New York Stock Exchange (the "NYSE").

Plaintiff claimed the Committee failed to meet the LPA's independence standards under the NYSE's rules and regulations and failed to act in good faith in considering the Transaction. The NYSE Listed Company Manual provided that a director qualifies as independent if the board "affirmatively determines that the director has no material relationship with the listed company" and none of the disqualifying conditions apply. The court found that the Partnership made the affirmative determination required and that none of the disqualifying conditions applied, and, therefore, the NYSE Listed Company Manual requirements were satisfied. It did not matter that members of the Committee owned units in limited partnerships controlled by Duncan because the NYSE Listed Company Manual explicitly provided that ownership of stock does not, by itself, bar an independence finding.

Plaintiff further contended that the Committee failed to act in good faith in considering the Transaction. The LPA eliminated common law fiduciary duties and contained a specific mechanism for resolving conflicts of interest—approval by a majority of the members of the Committee—which did not include an express duty to act in good faith. The court found that, even if a separate provision in the LPA requiring good faith applied, the Committee did not violate such duty. The LPA defined "good faith" as a belief "that the determination or other action is in the best interests of the Partnership." Courts have interpreted similar language to mean the actor subjectively believed the act was in the best interests of the limited partnership, requiring a complaint to allege defendants had a subjective belief that the act was not in the best interests of the limited partnership. The inquiry focuses on conduct evidencing an "intent to harm the company." The court held that a run-up in the price of Teppco GP over more than a 2-year period alone was not sufficient to trigger a reasonable inference that defendants lacked a subjective belief that the Transaction was in the Partnership's best interests, and the court would not "speculate or guess as to whether the price paid was appropriate under market conditions at the time." Because the Transaction was granted Special Approval, the defendants satisfied their express obligations under the LPA and plaintiff failed to state a claim.

The court also considered whether defendants breached the implied covenant of good faith and fair dealing, which a limited partnership agreement cannot contractually eliminate pursuant to Section 17-1101(d) of DRULPA. The court held that, because the LPA did not require consideration of any particular factors in granting Special Approval, exculpated defendants from liability absent bad faith, fraud, willful misconduct, or knowledge that conduct was criminal, and expressly waived fiduciary duties, a judicially-imposed requirement that Special Approval be objectively fair and reasonable could not be read into or reconciled with the LPA's framework. Plaintiff's claim against other defendants for aiding and abetting a breach of fiduciary duty similarly failed because plaintiff failed to state a claim for breach of fiduciary duty.

Defendants also challenged plaintiff's standing to bring the claims because plaintiff did not make a demand on the General Partner to bring the action. Although the court found that plaintiff's claims failed to state a claim and, therefore, should be dismissed, it also addressed defendants' claim that plaintiff lacked standing because he failed to make a pre-suit demand, noting that standing is a threshold question. The court looked to the corporate law test found in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), for determining whether a claim is direct or derivative, which asks (1) who suffered the alleged harm and (2) who would receive the benefit of the recovery or remedy. The court noted the difficulties of applying corporate law derivative rules to partnership-related claims, but nonetheless applied the established principles of the *Tooley* analysis. The court determined that all of plaintiff's claims were derivative. In a derivative action, Section 17-1003 of DRULPA requires a complaint set forth with particularity plaintiff's efforts to secure initiation of the action by the general partner or the reasons for not making such efforts. Plaintiff claimed that the Partnership paid too much for Teppco GP and thus, if successful, any recovery would be paid to the Partnership, or MergeCo as the Partnership's successor. Plaintiff claimed that the General Partner was controlled by Duncan's interests and therefore could not have independently and fairly assessed whether to pursue the action. Although the General Partner acts through its board of directors, because DRULPA refers to the general partner of the limited partnership and not to the general partner's governing body, the General Partner's independent board would not overcome Duncan's control over the General Partner for purposes of determining whether demand was futile. Therefore, the court held that demand was excused and plaintiff had standing to bring the action.

d. *Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, C.A. No. 7092-VCP (Del. Ch. Dec. 20, 2012)

In this case, the Delaware Court of Chancery was presented with a motion to dismiss numerous claims by certain limited partners of Tremont Opportunity Fund II, L.P., a Delaware limited partnership (the "Fund"), against Tremont Partners, Inc., a Connecticut corporation and the general partner of the Fund (the "General Partner"), Tremont Group Holdings, Inc., a Delaware corporation and the parent of the General Partner (the "Parent"), and certain individuals that were officers, directors, managers and principal decision makers of the General Partner and the Parent (the "Individual Defendants"). The claims were all related to losses connected with an investment by the Fund in a hedge fund (the "Hedge Fund") that invested most of its assets in Bernard Madoff's ponzi scheme. The General Partner was also the general partner of the Hedge Fund. In the context of this motion to dismiss, the court addressed, among other things, whether (i) the court had jurisdiction over the Individual Defendants, (ii) an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims, (iii) certain claims were derivative or direct and whether the derivative claims should be permitted notwithstanding a settlement in an action involving similar claims filed by other limited partners of the Fund in the United States District Court for the Southern District of New York (the "New York Case"), (iv) plaintiffs could maintain a valid breach of contract claim under the partnership agreement of the Fund and a private placement memorandum (the "PPM") relating to interests in the Fund on which plaintiffs' allegedly relied, (v) defendants' breached the implied covenant of good faith and fair dealing and (vi) whether the Parent could be liable for aiding and abetting the General Partner's alleged breach of fiduciary duty.

The court first addressed whether it could exercise personal jurisdiction over the Individual Defendants. The partnership agreement of the Fund included a clause pursuant to which the parties thereto consented to the exclusive jurisdiction of the Delaware courts. However, the court observed that the Individual Defendants were not parties to the partnership agreement of the Fund simply by virtue of being directors, officers, managers or decision makers of the General Partner and thus they were not bound by such provision. Plaintiffs' further claimed that the court had jurisdiction under Delaware's long-arm statute, but the court granted the Individual Defendants' motion to dismiss on this issue, finding that participation in the formation of the Fund and having management positions in the Fund did not cause the Individual Defendants to have contacts with the State of Delaware so extensive and continuing that exercising personal jurisdiction would be fair and consistent with state policy. The court also found that the alleged wrongs did not arise out of conduct that occurred within the State of Delaware, and therefore, the court did not have personal jurisdiction on that basis under the Delaware long-arm statute.

The court next turned to defendants' argument that an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims for breach of contract, breach of fiduciary duty, negligent misrepresentation and unjust enrichment. This provision essentially exculpated the General Partner and the Parent for any losses or expenses except those resulting from gross negligence, willful misfeasance, bad faith or reckless disregard of duties under the partnership agreement of the Fund. Plaintiffs claimed that they adequately pled facts that would support a finding of gross negligence. The court referred to the definition of "gross negligence" in the civil context as "a higher level of negligence representing an extreme departure from the ordinary standard of care." The court further indicated that gross negligence is a decision "so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion." The court stated that, under the law of entities, gross negligence "involves a devil-may-care attitude or indifference to duty amounting to recklessness." In order to prevail on a claim of gross negligence, the court stated that a plaintiff must plead and prove that the defendant was "recklessly uninformed" or acted "outside the bounds of reason." Plaintiffs' generally claimed that defendants committed gross negligence by failing to supervise, monitor and manage investments by the Hedge Fund in the Madoff ponzi scheme and instead blindly and recklessly handed over their responsibility to Madoff without performing any due diligence. The court observed that while no Delaware case has addressed whether failure to heed "warning signs" can constitute gross negligence in the partnership context, the analysis in *Forsythe v. ESC Fund Mgmt. Co. (U.S.)* was instructive. The court noted that in *Forsythe*, a motion to dismiss that accused the general partner of failing to oversee an affiliate that was delegated management responsibility for the subject limited partnership was denied. The court found that in this case, defendants' conduct was arguably more egregious than that at issue in *Forsythe*, and therefore, the court denied the motion to dismiss based on the exculpation provision.

The court next addressed whether plaintiffs' breach of fiduciary duty and unjust enrichment claims were derivative or direct claims. The court applied the test set forth in the corporate case of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, which requires answering two questions in making this determination: (1) who suffered the alleged harm; and (2) who would receive the benefit of any recovery or other remedy. The court noted that these claims related to a diminution in the value of the Fund and the Hedge Fund resulting from the Madoff ponzi scheme. According to the court, these injuries were suffered by the Fund and the Hedge Fund, and only indirectly by plaintiffs, and thus, they were derivative in nature. With respect to these claims and all other derivative claims asserted by plaintiffs, including, among others, claims of negligent misrepresentation and intentional misrepresentation, plaintiffs argued that their claims must have been direct because they elected to opt-out of the settlement in the New York Case. The court found, however, that opting-out of a settlement cannot convert a derivative claim to a direct claim. The court further held that because the settlement released defendants with respect to derivative claims, the court was bound by res judicata and thus granted the motion to dismiss.

Plaintiffs alternatively argued that principles of equity warranted disregarding the distinction between their direct and derivative claims. Although the court acknowledged that there was some authority under the *Cencom* and the *Anglo American* limited partnership cases that principles of equity could warrant disregarding a distinction between direct and derivative claims, the court found that those cases involved unique circumstances and there were no similar circumstances in the present case that warranted disregarding the derivative nature of plaintiffs' claims.

The court then discussed defendants' motion to dismiss plaintiffs' claim that defendants breached the partnership agreement of the Fund and the PPM because they allegedly failed to analyze, evaluate and monitor the Madoff-related investments in any manner whatsoever and failed to perform any meaningful due diligence or to monitor the Hedge Fund's investments. The court looked to the PPM, which expressly provided that the General Partner would monitor the Fund's investments and evaluate information regarding the personnel, history and background of professional investment management firms in selecting managers of the Fund. The court also assessed the partnership agreement of the Fund, which provided that the General Partner and its affiliates were not obligated to do or perform any act or thing in connection with the business of the Fund not expressly set forth in the partnership agreement of the Fund. The court found that this provision conflicted with another provision in the partnership agreement of the Fund, which provided that the PPM did not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading. In applying well settled Delaware principles of contract interpretation, the court found that because of this conflict, the partnership agreement of the Fund was ambiguous as to whether it incorporated the promises made in the PPM that were allegedly breached. Because any ambiguity must be resolved in favor of the nonmoving party, the court denied defendants' motion to dismiss the breach of contract claim.

With respect to plaintiffs' claim that defendants' breached the implied covenant of good faith and fair dealing, the court stated that plaintiffs' must have alleged (1) a specific obligation implied in the partnership agreement of the Fund, (2) a breach of that obligation, and (3) resulting damages. Plaintiffs alleged that the General Partner had an obligation to refrain from unreasonable conduct and had an implied contractual obligation to collect, analyze and evaluate information when selecting investment managers and to monitor their performance after any such selection. The court held that this allegation was conclusory and did not amount to pleading a specific implied contractual obligation as required to survive a motion to dismiss. Accordingly, the court granted defendants' motion to dismiss this claim.

Finally, the court addressed plaintiffs' claim that the Parent aided and abetted the General Partner's alleged breach of fiduciary duty. To make a valid aiding and abetting claim, the court indicated that plaintiffs must demonstrate: (1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) that damages to plaintiffs resulted from the concerted action of the fiduciary and the nonfiduciary. The court noted that the General Partner undoubtedly owed fiduciary duties to the limited partners of the Fund. With respect to the third element, the court indicated that, under Delaware law, the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal. In this case, the court found that the General Partner could be considered the Parent's agent, and the General Partner's knowledge could be imputed to the Parent. Thus, the court found that the third element was satisfied. The court did not address the fourth element and denied defendants' motion to dismiss this claim.

e. *Gerber v. Enter. Prods. Holdings, LLC*, C.A. No. 5989-VCN (Del. Ch. Jan. 6, 2012)

Plaintiff brought a purported class action challenging two transactions: the sale by Enterprise GP Holdings, L.P. ("EPE") of Texas Eastern Products Pipeline Company, LLC ("TEPPCO GP") to Enterprise Products Partners, L.P. ("Enterprise Products") (the "2009 Sale") and the merger of EPE into a wholly owned subsidiary of Enterprise Products (the "Merger"). Plaintiff alleged that in 2007, EPE had purchased TEPPCO GP for approximately $1.9 billion (the "2007 Purchase") and that under the terms of the 2009 Sale EPE received approximately $100 million in compensation. In accordance with the procedure in the EPA partnership agreement, the 2009 Sale had been submitted to the Audit, Conflict and Governance Committee (the "ACG Committee") of EPE's general partner ("EPE GP"). In connection with its review of the 2009 Sale, the ACG Committee hired Morgan Stanley & Co. who opined that the consideration to be paid pursuant to the 2009 Sale was fair from a financial point of view to EPE and to the public limited partners of EPE. The ACG Committee approved the 2009 Sale and recommended it to the full Board which subsequently approved the 2009 Sale. Morgan Stanley was also hired by the ACG Committee to render an opinion on the Merger and they opined that the Merger exchange ratio was fair from a financial point of view. In his complaint, plaintiff alleged that defendants breached their express and implied duties under EPE's partnership agreement by causing EPE to undertake the 2009 Sale and also by causing EPE to enter into the Merger without valuing legal claims relating to the 2007 Purchase or the 2009 Sale (the "Claims"). Plaintiff also alleged that various controlling persons of Enterprise Products tortiously interfered with the EPE partnership agreement by causing EPE to undertake the 2009 Sale and the Merger and that those defendants were thereby unjustly enriched. In addition, plaintiff alleged that all defendants other than EPE GP aided and abetted the breaches of express and implied duties by EPE GP. Defendants moved to dismiss all claims. The court began by considering whether certain of plaintiff's claims were direct or derivative, noting that claims that an entity has entered into a transaction that was essentially "a bad deal" are typically derivative and also that a merger will typically deprive the merged entity's former equity holders of standing to pursue derivative claims. The court recognized, however, that when a principal purpose of a merger is the inequitable termination of derivative claims, those claims may be brought as direct claims following consummation of the merger, and the court held that plaintiff had met its burden of pleading facts from which the court could infer that a principal purpose of the Merger was the termination of the Claims. The court then turned to defendants' motion to dismiss all claims for failure to state a claim. In analyzing defendants' motion to dismiss, the court began with the proposition that absent contractual modification, a general partner and certain persons affiliated with the general partner such as the general partner's board of directors and controller each owe fiduciary duties to the limited partnership. The court noted, however, that the EPE partnership agreement modified the fiduciary duties of EPE

GP and its affiliates. Specifically, the partnership agreement provided that if a conflict transaction were approved by the ACG Committee ("Special Approval"), then it would be deemed approved by all partners and not constitute a breach of the partnership agreement or any law. Based on this provision, the court held that plaintiff's first count did not state a claim for breach of an express fiduciary duty against any defendant. However, the court also noted that the implied covenant of good faith and fair dealing constrained the Special Approval process. Under the implied covenant, the court found that EPE GP was required to act in good faith if it exercised its discretionary authority to use the Special Approval process to take advantage of the contractual duty limitation provided by the partnership agreement, and the court found that the complaint could fairly be read to allege that EPE GP acted in bad faith when it choose to use the Special Approval process. However, the court found that in connection with the 2009 Sale the ACG Committee had received a fairness opinion from Morgan Stanley and that EPE GP had relied on the Morgan Stanley fairness opinion in deciding whether to use the Special Approval process. The court also found that the EPE partnership agreement provided that when EPE GP relied on an expert report such as the Morgan Stanley fairness opinion, it was conclusively presumed to have acted in good faith. The court held that a plaintiff could not plead that a defendant has breached the implied covenant when defendant was conclusively presumed by the terms of a contract to have acted in good faith. The court therefore dismissed the claims relating to the 2009 Sale. For the same reason, it dismissed the claims relating to the Merger, which had also received Special Approval in reliance upon a Morgan Stanley fairness opinion. Finally, because it found no underlying breach, it dismissed the secondary liability claims as well resulting in the dismissal of all of plaintiff's claims.

f. *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, C.A. No. 2427-VCL (Del. Ch. Jan. 15, 2010)

In this decision, the Court of Chancery considered a settlement to resolve two representative actions by holders of limited partnership units of Teppco Partners L.P. ("Teppco"). The first action, styled as the "derivative action," challenged two transactions between Teppco and Enterprise Products Partners, L.P. ("Enterprise"). Teppco and Enterprise were under common control and the transactions allegedly unfairly favored Enterprise. The second action, referred to as the "merger action," related to Enterprise's proposal to acquire Teppco by merger.

A series of transactions moving assets from Teppco to Enterprise and relating to a joint venture gave rise to the derivative action. The Teppco audit committee approved the joint venture without obtaining a fairness opinion, and according to the opinion of the financial advisor employed by Enterprise, the deal was more favorable for Enterprise than comparable transactions. In the derivative action, plaintiffs alleged breaches of fiduciary duties and aiding and abetting of such breaches. (In addition, plaintiffs had earlier challenged disclosures made in connection with proposed transactions as inadequate, but the court had previously dismissed such claims. *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*)

During the pendency of the derivative action, defendants decided to pursue the merger between Teppco and Enterprise. The audit committee of Teppco's general partner engaged special legal counsel and considered the effect of the merger on the derivative action. After receipt of Enterprise's initial offer, which was deemed unacceptably low, the Teppco audit committee retained special Delaware legal counsel to advise the committee and independently assess the derivative action and a financial advisor to provide a sensitivity analysis. At this point, independent directors were appointed to the board of Teppco's general partner and the audit committee formed a special committee with the exclusive power to evaluate, negotiate and approve or reject the merger. The financial advisor and legal counsel previously employed by the audit committee were retained by the special committee.

During the course of the merger negotiations, defendants advised plaintiffs of the merger proposal, which would extinguish plaintiffs' standing in the derivative action. Upon the public announcement of the merger, plaintiffs filed the merger action but did not move to expedite the proceedings or enjoin the merger. At this point, the special committee negotiated with both Enterprise over the merger and with plaintiffs' counsel over the derivative action, to ultimately reach an agreement among the three sides. The special committee negotiated the exchange ratio of Teppco units for Enterprise units and then obtained plaintiffs' agreement to a settlement of all litigation in consideration for the merger. The special committee's financial advisor opined that the exchange ratio was fair but did not assign any value to the derivative action. The special committee did, however, receive a separate valuation that considered the derivative action, which was presented as supplemental evidence.

In assessing the settlement agreement as a resolution of both the derivative action and the merger action, the court noted that the claims in the derivative action actually afforded plaintiffs with a derivative right on behalf of Teppco and a direct right as limited partners for breach of the limited partnership agreement. Therefore, the court noted, after the merger, the Teppco unitholders could have pursued the direct claims in the derivative action after the merger as a de facto class action. Further, even in derivative actions, the continuous ownership requirement under Delaware law is suspended in cases in which a principal purpose of a merger is to terminate pending derivative claims. Because the derivative action could have been pursued post-merger in some form, the settlement agreement was properly considered as a resolution of the derivative action as well as the merger action.

Considering the fairness of the settlement, the court noted that in the context of representative litigation, a court must balance the policy favoring settlement with the need to fairly represent the interests of the class of plaintiffs because of the fiduciary nature of the litigation, weighing the value of the claims being compromised against the value to the class of the settlement. The court observed that the plaintiffs' claims in the derivative action seemed to be strong, given the language of Section 6.6(e) of the Teppco limited partnership agreement requiring that affiliate transactions be fair and reasonable to Teppco, considered in the context of all similar or related transactions. Under the limited partnership agreement, this standard would be deemed satisfied if the terms of the subject transaction were no less favorable to Teppco than those provided to or available from unrelated third parties. Defendants attempted to counter the application of this provision with the grant of full power and authority to the general partner to conduct the business of the partnership, including disposition of assets and entry into joint ventures, in its sole discretion under Section 6.1(a) of the limited partnership agreement. The court rejected defendants' argument, as it did not comport with a reading of the limited partnership agreement as a whole or in accordance with its plain meaning. Section 6.1(a) was a general grant of authority, while Section 6.6(e) was a specific provision as to transactions authorized under Section 6.1(a) and involving affiliates, and if Section 6.1(a) were to control, Section 6.6(e) would be read out of the agreement. The court also noted that if there was ambiguity, the agreement would be construed against the general partner who drafted it. With respect to the sole discretion standard, the court explained that *Gelfman v. Weedon Investors, L.P.* does not stand for the proposition that sole discretion language will trump any conflict of interest provision and that such language could not override a provision such as Section 6.6(e), which explicitly barred affiliate transactions that did not satisfy the standard set forth in the agreement. Applying Section 6.6(e) to the challenged transactions, the court found that there was a strong case for plaintiffs' breach claims, given that the transactions undervalued Teppco's assets, were pursued by fiduciaries who were conflicted and had reason to favor Enterprise, were not as favorable as a third party transaction and were unlikely to be fair and reasonable. As to plaintiffs' claims for common law breaches of fiduciary duty, however, the court found that the LP Act allows for a limited partnership agreement to limit or eliminate fiduciary duties and that Section 6.9(b) of the Teppco limited partnership agreement utilized this authority by providing an express standard displacing default fiduciary duties.

In contrast to the derivative action, the merger action was judged under an amended and restated limited partnership agreement. The operative provisions were modified to provide a more flexible standard for affiliate transactions, under which affiliate transactions were deemed to be fair and reasonable if blessed by special approval of a majority of the members of the audit committee. To the court, these provisions provided a weighty defense but not an automatic judgment for defendants. When such provisions are employed, the special approval remains subject to the implied covenant of good faith and fair dealing, which cannot be eliminated by a partnership agreement. Further, these particular provisions did not grant authority to the audit committee in its sole discretion and some form of reasonableness standard would likely apply. In the view of the court, the claims in the merger action were weaker but still a meaningful litigation threat.

The court then assessed the value of plaintiffs' claims and plaintiffs' and defendants' contentions as to potential damages in the derivative action and noted that both plaintiffs and defendants, as well as the special committee, had given the derivative action real value. The court questioned the premium obtained on the exchange ratio of units, and noted that there were no appraisal rights in the merger, that the majority of the minority votes were based on units voting rather than units outstanding, that plaintiffs did not challenge the merger and that the fees defendants agreed to were among the largest awarded by the court. However, the transaction was at a premium and negotiated by a special committee of independent, outside directors without ties to the controlling company who appeared to have acted in good faith and retained experienced financial and legal advisors. As to plaintiffs, the court found that they engaged in real work and created a substantial litigation risk. Balancing these factors, the court approved the settlement as fair and reasonable.

g. *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, C.A. No. 20066-NC (Del. Ch. Aug. 4, 2003)

The general partner of a hedge fund withdrew over $22 million from its capital account. The limited partners took issue with this withdrawal on three bases: (i) the withdrawal overdrew the general partner's account, (ii) the general partner was permitted by the fund agreement to withdraw funds only on the last day of a given month, which it did not do here, and (iii) the fund's annual audited financial statement did not disclose the general partner's withdrawal of funds. The plaintiff limited partners sued the general partner and the firm's independent auditors for breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, negligent misrepresentation and fraud. The defendants challenged the standing of the plaintiffs to bring the claims and moved to dismiss the complaint under Court of Chancery Rule 12(b)(6) (failure to state a claim). Delaware partnership law requires in a derivative action that the plaintiff be a partner or a partner's assignee at the time of bringing the action and at the time of the challenged transaction. Here, the plaintiffs did not meet these requirements because they had all withdrawn from the fund by the time the instant action was filed.

Chancellor Chandler spent a good deal of the opinion discussing the defendants' argument that all of the plaintiffs' claims were derivative and that the plaintiffs did not have the standing to bring a derivative claim. The court noted that the test for distinguishing direct from derivative claims in the context of a limited partnership is substantially the same as that used when the underlying entity is a corporation. If the injury is one that affects all partners proportionally to their *pro rata* interests in the partnership, the claim is derivative, the plaintiff sues for an injury done to the partnership and any recovery of damages is paid to the partnership. In a direct action, on the other hand, the plaintiff sues to redress an injury suffered by the individual plaintiff and damages recovered are paid directly to the plaintiff who suffered injury. But flexibility, common sense and equity predominate over formal distinctions: "[I]n some instances, the relationships among the parties and the function and structure of the partnership itself may diverge from the corporate model so dramatically that some claims, which in a corporate context might be classified as derivative, *must* be brought as direct claims in order to enable the injured parties to recover while preventing a windfall to individuals or entities whose interests were not injured." Here, even though a diminution in value of business entity is a quintessentially derivative claim, the court held that circumstances required that the claims be treated as direct. Otherwise, characterizing the plaintiffs' claims as derivative would have the perverse effect of denying both standing and recovery to the limited partners who were actually injured by the challenged transactions while granting ultimate recovery to new partners who were not harmed. Moreover, such characterization would do nothing to further the gatekeeping functions of derivative litigation requirements, which otherwise, but not in this instance, would promote corporate resolution of internal problems and deter strike suits. Such a result "makes no sense." Similarly, the plaintiffs' claim regarding the nondisclosure of material information, while at first glance a derivative claim, was treated here as a direct claim because of significant differences between the fund's structure and corporate structure and also because the general partner violated the contractual rights of the limited partners to receive an annual audited financial report, which rights were not also rights of the fund.

Although the plaintiffs' claims of fraud did not survive the defendants' motion to dismiss because they were not pled with sufficient particularity, all of the plaintiffs' other claims survived the motion to dismiss.

h. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, C.A. No. 15754-NC (Del. Ch. Sept. 27, 2000) (letter opinion) and (Del. Ch. Oct. 20, 2000)

Plaintiff limited partner brought direct and derivative claims challenging a series of unit purchases in a Delaware limited partnership by the corporate parent of the general partner and other related persons as unfair to the partnership and designed to entrench the general partner. The defendants alleged that prior to bringing the derivative action the plaintiff expressed a willingness not to pursue it if the plaintiff were given a fee-generating role to seek a financial restructuring of the partnership and that the plaintiff only pursued the action after the defendants refused the plaintiff's offer. The defendants asserted that, because the plaintiff attempted to coerce the partnership into paying it a fee to avoid this lawsuit, the plaintiff had a conflict of interest that precluded it from serving as a derivative plaintiff on behalf of the partnership and, in addition, that the doctrine of unclean hands barred the plaintiff's right to assert its claims. The plaintiff moved for summary judgment with respect to the defendants' affirmative defenses.

In evaluating the defendants' claim that the plaintiff is not a proper derivative plaintiff, the court adopted the standard developed under Delaware corporate case law, which requires a

> show[ing] that a serious conflict of interest exists, by virtue of one factor or a combination of factors, and that the plaintiff cannot be expected to act in the interests of others because doing so would harm his other interests. In effect, the defendant[s] must show a substantial likelihood that the derivative suit is not being maintained for the benefit of the [partners of the Partnership].

The court found that even though the lawsuit may have originated from unseemly behavior of the plaintiff, there was nothing in the plaintiff's litigation strategy that suggested that its prior behavior affected its ability to prosecute the action in a manner that was in harmony with the interests of the other unitholders. According to the court, the relief the plaintiff was seeking in the suit would benefit all of the unitholders of the partnership other than the defendants. The court stated that there was no evidence that the plaintiff's interests were adverse to the non-defendant unitholders and that, on the contrary, granting defendants' motion would allow the defendants' to avoid the merits of a lawsuit that could compromise their interests and benefit the other unitholders. The court thus granted the plaintiff an award of summary judgment declaring it to be a proper, non-conflicted plaintiff with standing to pursue this derivative lawsuit on behalf of the partnership.

The court then turned to the plaintiff's motion for summary judgment on the defendants' unclean hands affirmative defense. The defendants did not claim that the plaintiff's behavior in any way influenced the challenged transactions. Rather, the defendants' argued that they would not be facing a challenge to the transactions if they had not denied the plaintiff's extortionate offer. The court found that the plaintiff's alleged conduct had no effect on the court's analysis of whether or not the challenged transactions were proper. Therefore, the court held that the public policy underlying the clean hands doctrine would not be served by denying the plaintiff its right to seek relief that would benefit the other unitholders of the partnership and, in fact, the application of the clean hands doctrine in this circumstance may have the practical effect of exculpating the wrongful conduct of the defendants. The court thus granted the plaintiff's motion for summary judgment on the issue but noted that, if the defendants prevail in the derivative suit and prove that plaintiff engaged in the alleged conduct, they may have a basis to recover their fees and expenses incurred in defending this lawsuit and, if the defendants lose, the plaintiff's alleged conduct may be relevant in determining whether the plaintiff is entitled to recover its fees and expenses.

In a later proceeding in this action, the court addressed the plaintiff's motion for partial summary judgment seeking a declaration (i) that the plaintiff had standing to pursue the derivative action on behalf of the partnership and (ii) that the plaintiff had been admitted as a substituted limited partner of the partnership when it first acquired units in the partnership in 1994. The plaintiff filed this motion in response to the defendants' denial that the plaintiff had been admitted to the partnership prior to the general partner's decision to admit the plaintiff as a limited partner in 2000 during the course of this litigation.

With respect to the plaintiff's standing to pursue the derivative action, the court looked to Section 17-1001 of DRULPA, which provides that a limited partner or an assignee has the right to bring a derivative action. However, the provision giving an assignee the right to bring a derivative action was added to Section 17-1001 pursuant to an amendment that was not enacted until a year after this action was filed. Relying upon Section 17-1108 of DRULPA, which provides that all amendments to DRULPA shall be applied retroactively unless DRULPA expressly states otherwise, the court held that the amendment giving an assignee the right to bring a derivative action should be applied retroactively in this action and that, based on the defendants' concession that the plaintiff was an assignee, the plaintiff had standing to pursue the derivative action.

With respect to the plaintiff's admission as a substituted limited partner, the court examined the partnership agreement, which provided that an assignee must apply to become a substituted limited partner. Under the partnership agreement, an assignee was deemed to have applied to become a substituted limited partner by delivering a transfer application to a transfer agent or by otherwise becoming an assignee under the terms of the partnership agreement. The court determined that the plaintiff had applied to become a substituted limited partner both by becoming a assignee and by delivering a transfer application. The partnership agreement further provided that the general partner must decide whether to admit any assignees as a limited partner no later than thirty days after receiving a monthly list of the transfers by which such assignees acquired their units in the partnership, which decision must be in writing and that that the general partner must consent in writing to any application for admission of a limited partner and has sole and absolute discretion to withhold or grant such consent. The partnership agreement also provided that a person is admitted as a limited partner at the time such person is listed as a limited partner on the books and records of the partnership. The court found that (i) the plaintiff had made proper application for admission as a limited partner under the partnership agreement, (ii) the partnership's transfer agent had listed the plaintiff on the only list of limited partners maintained on behalf of the partnership, (iii) correspondence from the partnership to the plaintiff was addressed to the plaintiff as a limited partner and (iv) the general partner had essentially delegated the application process to its transfer agent. Despite these facts, the defendants argued that the general partner had breached its contractual duty to consider any applications for admission following the formation of the partnership and thus that no assignees had been admitted to the partnership since its formation (including the defendant itself with respect to its holdings of limited partnership units). The court held that the evidence clearly demonstrated that either the general partner had exercised its discretion to grant all applications for admission received by the general partner by affirmatively including all assignees in the only list of limited partners of the partnership or the defendant had breached its contractual duty to timely consider the plaintiff's application for admission and the proper remedy for such breach was to admit the plaintiff as a limited partner as of the date that its application should have been considered. Without determining which was the actual scenario, the court granted the plaintiff's motion for summary judgment on its claim that it was admitted as a substituted limited partner in 1994.

i. *Flynn v. Bachow*, C.A. No. 15885 (Del. Ch. Sept. 18, 1998)

Plaintiff brought a derivative action under DRULPA Section 17-1001, on behalf of a limited partnership and its general partner, claiming that defendant Bachow wrongfully misappropriated a partnership opportunity and failed to seek approval from the limited partnership's advisory committee before he made a personal investment of more than $500,000 in an operating company, as required by the partnership agreement. Plaintiff had been a limited partner in the general partner, also a limited partnership, but had, two weeks before bringing suit, acknowledged in settlement of a separate suit that his limited partnership interest had been validly repurchased. Defendant filed a motion to dismiss alleging lack of standing to bring suit and another limited partner filed a motion to intervene.

The court first converted defendants' motion to dismiss to a motion for summary judgment, then granted the summary judgment motion. In so doing, the court based its ruling on the conditions set forth in DRULPA Section 17-1002 for bringing a derivative suit on behalf of a Delaware limited partnership. The first predicate for standing required that the plaintiff be a partner at the time "of the bringing of the action." The plaintiff failed to meet this prong because his limited partnership interest in the general partner was extinguished when the general partner bought back the plaintiff's interest pursuant to a right granted to it under the general partner's partnership agreement. Because the plaintiff did not have an interest in the general partner at the time of the bringing of the action, he could not bring a derivative claim on behalf of the general partner. Similarly, the court held that because plaintiff's suit on behalf of the partnership would be in effect a double derivative suit brought on behalf of the partnership by the general partner, the buy-back of plaintiff's interest in the general partner also deprived him of standing to bring claims on behalf of the partnership.

In granting the intervenor's motion to intervene in part, the court again referred to DRULPA Section 17-1002. The intervenor satisfied the first predicate for standing because it owned its limited partner interest in the limited partnership at the time it filed its motion to intervene. The court's decision turned on the second predicate for standing—status as a partner at the time of the transaction complained of in the derivative suit or status which had devolved upon a plaintiff by operation of law or pursuant to terms of the partnership agreement from a person who was a partner at the time of the transaction at issue. The court denied the intervenor's motion to intervene with respect to the misappropriation of a limited partnership opportunity claim because the intervenor acquired its limited partner interest after the alleged misappropriation of the opportunity occurred and did not allege that it acquired the status of a partner pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction. However, the court held that the intervenor did have standing to pursue the advisory committee claim because the basis for that claim may have occurred after the intervenor acquired its interest in the limited partnership.

j. *U-H Acquisition Co. v. Barbo*, C.A. No. 13279 (Del. Ch. Jan. 31, 1994)

Plaintiffs commenced a consent solicitation in an attempt to acquire a group of limited partnerships. The general partners of the partnerships responded by adopting amendments to the partnership agreements significantly restricting the ability of the limited partners to act by written consent. The plaintiffs then filed suit to challenge the validity of the amendments to the partnership agreements, alleging that the adoption of the amendments constituted a breach of the general partners' fiduciary duties and seeking a declaratory judgment that the amendments were null and void. None of the plaintiffs were limited partners of any of the partnerships, although one of the limited partners had acquired an interest in a partnership as an assignee but had not been admitted as a substituted limited partner.

The court dismissed the claims of the plaintiffs for lack of standing. It held that in order to maintain a claim for breach of fiduciary duty, the plaintiffs must first show that they were owed such a fiduciary duty and because none of the plaintiffs (including the assignee) had a right to vote by written consent, they had no standing to bring a claim alleging breach of fiduciary duty relating to the exercise of a right to vote by written consent. In addition, certain aspects of the plaintiffs' claims were found to be derivative in nature, which required, among other things, the plaintiffs to be partners at the time of bringing the action under Section 17-1002 of the DRULPA. (DRULPA Sections 17-1001 and 17-1002 were amended in 1998 to specifically authorize an assignee of a partnership interest to bring a derivative action.) Finally, the request for declaratory judgment was dismissed because, after the dismissal of the breach of fiduciary duty claim, no independent basis for equitable jurisdiction existed to support a declaratory judgment action in the Court of Chancery. (DRULPA Section 17-111 was adopted later in 1994 to provide jurisdiction in the Court of

Chancery for all actions relating to the interpretation or enforcement of partnership agreements.)

k. *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12 (Del. Ch. 1992)

The individual unitholders of a limited partnership filed a class action against the general partners for breach of the general partners' fiduciary duties by engaging in misconduct that resulted in diminished income to the partnership, diminished distributions to the unitholders and diminished value of the units. The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted on the grounds that the plaintiffs' claims were derivative in nature and that the plaintiffs had failed to comply with the demand requirements for derivative suits.

In granting the defendants' motion to dismiss, the court held that the determination of whether a fiduciary duty lawsuit is derivative or direct in nature is substantially the same for corporate cases as it is for limited partnership cases. The court concluded that the injuries for which plaintiffs sought redress did not directly injure the plaintiffs, but rather directly injured the partnership. Injuries that do not exist independently of the partnership or that are not directly inflicted on the limited partners are derivative claims. Therefore, the court held that the plaintiffs lacked standing since they failed to comply with the statutory demand requirements of the DRULPA for bringing a derivative claim.

2. Demand Requirements

a. *DiRienzo v. Lichtenstein*, C.A. No. 7094-VCP (Del. Ch. Sept. 30, 2013)

This case involved a series of transactions in which a hedge fund formed as a Delaware limited partnership merged with a publicly traded portfolio company that was a Delaware corporation with a minority interest held by the public, which was converted in connection with such merger to a publicly traded limited partnership (the "Partnership"). Plaintiff was a minority shareholder of the portfolio company and brought claims based on both pre-merger actions by the board of the portfolio company and others and post-merger actions by the general partner of the Partnership (the "General Partner"), the managing member of the General Partner and the directors of the General Partner. With respect to the claims involving conduct after the merger, plaintiff's main allegations were (i) direct claims against a special committee of the portfolio company, arguing that they functioned as the board of the General Partner post-merger and breached their fiduciary duties in taking certain actions related to the merger, (ii) derivative claims against the General Partner, its managing member and the board of the General Partner for alleged breaches of fiduciary and contractual duties by having the Partnership assume a deferred fee liability that was owed by an affiliate of the hedge fund pre-merger, granting investors in the hedge fund that desired to exit their investment units in the Partnership in addition to cash and distributions in-kind of portfolio securities (the "Partial Unwind") and allowing the managing member of the General Partner to purchase "corporate opportunity units" in the Partnership and (iii) derivate claims against the General Partner for alleged breaches of its express and implied contractual duties under the partnership agreement of the Partnership by disposing of substantially all of the Partnership's assets in connection with the Partial Unwind and acting without a board in place for a certain period of time. The court granted the special committee's motion for dismissal for failing to state a direct claim upon which relief could be granted. The court also granted defendants' motion to dismiss the derivative claims for failure to make a demand.

With respect to the direct claims against the special committee, plaintiff alleged that the special committee impermissibly took actions for which they should be held liable at a time when the General Partner did not constitute a board of directors. Plaintiff claimed the special committee served as the General Partner's de facto board during this time. The court disagreed, ruling that because the special committee had said only that it would "not refuse to grant consent" to proposed actions, it had neither actual nor de facto authority.

With respect to the derivative claims, the court first addressed whether demand was futile. Plaintiff argued that demand was futile because, in the limited partnership context, whether demand would be futile should only be considered from the perspective of the general partner. The court noted that although there is Delaware case authority supporting this position where limited partners had no say in how a general partner was governed, in the instant case, the partnership agreement provided that the limited partners had the right to elect directors of the General Partner. The court held that because the limited partners elected the board of the General Partner and because the members of the board owed fiduciary duties to the limited partners, demand should have been directed to the board of the General Partner and not the General Partner itself. Plaintiff also argued that the exculpatory provisions in the partnership agreement were unenforceable and the board of the General Partner was therefore threatened with liability, rendering demand futile. The court noted that where directors are exculpated contractually or otherwise from liability for certain conduct, such as in a partnership agreement, then a serious threat of liability may only be found to exist if plaintiff pleads a non-exculpated claim against the directors based on particularized facts. Thus, whether a partnership agreement is enforceable is important to a determination of whether demand is excused. The court found the exculpatory provisions in the partnership agreement to be enforceable because the merger was validly consummated in accordance with the DGCL and organizational documents of the portfolio company to which plaintiff was bound by becoming a stockholder thereof. Plaintiff then argued that the exculpation provisions in the partnership agreement were ambiguous and failed to eliminate fiduciary duties. The partnership agreement provided in relevant part that, except as otherwise provided in the partnership agreement, each director shall have the same fiduciary duties as a director of a corporation incorporated under the DGCL. However, the partnership agreement also provided that, notwithstanding anything to the contrary set forth therein, no general partner, board member thereof or other indemnitee would be liable except for bad faith, fraud, willful misconduct or gross negligence. Further, the partnership agreement expressly approved transactions contemplated by the merger and waived any conflicts of interest in connection therewith. The court found that these provisions were not ambiguous and that in cases in which the General Partner executed, delivered or performed any agreement authorized or permitted under the partnership agreement, the General Partner contractually eliminated its liability to limited partners to the greatest extent allowed by law. Because of this, the court dismissed several of plaintiff's claims involving breaches of the partnership agreement because demand was not made and defendants were exculpated for the alleged actions under the terms of the partnership agreement. In addition, with respect to claims involving actions taken by the General Partner during the period of time in which there was no board of the General Partner, because any and all of such actions related to the merger, the court found that demand was also required for those claims. In its analysis as to whether demand was excused, the court last addressed whether a majority of the board members were independent. The court found that each director that met the NYSE test for independence also satisfied the Delaware test for independence. In this finding, the court noted that although a director that qualifies for independence under the NYSE rules does not necessarily mean they are independent as a matter of Delaware law, the NYSE rules are a "useful source" for this determination. Accordingly, the court found that demand was not excused with respect to the derivative claims.

Plaintiff also apparently argued in briefing and at argument that these derivative claims were both direct and derivative under *Tri-Star* and *Gentile*, which required a showing, applying corporate law by analogy, that (i) a stockholder had majority or effective control and caused the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value and (ii) the exchange caused an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) stockholders. Based on the facts in this case, the court found that plaintiff failed to satisfy both of these prongs with respect to each of the claims—assumption of deferred liability fee and purchase by the managing member of the General Partner of corporate opportunity units. The court accordingly treated the claims as derivative, stating that because plaintiff had failed to make a demand upon the General Partner's board, the court would dismiss unless demand could be excused as being futile.

The court next considered whether demand was excused with respect to claims involving the deferred liability fee. The court noted that the *Rales* test applied where (i) a business decision was made by the board of a company but a majority of the directors making the decision was replaced, (ii) where the subject of the derivative suit was not a business decision of the board and (iii) where the decision being challenged was made by the board of a different corporation. In this case, the board applied the *Rales* test to determine whether demand was futile with respect to the claim involving the assumption by the Partnership of the deferred fee liability. Under the *Rales* test, demand is excused only where particularized factual allegations create a reasonable doubt that, as of the time the complaint was filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. A board exercises its independent and disinterested business judgment when it responds to a demand free of personal financial interest and improper extraneous influences, which include domination by a controlling shareholder and a substantial risk of personal liability. The court found that demand was not excused as plaintiff failed to demonstrate this.

The court then addressed whether demand was excused with respect to a separate claim relating to payment of the deferred liability fee. Because *Rales* did not apply to this question, the court applied the *Aronson* test. To succeed under this test, the court noted that plaintiff must plead particularized facts that create a reasonable doubt that (i) the directors are disinterested and independent or (ii) the challenged transaction was otherwise the product of a valid exercise of business judgment. With respect to the first prong, which the court noted was virtually identical to the *Rales* test, the court indicated that, to succeed, plaintiff must have alleged that the board of the General Partner faced a substantial likelihood of personal liability for their decision to change the deferred fee agreement. The court looked to the partnership agreement, which limited liability to, in relevant part for this case, gross negligence, bad faith and willful misconduct. The court found that gross negligence requires pleading and proving that a defendant was recklessly uninformed or acted outside the bounds of reason. The court found that the deferred liability fee agreement had certain benefits to the Partnership and was therefore, among other reasons, not outside the bounds of reason. With respect to bad faith and willful misconduct, the court noted that a fiduciary's conduct is in bad faith if the fiduciary acted with a purpose other than advancing shareholder interests (i.e., the best interests of the corporation), intentionally violated relevant positive law, intentionally failed to respond to a known duty, or exhibited a conscious disregard of a known duty. In this regard, the court noted that to overcome the presumption that a fiduciary acted in good faith and state a claim for bad faith, a plaintiff must show that the fiduciary's actions were so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. The court noted that even if this were a bad business decision, it was approved by independent directors that had a reasonable basis for their decisions and thus plaintiff did not demonstrate bad faith. Turning to the second prong of *Aronson*, the court noted that this would also require a showing of bad faith or gross negligence. For the above reasons, plaintiff did not satisfy this "heavy burden." The court applied the same analysis under the *Aronson* test for the claim relating to the corporate opportunity units and similarly found that plaintiff's claim was deficient.

Finally, plaintiff alleged that certain underlying offenses articulated in its complaint breached the implied covenant of good faith and fair dealing. Because, pursuant to *Gerber v. Enter. Products Holding, LLC,* only parties to a contract may breach this covenant, the court held that only the General Partner could be liable and not the members of its board. Therefore, plaintiff was required to demonstrate that the General Partner had breached the covenant and that the General Partner's board had facilitated such breach to show that demand was excused. Because the court found that the board of the General Partner did not act in bad faith or with gross negligence, the court held that demand was not excused. The court then dismissed the last claim of aiding and abetting because all underlying claims had been dismissed.

b. *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.,* 2007 WL 2982247 (Del. Ch. Oct. 9, 2007)

Plaintiffs were current or former employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in a Delaware limited partnership operating as a private equity fund (the "Fund") who brought a derivative action against the Fund, its corporate general partner (the "General Partner"), past and present directors of the General Partner, the Fund's investment advisor (the "Investment Advisor"), the Fund's special limited partner (the "Special Limited Partner") and CIBC alleging breach of fiduciary duty, breach of the Fund's partnership agreement and aiding and abetting. Defendants moved to dismiss on the grounds that (i) plaintiffs did not make demand and demand was not excused; (ii) plaintiffs failed to state a claim upon which relief could be granted; (iii) plaintiffs' claims were barred by laches and/or the statute of limitations; and (iv) plaintiffs waived their right to bring suit.

The Fund was created by CIBC to co-invest with CIBC in accordance with the investment criteria set forth in the Fund's partnership agreement and offering documents. Under the Fund's partnership agreement, the General Partner had the sole right to manage and administer the affairs of the Fund but the partnership agreement also provided for the General Partner to delegate certain of its responsibilities and pursuant thereto the General Partner delegated its authority to select and dispose of the Fund's investments to the Special Limited Partner. The General Partner also delegated other investment management and related powers, such as exercising the Fund's voting rights in its investments, to the Investment Advisor which also had the authority to develop investment policies and strategies and to recommend particular investments for the Fund. The Investment Advisor in turn delegated much of this investment decision authority to CIBC's investment committee, which consisted of upper level CIBC executives. The Investment Advisor could also buy investments for the Fund with approval of the Special Limited Partner. Notwithstanding the foregoing delegations, the court found that the General Partner retained supervisory responsibility because under the partnership agreement the exercise of their powers by the delegatees and the performance of their duties was "subject to the oversight of the General Partner." The partnership agreement also provided that the General Partner, Investment Advisor, Special Limited Partner and certain other persons were liable only for actions or omissions resulting from bad faith, willful misconduct, gross negligence or material breach of the partnership agreement.

The Fund lost over 75% of its initial value and over half of its investments were written down or written off. The complaint alleged that these losses resulted from defendants' breaches of fiduciary duties. Specifically, the complaint alleged that the Fund was designed to "co-invest" with CIBC. Under this design, when CIBC's investment committee decided to make a particular investment on behalf of CIBC, the Investment Advisor or Special Limited Partner would then decide if the investment met the Fund's eligibility requirements and, if so, invest alongside CIBC. According to the complaint, however, investments were not made in this way. Rather, the same CIBC senior executives who served on CIBC's investment committee also acted for the Investment Advisor and the Special Limited Partner, and when an investment owned by CIBC lost value, these individuals acting for the Special Limited Partner or Investment Advisor allegedly approved the Fund's purchase of these investments from CIBC at prices equal to CIBC's original cost of investment and also paid CIBC a 7% finders fee. The complaint alleged that CIBC, the Special Limited Partner and the Investment Advisor violated their fiduciary duty to the Fund through this activity and the General Partner violated its duty by failing to oversee these activities.

With respect to the issue of plaintiffs' failure to make a demand, the court referred to the two-part test developed in *Aronson v. Lewis*) as modified by *Rales v. Blasband* in the context of a complaint challenging a board's failure to exercise business judgment. Under *Rales*, the court held that demand would be excused if the particularized facts alleged in the complaint established that there was a substantial likelihood of liability for the General Partner. This in turn raised the issue of determining the standard of liability governing the General Partner's duty of oversight. The defendants argued that the applicable standard derived from *In re Caremark Int'l Derivative Litig.* which requires a showing that the directors knew they were not discharging their fiduciary obligations. The plaintiffs countered that the appropriate standard was found in *Davenport Group MG, L.P. v. Strategic Inv. Partners, Inc.* which, they asserted, stood for the proposition that the misconduct of a General Partner's delegatees is always imputed to the General Partner even when notice of such misconduct is never actually communicated to the General Partner. The court held, however, that neither the standard in *Caremark* nor the standard in *Davenport* applied in the present case because the partnership agreement set the proper standard of liability. Here the court found the partnership agreement left the General Partner with the duty to oversee the activities of the CIBC-related entities that actually managed the affairs of the Fund, and the partnership agreement also provided that the

General Partner would be liable for acts or omissions resulting from bad faith, willful misconduct, gross negligence or a material breach of the partnership agreement thus establishing the General Partner's standard of liability. In rejecting application of the *Caremark* standard, the court also noted that the standard established in *Caremark* was based on the premise that those to whom corporate boards delegated management duties generally owed their loyalty to the corporation, whereas in the present case, the General Partner's duties were delegated to third parties occupying inherently conflicted positions. The court therefore concluded that the facts alleged in the complaint were sufficient to support an inference that the General Partner exercised no oversight and created a substantial likelihood of the General Partner's liability for gross negligence in discharging its oversight duty or material breach of the partnership agreement. For these reasons, the court excused demand.

c. *Albert v. Alex. Brown Mgmt. Servs., Inc.*, C.A. Nos. 762-N, 763-N (Del. Ch. Aug. 26, 2005)

In a further decision in this case brought by limited partners of two Delaware limited partnerships, the court addressed several issues raised by defendants' motion to dismiss that remained unresolved following an earlier decision, including issues relating to plaintiffs' disclosure claims, plaintiffs' breach of fiduciary duty and contract claims, whether plaintiffs' claims were direct or derivative in nature and whether the court had personal jurisdiction over certain defendants.

With respect to plaintiffs' disclosure claims, the court stated that to survive the motion to dismiss, the court must find that the allegations supported a reasonable inference of materiality. The standard to be applied was whether there existed a substantial likelihood that a reasonable investor would have considered the disclosure of the omitted fact to significantly alter the total mix of information. The court determined that the managers' failure to disclose (i) that hedging, which was believed by the managers to be in the best interests of the funds, was impractical because of the funds' liquidity situation, (ii) information regarding the funds' liquidity problems and (iii) the funds' defaults under credit arrangements were material. The court made clear that there is no independent duty of disclosure, but rather that the disclosure allegations must be tied to a fiduciary or contractual duty to disclose, and, in this case, plaintiffs claimed both.

The court then turned to plaintiffs' breach of fiduciary duty claims, the first of which related to the managers' failure to provide financial statements. The court held that, while financial statements were required to be provided as a contractual matter under the partnership agreements, the failure to provide such financial statements did not amount to a fiduciary duty claim. Similarly, the managers' permitting limited partners to withdraw and redeem their interests pursuant to the partnership agreements did not constitute a breach of fiduciary duty, as there was no personal benefit to the managers to support a breach of the duty of loyalty and there was no gross negligence (which the court stated would require allegations that the managers acted on a "recklessly uninformed" basis or acted "outside the bounds of reason") to support a breach of the duty of care. The partnership agreements' grant of sole discretion to the managers to deny a limited partner's limited contractual right of redemption did not impart a positive duty to exercise such power, regardless of the liquidity issues faced by the funds. Finally, while the court disposed of the related allegations as to the qualifications of the managers, it determined that plaintiffs' allegations regarding the time and attention the managers devoted to the funds and the alleged disclosure violations did state breach of duty of care claims. In this regard, the court explained that adequate management is a fact-intensive question and the answer varies depending on the type of fund and complexity of the issues faced.

With respect to plaintiffs' breach of contract claims, the court set forth the standard to survive a motion to dismiss, which requires proof of (i) the existence of a contract, (ii) breach of a duty imposed by such contract and (iii) damages to plaintiff from such breach. In contrast to the dismissal of the corresponding breach of fiduciary claim, the court found that the failure to provide financial statements did constitute a breach of contract claim. However, plaintiffs' allegations as to the limited partner withdrawals and redemptions were not sufficient to sustain a breach of contract claim. Finally, the court found the managers' failure to provide information due to limited partners under the partnership agreements in good faith and without material misinformation created a breach of contract claim, in addition to the breach of fiduciary duty claim discussed above.

Apart from whether plaintiffs' claims were factually supported, defendants argued that several counts of the complaint were derivative claims for which demand was neither made nor excused. The court first cited the demand requirement in the limited partnership context, as codified in DRULPA Section 17-1001, and observed the substantial similarity to Delaware corporate law, under which the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004)*, set forth a revised test for determining whether a suit is derivative or direct. Under the revised test, the only factors are (i) who suffered the harm and (ii) who would receive the benefit of any recovery or other remedy, in each case looking at the corporation or partnership, as applicable, versus the stockholders or interest holders, as applicable. In this case, the court found that the fiduciary duty and contract claims based on alleged failures to disclose were direct claims (for which demand was not required). The harm was to the interest holders, in their loss of the ability to withdraw or redeem their interests in response to the information that would have been gained, and the remedy, which, at this stage, may be monetary damages, would go to such holders. In contrast, the fiduciary duty claims based on gross negligence and inadequate management were derivative claims. Mismanagement is, according to the court, the paradigm of the derivative claim, as the managers' actions caused losses to the funds and any recovery would go to the funds. While the failure of demand, and absence of allegations as to why demand was excused, forced the court to dismiss these claims, plaintiffs were given leave to replead.

The final issue addressed by the court was a challenge to personal jurisdiction over certain defendants. Two individual defendants, who were the owners and managers of a Tennessee limited liability company that was the general partner of one of the funds, argued that they were residents of Tennessee who performed their duties from such state and had not solicited business from, engaged in regular conduct with, or even traveled to, Delaware. The court explained that upon such a challenge, the burden was on plaintiffs to show the basis for personal jurisdiction, which will then requires the court to determine (i) whether service of process on the nonresident defendant was authorized by the Delaware long-arm statute and (ii) whether the exercise of jurisdiction is consistent with due process. After stating that the Delaware long-arm statute had been interpreted to allow jurisdiction to the fullest extent permitted by the due process clause, the court observed that the funds were formed as Delaware limited partnerships governed by Delaware law and that the entity in which these defendants were managing members and owners was responsible for the day-to-day management of both funds (in its capacity as sub-advisor of each fund, in addition to being the general partner of one fund). The conclusion that the contacts of these defendants constituted "transacting business" within the meaning of the long-arm statute was supported by the facts that the entity that these defendants served (i) participated in the formation of, (ii) was primarily responsible for the management of and (iii) received fees from, the funds. The court then considered whether "minimum contacts" between the nonresident defendants and the state existed — that is, whether these defendants deliberately engaged in conduct that created obligations between themselves and the state, including the protection of the state's laws, such that these defendants should reasonably anticipate action in Delaware courts. In addition to the facts cited with respect to the long-arm statute, these defendants enjoyed the benefits of Delaware law, including limited liability. Further, Delaware's important interest in regulating entities that choose its laws warrants its exercise of jurisdiction over those who manage such entities and avail themselves of the laws of the state that empower them to act. The claims at issue in this case involved corporate power and fiduciary obligations, which are at the heart of the internal affairs and governance issues of special concern for the state, making the exercise of personal jurisdiction over these defendants appropriate.

d. *In re Cencom Cable Income Partners, L.P. Litig.*, C.A. No. 14634 (Del. Ch. Jan. 27, 2000)

After a series of legal proceedings relating to the post-dissolution liquidation of a Delaware limited partnership, the court had granted summary judgment to the general partner on all but five of the plaintiff limited partners' claims. The five remaining claims against the general partner included a claim for the breach of duty of loyalty by giving certain information to only one of three appraisers valuing the partnership's assets, allegedly in order to manipulate the ultimate appraisal figures, and a claim for breach of the partnership agreement by not valuing the assets on a "going concern" basis, resulting in the partnership receiving less than the assets were worth. In this proceeding, the general partner moved for judgment on the pleadings on the five remaining claims, arguing that the claims were derivative claims and that plaintiffs had not properly pleaded such claims because plaintiffs had not pleaded demand refused or, in the alternative, demand futility. Plaintiffs moved to have a class of all limited partners certified to pursue each of these claims and moved to have the general partner enjoined from advancing itself litigation expenses from partnership funds to pay for the litigation.

The court began its discussion by reference to the corporate common law rules surrounding derivative claims and noting that while it would look to corporate precedent it recognized the need for flexibility in determining its applicability. Turning to plaintiffs' five claims, it first held that three were clearly direct claims because they fell distinctly upon the individual participants in the business association or involved the participants' contractual rights. The court noted that the two remaining claims, which are referenced above, at first appear derivative in nature since the alleged injury devalued the partnership's assets. However, given the current position of the partnership in the final stages of its post-dissolution liquidation, the court found that the "purposes for classifying claims as derivative and, in particular, the reasons for its attendant demand rule, are not present here." The court had identified the two discernable purposes for classifying claims as derivative as first, insuring that injury to a whole association is adjudicated on behalf of that whole and not just for the benefit of the individuals who have undertaken to pursue the claims, and second, carrying out the desired public policy of galvanizing a governing entity within the business association into taking action to address injury on behalf of the business. The court therefore found that "imposing derivative requirements on these two claims would only set up a legal artifice that has no justification and, therefore, put plainly, makes no sense." The court stated the test for determining whether claims were direct or derivative in the partnership's situation as follows:

> If: (1) a business association consists of only two parties in interest, one a putative class of injured plaintiffs and the other the defendant party that controls the business association; and, (2) the business association is effectively ended, but for the winding up of its affairs; and, (3) the two sides oppose each other in the final dispute over the liquidation of that association; then a claim brought in that context is direct.

Applying the foregoing standard, the court held that plaintiffs' claims were direct claims, and therefore denied defendant's motion for judgment on the pleadings. In addition, since defendant's only opposition to plaintiffs' motion for certification of a class of limited partners was on grounds that the claims were derivative in nature, plaintiffs' motion for class certification was granted.

With respect to plaintiffs' motion to have defendant enjoined from advancing itself litigation expenses from the partnership funds, the partnership agreement provided, in relevant part, that "[e]xpenses incurred by an Indemnitee . . . shall be advanced . . . provided that . . . (ii) such legal action is initiated by a third party who is not a Limited Partner." Plaintiffs argued that the limitation in such provision conditioning advances on limited partners not being plaintiffs in the litigation prohibited the payment of advances to defendant with respect to this action. Defendant claimed that the partnership agreement only specified conditions under which advances were mandatory and that, pursuant to defendant's exclusive authority under the partnership agreement to manage the business affairs of the partnership, defendant could in the exercise of its discretion make advances to itself. The court rejected defendant's argument because it would render the limitation on advances in the partnership agreement illusory and because it was contrary to the court's adherence to the principle that general discretionary provisions in contracts do not negate explicit limitations found elsewhere in the contract. After finding that plaintiffs had satisfied the criteria for granting injunctive relief, the court permanently enjoined defendant from advancing itself litigation expenses from partnership funds and required defendant to return any funds it had previously advanced to itself in this action.

e. *Dean v. Dick*, C.A. No. 16566 (Del. Ch. June 10, 1999)

Plaintiff, the sole owner of the general partner of a Delaware limited partnership, sued various persons, as co-makers on two notes, seeking contribution toward a shortfall in debt that resulted from the sale of the limited partnership's primary asset. Defendant, a limited partner of the partnership, responded with counterclaims alleging breach of fiduciary duty, and plaintiff moved to dismiss such claims. Based on the assumption that defendant's counterclaims were properly filed as derivative claims, the court engaged in a demand futility analysis. The court stated that the rule regarding demand futility is nearly the same in both the corporate and limited partnership contexts. Therefore, due to the paucity of derivative suits involving limited partnerships, the court applied corporate case law concerning demand futility to the limited partnership setting. The court began with the first prong of the *Aronson* test, i.e., whether there is a reasonable doubt that the board of directors or general partner is disinterested and independent under the circumstances. The court noted that, in the corporate context, the mere fact that a director would be required to sue himself is not sufficient to excuse demand. However, when a majority of the board is beholden to the person from who damages would be sought, demand is excused. Thus, because in the present case the only person against whom relief was sought was the 100% owner of the party that could be requested to bring suit, demand was excused as futile. Having held the first prong of the *Aronson* test was satisfied, the court, therefore, did not address the second prong of the *Aronson* test, namely whether the challenged transactions were otherwise the product of a valid exercise of business judgment.

f. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, C.A. No. 15754-NC (Del. Ch. Nov. 10, 1998)

In response to the allegations of a plaintiff limited partner that a series of unit purchases by the corporate general partner of a Delaware limited partnership breached fiduciary and contractual duties of the general partner by serving to entrench the general partner and enriching the general partner at the expense of the limited partners, the defendants, consisting of the limited partnership, the general partner and other controlling persons, moved to dismiss the action arguing that the limited partner's claims were derivative in nature and that the limited partner had failed to comply with the prerequisites for bringing a derivative action under Section 17-1001 of DRULPA of making a pre-suit demand on the general partner or pleading facts showing the futility of a making such a demand. The defendants claimed specifically that a limited partner derivatively challenging a corporate general partner's acts must make a pre-suit demand or plead demand-futility to the corporate general partner's board of directors.

The court denied the defendants' motion to dismiss. With respect to the limited partner's claim that the disputed transactions impinged upon the unitholders' right to remove the general partner, the court found the injury to be specific to the unitholders as a class as opposed to a harm inflicted upon the limited partnership as a whole and consequently held such claim to be a direct claim, not a derivative claim, and, therefore, not subject to the pre-suit demand requirement or the pleading of demand-futility. With respect to the derivative claims of the limited partner, after finding nothing in DRULPA that would indicate that a pre-suit demand was required to be made on the board of directors of a corporate general partner rather than the general partner itself, the court held that a limited partner was required to make a pre-suit demand or plead demand futility to the general partner, not its board of directors. The court concluded that to hold otherwise would undermine the state's established policy of respecting the legal fiction of the business entity and would ignore the reality that it is the general partner itself who owes the limited partners fiduciary duties, not the management of the general partner. The court then went on to hold that the limited partner's allegations that the general partner's interest in entrenching itself and its interest in enriching itself at the expense of the limited partners were sufficient to meet the limited partner's burden of showing demand-futility.

g. *Seaford Funding Ltd. P'ship v. M & M Assocs. II, L.P.*, 672 A.2d 66 (Del. Ch. 1995)

Plaintiff limited partners brought a derivative suit against the general partner and another limited partnership controlled by the general partner alleging default on a loan agreement by the limited partnership and breach of fiduciary duty to the limited partners by the general partner. The defendants moved to dismiss for failure to state a claim upon which relief can be granted.

In denying the defendants' motion, the court reiterated its previous holding that corporate "demand refused" requirements are applicable to derivative suits involving limited partnerships. The court, however, refused to apply the corporate rule that a shareholder that elects to make a demand concedes the independence of the board of directors because the corporate rule is premised upon the demand request receiving a reasoned vote of a majority of the board, rather than being decided by a one-person general partner involved in a web of self-interested transactions. The allegations, therefore, were deemed sufficient to create a reasonable doubt whether the general partner had exercised valid business judgment in refusing to act on the demand of the limited partners.

h. *Katell v. Morgan Stanley Grp., Inc.*, C.A. No. 12343 (Del. Ch. Jan. 14, 1993)

Two limited partners brought suit individually, and in the alternative derivatively, against the general partners and others involved with the partnership and the partnership itself for the breach of fiduciary duties in allowing the partnership to sell off certain investments at unfairly low prices. The defendants subsequently filed a motion to dismiss all of the plaintiffs' claims for failure to state a claim.

The plaintiffs' individual claim against the general partners for causing the partnership to dispose of its assets at inadequate prices was dismissed because the limited partners were unable to show they were injured directly or independently of the partnership. The court, however, upheld the plaintiffs' derivative claim regarding this issue. Although no formal demand was made on the general partners, the well-pleaded allegations of the limited partners were enough to show that one of the general partners was interested and the other lacked independence. Thus, demand was excused as being futile and the motion to dismiss was denied.

i. *Litman v. Prudential-Bache Props., Inc.*, C.A. No. 12137 (Del. Ch. Jan. 4, 1993)

After having a class action complaint dismissed in an earlier decision, the plaintiffs filed an amended derivative complaint, which the defendants moved to dismiss for failure to comply with the demand requirements contained in DRULPA Sections 17-1001 and 17-1003. The plaintiffs did not attempt to make a pre-suit demand on the general partners and, therefore, were required to "plead with particularity" the reasons for not attempting to make such a demand. The arguments set forth by the plaintiffs were that (1) the general partners had a conflict of interest due to financial remunerations; (2) the loyalties of the general partners were split; and (3) the arguments of the defendants in previous litigation invoking the business judgment rule evinced an unwillingness of the general partners' to act on a demand.

In analogizing to Delaware corporate case law on demand futility, the court held that the plaintiffs were required to plead with particularized facts that the business judgment rule did not apply to the challenged conduct in order to maintain a derivative action, and then concluded that the plaintiffs had failed to allege facts showing a conflict affecting the general partners' conduct that raised a reasonable question as to their disinterestedness, independence or business judgment. The court found the fact that the directors of the corporate general partners owed fiduciary duties to both the stockholders of the corporate general partners as well as the limited partners of the partnership was not such as to render a demand futile. Moreover, because the plaintiffs had been advised of the nature of the conflict in the prospectus and had accepted the terms of the relationship in the partnership agreement, they were precluded from bringing a derivative action based on the relationships disclosed in those documents. The plaintiffs' allegations were also found not to rise to the level of gross negligence and thus failed as a matter of law to excuse the demand requirement.

3. The Role of Special Committees

a. *Katell v. Morgan Stanley Leveraged Capital Fund, Inc.*, C.A. No. 12343 (Del. Ch. June 15, 1995)

In the third chapter of the *Katell* derivative claim, after reviewing the derivative claims of the limited partners alleging that the general partners breached their fiduciary duties to the partnership by engaging in self-dealing transactions, the special committee found the suit not to be in the best interests of the partnership and moved for dismissal.

Under the corporate special committee doctrine, upon recommendation of dismissal, the corporation is required to prove that the committee was independent, conducted a good faith, reasonable investigation and had a reasonable basis for its conclusion to dismiss the lawsuit. The court had earlier ruled that whether corporate special committee procedures apply to a derivative suit brought on behalf of a limited partnership depends on the terms of the partnership agreement, and it then ruled that the provision in the partnership agreement that required the special committee to request the court to carry out its recommendation unambiguously anticipated judicial review of the special committee's recommendation. The court, therefore, applied the requirements of the corporate special committee doctrine and, finding each satisfied, granted the special committee's motion to dismiss the derivative action.

b. *Katell v. Morgan Stanley Grp., Inc.*, C.A. No. 12343 (Del. Ch. Sept. 27, 1993)

Following the ruling referred to above that the creation of a special committee violated the limited partnership agreement, the partnership agreement was amended according to its terms to permit the delegation of decision-making power to a special committee. The defendant general partners then moved to stay the derivative action pending the findings of the special committee. The plaintiff limited partners challenged the creation of the special committee pursuant to the amended partnership agreement and challenged the independence of the special committee, analogizing to the corporate special committee doctrine set forth in *Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981).

This time the court rejected the plaintiffs' challenge to the creation of the special committee, finding that its creation complied with the requirements of the amended partnership agreement. The court also rejected the plaintiffs' challenge to the independence of the special committee. The court held that under the corporate special committee doctrine, unless the plaintiffs' allegations give rise to a conclusive presumption of lack of independence, any challenge to the independence of a special committee is premature if it comes prior to the special committee making a recommendation of dismissal of the derivative action. The court thus granted the defendant general partners' request to stay the derivative suit pending the investigation of the special committee.

c. *Katell v. Morgan Stanley Grp., Inc.*, C.A. No. 12343 (Del. Ch. June 8, 1993)

A limited partnership created a special committee, consisting solely of the lone disinterested general partner, to investigate the plaintiff limited partners' derivative breach of fiduciary duty claims against the general partners and the partnership. The defendant general partners moved to stay the derivative action pending the findings of the special committee. The plaintiffs countered that the establishment of the special committee violated the partnership agreement.

The court acknowledged that in the absence of existing authority in the limited partnership context, analogues to corporate law may be applied. The court noted, however, that unlike the demand and demand excused concept, the concept of the special litigation committee was derived from corporate origins not reflected in Delaware partnership law. The court held, however, that unlike other corporate law doctrines, the corporate special committee doctrine could not be easily extended into partnership law because general corporation law expressly provided for the delegation of managerial decision-making power while no such express power existed in partnership law. Therefore, the court held that the applicability of the special committee doctrine had to be evaluated on a case-by-case basis depending on the terms of the partnership agreement. Using principles of contract construction, the court found that the partnership agreement did not support the delegation of decision-making power to a special committee, and thus the creation of the special committee was invalid under the partnership agreement. The defendants' motion to stay was denied. It should be noted that the DRULPA was subsequently amended to sanction delegation of authority by general partners, absent limitations in the partnership agreement, thus presumably allowing special committees without specific authorization in the partnership agreement. *See* DRULPA Section 17-403(c).

I. Disclosures

1. *In re El Paso Pipeline Partners, L.P. Derivative Litig,*, C.A. No. 7141-VCL (Del. Ch. June 12, 2014) and (Del. Ch. Apr. 20, 2015)

This case involved a master limited partnership drop-down transaction. El Paso Corporation ("El Paso Parent"), the sponsor and indirect controlling entity of El Paso Pipeline Partners, L.P. (the "MLP") sold part of its interest in two entities to the MLP in a transaction that constituted a conflict of interest. Plaintiffs sued defendants alleging, among other things, breach of the MLP's limited partnership agreement (the "MLP LPA"), breach of the implied covenant of good faith and fair dealing and aiding and abetting. The court previously dismissed the additional allegations in a bench ruling. Plaintiffs and defendants each moved for summary judgment.

In 2010, El Paso Parent offered to sell the MLP 51% of its interest in an entity ("Southern LNG") that owned a liquefied natural gas ("LNG") terminal and the entity ("Elba Express") that owned the natural gas pipeline that connected the LNG terminal to interstate pipelines (the "Drop-Down"). At the time of the Drop-Down proposal, shale gas discoveries had led to higher levels of production and lower gas prices, weakening the market for imported LNG. However, Southern LNG and Elba Express maintained services agreements ("Services Agreements") that provided revenue regardless of any actual storage or transport of LNG. The plaintiffs focused on two issues with regard to the Service Agreements: (i) the counterparties were judgment-proof special purpose entities with no assets and (ii) the Services Agreements were backed by guarantees that only covered roughly 20% of the revenue that the Services Agreements might generate (collectively, the "Risks").

After the Drop-Down was proposed, the MLP determined that the transaction posed a conflict of interest for the general partner of the MLP and sought "Special Approval" by way of a conflicts committee, as contemplated by the MLP LPA. The conflicts committee met five times over the course of two months and received input from a financial advisor, then unanimously approved the Drop-Down proposal. Unbeknownst to the conflicts committee, El Paso Parent turned down a right of first refusal option to purchase LNG assets for itself at the time the Drop-Down was proposed. El Paso Parent and the members of the general partner's board who know about the right of first refusal offer did not disclose its existence to the conflicts committee.

The court first addressed plaintiffs' claim that the defendants breached the express terms of the MLP LPA and granted defendants' motion to dismiss. The court determined that Section 7.9(a) of the MLP LPA required the general partner to proceed in one of four contractually specified ways (including seeking "Special Approval") when faced with making a decision that involved a conflict of interest. Because the Drop-Down implicated a conflict of interest, Section 7.9(a) controlled, and the general partner had sought Special Approval, defined by the MLP LPA as "approval by a majority of the members of the Conflicts Committee acting in good faith." Under settled Delaware law, the standard for good faith is a subjective, not objective, belief that the determination or action is in the best interests of the company. The record supported the fact that the conflicts committee understood the state of the LNG market, was informed about the terms of the Service Agreements and guarantees and considered the revenue risk involved in the Drop-Down proposal. While reasonable minds could differ on the weight that the conflicts committee should have placed on the Risks, the court found that the conflict committee's judgment and process was not so extreme or egregious that it could support a potential finding of bad faith. Further, the conflicts committee had no knowledge of El Paso Parent's failure to consummate its right of first refusal to purchase LNG assets and, therefore, could not have acted in bad faith based on facts it did not know.

The court then addressed the plaintiffs' claims that the general partner breached the implied covenant of good faith and fair dealing by "intentionally" concealing the information about El Paso Parent's refusal to purchase LNG assets and, again, granted defendants' motion to dismiss. The court initially clarified that the MLP LPA's "good faith" standard did not override the implied covenant, noting that the implied covenant is intended to be a gap-filler. In applying the implied covenant, the court stated that it must determine (i) whether there was a gap to be filled, (ii) whether the implied covenant should be used to fill the gap and (iii) how to fill the gap. Here, the court determined a gap existed because the MLP LPA was silent on whether the general partner was required to volunteer information to the conflicts committee. However, the court declined to use the implied covenant to infer an affirmative disclosure obligation. The court recognized that the Supreme Court in *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400 (Del. 2013) had stated that a failure to volunteer information could constitute a breach of the implied covenant, but noted that statement was dictum. In this case, the MLP LPA expanded the general partner's freedom to act, specifically eliminated all fiduciary duties of the general partner (which would traditionally include disclosure obligations), did not include a contractual duty to disclose information and affirmatively renounced the traditional corporate opportunity doctrine. The court coupled these facts with plaintiffs' failure to identify any indication that the parties to the MLP LPA believed that the general partner would volunteer information to the conflicts committee and declined to permit plaintiffs to use the implied covenant to create a disclosure requirement.

The court dismissed the aiding and abetting claims, noting that secondary liability could not exist when the underlying causes of action had been dismissed.

In the post-trial opinion, the court addressed plaintiffs' challenge to a "dropdown" transaction whereby the parent corporation in a master limited partnership structure, El Paso Corporation ("El Paso Parent"), sold interests in two of its subsidiaries to El Paso Pipeline Partners, L.P. (the "MLP"). The court found that the MLP's general partner, in engaging in the transaction with El Paso Parent, had violated the MLP's limited partnership agreement. The court held that members of a committee of independent members of the general partner's board (the "Committee") who approved the transaction via "special approval" failed to form the requisite subjective belief that the dropdown transaction was in the best interests of the MLP.

Plaintiffs originally challenged two dropdown transactions, which the court referred to as the "Spring Dropdown" and the "Fall Dropdown." The court previously had granted defendants' motion for summary judgment as to the Spring Dropdown and partially denied defendants' motion for summary judgment as to the Fall Dropdown, finding that questions of material fact existed requiring a trial as to the state of mind of the members of the Committee when approving the Fall Dropdown. The court noted that it expected that the Committee members and their financial advisor would provide a credible account of how they evaluated the Fall Dropdown, negotiated with El Paso Parent and ultimately determined that the transaction was in the best interests of the MLP. However, that is not what the court found. Rather, the court found that the Committee members went against their better judgment and did what El Paso Parent wanted and not what they believed was in the best interests of the MLP. The court rejected trial testimony of the Committee members that they believed the transaction was in the best interests of the MLP, finding that the testimony was rehearsed, not credible, and inconsistent with their contemporaneous emails and deposition testimony. Specifically, the court pointed to various internal assessments by Committee members suggesting they believed that the actual value of the assets was lower than the price proposed by El Paso Parent – and accepted by the Committee – and also that it was not in the best interest of the MLP to acquire additional interests in the subsidiary, which related to the importation of liquefied natural gas, a market that appeared to be in decline. Consequently, the court determined that the MLP had paid $171 million more for one of the assets that it acquired than it would have if the general partner had not breached the limited partnership agreement.

The court also expressed concern regarding the process followed, and the work product generated, by the Committee's banker. Specifically, the court noted that the banker met with El Paso Parent's management before meeting with the Committee, did not emphasize certain relevant information in their presentation and failed either to follow the same approach in the Fall Dropdown as in the Spring Dropdown or bring the inconsistency to the Committee's attention, all in an effort to make the Spring Dropdown look as attractive as possible. The court noted that the banker's entire fee was contingent on delivering a fairness opinion, suggesting that the banker did what it could to justify the Fall Dropdown, get to closing and collect its contingent fee.

The court also found that the Committee was unduly focused on accretion of distributable cash to the holders of the common units, when they should have been focused on carrying out their known contractual obligation to determine whether the Fall Dropdown was in the best interests of the MLP. In its prior opinion, the court had noted that the contractual standard under the limited partnership agreement was whether a proposed transaction was in the best interests of the MLP, which meant that the Committee could consider constituencies including employees, creditors, suppliers, customers, the general partner, IDR holders and "of course" the limited partners. In this post-trial opinion, however, the court made clear that in considering the interests of the limited partners, it was not sufficient for the Committee members to focus only on whether a proposed transaction was accretive to cash distributions. Rather, the Committee and its banker should have engaged in a rigorous valuation analysis that took into account prior transactions involving the same assets. The court noted that the Fall Dropdown related to two separate assets that the Committee should have evaluated separately, and had it done so, it would have realized that it was paying more than it agreed to pay for one of the assets when it was the only asset in the proposed transaction.

Based on these findings, the court held that the Committee members did not conclude that the Fall Dropdown was "in the best interests of [the MLP]" as required by the MLP's limited partnership agreement and, therefore, the MLP's general partner breached the MLP's limited partnership agreement by engaging in the Fall Dropdown. The court awarded damages in the amount that the MLP paid for the interest acquired in the Fall Dropdown that exceeded what it would have paid had the general partner not breached the MLP's limited partnership agreement.

2. *In re K-Sea Trans. Partners L.P. Unitholders Litig.*, C.A. No. 6301-VCP (Del. Ch. June 10, 2011) and (Del. Ch. Apr. 4, 2012)

Plaintiffs, holders of common units in K-Sea Transportation Partners L.P. ("K-Sea"), moved to expedite discovery in their application for an injunction to escrow a portion of the consideration to be paid in connection with a merger in which K-Sea would be acquired for cash or a mix of cash and the acquirer's stock. The court noted that a motion to expedite should be granted only if the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury to justify imposing on defendants and the public the extra costs of an expedited proceeding. After reviewing each of plaintiffs' claims, the court concluded that although the complaint asserted at least one sufficiently colorable claim, plaintiffs failed to demonstrate a sufficient threat of irreparable harm.

In late 2010, representatives of K-Sea and the acquirer, Kirby Corporation, met to discuss a potential strategic transaction. Because K-Sea sought an offer that specifically accounted for the controlling interest and incentive distribution rights ("IDRs") of K-Sea's general partner, K-Sea's board of directors (the "Board") submitted the proposed transaction for "Special Approval" by the K-Sea conflicts committee (the "Committee") pursuant to the terms of the K-Sea partnership agreement. After consulting with financial and legal advisors, the Committee gave the transaction "Special Approval" and the Board followed with its own approval. A majority of K-Sea unitholders then entered into support agreements pursuant to which they agreed to vote in favor of the transaction.

Non-employee, independent directors comprised the Committee. Shortly before negotiation of the transaction at issue commenced in late 2010, the Board approved a grant of 15,000 phantom common units to each member of the Committee. The phantom units, which were set to vest over a period of five years, vested immediately in the case of a change in control.

In support of their motion to expedite, plaintiffs made three primary arguments. First, plaintiffs argued that the Committee had a duty to consider, in isolation, the fairness of the portion of the transaction consideration that accounted for the IDRs. Defendants countered that the Committee only had to consider the fairness of the transaction as a whole. The K-Sea partnership agreement required resolution of conflicts to be "fair and reasonable" and "Special Approval" by the Committee was conclusively deemed under the K-Sea partnership agreement to be fair and reasonable so long as K-Sea's general partner disclosed all known material facts to the Committee.

The court concluded that plaintiffs failed to allege facts sufficient to state a colorable claim that the Committee had a duty to consider the fairness of the transaction other than with respect to the transaction as the whole. In support of its conclusion, the court noted that plaintiffs failed to allege a failure to disclose any material facts on the part of the general partner and that the actions of the Committee went above and beyond the requirements of the K-Sea partnership agreement, the Committee having obtained a fairness opinion from its financial advisor. The court also found that plaintiffs failed to present a convincing argument that the K-Sea partnership agreement required the Committee to consider anything other than the fairness of the transaction as a whole.

Second, plaintiffs argued that the Committee members lacked independence because the phantom units granted to such members would vest in the event of a change of control transaction thereby increasing the incentive to provide "Special Approval." Defendants, on the other hand, argued that the vesting of the phantom units aligned the interests of Committee members and common unitholders in obtaining the best price. The court concluded that plaintiffs had stated at least a colorable claim in this instance. In doing so, the court distinguished prior precedent stating that the vesting of options aligns the interests of shareholders and directors in obtaining the highest price. First, the court noted, because the number of phantom units, upon vesting, nearly doubled the number of common units already held by the Committee members, it was possible that the prospect of the immediate vesting of the phantom units may have biased the Committee. Moreover, the court concluded, the timing of the phantom units grant supported an inference that it was made with intent to influence the Committee.

Third, plaintiffs contended that disclosures provided to common unitholders in the relevant registration statement were materially misleading. Preliminarily, plaintiffs argued that the K-Sea partnership agreement did not modify defendants' traditional duty of disclosure. The court, however, rejected this preliminary argument, noting that the K-Sea LP agreement set forth a procedure for merger approval that included provision to the common unitholders of a copy or summary of the merger agreement along with notice of the special meeting or written consent. The court read this provision as reflecting the parties' intent to preempt traditional fiduciary duties of disclosure. Moreover, the court found that even if a traditional duty of disclosure had applied, plaintiffs had not demonstrated that the disclosures about which they complained were misleading.

Because plaintiffs stated at least one colorable claim, the court then turned to whether plaintiffs had demonstrated that they would suffer irreparable harm if expedition was not granted. The court concluded that plaintiffs had not. In doing so, the court found that plaintiffs had not refuted defendants' argument that money damages would be sufficient. First, the court noted its reluctance to enjoin a premium transaction where there was no superior bid and stated that money damages repeatedly have been held to be sufficient to remedy a claim of inadequate transaction price. With these points in mind, the court concluded that because no other offers were reasonably available to K-Sea and because plaintiffs claim focused on the portion of the transaction consideration allocated to the IDRs, money damages were an adequate remedy.

The court also rejected plaintiffs' argument that they were at risk of irreparable harm because nearly all of the economic interest in K-Sea's general partner and the IDRs was owned by single-purpose entities that would essentially be judgment-proof after consummation of the transaction at issue. The court concluded that plaintiffs' claims were too speculative and unsupported by facts that could lead to a reasonable inference that no defendant or those associated with them could satisfy a judgment.

In a subsequent decision pertaining to K-Sea's merger with Kirby Corporation, the Court of Chancery addressed the defendants' motion to dismiss the plaintiffs' complaint. The court first turned to the plaintiffs' claims that the Committee, the Board, K-Sea's general partner and the general partner of K-Sea's general partner breached their fiduciary duties and the K-Sea partnership agreement by approving the merger without evaluating the fairness or reasonableness of the payment for the IDRs and by relying on the "Special Approval" of the Committee, which was comprised of members who improperly held phantom units.

The court noted that the exculpation provisions of the K-Sea partnership agreement required the plaintiffs to demonstrate both that the defendants had breached the K-Sea partnership agreement or their fiduciary duties and, in doing so, acted in bad faith. Turning to the provisions of the K-Sea partnership agreement pertaining to mergers to determine what duties were owed, the court found that the agreement established only one contractual duty with respect to mergers: that K-Sea's general partner must exercise its discretion. The K-Sea partnership agreement permitted K-Sea's general partner to consider whatever factors it chose in exercising its discretion and imposed no requirement to determine that a merger be fair and reasonable. The court further noted that the K-Sea partnership agreement displaced traditional fiduciary duties that ordinarily would constrain K-Sea's general partner in exercising its discretion with a narrower duty not to exercise its discretion in a manner inconsistent with the best interests of K-Sea as a whole, which, according to the court, essentially amounted to a duty not to exercise its discretion in bad faith.

The court then turned to the K-Sea partnership agreement provisions pertaining to "Special Approval." The court rejected the plaintiffs' claim that if the phantom units granted to the members of the Committee rendered the "Special Approval" defective, then the defendants breached their fiduciary duties and the K-Sea partnership agreement by approving the merger in reliance on the defective “Special Approval.” In the court’s view, a failure to qualify for the “Special Approval” safe harbor did not make the defendants’ conduct improper unless the defendants also failed to satisfy the otherwise controlling standard of review—namely, whether K-Sea’s general partner exercised its discretion in good faith.

With respect to whether K-Sea’s general partner exercised its discretion in good faith, the court found that the complaint alleged facts that could support a finding of bad faith. Specifically, the plaintiffs alleged that the Board caused K-Sea’s general partner to refuse to consent to any transaction that did not include a separate payment for the IDRs and that the Board incentivized the Committee to approve the merger by granting the phantom units on the eve of negotiations. The court noted, however, that the K-Sea partnership agreement entitled K-Sea’s general partner to a conclusive presumption of good faith whenever it acted in reliance on an expert opinion. The Committee relied on a fairness opinion and the court concluded that it would be unreasonable to infer that K-Sea’s general partner did not also rely on the same opinion. Therefore, the court found, K-Sea’s general partner was conclusively presumed to have acted in good faith. The court also noted that the implied covenant of good faith and fair dealing could not be used to infer language that contradicts a clear exercise of an express contractual right. As a result, the court dismissed the plaintiffs’ claims of breach of fiduciary duty and the K-Sea partnership agreement in connection with approval of the merger.

The court next turned to the plaintiffs’ remaining claim alleging breach of the fiduciary duty of disclosure. The court noted that, because of the exculpation provision of the K-Sea partnership agreement, to state a claim the plaintiffs needed to allege facts to support a reasonable inference that the defendants, in authorizing a materially misleading disclosure, acted in bad faith. The plaintiffs first claimed that a statement in the Form S-4 that the consideration to be exchanged in the merger represented a 9.56% increase over the amount originally offered was misleading because a significant portion of that increase was allocated to the IDR payment. The court rejected this argument, noting that the Form S-4 contained a detailed discussion regarding the increase in the amount of consideration. The plaintiffs next contended that a statement in the Form S-4 that the members of the Committee would not personally benefit from the merger in a manner different from unitholders was materially misleading. The court rejected this argument and in doing so relied on its prior opinion, in which the court found this statement to be generally true and noted that the Form S-4 disclosed the grant of the phantom units. The court therefore dismissed the plaintiffs’ disclosure claim.

3. *Lonergan v. EPE Holdings LLC*, C.A. No. 5856-VCL (Del. Ch. Oct. 11, 2010)

Plaintiff, a holder of LP units in defendant Enterprise GP Holdings, L.P. (“Holdings”), sought to expedite the hearing on his application for a preliminary injunction to enjoin the merger of Holdings with a subsidiary of Enterprise Products Partners, L.P. (“EPD”). The court noted that a motion to expedite should only be granted if the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra costs of an expedited preliminary injunction proceeding. After reviewing each of the plaintiff’s claims, the court concluded that the complaint failed to assert a sufficiently colorable claim.

EPD is, and Holdings was, a publicly-traded Delaware master limited partnership. Holdings controlled EPD through its one-hundred percent ownership of EPD’s general partner. Distributions to Holdings unitholders derived primarily from Holdings’ ownership of all the incentive distribution rights (“IDRs”) in EPD. IDRs are a form of pay for performance whereby the percentage of cash received by holders of IDRs increases as distributions from the partnership increase. IDRs’ claim to partnership cash flow, however, can reduce the trading price of LP units and thereby make such LP units a less attractive source of new money or acquisition currency.

To address the negative effect of the IDRs and implications arising from proposed federal tax legislation, EPD proposed the merger to the Holdings Audit, Conflicts and Governance Committee (the “Audit Committee”). As a result of the merger, Holdings LP units would be converted into EPD LP units, the IDRs would be cancelled, and control of EPD would remain essentially unchanged, with Holdings’ general partner becoming general partner of EPD. The Audit Committee had full power to negotiate and accept or reject any deal. Over the course of two months of negotiations, the initial exchange ratio of 1.377 EPD units for each Holdings unit rose to 1.50. As part of the merger, EPCO, an affiliated entity and beneficial owner of seventy-six percent of

Holdings LP units and twenty-seven percent of EPD LP units, also waived a percentage of distributions to which it was entitled for a period of five years following consummation of the transaction. After the Audit Committee's financial advisor opined that the transaction was fair from a financial perspective, the Audit Committee gave "Special Approval" for purposes of the Holdings LP agreement.

The court found that the Holdings LP agreement eliminated all fiduciary duties leaving only the contractual standards set forth therein and the implied covenant of good faith and fair dealing. The court also found that the complaint did not identify any provision of the Holdings LP agreement that the merger might violate, but rather relied solely on the implied covenant of good faith and fair dealing. Plaintiff's claims fell essentially into two categories: (1) Revlon-type claims alleging failure to seek an alternative transaction; and (2) Lynch-type claims insisting on majority-of-the-minority approval of the merger. But the court found that "plaintiff [sought] to cloak familiar breach of fiduciary duty theories in the guise of the implied covenant of good faith and fair dealing." The court rejected plaintiff's attempt to do so, concluding that "[t]o use the implied covenant to replicate fiduciary review would vitiate the limited reach of the concept of the implied duty of good faith and fair dealing."

The court further noted that section 7.9(a) of the Holdings LP agreement established "four alternative standards of review" to permit and approve conflict of interest transactions. Because the Holdings LP agreement set forth two other alternative methods of approval in addition to provisions contemplating majority-of-the-minority approval and Revlon best-offer-reasonably-available standards of review, the court concluded section 7.9 disposed of plaintiff's claim that the implied covenant of good faith and fair dealing required compliance with either Revlon or Lynch.

Next, the court addressed plaintiff's claim that the implied covenant constrained the Special Approval process of the Audit Committee. To state a colorable claim under this theory, the court noted, the "plaintiff would need to allege particularized facts from which this Court could infer that the members of the Audit Committee acted arbitrarily or in bad faith." The court concluded plaintiff failed to do so. First, plaintiff did not challenge the disinterestedness or independence of the Audit Committee members. Second, the deal process, the terms negotiated by the Audit Committee, and the financial analyses conducted by the Audit Committee's financial advisor did not indicate arbitrary or bad faith conduct. Finally, section 7.10(b) of the Holdings LP agreement "conclusively presumed" action in reliance on an expert opinion, as was the case here, "to have been done . . . in good faith."

Finally, plaintiff also alleged defendants "violated the implied covenant of good faith and fair dealing by failing to disclose all material information reasonably available in connection with the LP unitholder vote." Ordinarily a general partner of a limited partnership owes fiduciary duties that include a duty of disclosure. Because the Holdings LP agreement eliminated all fiduciary duties, the court found that no fiduciary duty of disclosure remained. The complaint did not identify a contractual duty to disclose material information in connection with the merger, and the court refused to infer a disclosure obligation under the implied covenant of good faith and fair dealing. The court also found nothing inequitable about the level of disclosure provided (a meeting notice and a copy or summary of the merger agreement) and therefore concluded that this was not a situation where "compelling fairness" required it to invoke the implied covenant.

4. *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC,* C.A. No. 2427-VCL (Del. Ch. Nov. 25, 2008)

Plaintiff, a limited partner of a Delaware master limited partnership, brought this proceeding as a class action on behalf of unitholders and derivatively on behalf of the partnership against the general partner and other related entities of the partnership and certain directors of the partnership and the general partner alleging breach of the directors' fiduciary duties and failure to disclose material information in connection with the solicitation of limited partners' votes on the general partner's proposals to exchange certain of its distribution rights for limited partnership units and to amend the partnership agreement. Defendants moved to dismiss the fiduciary duty claims against some of the directors for failure to sufficiently plead facts as to their involvement in allegedly unfair transactions and to dismiss all of the disclosure claims.

While the immediate issue involved the general partner's acquisition of additional limited partnership units and amendments to the partnership agreement, among them an amendment to reduce the vote required for approval of conflict transactions from 66 2/3% of outstanding units to a majority, plaintiff's claims cited certain affiliate transactions (including a joint venture and a sale) that had been consummated in the months prior to the solicitation of the limited partner vote. In the original complaint, plaintiff alleged that fiduciary duties were breached by the partnership's entry into grossly unfair transactions and that the disclosures in the proxy materials in connection with the limited partner vote on the amendments to the partnership agreement were insufficient and misleading. Subsequent to the filing of the original complaint, the partnership made supplemental disclosures in public filings. For its part, the general partner filed a letter from its president and CEO, Jerry Thompson, to the unitholders of the partnership, outlining the benefits of the proposals and encouraging their approval and directing the unitholders to the previous proxy materials, together with a letter from Dan Duncan to Mr. Thompson, which Mr. Thompson described in his letter as representing Mr. Duncan's view of the proposals, as additional proxy materials. Mr. Duncan, in addition to being a director of the partnership and of the general partner, was a director of the general partner of a company with which the partnership had entered into a joint venture arrangement and to which the partnership sold its interest in a processing plant, as well as being the chairman of the company that provided management, administrative and operating services for the partnership and the general partner and for the company involved in the joint venture and sale transactions. Mr. Duncan also owned limited partnership units of the partnership, indirectly acquired the controlling interest in the general partner and owned limited partnership units of the company involved in the joint venture and sale transactions. At a meeting following the supplemental disclosures, the owners of at least 66 2/3% of the outstanding units of the partnership approved the proposals. Plaintiff then amended the complaint to modify the disclosure claims given the additional filings, resting such claims on the information provided about the joint venture and sale transactions and on Mr. Duncan's letter as a one-sided portrayal of the general partner's proposals, and defendants moved to dismiss as described above.

The court denied the motion to dismiss the fiduciary duty claims, finding that the allegations in the complaint referring collectively to the directors of the general partner as responsible for approving certain affiliate transactions were adequate pleadings that put the directors on notice of the claims against them. The motion to dismiss the disclosure claims, however, was granted as to all defendants. As to such claims, the court noted that the violation must be material and that under Delaware law this standard requires that there exists a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available." (quoting *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997)). Plaintiff had not claimed that materially false statements were made but rather alleged that there were actionable omissions and misleading partial disclosures. Plaintiff had attempted to connect the joint venture and sale transactions to the proposals based on the fact that an effect of the passage of the proposals would be that similar affiliate transactions would be easier to approve. The court determined that the proxy materials neither contained inadequate detail nor did they present a misleadingly good view of these prior transactions. Further, as to the information disclosed with respect to the proposals, the court declined to view Mr. Duncan's letter in isolation, as plaintiff had urged, and found that the material facts cited by plaintiff as being absent from the letter were part of the "total mix" of information available to unitholders before their vote, either in the original proxy statement or the supplemental materials. In reaching this decision, the court considered the content of the letters from Messrs. Duncan and Thompson, including the specific direction to review the proxy materials in the latter, and concluded that a reasonable unitholder would not have relied on the Duncan letter alone. As to the remaining allegation that the letter should have disclosed an intention to transfer the partnership's assets to affiliates, the court stated that the record did not support such an intention and that the disclosures sought by plaintiff would have been tantamount to Mr. Duncan implicating himself in future breaches of fiduciary duty.

5. *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247 (Del. Ch. Oct. 9, 2007)

Plaintiffs were current or former employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in a Delaware limited partnership operating as a private equity fund (the "Fund") who brought a derivative action against the Fund, its corporate general partner (the "General Partner"), past and present directors of the General Partner, the Fund's investment advisor (the "Investment Advisor"), the Fund's special limited partner (the "Special Limited Partner") and CIBC alleging breach of fiduciary duty, breach of the Fund's partnership agreement and aiding and abetting. Defendants moved to dismiss on the grounds that (i) plaintiffs did not make demand and demand was not excused; (ii) plaintiffs failed to state a claim upon which relief could be granted;

(iii) plaintiffs' claims were barred by laches and/or the statute of limitations; and (iv) plaintiffs waived their right to bring suit.

The Fund was created by CIBC to co-invest with CIBC in accordance with the investment criteria set forth in the Fund's partnership agreement and offering documents. Under the Fund's partnership agreement, the General Partner had the sole right to manage and administer the affairs of the Fund but the partnership agreement also provided for the General Partner to delegate certain of its responsibilities and pursuant thereto the General Partner delegated its authority to select and dispose of the Fund's investments to the Special Limited Partner. The General Partner also delegated other investment management and related powers, such as exercising the Fund's voting rights in its investments, to the Investment Advisor which also had the authority to develop investment policies and strategies and to recommend particular investments for the Fund. The Investment Advisor in turn delegated much of this investment decision authority to CIBC's investment committee, which consisted of upper level CIBC executives. The Investment Advisor could also buy investments for the Fund with approval of the Special Limited Partner. Notwithstanding the foregoing delegations, the court found that the General Partner retained supervisory responsibility because under the partnership agreement the exercise of their powers by the delegatees and the performance of their duties was "subject to the oversight of the General Partner." The partnership agreement also provided that the General Partner, Investment Advisor, Special Limited Partner and certain other persons were liable only for actions or omissions resulting from bad faith, willful misconduct, gross negligence or material breach of the partnership agreement.

The Fund lost over 75% of its initial value and over half of its investments were written down or written off. The complaint alleged that these losses resulted from defendants' breaches of fiduciary duties. Specifically, the complaint alleged that the Fund was designed to "co-invest" with CIBC. Under this design, when CIBC's investment committee decided to make a particular investment on behalf of CIBC, the Investment Advisor or Special Limited Partner would then decide if the investment met the Fund's eligibility requirements and, if so, invest alongside CIBC. According to the complaint, however, investments were not made in this way. Rather, the same CIBC senior executives who served on CIBC's investment committee also acted for the Investment Advisor and the Special Limited Partner, and when an investment owned by CIBC lost value, these individuals acting for the Special Limited Partner or Investment Advisor allegedly approved the Fund's purchase of these investments from CIBC at prices equal to CIBC's original cost of investment and also paid CIBC a 7% finders fee. The complaint alleged that CIBC, the Special Limited Partner and the Investment Advisor violated their fiduciary duty to the Fund through this activity and the General Partner violated its duty by failing to oversee these activities.

With respect to the defendants' argument that based on the disclosures of the offering documents and the partnership agreement the plaintiffs waived their right to object to the alleged wrongdoing, the court was unpersuaded. It found that the alleged disclosures did not convey full knowledge of all of the facts and noted that the plaintiff limited partners were entitled to rely on the good faith and competence of the Fund's fiduciaries in selecting investments. Thus, the court rejected defendants' waiver claim.

6. *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, C.A. No. 20066-N (Del. Ch. May 24, 2006)

Plaintiffs were limited partners ("LPs") in a Delaware limited partnership operating as a hedge fund (the "Fund") and brought suit against the Fund, its general partner ("GP") and its independent auditors for breach of contract, breach of fiduciary duty and negligence. Both the plaintiffs and defendants moved for summary judgment, and the court granted the defendants' motion. At the center of the dispute were provisions of the limited partnership agreement relating to the deduction, crediting and withdrawal of the GP's incentive fee. The partnership agreement provided that the GP was entitled to a 15% incentive fee on the LPs' net profits, such incentive fee to be deducted from each LP's capital account and credited to the GP's capital account as of the end of the fiscal year. The GP had the right to withdraw funds from its capital account as of the last day of any month. The books and records of the Fund were to be audited by an independent certified accountant as of the end of each fiscal year, and the Fund was to provide copies of the audited financial statements to the LPs after the end of each fiscal year. On December 31, 1999, the incentive fee was deducted from the LPs' capital accounts and credited to the GP's capital account (the "Allocation"). After the close of business on the same day, the incentive fee was withdrawn from the GP's capital account (the "Withdrawal"). The Allocation was reported to the LPs in February of 2000 in the Fund's 1999 fourth quarter financial statement, but the Withdrawal was not. Instead, the Withdrawal was reported in May in the Fund's first quarter statement for the year 2000. Based on the Fund's fourth quarter statement received in February, the plaintiffs withdrew part of their investment, but without regard to whether or not the GP kept its 1999 incentive fee invested in the Fund. After the Withdrawal was disclosed in May, the plaintiffs continued to remain invested in the Fund.

The plaintiffs alleged that the GP breached its fiduciary duties by misstating that it had retained the incentive fee in its capital account when it had actually withdrawn nearly all of it, by not disclosing the Withdrawal as a subsequent event and by not disclosing that the Withdrawal was contrary to the terms of the limited partnership agreement. The court held that the plaintiffs had not established that they relied upon the omitted disclosure of the Withdrawal in the 1999 fourth quarter financial statements. Thus the court refused to consider whether the 1999 statement should have disclosed the Withdrawal or whether the Withdrawal should have been reported in the Subsequent Event footnote of those financials. In so holding, the court rejected the plaintiffs' reliance on federal precedents under Section 10(b) of the Securities Exchange Act of 1934. Specifically, the court reiterated that Delaware does not recognize the "fraud on the market" theory recognized in the federal courts. In breach of fiduciary duty cases based on omissions, reliance may only be presumed when shareholder or partner action is requested. As such action was not requested in the present case, the plaintiffs were required to prove reliance, which they failed to do. With regard to plaintiffs' disclosure claim, the court emphasized that if the language of a contract is unambiguous, its plain meaning would dictate the outcome, and held that the unambiguous language of the partnership agreement did not impose a duty of disclosure on the defendants in the present circumstances.

7. *Albert v. Alex. Brown Mgmt. Servs., Inc.*, C.A. Nos. 762-N, 763-N (Del. Ch. Aug. 26, 2005)

In a further decision in this case brought by limited partners of two Delaware limited partnerships, the court addressed several issues raised by defendants' motion to dismiss that remained unresolved following an earlier decision, including issues relating to plaintiffs' disclosure claims, plaintiffs' breach of fiduciary duty and contract claims, whether plaintiffs' claims were direct or derivative in nature and whether the court had personal jurisdiction over certain defendants.

With respect to plaintiffs' disclosure claims, the court stated that to survive the motion to dismiss, the court must find that the allegations supported a reasonable inference of materiality. The standard to be applied was whether there existed a substantial likelihood that a reasonable investor would have considered the disclosure of the omitted fact to significantly alter the total mix of information. The court determined that the managers' failure to disclose (i) that hedging, which was believed by the managers to be in the best interests of the funds, was impractical because of the funds' liquidity situation, (ii) information regarding the funds' liquidity problems and (iii) the funds' defaults under credit arrangements were material. The court made clear that there is no independent duty of disclosure, but rather that the disclosure allegations must be tied to a fiduciary or contractual duty to disclose, and, in this case, plaintiffs claimed both.

The court then turned to plaintiffs' breach of fiduciary duty claims, the first of which related to the managers' failure to provide financial statements. The court held that, while financial statements were required to be provided as a contractual matter under the partnership agreements, the failure to provide such financial statements did not amount to a fiduciary duty claim. Similarly, the managers' permitting limited partners to withdraw and redeem their interests pursuant to the partnership agreements did not constitute a breach of fiduciary duty, as there was no personal benefit to the managers to support a breach of the duty of loyalty and there was no gross negligence (which the court stated would require allegations that the managers acted on a "recklessly uninformed" basis or acted "outside the bounds of reason") to support a breach of the duty of care. The partnership agreements' grant of sole discretion to the managers to deny a limited partner's limited contractual right of redemption did not impart a positive duty to exercise such power, regardless of the liquidity issues faced by the funds. Finally, while the court disposed of the related allegations as to the qualifications of the managers, it determined that plaintiffs' allegations regarding the time and attention the managers devoted to the funds and the alleged disclosure violations did state breach of duty of care claims. In this regard, the court explained that adequate management is a fact-intensive question and the answer varies depending on the type of fund and complexity of the issues faced.

With respect to plaintiffs' breach of contract claims, the court set forth the standard to survive a motion to dismiss, which requires proof of (i) the existence of a contract, (ii) breach of a duty imposed by such contract and (iii) damages to plaintiff from such breach. In contrast to the dismissal of the corresponding breach of fiduciary claim, the court found that the failure to provide financial statements did constitute a breach of contract claim. However, plaintiffs' allegations as to the limited partner withdrawals and redemptions were not sufficient to sustain a breach of contract claim. Finally, the court found the managers' failure to provide information due to limited partners under the partnership agreements in good faith and without material misinformation created a breach of contract claim, in addition to the breach of fiduciary duty claim discussed above.

Apart from whether plaintiffs' claims were factually supported, defendants argued that several counts of the complaint were derivative claims for which demand was neither made nor excused. The court first cited the demand requirement in the limited partnership context, as codified in DRULPA Section 17-1001, and observed the substantial similarity to Delaware corporate law, under which the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004)*, set forth a revised test for determining whether a suit is derivative or direct. Under the revised test, the only factors are (i) who suffered the harm and (ii) who would receive the benefit of any recovery or other remedy, in each case looking at the corporation or partnership, as applicable, versus the stockholders or interest holders, as applicable. In this case, the court found that the fiduciary duty and contract claims based on alleged failures to disclose were direct claims (for which demand was not required). The harm was to the interest holders, in their loss of the ability to withdraw or redeem their interests in response to the information that would have been gained, and the remedy, which, at this stage, may be monetary damages, would go to such holders. In contrast, the fiduciary duty claims based on gross negligence and inadequate management were derivative claims. Mismanagement is, according to the court, the paradigm of the derivative claim, as the managers' actions caused losses to the funds and any recovery would go to the funds. While the failure of demand, and absence of allegations as to why demand was excused, forced the court to dismiss these claims, plaintiffs were given leave to replead.

The final issue addressed by the court was a challenge to personal jurisdiction over certain defendants. Two individual defendants, who were the owners and managers of a Tennessee limited liability company that was the general partner of one of the funds, argued that they were residents of Tennessee who performed their duties from such state and had not solicited business from, engaged in regular conduct with, or even traveled to, Delaware. The court explained that upon such a challenge, the burden was on plaintiffs to show the basis for personal jurisdiction, which will then requires the court to determine (i) whether service of process on the nonresident defendant was authorized by the Delaware long-arm statute and (ii) whether the exercise of jurisdiction is consistent with due process. After stating that the Delaware long-arm statute had been interpreted to allow jurisdiction to the fullest extent permitted by the due process clause, the court observed that the funds were formed as Delaware limited partnerships governed by Delaware law and that the entity in which these defendants were managing members and owners was responsible for the day-to-day management of both funds (in its capacity as sub-advisor of each fund, in addition to being the general partner of one fund). The conclusion that the contacts of these defendants constituted "transacting business" within the meaning of the long-arm statute was supported by the facts that the entity that these defendants served (i) participated in the formation of, (ii) was primarily responsible for the management of and (iii) received fees from, the funds. The court then considered whether "minimum contacts" between the nonresident defendants and the state existed—that is, whether these defendants deliberately engaged in conduct that created obligations between themselves and the state, including the protection of the state's laws, such that these defendants should reasonably anticipate action in Delaware courts. In addition to the facts cited with respect to the long-arm statute, these defendants enjoyed the benefits of Delaware law, including limited liability. Further, Delaware's important interest in regulating entities that choose its laws warrants its exercise of jurisdiction over those who manage such entities and avail themselves of the laws of the state that empower them to act. The claims at issue in this case involved corporate power and fiduciary obligations, which are at the heart of the internal affairs and governance issues of special concern for the state, making the exercise of personal jurisdiction over these defendants appropriate.

8. *Bren v. Capital Realty Grp. Senior Hous., Inc.*, C.A. 19902-NC (Del. Ch. Feb. 27, 2004)

Plaintiff was a noteholder of a Delaware limited partnership. Following the partnership's default on the notes, plaintiff brought suit against the partnership and its general partner claiming, among other things, that the partnership and the general partner breached a fiduciary duty to creditors by failing timely to pursue a valuable litigation claim and by making false and misleading statements while soliciting the noteholders for various consents and waivers. Defendants moved for dismissal or summary judgment with respect to plaintiff's claims.

Plaintiff alleged that prior to the default on the notes the partnership engaged in a sham transaction to avoid a restriction in the partnership agreement that precluded the partnership from selling any property to an entity affiliated with the general partner. To circumvent this requirement, James Stroud ("Stroud") and Jeffrey Beck ("Beck"), the owners of the entity that owned the general partner, caused such entity to sell the stock of the general partner to an entity owned by a friend and business associate. The partnership then sold four of its five properties to another entity controlled by Stroud and Beck and paid yet another entity owned by Stroud and Beck a brokerage fee of over $1 million for the sale. A limited partner filed suit challenging the sale of the four properties, which was subsequently settled, and as part of the settlement all claims of the limited partners of the partnership arising out of the transaction were released but the settlement did not expressly release claims brought on behalf of the partnership or the noteholders.

Plaintiff alleged that when the partnership became insolvent between February and July of 2001, the general partner owed a fiduciary duty to the noteholders to preserve and pursue whatever non-operating assets the partnership possessed in an effort to ensure the maximum return to creditors and claimed that the general partner breached this fiduciary duty to the noteholders by failing to bring a claim challenging the sale of the properties before the statute of limitations with respect to such claim expired in September, 2001. Defendants contended that plaintiff's claim was barred by the statute of limitations. Plaintiff argued that the wrong alleged in his complaint was the failure of the general partner to bring a claim challenging the sale of the properties, not the sale itself. The court rejected plaintiff's argument, finding that the claim arose when the sale occurred. Plaintiff further argued that his claim did not arise until the partnership's fiduciary duty to its creditors arose upon the insolvency of the partnership. The court rejected this claim as well but did acknowledge that a fiduciary duty to the creditors of the partnership arose when the partnership became insolvent. While the court did not cite any precedent for its conclusion that a fiduciary duty was owed to creditors of the partnership, it did state that the noteholders did not have standing to allege breach of fiduciary duty prior to the partnership coming within the "vicinity of insolvency," which is an apparent reference to corporate precedent in which the Court of Chancery had held that directors of a Delaware corporation operating "in the vicinity of insolvency" owed their primary fiduciary duty to the corporate enterprise, which encompasses creditors as well as stockholders, rather to stockholders alone. (*See Credit Lyonnais Bank Nederland v. Pathe Commc'ns Corp.*, C.A. 12150 (Del. Ch. Dec. 30, 1991).

Plaintiff also alleged that the general partner breached its fiduciary duty of disclosure to the noteholders by failing to disclose material information to the noteholders when following the insolvency of the partnership the general partners sought the consent of the noteholders to the sale of the final property owned by the partnership and the noteholders' waiver or release of all claims relating to the notes as a condition to a liquidating distribution by the partnership. The court stated that the general partner presumably was obligated to act with complete candor when seeking noteholder action while the partnership was insolvent and held that the existence of a fiduciary duty to disclose was sufficiently plausible to survive defendants' motion to dismiss. After analyzing the specific aspects of the disclosure claims, the court granted defendants' motion for dismissal or summary judgment with respect to certain aspects of the claims and denied defendant's motion with respect to the other aspects of the claims based on the particular facts associated with each claim.

9. *Zoren v. Genesis Energy, L.P.*, C.A. No. 19694 (Del. Ch. July 28, 2003)

Plaintiff, a public unitholder of a Delaware limited partnership, brought an action on his own behalf and on behalf of the other public unitholders for breach of fiduciary duty against the general partner, the board of directors of the general partner and Salomon Smith Barney, Inc., the parent of the general partner, in connection with a restructuring of the partnership's finances that occurred in 2000. The general partner and its board of directors approved the restructuring based on the recommendation of a special committee and thereafter a majority of the public unitholders of the partnership voted to approve the restructuring. Plaintiff claimed the restructuring was a self-dealing transaction that did not comport with either the fair process or fair price elements of the standard of entire fairness. Defendants moved to dismiss on the grounds that plaintiff's complaint failed to state a claim for breach of fiduciary duty because it did not articulate a theory or basis for finding that the restructuring was unfair to plaintiff or the other unitholders or that the restructuring was even properly the subject of an entire fairness analysis.

The court stated that plaintiff had the burden of rebutting the presumption under the business judgment rule that defendants acted on an informed basis and in the honest belief that their actions were in the best interests of the partnership and the limited partners by pleading sufficient facts showing that defendants appeared on both sides of the restructuring or derived a personal benefit from the restructuring in the sense of self-dealing. The court held that plaintiff's complaint failed to meet this burden because it only made conclusory claims about defendants' interest in the restructuring. Plaintiff claimed that the restructuring would permit Salomon to sell the general partner and therefore cease to provide financial support to the partnership. The court found, however, that Salomon had no legal or equitable duty to provide financial support beyond the contractual terms it had satisfied in the restructuring and that the fact that the restructuring, by stabilizing the partnership's financial situation, might have permitted Salomon to sell the general partner did not form the basis for a claim for breach of the duty of loyalty. Plaintiff also asserted claims that related to the formation of the partnership in 1996 and the management of the partnership from 1996 to the restructuring. The court found that none of these allegations stated a claim for breach of the duty of loyalty in connection with the restructuring, stating that certain of the claims were barred by a judgment of the federal district court in an earlier lawsuit brought by plaintiff and that others of these claims could only be brought derivatively on behalf of the partnership, which plaintiff refused to do. Plaintiff also claimed that the restructuring should have happened years earlier but was delayed by defendants in order to avoid alerting the public unitholders to the fact that the finances of the partnership had been impracticably structured until the limitations governing claims under the federal securities laws had elapsed. The court found this claim also to be either one for mismanagement that was required to be brought derivatively or one barred by the federal district court judgment. The court thus held that plaintiff's complaint did not state a claim upon which relief can be granted in regard to the substance of the restructuring.

Plaintiff also alleged claims for breach of the duty of disclosure in connection with the proxy materials and other public statements relating to the restructuring. While the court stated that a few of the claims had at least colorable merit, the court concluded that these claims must be dismissed as well because no possible relief with respect to such claims was available to plaintiff or the putative class. The court stated that it was too late to provide equitable or injunctive relief in the form of corrective or supplemental disclosure in connection with the vote taken in 2000 and noted that plaintiff had been aware of the disclosure claims well before the vote to approve the restructuring was held. The court also stated that the other possible form of equitable relief – an order of rescission – was impracticable in this setting and had not been requested by plaintiff. The court further stated that it would not award actual or nominal monetary damages to plaintiff or the class because they had not suffered any economic injury as a result of the vote to approve the restructuring. The court thus granted defendants' motion to dismiss.

10. *Werner v. Miller Tech. Mgmt., L.P.*, C.A. No. 19721 (Del. Ch. Feb. 13, 2003)

The plaintiff, a limited partner in a Delaware limited partnership, brought an action against the partnership, its general partner, the members of an Advisory Board of the partnership comprised of limited partners, the general partner's controlling entity and the two individuals ultimately exercising control over the general partner. The plaintiff alleged a breach of the duty of care and the duty of disclosure against the general partner and its principals as well as a claim of aiding and abetting a breach of the fiduciary duty of loyalty and conspiracy against all defendants. The allegations centered on the plaintiff's assertion that the general partner and its principals acted in concert with the members of the Advisory Board to cause the partnership to invest in, and make financing commitments to, companies in which they had personal stakes. The plaintiff also asserted that the general partner, its principals and the Advisory Board members engaged in a scheme to direct companies in which the partnership had significant investments to enter into lucrative consulting agreements with a consulting company controlled by them, thereby enriching themselves at the expense of the other limited partners.

Before the court was, among other things, a motion to dismiss for failure to state a claim upon which relief can be granted with respect to the plaintiff's breach of duty of loyalty claim. The defendants argued that such claim was precluded by the disclosure of potential conflicts of interest set forth in the partnership's private placement memorandum. Relying on *Midland Food Servs., LLC v. Castle Hill Holdings V, LLC*, the defendants argued that the private placement memorandum should be considered by the court because, although it was not referenced in the plaintiff's complaint, it was referenced in the partnership agreement, which, in turn, was referenced in the complaint. The court rejected the defendant's argument and held that *Midland* and its progeny were implicated only where the complaint strategically omitted crucial information, which the court found not to be the case here. Furthermore, the court found that even if the private placement memorandum was considered, it would not suffice to obviate the plaintiff's duty of loyalty claim. The court held that while in some instances, disclosures of conflicts of interest may preclude a claim for breach of the duty of loyalty, the partnership's private placement memorandum did not disclose the potential for conflicts of interest with enough specificity to prevent the plaintiff from bringing a breach of duty of loyalty claim. The language of the private placement memorandum did not contain any disclosure that the general partner of the partnership would cause the partnership's portfolio companies to enter into consulting arrangements with an affiliated company. Thus, the court denied the motion to dismiss.

11. *In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351 (Del. Ch. 2002)

Limited partners sued the general partners, which were affiliated with one another, of a Delaware limited partnership for breach of fiduciary duty and breach of contract and sued an affiliate of the general partners for aiding and abetting breaches of fiduciary duty. Plaintiffs' claims stemmed from actions taken by the general partners in connection with an offering of preferred units having superior claims to capital and income distributions, including the amendment of the partnership agreement without limited partner approval to subordinate the contractual distribution rights of the existing limited partners to those new claims and a subsequent sale of partnership property also without limited partner approval. Before the court were cross-motions for partial summary judgment.

The plaintiffs claimed that the general partners breached their fiduciary duty to disclose all material facts bearing on the limited partners' decision whether to participate in the preferred units offering. The plaintiffs argued that an offer with respect to certain of the sold properties made by an anonymous third party prior to the general partners' initiation of the preferred units offering should have been disclosed and would have added materially to the total mix of information available to the limited partners. The defendants countered that the anonymous offer was not a firm offer and, thus, was immaterial. The court declined to reach a determination on the materiality of the offer prior to trial. However, the court rejected the plaintiffs' disclosure claim based on the failure to disclose a development plan related to certain other sold properties as immaterial and also denied the plaintiffs' motion with respect to their claim that the offering prospectus omitted the material fact that individual officers and directors of the general partners were investors in a limited partner of the general partners' affiliate that guaranteed the offering and agreed to purchase all preferred units not subscribed for by the limited partners. The court held that the additional disclosure would have added little value because the prospectus disclosed the guarantee and the fact that the affiliate would purchase all preferred units not subscribed for by the limited partners and, thus, any reasonable reader of the prospectus would have known that an affiliate of the general partners was willing to put up a large sum of money to buy unsubscribed units and could reasonably infer that the general partners believed that the offering was an attractive investment opportunity.

12. *R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, C.A. No. 17449 (Del. Ch. Apr. 10, 2001)

Plaintiffs challenged an already consummated reorganization of a limited partnership which separated the ownership of a single public limited partnership into the old public limited partnership and a new privately-traded limited partnership. Plaintiffs challenged the reorganization on several grounds: First, that it did not receive the requisite approval by the public unitholders; second, that defendants breached their fiduciary duties in structuring the reorganization in an unfair manner; and third, that the defendants made materially misleading disclosures. Plaintiffs' first claim was based on the fact that the defendants needed to amend the partnership agreement of the existing limited partnership in order to implement the reorganization and the defendants presented the proposed amended and restated partnership agreement containing all of the proposed amendments to the public unitholders for their approval in a single vote and provided that it would be approved if it received the affirmative vote of a majority of the public unitholders. Plaintiff argued, however, that one provision of the proposed restatement of the partnership agreement could only be accomplished by a unanimous vote and that therefore the entirety of the proposed amendment, including all the remaining provisions which could otherwise have been approved by a majority vote of the public unitholders, was never validly adopted and must be declared void. The court agreed with plaintiffs that one provision of the amendment could only be put into effect by unanimous vote. However, the court rejected plaintiffs' argument the entirety of the amendment was therefore void. The court cited several bases for this decision including the "severability" provisions of both the original partnership agreement and the proposed amendment and restatement and the fact that the general partner removed the one provision that required unanimous approval from the final restated and amended partnership agreement. With respect to the severability issue, the court cited several legislative cases supporting the proposition that if part of one legislative bill required a majority vote and another part a supermajority vote and only the majority vote were obtained, so long as the matters were of a severable nature, the part that received the requisite approval would be valid notwithstanding the fact that the remaining part would be void. The court also rejected plaintiffs attempt to limit that principle to the legislative context finding that it applied equally in the private contract context and was consistent with the approach Delaware has historically taken to the regulation of economic activity which rests on "flexibility and efficiency, not unjustified rigidity." In their fiduciary duty claim, plaintiffs had argued that the reorganization was motivated solely to advantage the majority unitholder and corporate parent of the general partner without conferring any benefit on the public unitholders. The defendants moved to dismiss this claim on the grounds that the public unitholders had approved the transaction in accordance with the criteria set forth in the original limited partnership agreement which displaced any default fiduciary duties that would otherwise have applied to the transaction. Plaintiffs countered that the requirements of the limited partnership agreement including the vote requirement were in addition to, not in substitution for, the general partner's common law fiduciary obligations and pointed to the absence of any language expressly restricting the operation of default fiduciary duties in the operative section of the partnership agreement. The court held that in deciding whether default fiduciary duties were preempted by contractual provisions it was required to determine whether the application of default fiduciary duties could be reconciled with the practical and efficient operation of the terms of the limited partnership agreement; where such a reconciliation was possible, the court would apply default fiduciary duties in the absence of clear language disclaiming their applicability. "But where the use of default fiduciary duties would intrude upon the contractual rights or expectations of the general partner or be insensible in view of the contractual mechanisms governing the transactions under consideration, the court will eschew fiduciary concepts and focus on a purely contractual analysis of the dispute." However, the court held that it did not need to answer that question for the present case because, based on corporate law principles, it concluded that if the challenged transactions received an informed, uncoerced majority vote of the public unitholders that vote would obviate any generalized fairness inquiry and insulate the general partner from contractual or fiduciary liability. Thus, the court held that plaintiffs' fiduciary claim turned on the adequacy of the general partner's disclosures. Plaintiffs had challenged a number of the general partner's disclosures as false or misleading. The court dismissed a number of these claims. However, it held that certain of the claims were sufficient to withstand a motion to dismiss. Thus, the court denied defendants' motion to dismiss those disclosure claims and the fiduciary duty claim which turned on the adequacy of the disclosure.

13. *In re Marriott Hotel Props. II Ltd. P'ship Unitholders Litig.*, C.A. No. 14961 (Del. Ch. June 12, 1996), (Del. Ch. Sept. 17, 1997) and (Del. Ch. Jan. 24, 2000)

Plaintiff limited partners sought to enjoin a tender offer by the corporate parent of the general partner for at least a majority of the limited partnership units, claiming, among other things, that the tender offer constituted a change of control that brought about a fiduciary obligation of the general partner to take reasonable steps to achieve the highest price available, i.e. the corporate "Revlon" duty.

In denying injunctive relief, the court held that the general partner had no fiduciary duty to seek a control premium in the acquisition by its corporate parent of a majority of the limited partnership interests because such an acquisition would not constitute a change of control where the partnership agreement deprived the limited partners of any significant control rights. Under the agreement, the limited partners could not manage the partnership or control its assets and could not remove the general partner except for a breach of fiduciary duty. Although the limited partners were entitled to vote on designated matters such as mergers and certain acquisitions and amendments, the court held that this did not amount to control or the ability to command a control premium. Moreover, as further evidence that no control premium was applicable, the court noted that the general partner had absolute discretion to prohibit the transfer of any limited partnership units. Thus the court refused to impose a Revlon duty on the general partner which would effectively undermine the explicit terms of the limited partners' investment as dictated by the partnership agreement.

In a subsequent decision, the court granted the plaintiffs' motion for a voluntary dismissal of this case without prejudice in favor of parallel litigation pending in the United States District Court for the Southern District of Florida, citing judicial economy and the lack of legal prejudice to the defendants.

After the District Court in Florida dismissed the action for want of subject matter jurisdiction as a result of the defection of certain plaintiffs, the action was revived in the Court of Chancery. At this point in time, the tender offer had closed and the corporate parent of the general partner owned 50.4% of the limited partnership units of the partnership. Within months of the closing, defendant general partner, in a change from its prior distribution policy and the projections forecast in the tender offer circular, more than doubled the size of cash distributions to limited partners. Plaintiffs filed an amended class action complaint alleging breach of partnership agreement, breach of fiduciary duties and additional claims relating to the tender offer. Defendants filed a motion to dismiss several of plaintiffs' claims and a motion for summary judgment with respect to plaintiffs' claim that the general partner breached its fiduciary duty of loyalty by limiting pre-closing distributions to limited partners in contemplation of and to facilitate the tender offer. The court denied the defendants' motion to dismiss with respect to the claims that the general partner's disclosures relating to distributions were materially misleading. The court stated that "[w]here, as here, the lone source of disclosure is a fiduciary having a conflicting interest, an obligation of complete candor is imposed on the fiduciary and judicial scrutiny of the disclosure is more exacting" and, based on the timing and dramatic nature of the change in distributions policy, found that plaintiffs were entitled to an inference that defendants did not believe the projections when they made them. The court also denied defendants' motion for summary judgment, finding that material issues of fact were in dispute with respect to the timing, motivation and effect of the general partner's decision to change the distribution policy, noting that "the fortuitous timing of the General Partner's change in distribution policy calls into question the good faith of the General Partner's management decisions in the time period preceding the Offer." The court granted the defendants' motion to dismiss the remaining claims in the complaint. With respect to plaintiffs' claim that the "entire fairness" standard applied to the tender offer, the court disagreed, stating that this was not a situation in which one party stood on both sides of a transaction and could have effectuated changes to the detriment of fellow investors; in this case, defendants made a voluntary tender offer directly to the limited partners. With respect to the claim that defendants breached an implied obligation in the partnership agreement to ensure fairness in any transaction involving the general partner, which obligation the plaintiffs alleged arose from provisions in the partnership agreement that set forth an independent appraisal process designed to ensure that the partnership would receive fair value in a sale of partnership assets to the general partner or its affiliates, the court found no basis for the inference in this situation due to the essentially voluntary nature of the tender offer and refused to imply an intention in the partnership agreement to subject the tender offer to an independent appraisal process. Finally, with respect to plaintiffs' claim that defendants breached fiduciary duties of due care and good faith by not protecting the limited partners from the threat of an unfairly priced offer, the court held that it would be unreasonable and inappropriate to impose such an obligation on the defendants in relation to a voluntary tender offer which involved no act of corporate governance and found that the requirement under Delaware law that the tender offer by the defendants be made with complete disclosure and be non-coercive provided an adequate framework to protect the interests of limited partners.

14. *Sonet v. Plum Creek Timber Co., L.P.*, C.A. No. 16931 (Del. Ch. Mar. 18, 1999)

This was the second lawsuit arising from the plan of a publicly traded Delaware limited partnership to convert to a REIT through a merger. In the first lawsuit, the court dismissed a claim that the structure of the transaction violated contractual and fiduciary duties of the defendant general partner and its general partner holding that the requirement in the partnership agreement that the transaction receive the approval of the unitholders by a 66 2/3% vote replaced, by contract, the unitholders' right to seek judicial review of the transaction under traditional fiduciary duty principles.

After the court rendered its decision in the first lawsuit, the defendants issued a proxy statement soliciting unitholder approval of the transaction. In this action, the plaintiff unitholder moved to preliminarily enjoin the upcoming unitholder vote based on claims that the disclosure documents failed fully and fairly to disclose the material facts necessary for the unitholders to make an informed decision whether to approve the REIT conversion. Specifically, the plaintiff claimed that the disclosure documents misrepresented (i) the process by which the transaction was negotiated and agreed upon, (ii) the facts material to assessing the fairness of the transaction and (iii) the risks in converting the partnership to a REIT.

Relying on corporate precedent, the court held that (i) controlling persons seeking unitholder approval of a transaction have a fiduciary duty to honestly provide full and fair disclosure of all material facts relating to that transaction, (ii) the burden is on the fiduciary to demonstrate that all material facts were disclosed and (iii) where the lone source of the disclosure is a fiduciary having a conflicting interest, the scrutiny of the disclosures made in that context is more exacting (particularly in light of the fact that the vote and the related disclosure replaced the traditional fiduciary protections). Applying these standards, the court found that (i) the defendants did not omit to disclose or impose a misleading "spin" on the risks inherent in the REIT conversion, (ii) the defendants' disclosure of the process leading to the decision of the defendants to proceed with the REIT conversion was materially misleading because it created a false impression that an independent negotiating committee was established to and did negotiate a fair transaction on behalf of the unitholders whereas the committee did not engage in negotiations and its members were not independent from the general partner and (iii) the defendants also failed to disclose, and disclosed in a misleading manner, material facts relating to the fairness of the transaction, including the fact that the valuation that formed the basis for the large equity interest that the defendants would receive in the REIT conversion was based on distribution levels that were kept artificially high by the defendants. The court granted the plaintiff's request to enjoin the unitholder vote until the disclosure deficiencies were cured by the issuance of a supplemental disclosure by the defendants.

J. Procedural Issues

1. Subject Matter Jurisdiction

a. *Albert v. Alex. Brown Mgmt. Servs., Inc.*, C.A. Nos. 04C-05-250 PLA, 04C-05-251 PLA (Del. Super. Ct. Sept. 15, 2004)

The limited partners of two Delaware limited partnerships filed suit in the Superior Court against the general partners of the partnerships, certain affiliates of the general partners and numerous members of the partnerships' management committees. Defendants moved to dismiss for lack of subject matter jurisdiction.

Plaintiffs phrased their claims as breach of contract (i.e., the partnership agreements), fraud, negligence and unjust enrichment, seeking punitive damages as well as a jury trial in the Superior Court. The court rejected plaintiffs' attempt to bring suit in the Superior Court on these claims, finding that the complaint stated only claims within the sole jurisdiction of the Court of Chancery. Despite plaintiffs' careful wording of the complaint, the court determined that this was, in essence, an action for breach of fiduciary duty and that, while almost all breaches of fiduciary duty are frauds, such actions belong nonetheless in the Court of Chancery, where sophisticated standards governing the liability of entity fiduciaries have evolved in order to deal with specific policy concerns. With respect to plaintiffs' breach of contract claims, the court held that despite the permissive wording of DRULPA Section 17-111, Section 17-111 grants the Court of Chancery exclusive, rather than concurrent, jurisdiction over matters involving interpretation of partnership agreements, except to the extent that (i) there has already been an accounting or settlement of partnership affairs or (ii) the partners evince intent to segregate business out of the partnership by creating a separate instrument. The court also held that plaintiffs' fraud and negligence claims likewise had no place in the Superior Court since any duty defendants might have breached would have arisen only through the partnership agreements and to determine the scope of such a duty would necessarily involve the interpretation of the partnership agreements. Further, the court held that the unjust enrichment claims were purely equitable matters that do not properly lie before the Superior Court. The court thus granted defendants' motion to dismiss.

b. *Adirondack GP, Inc. v. Am. Power Corp.*, C.A. No. 15060 (Del. Ch. Nov. 13, 1996)

One general partner of a limited partnership brought suit against the other general partner and a limited partner to enforce the default provisions of the partnership agreement after the defendants failed to meet a mandatory cash call. The defendants responded by filing a motion to dismiss for lack of subject matter jurisdiction and a motion to stay the proceedings pending the outcome of a suit previously filed in Pennsylvania involving substantially the same parties. In their motion to dismiss, the defendants argued that the plaintiff must allege Section 17-110 of the DRULPA (which addresses contested matters relating to general partners and contested votes) as the jurisdictional basis for the suit rather than Section 17-111 (which relates to interpretation and enforcement of partnership agreements) since the claim will ultimately determine whether a defendant may continue to serve as a general partner.

The court denied defendants' jurisdictional motion, holding that Section 17-111 is the correct jurisdictional basis because the parties' dispute primarily concerned the interpretation and enforcement of the partnership agreement rather than a general partner's right to serve in that capacity. However, the court granted defendants' motion to stay the Delaware action in favor of the prior-filed Pennsylvania action, noting that governance issues were not significantly implicated by this suit and that the claims of the Pennsylvania action were expected to form the affirmative defenses of the Delaware action.

DRULPA Section 17-110 was amended subsequent to the decision in *Adirondack* to provide that an action for removal of a general partner may be brought under that section.

c. *Snyder v. Butcher & Co.*, C.A. No. 91C-04-0289 (Del. Super. Ct. Sept. 15, 1992)

Plaintiff limited partners brought suit in Superior Court against the general partners for, among other things, breach of fiduciary duty. The defendants moved to dismiss this claim for lack of subject matter jurisdiction.

In dismissing the claim of limited partners, the court analogized to corporate precedent in holding that the fiduciary duties owed by general partners to limited partners are wholly equitable creations that are recognized and enforced exclusively by a court of equity.

2. Personal Jurisdiction

a. *Lucas v. Hanson*, C.A. No. 9424-ML (Del. Ch. July 1, 2014)

Plaintiff, the operating managing manager of the general partner of a Delaware limited partnership (the "Partnership"), was convicted by an Iowa court for theft and ongoing criminal conduct associated with Plaintiff's expenditure of Partnership funds and liquidation of Partnership assets. Plaintiff filed an action in the Chancery Court of the State of Delaware seeking declaratory and injunctive relief from the Iowa court's ruling that required the distribution of Partnership assets to current and former limited partners of the Partnership. Plaintiff argued that the ruling, among other things, was an attempt to regulate the internal affairs of a Delaware entity.

Plaintiff conceded that the complaint did not allege that he was a limited partner of the Partnership – a requirement to establish standing, but asserted that was merely an oversight. Noting that on a motion to dismiss the court cannot look outside the complaint for facts to support it, the Master in Chancery (the "MC") recommended that the court dismiss plaintiff's complaint without prejudice on the basis that plaintiff lacked standing to bring the action. The MC also recommended that the court grant defendant's motion to dismiss for want of personal jurisdiction over defendants. The MC acknowledged that a defendant may waive a defense based on personal jurisdiction by expressly consenting to jurisdiction by contract, which will eliminate the need for a minimum contacts analysis. However, because plaintiff did not file a copy of the partnership agreement with the court, the MC recommended that the court grant defendants' motion to dismiss without prejudice.

b. *Northside Cmty. Bank v. Friedman*, C.A. No. 8405-VCG (Del. Ch. Nov. 20, 2013)

Two defendants, who were individuals that personally guaranteed a loan made by plaintiff bank, allegedly created multiple Delaware entities, including an LLC, a limited partnership and two corporations, as part of a plan to fraudulently transfer assets beyond the bank's reach with the help of a third defendant, who allegedly facilitated the fraudulent transfers. Defendants moved to dismiss the bank's allegations of fraudulent transfer for lack of personal jurisdiction.

Upon learning that the loan they had personally guaranteed was going into default, the guarantors allegedly established a labyrinth of Delaware entities and, with the help of the third defendant, transferred their assets into certain of those entities and used other entities to hold and transfer interests in those entities.

In analyzing defendants' motion to dismiss for lack of personal jurisdiction, the court first found that it had personal jurisdiction over the two defendants who guaranteed the bank loan under Delaware's long-arm statute, which gives the court jurisdiction over any nonresident who, either in person or through an agent, transacted any business in Delaware. The court stated that the allegations that the guarantors made corporate filings with the Delaware Secretary of State through an agent to form Delaware entities and transferred their assets into these entities were sufficient to make a prima facie case that the guarantors engaged in business transactions in Delaware. Further, the court found that the transfer of the assets into these Delaware entities arose out of the forum transactions and that exercising personal jurisdiction over the guarantors in these circumstances did not offend due process.

Second, the court found that it had personal jurisdiction over the third defendant, who facilitated the alleged fraudulent transfers by acquiring ownership interests in the Delaware entities and serving as a director of the Delaware corporations, under the conspiracy theory of jurisdiction because the bank sufficiently alleged facts to support an inference that the conspiracy elements were satisfied.

Finally, the court also found that it had personal jurisdiction over certain non-Delaware trusts under the conspiracy theory of jurisdiction. The non-Delaware trusts, which were created for the benefit of the guarantors' children, acquired interests in the Delaware entities formed by the guarantors. The court stated that a nonresident co-conspirator transacts business in Delaware under the long-arm statute when its alleged co-conspirators transacted business in Delaware. The court attributed the acts of the guarantors to the trusts as co-conspirators and found that the exercise of personal jurisdiction over the trusts was appropriate.

c. *Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, C.A. No. 7092-VCP (Del. Ch. Dec. 20, 2012)

In this case, the Delaware Court of Chancery was presented with a motion to dismiss numerous claims by certain limited partners of Tremont Opportunity Fund II, L.P., a Delaware limited partnership (the "Fund"), against Tremont Partners, Inc., a Connecticut corporation and the general partner of the Fund (the "General Partner"), Tremont Group Holdings, Inc., a Delaware corporation and the parent of the General Partner (the "Parent"), and certain individuals that were officers, directors, managers and principal decision makers of the General Partner and the Parent (the "Individual Defendants"). The claims were all related to losses connected with an investment by the Fund in a hedge fund (the "Hedge Fund") that invested most of its assets in Bernard Madoff's ponzi scheme. The General Partner was also the general partner of the Hedge Fund. In the context of this motion to dismiss, the court addressed, among other things, whether (i) the court had jurisdiction over the Individual Defendants, (ii) an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims, (iii) certain claims were derivative or direct and whether the derivative claims should be permitted notwithstanding a settlement in an action involving similar claims filed by other limited partners of the Fund in the United States District Court for the Southern District of New York (the "New York Case"), (iv) plaintiffs could maintain a valid breach of contract claim under the partnership agreement of the Fund and a private placement memorandum (the "PPM") relating to interests in the Fund on which plaintiffs' allegedly relied, (v) defendants' breached the implied covenant of good faith and fair dealing and (vi) whether the Parent could be liable for aiding and abetting the General Partner's alleged breach of fiduciary duty.

The court first addressed whether it could exercise personal jurisdiction over the Individual Defendants. The partnership agreement of the Fund included a clause pursuant to which the parties thereto consented to the exclusive jurisdiction of the Delaware courts. However, the court observed that the Individual Defendants were not parties to the partnership agreement of the Fund simply by virtue of being directors, officers, managers or decision makers of the General Partner and thus they were not bound by such provision. Plaintiffs' further claimed that the court had jurisdiction under Delaware's long-arm statute, but the court granted the Individual Defendants' motion to dismiss on this issue, finding that participation in the formation of the Fund and having management positions in the Fund did not cause the Individual Defendants to have contacts with the State of Delaware so extensive and continuing that exercising personal jurisdiction would be fair and consistent with state policy. The court also found that the alleged wrongs did not arise out of conduct that occurred within the State of Delaware, and therefore, the court did not have personal jurisdiction on that basis under the Delaware long-arm statute.

The court next turned to defendants' argument that an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims for breach of contract, breach of fiduciary duty, negligent misrepresentation and unjust enrichment. This provision essentially exculpated the General Partner and the Parent for any losses or expenses except those resulting from gross negligence, willful misfeasance, bad faith or reckless disregard of duties under the partnership agreement of the Fund. Plaintiffs claimed that they adequately pled facts that would support a finding of gross negligence. The court referred to the definition of "gross negligence" in the civil context as "a higher level of negligence representing an extreme departure from the ordinary standard of care." The court further indicated that gross negligence is a decision "so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion." The court stated that, under the law of entities, gross negligence "involves a devil-may-care attitude or indifference to duty amounting to recklessness." In order to prevail on a claim of gross negligence, the court stated that a plaintiff must plead and prove that the defendant was "recklessly uninformed" or acted "outside the bounds of reason." Plaintiffs' generally claimed that defendants committed gross negligence by failing to supervise, monitor and manage investments by the Hedge Fund in the Madoff ponzi scheme and instead blindly and recklessly handed over their responsibility to Madoff without performing any due diligence. The court observed that while no Delaware case has addressed whether failure to heed "warning signs" can constitute gross negligence in the partnership context, the analysis in *Forsythe v. ESC Fund Mgmt. Co. (U.S.)* was instructive. The court noted that in *Forsythe*, a motion to dismiss that accused the general partner of failing to oversee an affiliate that was delegated management responsibility for the subject limited partnership was denied. The court found that in this case, defendants' conduct was arguably more egregious than that at issue in *Forsythe*, and therefore, the court denied the motion to dismiss based on the exculpation provision.

The court next addressed whether plaintiffs' breach of fiduciary duty and unjust enrichment claims were derivative or direct claims. The court applied the test set forth in the corporate case of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, which requires answering two questions in making this determination: (1) who suffered the alleged harm; and (2) who would receive the benefit of any recovery or other remedy. The court noted that these claims related to a diminution in the value of the Fund and the Hedge Fund resulting from the Madoff ponzi scheme. According to the court, these injuries were suffered by the Fund and the Hedge Fund, and only indirectly by plaintiffs, and thus, they were derivative in nature. With respect to these claims and all other derivative claims asserted by plaintiffs, including, among others, claims of negligent misrepresentation and intentional misrepresentation, plaintiffs argued that their claims must have been direct because they elected to opt-out of the settlement in the New York Case. The court found, however, that opting-out of a settlement cannot convert a derivative claim to a direct claim. The court further held that because the settlement released defendants with respect to derivative claims, the court was bound by res judicata and thus granted the motion to dismiss.

Plaintiffs alternatively argued that principles of equity warranted disregarding the distinction between their direct and derivative claims. Although the court acknowledged that there was some authority under the *Cencom* and the *Anglo American* limited partnership cases that principles of equity could warrant disregarding a distinction between direct and derivative claims, the court found that those cases involved unique circumstances and there were no similar circumstances in the present case that warranted disregarding the derivative nature of plaintiffs' claims.

The court then discussed defendants' motion to dismiss plaintiffs' claim that defendants breached the partnership agreement of the Fund and the PPM because they allegedly failed to analyze, evaluate and monitor the Madoff-related investments in any manner whatsoever and failed to perform any meaningful due diligence or to monitor the Hedge Fund's investments. The court looked to the PPM, which expressly provided that the General Partner would monitor the Fund's investments and evaluate information regarding the personnel, history and background of professional investment management firms in selecting managers of the Fund. The court also assessed the partnership agreement of the Fund, which provided that the General Partner and its affiliates were not obligated to do or perform any act or thing in connection with the business of the Fund not expressly set forth in the partnership agreement of the Fund. The court found that this provision conflicted with another provision in the partnership agreement of the Fund, which provided that the PPM did not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading. In applying well settled Delaware principles of contract interpretation, the court found that because of this conflict, the partnership agreement of the Fund was ambiguous as to whether it incorporated the promises made in the PPM that were allegedly breached. Because any ambiguity must be resolved in favor of the nonmoving party, the court denied defendants' motion to dismiss the breach of contract claim.

With respect to plaintiffs' claim that defendants' breached the implied covenant of good faith and fair dealing, the court stated that plaintiffs' must have alleged (1) a specific obligation implied in the partnership agreement of the Fund, (2) a breach of that obligation, and (3) resulting damages. Plaintiffs alleged that the General Partner had an obligation to refrain from unreasonable conduct and had an implied contractual obligation to collect, analyze and evaluate information when selecting investment managers and to monitor their performance after any such selection. The court held that this allegation was conclusory and did not amount to pleading a specific implied contractual obligation as required to survive a motion to dismiss. Accordingly, the court granted defendants' motion to dismiss this claim.

Finally, the court addressed plaintiffs' claim that the Parent aided and abetted the General Partner's alleged breach of fiduciary duty. To make a valid aiding and abetting claim, the court indicated that plaintiffs must demonstrate: (1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) that damages to plaintiffs resulted from the concerted action of the fiduciary and the nonfiduciary. The court noted that the General Partner undoubtedly owed fiduciary duties to the limited partners of the Fund. With respect to the third element, the court indicated that, under Delaware law, the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal. In this case, the court found that the General Partner could be considered the Parent's agent, and the General Partner's knowledge could be imputed to the Parent. Thus, the court found that the third element was satisfied. The court did not address the fourth element and denied defendants' motion to dismiss this claim.

d. *Picard v. Wood*, C.A. No. 6526-VCG (Del. Ch. July 12, 2012)

In this case, defendant, a limited partner of a Delaware limited partnership, sought to have a claim against him dismissed for lack of personal jurisdiction. The court granted defendant's motion to dismiss, holding that it is well settled under Delaware law that mere membership in a Delaware limited partnership is insufficient to confer personal jurisdiction absent additional considerations. The court stated that because there were no allegations or evidence that defendant managed, controlled, or exerted influence over the limited partnership, it would be improper to exercise personal jurisdiction over him. In addition, plaintiff asserted that defendant's alleged service as a trustee of a Delaware charitable organization made him subject to personal jurisdiction. The court rejected this assertion because plaintiff's claims against defendant did not arise from defendant's alleged trustee service.

e. *Albert v. Alex. Brown Mgmt. Servs., Inc.*, C.A. Nos. 762-N, 763-N (Del. Ch. Aug. 26, 2005)

In a further decision in this case brought by limited partners of two Delaware limited partnerships, the court addressed several issues raised by defendants' motion to dismiss that remained unresolved following an earlier decision, including issues relating to plaintiffs' disclosure claims, plaintiffs' breach of fiduciary duty and contract claims, whether plaintiffs' claims were direct or derivative in nature and whether the court had personal jurisdiction over certain defendants.

With respect to plaintiffs' disclosure claims, the court stated that to survive the motion to dismiss, the court must find that the allegations supported a reasonable inference of materiality. The standard to be applied was whether there existed a substantial likelihood that a reasonable investor would have considered the disclosure of the omitted fact to significantly alter the total mix of information. The court determined that the managers' failure to disclose (i) that hedging, which was believed by the managers to be in the best interests of the funds, was impractical because of the funds' liquidity situation, (ii) information regarding the funds' liquidity problems and (iii) the funds' defaults under credit arrangements were material. The court made clear that there is no independent duty of disclosure, but rather that the disclosure allegations must be tied to a fiduciary or contractual duty to disclose, and, in this case, plaintiffs claimed both.

The court then turned to plaintiffs' breach of fiduciary duty claims, the first of which related to the managers' failure to provide financial statements. The court held that, while financial statements were required to be provided as a contractual matter under the partnership agreements, the failure to provide such financial statements did not amount to a fiduciary duty claim. Similarly, the managers' permitting limited partners to withdraw and redeem their interests pursuant to the partnership agreements did not constitute a breach of fiduciary duty, as there was no personal benefit to the managers to support a breach of the duty of loyalty and there was no gross negligence (which the court stated would require allegations that the managers acted on a "recklessly uninformed" basis or acted "outside the bounds of reason") to support a breach of the duty of care. The partnership agreements' grant of sole discretion to the managers to deny a limited partner's limited contractual right of redemption did not impart a positive duty to exercise such power, regardless of the liquidity issues faced by the funds. Finally, while the court disposed of the related allegations as to the qualifications of the managers, it determined that plaintiffs' allegations regarding the time and attention the managers devoted to the funds and the alleged disclosure violations did state breach of duty of care claims. In this regard, the court explained that adequate management is a fact-intensive question and the answer varies depending on the type of fund and complexity of the issues faced.

With respect to plaintiffs' breach of contract claims, the court set forth the standard to survive a motion to dismiss, which requires proof of (i) the existence of a contract, (ii) breach of a duty imposed by such contract and (iii) damages to plaintiff from such breach. In contrast to the dismissal of the corresponding breach of fiduciary claim, the court found that the failure to provide financial statements did constitute a breach of contract claim. However, plaintiffs' allegations as to the limited partner withdrawals and redemptions were not sufficient to sustain a breach of contract claim. Finally, the court found the managers' failure to provide information due to limited partners under the partnership agreements in good faith and without material misinformation created a breach of contract claim, in addition to the breach of fiduciary duty claim discussed above.

Apart from whether plaintiffs' claims were factually supported, defendants argued that several counts of the complaint were derivative claims for which demand was neither made nor excused. The court first cited the demand requirement in the limited partnership context, as codified in DRULPA Section 17-1001, and observed the substantial similarity to Delaware corporate law, under which the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), set forth a revised test for determining whether a suit is derivative or direct. Under the revised test, the only factors are (i) who suffered the harm and (ii) who would receive the benefit of any recovery or other remedy, in each case looking at the corporation or partnership, as applicable, versus the stockholders or interest holders, as applicable. In this case, the court found that the fiduciary duty and contract claims based on alleged failures to disclose were direct claims (for which demand was not required). The harm was to the interest holders, in their loss of the ability to withdraw or redeem their interests in response to the information that would have been gained, and the remedy, which, at this stage, may be monetary damages, would go to such holders. In contrast, the fiduciary duty claims based on gross negligence and inadequate management were derivative claims. Mismanagement is, according to the court, the paradigm of the derivative claim, as the managers' actions caused losses to the funds and any recovery would go to the funds. While the failure of demand, and absence of allegations as to why demand was excused, forced the court to dismiss these claims, plaintiffs were given leave to replead.

The final issue addressed by the court was a challenge to personal jurisdiction over certain defendants. Two individual defendants, who were the owners and managers of a Tennessee limited liability company that was the general partner of one of the funds, argued that they were residents of Tennessee who performed their duties from such state and had not solicited business from, engaged in regular conduct with, or even traveled to, Delaware. The court explained that upon such a challenge, the burden was on plaintiffs to show the basis for personal jurisdiction, which will then require the court to determine (i) whether service of process on the nonresident defendant was authorized by the Delaware long-arm statute and (ii) whether the exercise of jurisdiction is consistent with due process. After stating that the Delaware long-arm statute had been interpreted to allow jurisdiction to the fullest extent permitted by the due process clause, the court observed that the funds were formed as Delaware limited partnerships governed by Delaware law and that the entity in which these defendants were managing members and owners was responsible for the day-to-day management of both funds (in its capacity as sub-advisor of each fund, in addition to being the general partner of one fund). The conclusion that the contacts of these defendants constituted "transacting business" within the meaning of the long-arm statute was supported by the facts that the entity that these defendants served (i) participated in the formation of, (ii) was primarily responsible for the management of and (iii) received fees from, the funds. The court then considered whether "minimum contacts" between the nonresident defendants and the state existed—that is, whether these defendants deliberately engaged in conduct that created obligations between themselves and the state, including the protection of the state's laws, such that these defendants should reasonably anticipate action in Delaware courts. In addition to the facts cited with respect to the long-arm statute, these defendants enjoyed the benefits of Delaware law, including limited liability. Further, Delaware's important interest in regulating entities that choose its laws warrants its exercise of jurisdiction over those who manage such entities and avail themselves of the laws of the state that empower them to act. The claims at issue in this case involved corporate power and fiduciary obligations, which are at the heart of the internal affairs and governance issues of special concern for the state, making the exercise of personal jurisdiction over these defendants appropriate.

f. *Werner v. Miller Tech. Mgmt., L.P.*, C.A. No. 19721 (Del. Ch. Feb.13, 2003)

The plaintiff, a limited partner in a Delaware limited partnership, brought an action against the partnership, its general partner, the members of an Advisory Board of the partnership comprised of limited partners, the general partner's controlling entity and the two individuals ultimately exercising control over the general partner. The plaintiff alleged a breach of the duty of care and the duty of disclosure against the general partner and its principals as well as a claim of aiding and abetting a breach of the fiduciary duty of loyalty and conspiracy against all defendants. The allegations centered on the plaintiff's assertion that the general partner and its principals acted in concert with the members of the Advisory Board to cause the partnership to invest in, and make financing commitments to, companies in which they had personal stakes. The plaintiff also asserted that the general partner, its principals and the Advisory Board members engaged in a scheme to direct companies in which the partnership had significant investments to enter into lucrative consulting agreements with a consulting company controlled by them, thereby enriching themselves at the expense of the other limited partners.

Before the court was, among other things, a motion by the members of the Advisory Board to dismiss the plaintiff's complaint against them for lack of personal jurisdiction which the court granted. The plaintiff asserted that the court had jurisdiction over the members of the

Advisory Board, none of whom were residents of Delaware, based on Delaware's long-arm statute (10 *Del. C.* § 3104(c)(1)) establishing jurisdiction where a defendant transacts any business in Delaware. The plaintiff claimed that the members of the Advisory Board participated in the management of the partnership. The court disagreed and found that the duties of the Advisory Board as set forth in the partnership agreement and private placement memorandum of the partnership were not managerial in nature but merely consisted of assistance and advice to the general partner. Neither the partnership agreement nor the private placement memorandum contained language giving the Advisory Board power to direct the actions of the general partner. Further, the plaintiff failed to allege any facts to show that the Advisory Board exerted actual control over the partnership.

The court also rejected the plaintiff's argument that the Advisory Board defendants were subject to personal jurisdiction under the conspiracy theory of jurisdiction. The court identified a five-part test that must be satisfied for the valid exercise of jurisdiction under the conspiracy theory: (i) the existence of a conspiracy to defraud; (ii) the defendant must be a member of that conspiracy; (iii) a substantial act or substantial effect in furtherance of the conspiracy occurs in Delaware; (iv) the defendant knows or has reason to know of the act in Delaware or that acts outside Delaware would have effect in Delaware; and (v) the act in or effect on Delaware is a direct and foreseeable result of the conduct in furtherance of the conspiracy. The court found that while the plaintiff alleged the existence of a conspiracy to which the Advisory Board members were a party, the plaintiff failed to show that a substantial act or effect of the conspiracy occurred in Delaware.

In addition, the court found that even if the complaint had satisfied Delaware's long arm statute, the Advisory Board members did not have the requisite contacts with Delaware to allow the court to exercise personal jurisdiction consistent with due process. The Advisory Board members did not reside in Delaware, conduct business in Delaware, own any real property in Delaware or contract to supply goods or services on behalf of the partnership in Delaware. Further, no Advisory Board meetings were held in Delaware and the Advisory Board members did no act in Delaware or any act outside of Delaware that caused injury in Delaware. The court also rejected the plaintiff's claim that the choice of law provision in the partnership agreement supported a claim of minimum contacts with Delaware. The court held that while a choice of law provision should not be ignored, such a provision does not by itself confer personal jurisdiction. Because the choice of law provision in the partnership agreement essentially stood alone, without an attendant forum selection clause, the court found that the provision was not sufficient to bestow personal jurisdiction.

g. *Cantor Fitzgerald, Inc. v. Chandler*, C.A. No. 15689-NC, C.A. No. 15690-NC (Del. Ch. Oct. 14, 1999)

Plaintiff limited partnership filed an action in the Court of Chancery claiming that defendant limited partners breached the partnership agreement and tortiously interfered with the partnership agreement by inducing other limited partners to breach the partnership agreement. In defendants' earlier motion to dismiss, the court found that the partnership agreement's forum selection clause provided the court with personal jurisdiction over the defendants with respect to the breach of partnership agreement claims. Because the court did not address defendants' claim that the forum selection clause did not confer personal jurisdiction over the defendants with respect to the tortious interference claim, the court granted defendants' motion to reargue. Finding that the court's exercise of personal jurisdiction over the defendants with respect to the tortious interference claim would not substantially prejudice the defendants, the court held that, where the parties are the same and the subject matter is closely related in an action alleging both contract claims and a tort claim, the close relationship of the subject matter calls for an exercise of personal jurisdiction over the tort claim in the interest of judicial economy and efficiency even though the tort claim would not by itself establish personal jurisdiction. The court found, by analogy to Delaware corporate case law, that Delaware public policy favors Delaware courts assuming personal jurisdiction over the parties in this action in order to adjudicate claims which sufficiently relate to other claims which properly give the court personal jurisdiction. The court noted that the only distinction between the corporate cases and this limited partnership case is that the fiduciary duties in the corporate cases arose directly under statute while the fiduciary duties in this case arose under the partnership agreement and found such distinction to be irrelevant since in each case the breach of fiduciary duty claims provided the court with personal jurisdiction.

h. *CRI Liquidating REIT, Inc. v. A.F. Evans Co.*, C.A. No. 15506 (Del. Ch. Oct. 30, 1997)

Plaintiff limited partner filed suit against the non-resident general partners of a Delaware limited partnership and attempted to effect service of process upon them under Section 17-109 of the DRULPA. Section 17-109, which provides that the filing of a certificate of limited partnership with the Secretary of State constitutes the "implied consent" of the general partners to the appointment of the limited partnership's registered agent as their own agent upon whom service of process may be made, did not become effective until 1988. Since the defendant general partners had recorded their certificate of limited partnership in 1987, they moved to dismiss the action for lack of personal jurisdiction, arguing that Section 17-109 was not applicable to them.

Significantly, the court declined to apply Section 17-109 retroactively and granted the defendants motion to dismiss on the ground that the court lacked personal jurisdiction. As explained by the court, statutory amendments that affect substantive rights do not operate retroactively unless the General Assembly explicitly so provides or the court determines that public policy requires retroactive application. The court rejected the plaintiff's argument that Section 17-1108 of the DRULPA, which states that "[a]ll provisions of [the DRULPA] may be altered from time to time or repealed and all rights of partners are subject to this reservation," made Section 17-109 retroactively applicable because Section 17-1108 does not explicitly provide that all future amendments to the DRULPA will operate retroactively. Further, the court found that the public policy of judicial oversight of those managing Delaware entities was not sufficient to subject the defendants to personal jurisdiction in Delaware without notice upon the filing of the limited partnership certificate. The court noted that, had the plaintiff attempted to effect service of process under the Delaware "long-arm" statute (Del. Code Ann tit. 10, § 3104), the court may have had personal jurisdiction over the general partners.

i. *Carlton Invs. v. TLC Beatrice Int'l. Holdings, Inc.*, C.A. No. 13950 (Del. Ch. Nov. 21, 1995)

The plaintiff filed a derivative action on behalf of a corporation seeking recovery of amounts paid out by the corporation, including payments to a New York limited partnership. The plaintiff sought personal jurisdiction in Delaware over the New York limited partnership, which was not registered in Delaware, by serving its general partner, a Delaware corporation. The New York limited partnership moved to dismiss the claim against it for lack of personal jurisdiction.

In an apparent narrowing of its holding in *Macklowe*, the court held that the mere selection of a Delaware corporation as general partner is not enough to subject a limited partnership to personal jurisdiction in Delaware. Under the "doing business" test of DRULPA Section 17-911, business must be transacted in Delaware on behalf of the unregistered foreign limited partnership in order to validate the service of process on the limited partnership through its corporate general partner. Thus, because its Delaware corporate general partner had not conducted business on its behalf in Delaware, the claim against the New York limited partnership was dismissed.

j. *Macklowe v. Planet Hollywood, Inc.*, C.A. No. 13689 (Del. Ch. Oct. 13, 1994)

The shareholders of a Delaware corporate general partner brought a derivative suit against the corporation and the Florida limited partnership, of which it was the general partner. The limited partnership moved to dismiss the complaint against it for lack of personal jurisdiction since it was not registered to do business in Delaware and its only connection to the state was the selection of a Delaware corporation to serve as general partner. The plaintiffs argued the presence of the limited partnership's general partner in Delaware constituted express consent to the exercise of personal jurisdiction in Delaware.

Section 17-911 of the DRULPA deems the Secretary of State to be the designated agent for service of process for unregistered foreign limited partnership's "doing business" in Delaware. This statute does not address the situation in which an unregistered foreign limited partnership has a Delaware general partner, but the court held that the limited partnership's selection of a Delaware corporation constituted a reasonable basis for concluding that the partnership expected that its general partner would be subject to service of process and accept service in the event that the partnership was found to be doing business in Delaware. The court then held that the selection of a Delaware general partner was sufficient to meet the "doing business" test of Section 17-911 and the "minimum contacts" test of the Fourteenth Amendment. Because the underlying cause of action was based on the interrelationship of the partnership and its general partner, the court found that the limited partnership must have anticipated answering in Delaware for complaints of this nature when it selected a Delaware general partner. Minimum contacts were also found to exist using the conspiracy theory, in which the acts of the directors of the corporate general partner were imputed to the partnership and provided evidence that it was reasonable and fair to require the partnership to defend an action in Delaware. Thus, the limited partnership's motion to dismiss was denied.

k. *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991)

After holding that the directors of corporate general partners owe fiduciary duties to the limited partnership and its limited partners, the court found that personal jurisdiction could be properly effected over the directors through service of process in accordance with the directors' consent statute *(Del. Code Ann*. tit. 10, § 3114).

l. *Regency Hous. and Drilling Ltd. P'ship I v. Cohen*, C.A. No. 89C-DE-70 (Del. Super. Ct. Sept. 11, 1991)

A Delaware limited partnership brought suit against a limited partner for failure to make payments on a promissory note reflecting the balance due on the limited partner's capital contribution. The limited partner, who was not a resident of and owned no real property in Delaware, filed a motion to dismiss for lack of personal jurisdiction. The limited partnership argued that personal jurisdiction was warranted because the limited partner had received the benefits and protections of Delaware's forum by joining a Delaware limited partnership and the general partners had been conducting business in Delaware on the limited partner's behalf and in his interests.

In granting the limited partner's motion to dismiss, the court held that status as a limited partner was not sufficient to confer personal jurisdiction over the limited partner. Under the partnership agreement, the limited partner was expressly incapable of performing any of the activities that the limited partnership contended constituted "doing business" to subject the limited partner to personal jurisdiction. Also, the passage of Section 17-109 of the DRULPA, which includes provisions that permit a limited partner to consent to personal jurisdiction in Delaware, provided evidence that the General Assembly did not believe that mere status as a limited partner implied consent to personal jurisdiction.

3. Arbitration

a. *Lewis v. AimCo Properties, L.P.*, C.A. No. 9934-VCP (Del. Ch. Feb. 10, 2015)

Plaintiffs in this matter were minority owners of limited partnership interests in four Delaware limited partnerships (the "LP Defendants"). Each LP Defendant had a corporate entity as its general partner (the "GP Defendant") and each such corporate general partner was indirectly owned by non-party Apartment Investment and Management Company, a Maryland real estate investment trust ("AimCo"); AimCo indirectly held a majority of the limited partnership interests in each LP Defendant. What gave rise to this action was the merger of the LP Defendants into a subsidiary of Aimco Properties, L.P., a Delaware limited partnership and an affiliate of Aimco ("Aimco OP"), without obtaining a vote from the minority limited partners of the LP Defendants. Plaintiffs asserted that the GP Defendants, Aimco OP and certain officers and directors of AimCo and the GP Defendants breached their fiduciary duties because the mergers were allegedly self-dealing transactions and were not entirely fair. Several defendants moved to dismiss the complaint against them for (i) lack of subject matter jurisdiction because two of the LP Defendants' partnership agreements contained a mandatory arbitration clause and (ii) failure to state a claim upon which relief could be granted because neither Aimco OP nor the officer-defendant of AimCo owed fiduciary duties to plaintiffs.

In ruling on the motion to dismiss for lack of subject matter jurisdiction, the court held that the relevant partnership agreements contained broad, mandatory arbitration clauses. According to binding Delaware precedent, the issue of substantive arbitrability was left to the arbitrator if the parties clearly and unmistakably agreed to submit that issue to the arbitrator. This "clear and unmistakable evidence" standard was met when the arbitration clause provided for arbitration of all disputes and incorporated a set of arbitration rules that allow arbitrators to decide arbitrability. The arbitration clauses of the partnership agreements of the relevant LP Defendants applied to the widest array of potential claims and provided that arbitration would be conducted in accordance with the rules of the American Arbitration Association, which empowered arbitrators to rule on their jurisdiction. The court therefore held that the partnership agreements required that the issue of substantive arbitrability be left to the arbitrator.

With respect to the motion to dismiss for failure to state a claim upon which relief could be granted, the court held that the moving defendants did not owe fiduciary duties to plaintiffs. Plaintiffs claimed that Aimco OP owed fiduciary duties to the limited partners of the LP Defendants because it controlled the LP Defendants and exercised that control to acquire unaffiliated minority interests held by the minority limited partners. The court restated plaintiffs' argument as follows: AimCo owned majority stakes in the LP Defendants through its affiliates; Aimco OP was an affiliate of AimCo; therefore, Aimco OP may have been liable for a breach of fiduciary duty as to one of the LP Defendants. The court, however, pointed out that this reasoning erroneously imposed on limited partnerships the corporate law concept of fiduciary duties owed by a controlling stockholder to the minority stockholders. The court disagreed with this assertion. The management and control of a limited partnership is vested with the general partner, and, even with a majority interest, a limited partner would not have the power to manage the business and affairs of the limited partnership without subjecting itself to personal liability as a general partner. Thus, the court did not find that AimCo's indirect majority interest in the LP Defendants supported a reasonable inference that AimCo or Aimco OP owed a fiduciary duty to the LP Defendants or their limited partners. Additionally, since plaintiffs named the GP Defendants and their directors as parties to this action, the complaint implicitly recognized that those GP Defendants were the controllers of the LP Defendants, not Aimco OP. The court explained that according to the In re USACafes, L.P. Litigation line of cases, the proper defendants for these alleged breaches of fiduciary duties may be the GP Defendants and their officers and directors, but not Aimco OP or its officers. The complaint was therefore dismissed as to the moving defendants.

b. *Aris Multi-Strategy Fund, LP v. Southridge Partners, LP*, C.A. No. 5422-CC (Del. Ch. May 21, 2010)

Plaintiff, a limited partner of a Delaware limited partnership, filed an action under Section 17-305 of the LP Act seeking access to the partnership's books and records. The plaintiff argued that such action was not subject to arbitration under the partnership's limited partnership agreement. The arbitration provision of the partnership agreement provided, in relevant part, that "any claim or controversy arising among or between the parties hereto pertaining to the Partnership or this Agreement shall be settled by arbitration . . . ." The court held that the dispute was clearly a dispute "pertaining to the Partnership" and was thus subject to arbitration. The plaintiff also argued that inspection rights under 17-305 could not be determined by an arbitrator because Section 17-305(e) of the LP Act grants exclusive jurisdiction to the Court of Chancery for this type of dispute. Section 17-305(e) provides that the "Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking such information is entitled to the information sought." The court disagreed, finding that Section 17-109(d) permits a limited partner to waive its right to bring actions "relating to the organization or internal affairs of a limited partnership" in the Delaware courts so long as it does so by agreeing to arbitrate such actions.

c. *Salzman v. Canaan Capital Partners, L.P.*, C.A. No. 14687 (Del. Ch. July 23, 1996)

A general partner of three Delaware limited partnerships brought an action in Delaware seeking the dissolution of the partnerships, against whom he was also litigating other issues in a Connecticut arbitration proceeding. The defendants moved to dismiss, or in the alternative stay, the Delaware action in favor of the arbitration proceeding. The court found the general partner bound to submit the dissolution claim against one limited partnership to arbitration by the all-encompassing arbitration clause in that partnership's agreement. The other partnership agreements, however, did not contain such a clause and the dissolution claims were not first brought in the arbitration proceeding. Therefore, despite the awkward procedural consequences and Delaware's policy of encouraging arbitration, the court did not have the power to compel the general partner to arbitrate the remaining dissolution claims in the Connecticut proceeding. The court did, however, exercise its power to stay the Delaware proceeding in the interests of judicial efficiency and consistency, pending the outcome of the arbitration proceeding.

d. *Malekzadeh v. Wyshock*, 611 A.2d 18 (Del. Ch. 1992)

In a prior proceeding captioned *Sorouri v. Wyshock*, the court had denied a motion by the limited partners of a Delaware limited partnership to enjoin the general partner from taking further action with respect to the partnership holding that, pursuant to a broad arbitration clause contained in the partnership agreement at issue, the limited partners had an adequate remedy and, upon the general partner's motion, the court had compelled the limited partners to arbitrate their dispute. The general partner then moved to vacate the arbitration award on the grounds that the arbitrators exceeded statutory authority and the authority granted to them under the parties' pre-arbitration stipulation. The court rejected the general partner's contention, holding that the award was within the arbitrators' grant of authority.

4. Statute of Limitations

a. *Bean v. Fursa Capital Partners, LP*, C.A. No. 7566-VCP (Del. Ch. Feb. 28, 2013)

Plaintiff, a limited partner in Fursa Capital Partners, LP, a Delaware limited partnership (the "Partnership"), sued the Partnership and its general partner, Fursa Advisors LLC (the "GP") for failing to receive audited financial statements as required by the Partnership's Limited Partnership Agreement (the "LP Agreement"). Plaintiff sought specific performance and alleged breach of contract and misrepresentation. The court granted plaintiff's request to review financial statements for years not barred by laches, denied plaintiff's motion for summary judgment on the breach of contract claim and granted defendants' motion to dismiss the claim of misrepresentation.

Both the LP Agreement and a private placement offering memorandum ("PPM") for the Partnership, an investment fund, stated that the Partnership would send audited annual financial statements to all partners within 120 days of the end of the fiscal year. Plaintiff sought to obtain these statements but did not receive the statements for years 2008-2011. Plaintiff filed suit in May 2012.

The court addressed the misrepresentation claim first. The court held that plaintiff essentially alleged a claim of promissory fraud, as he averred that defendants knew at the time they made the representations in the LP Agreement and the PPM that they had no intention of providing the audited annual financial statements. The court found that a promissory fraud claim requires plaintiff to plead specific facts, which plaintiff failed to do. Further, the facts suggested that defendants delivered the statements for years 2005 through 2008. Finally, if defendants made the alleged misrepresentations at the time they entered into the LP Agreement and PPM, then plaintiff engaged in impermissible bootstrapping of the fraud claim to his breach of contract claim, as the contract claim rested entirely on the representation regarding defendants' contractual obligations. The court granted defendants' motion to dismiss the misrepresentation claim.

The court then addressed the breach of contract claim, holding that the request for the 2008 statements was barred by laches. Under the LP Agreement, the action accrued on April 30 of each year for the previous years' financial statements. Because plaintiff did not file his complaint until May 24, 2012, his claim for the 2008 statement was barred by laches and the analogous 3-year statute of limitations. The court rejected plaintiff's arguments regarding fraudulent concealment as he alleged no facts to support the claim. However, the court held that the requests for the 2009-2011 statement were not time-barred because it was reasonably conceivable that plaintiff did not unreasonably delay in bringing the action, as he alleged that he attempted to make several demands to the Partnership for the statements. The court also addressed plaintiff's motion for summary judgment on the breach of contract claim. The LP Agreement appeared clear to the court in that it required the delivery of audited financial statements; however, defendants asserted that they validly amended the LP Agreement to no longer require the delivery of the statements. The LP Agreement permitted the GP to amend the agreement in any manner that did not adversely affect any partner's rights in any material respect without that partner's consent. Defendants did not inform plaintiff of the amendment. The court found that a genuine issue of material fact existed as to the validity of the amendment of the LP Agreement and, therefore, denied plaintiff's motion for summary judgment.

b. *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247 (Del. Ch. Oct. 9, 2007)

Plaintiffs were current or former employees of Canadian Imperial Bank of Commerce ("CIBC") and limited partners in a Delaware limited partnership operating as a private equity fund (the "Fund") who brought a derivative action against the Fund, its corporate general partner (the "General Partner"), past and present directors of the General Partner, the Fund's investment advisor (the "Investment Advisor"), the Fund's special limited partner (the "Special Limited Partner") and CIBC alleging breach of fiduciary duty, breach of the Fund's partnership agreement and aiding and abetting. Defendants moved to dismiss on the grounds that (i) plaintiffs did not make demand and demand was not excused; (ii) plaintiffs failed to state a claim upon which relief could be granted; (iii) plaintiffs' claims were barred by laches and/or the statute of limitations; and (iv) plaintiffs waived their right to bring suit.

The Fund was created by CIBC to co-invest with CIBC in accordance with the investment criteria set forth in the Fund's partnership agreement and offering documents. Under the Fund's partnership agreement, the General Partner had the sole right to manage and administer the affairs of the Fund but the partnership agreement also provided for the General Partner to delegate certain of its responsibilities and pursuant thereto the General Partner delegated its authority to select and dispose of the Fund's investments to the Special Limited Partner. The General Partner also delegated other investment management and related powers, such as exercising the Fund's voting rights in its investments, to the Investment Advisor which also had the authority to develop investment policies and strategies and to recommend particular investments for the Fund. The Investment Advisor in turn delegated much of this investment decision authority to CIBC's investment committee, which consisted of upper level CIBC executives. The Investment Advisor could also buy investments for the Fund with approval of the Special Limited Partner. Notwithstanding the foregoing delegations, the court found that the General Partner retained supervisory responsibility because under the partnership agreement the exercise of their powers by the delegatees and the performance of their duties was "subject to the oversight of the General Partner." The partnership agreement also provided that the General Partner, Investment Advisor, Special Limited Partner and certain other persons were liable only for actions or omissions resulting from bad faith, willful misconduct, gross negligence or material breach of the partnership agreement.

The Fund lost over 75% of its initial value and over half of its investments were written down or written off. The complaint alleged that these losses resulted from defendants' breaches of fiduciary duties. Specifically, the complaint alleged that the Fund was designed to "co-invest" with CIBC. Under this design, when CIBC's investment committee decided to make a particular investment on behalf of CIBC, the Investment Advisor or Special Limited Partner would then decide if the investment met the Fund's eligibility requirements and, if so, invest alongside CIBC. According to the complaint, however, investments were not made in this way. Rather, the same CIBC senior executives who served on CIBC's investment committee also acted for the Investment Advisor and the Special Limited Partner, and when an investment owned by CIBC lost value, these individuals acting for the Special Limited Partner or Investment Advisor allegedly approved the Fund's purchase of these investments from CIBC at prices equal to CIBC's original cost of investment and also paid CIBC a 7% finders fee. The complaint alleged that CIBC, the Special Limited Partner and the Investment Advisor violated their fiduciary duty to the Fund through this activity and the General Partner violated its duty by failing to oversee these activities.

With respect to defendants' statute of limitations and laches defenses, the court noted that limitations periods would be tolled where the facts of the underlying claim were so hidden that a reasonable plaintiff could not timely discover them. In this regard, the court agreed with plaintiffs that the statute of limitations was tolled for a period of time during which the plaintiffs had no knowledge or reason to know that the Fund purchased worthless or improper investments.

c. *Albert v. Alex. Brown Mgmt. Servs., Inc.*, C.A. Nos. 762-N, 763-N (Del. Ch. June 29, 2005)

After the disposition of this case by the Superior Court, the limited partners of the two Delaware limited partnerships filed suit in the Chancery Court against the general partners of the partnerships, certain affiliates of the general partners and numerous members of the partnerships' management committees. The defendants moved to dismiss, arguing that the plaintiffs' claims were time-barred, that the plaintiffs failed to state a claim upon which relief could be granted and finally that the plaintiffs' claims were derivative and the plaintiffs had not pleaded that demand was refused or futile. The Chancery Court held that a vast majority of the specific factual allegations made by the plaintiffs had to do with wrongful actions occurring more than three years before the parties entered into a tolling agreement and therefore any causes of action accruing as a result of these wrongful actions would be time-barred. Because it was unclear which of the plaintiffs' numerous claims were time-barred, the court ordered the plaintiffs to file supplemental arguments on this issue.

The Chancery Court began its analysis by stating that a three-year statute of limitations is applicable to tort, contract and fiduciary duty claims and that, even though statutes of limitation do not automatically bar actions in equity, the statutory period applies by analogy and it may create a presumptive time period for application of laches to bar a claim. The court stated that the statute of limitations begins to run at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action. Under this analysis, the court determined that the vast majority of the wrongful acts alleged by the plaintiffs took place sufficiently far in the past so that any causes of action arising therefrom would be time-barred. According to the court, whether or not the plaintiffs could have sued for damages is not dispositive as to whether a claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief. In other words, a claim accrues at the time of the alleged wrongdoing, not when a plaintiff suffers a loss. The plaintiffs went on to assert three separate theories to support a tolling of the statute of limitations: (i) inherently unknowable injuries, (ii) fraudulent concealment and (iii) equitable tolling. The court stated that each of these doctrines permits tolling of the limitations period only where the facts underlying a claim are so hidden that a reasonable plaintiff could not timely discover them and held that, in each case here, the plaintiffs were long since on inquiry notice of the existence of their claims.

d. *Salovaara v. SSP Advisors, L.P.*, C.A. No. 20288-NC (Del. Ch. Dec. 22, 2003); *South Street v. Salovaara*, C.A. No. 16579-NC (Del. Ch. Dec. 22, 2003)

In these, the last of several related actions brought in Delaware, New Jersey and New York, Mikael Salovaara sought enforcement of the indemnification clauses of several different partnership agreements. Previously, one of Salovaara's partners, Alfred C. Eckert, filed a complaint in the Court of Chancery, asking the court generally to interpret the indemnification provisions of the relevant partnership agreements and specifically to determine whether Salovaara was entitled to indemnification of his legal fees and expenses in connection with suits that Salovaara himself had initiated to obtain personal recovery as a plaintiff. During the pendency of Eckert's initial action, Eckert and Salovaara were involved in related litigation in New Jersey and New York. In the New York litigation, it was determined that one of the partnerships managed by Eckert and Salovaara was an ERISA fund, which could therefore indemnify a person only "for those expenses that are incurred pursuant to his duties with the plan, and that are undertaken for the exclusive benefit of the plan." In the New Jersey litigation, it was determined that Eckert was not entitled to indemnification because he had acted with bad faith and willful misconduct and further that the relevant partnership agreements contemplated the indemnification not of plaintiffs but only of defendants. Nonetheless, several months before the New Jersey court's decision, Eckert sought a voluntary dismissal without prejudice of the action he had originally brought in the Court of Chancery. Salovaara argued in response that (a) it would be inequitable to dismiss the action without prejudice because Eckert had forced the issues of plaintiff indemnification to be litigated in the Chancery Court, (b) the Chancery Court should dismiss the action with prejudice because Eckert had all along asserted that Delaware had a paramount interest in the matter and (c) the Chancery Court should dismiss the action with prejudice because the parties had already expended hundreds of thousands of dollars in legal fees and the case was ready for trial. The Court of Chancery dismissed the action with prejudice, ordering Salovaara to be indemnified for past legal fees and expenses and to receive an advancement against future legal fees and expenses. This order was stayed pending the final disposition of the New York litigation, including any appeals therefrom.

In the present disposition, the court vacated the stay of its earlier order, allowing Salovaara to be indemnified for the legal fees and expenses he had incurred as a plaintiff. The dismissal with prejudice had the effect of conclusively determining that the relevant partnership agreement was drafted to encompass plaintiff indemnification. In outlining this conclusion, Chancellor Chandler emphasized the fact that Eckert had brought this outcome on himself when he moved for the dismissal of his own case without prejudice: "In essence, by asking this Court to dismiss voluntarily the Related Indemnification Action, Eckert stood before this Court and said, 'I admit my claim has no merit. Salovaara is entitled to indemnification….' This Court is a court of equity and Eckert cannot persuade it to disregard the voluntary circumstances under which the June 14 Order was entered, simply in order to avoid a conflict, which is the product of his own actions, in judgments between this Court and a sister court in New Jersey." The New York decision regarding ERISA, however, prevented Salovaara from receiving indemnification from one of the partnerships. Related partnership agreements with identical indemnification clauses were read to provide indemnification for plaintiffs as well as defendants. Finally, the court refused to distinguish between plaintiff indemnification versus defendant indemnification regarding the statute of limitations, upholding the previous ruling of *Scharf v. Edgcomb Corp.*, 1997 WL 762656 (Del. Ch. 1997), that the statute of limitations on an indemnification claim accrues on the date the indemnitee could be confident any claim against him had been resolved with reasonable certainty.

e. *In re Dean Witter P'ship Litig.*, C.A. No. 14816 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999)

Plaintiffs, unitholders in numerous Delaware limited partnerships, brought an action seeking an accounting and damages from general partners and financial advisors for breaches of the fiduciary duties of care, loyalty and candor in connection with the operation of the partnerships. Specifically, plaintiffs claimed that the defendants breached their fiduciary duties in recommending and selling to plaintiffs units in partnerships that could never achieve their promised objectives and breached their fiduciary duties by operating the partnerships to benefit themselves at the expense of the unitholders. Defendants filed a motion to dismiss claiming that, among other things, the plaintiffs' claims were time-barred.

The court began its analysis by stating that a three-year statute of limitations is applicable to claims for breach of fiduciary duty and that, even though statutes of limitation do not generally apply directly in equity, equity follows the law and will apply a statute of limitations by analogy in appropriate circumstances. According to the court, the general law in Delaware was that the statute of limitations began to run at the time of the alleged wrongful act, even if the plaintiff was ignorant of the cause of action. The court divided the claims of the plaintiffs into two different types of injuries: (i) violation of fiduciary duties in the marketing and sale of partnership units and (ii) post-offering breaches of fiduciary duties in connection with management and oversight of the partnerships. Because partnership units were marketed and sold to the plaintiffs at least six years prior to the filing of the complaint in this action, the claims relating to the marketing and sale of the partnership units were stale, absent tolling of the statute of limitations, several years before the plaintiffs' claim was filed. With respect to the claims relating to post-offering breaches, the alleged violations of fiduciary duty began shortly after each partnership was formed and thus the post-offering breaches also accrued at least six years before the filing of the complaint and were stale absent tolling of the statute of limitations.

Plaintiffs alleged that their claims were timely because the statute of limitations was tolled until shortly before the filing of the complaint when an article printed in the *Wall Street Journal* concerning the practices of the defendants put them on notice of their potential claims. The court stated that in order for the plaintiffs to establish that the action was not time-barred, the plaintiffs must convince the court that they were not objectively aware of facts giving rise to the wrong, i.e. on inquiry notice, more than three years prior to the date on which the complaint was filed and further stated that a limitations period would be tolled until such time as persons of ordinary intelligence and prudence had facts sufficient to put them on inquiry, which, if pursued, would lead to the discovery of the injury. Because all of the plaintiffs' claims were based on disclosures in documents that were either provided to plaintiffs contemporaneously with the wrongful conduct or publicly available in filings with the Securities and Exchange Commission, the court held that the plaintiffs were clearly on inquiry notice of their claims more than three years before the filing of their complaint and granted the defendants' motion to dismiss on the ground that the plaintiffs' claims were time-barred by the operation of the statute of limitations. The court acknowledged the correctness of plaintiffs' assertion that beneficiaries are entitled to trust their fiduciaries but stated that plaintiffs still must be reasonably attentive to their interests and cannot ignore obvious signals of defendants' mismanagement contained in publicly filed annual and quarterly reports, proxy statements and other SEC filings.

f. *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497 (Del. 1996)

Plaintiff limited partner sued the general partner for, among other things, breach of the partnership agreement. The Supreme Court affirmed the Court of Chancery's entry of summary judgment in favor of the general partner in the breach of partnership agreement claim on the ground that the claim was time-barred. The claim was a legal claim brought in a court of equity for which an analogous contract action existed at law with a corresponding statute of limitations. Because the claim was not filed within the analogous statutory period, relief was denied to the limited partner.

5. Attorney-Client Privilege

a. *Metro. Bank and Trust Co. v. Dovenmuehle Mortg., Inc.*, C.A. No. 18023 (Del. Ch. Dec. 20, 2001)

Plaintiffs, two limited partners of a Delaware limited partnership, moved to compel the production of certain documents related to a subordinated debt transaction proposed by the general partner in connection with the restructuring of certain partnership debt and in which all limited partners of the partnership were offered an opportunity to participate. The general partner asserted the attorney-client privilege and work-product doctrine in opposition to the motion.

In response to the general partner's claim of attorney-client privilege, the limited partners argued that the fiduciary exception applied to the requested documents. The fiduciary exception to the attorney-client privilege is premised upon a commonality of interest and purpose between the general partner and the limited partners and permits a limited partner to gain access to otherwise privileged documents of the partnership under certain circumstances. The fiduciary exception ceases to apply once the purposes and interests of the general partner and the limited partners diverge. In order to avail themselves of the fiduciary exception, limited partners must establish a mutuality of interest between the general partner and the limited partners and make a showing of good cause.

The court found that more than a simple disagreement between the general partner and the limited partners must exist before mutuality of interest will be deemed to have expired but that once litigation about an identified dispute can be reasonably anticipated, the general partner and the limited partners no longer share a commonality of interest. The risk of litigation with one of the plaintiff limited partners was evident before the requested documents were created. While some of the documents subject to the motion were created prior to the time that litigation could be reasonably anticipated between the general partner and the other plaintiff limited partner, the court concluded that the attorney-client privilege must prevail against both limited partners with respect to all such documents because both plaintiffs sought the same documents to assert the same claims through the same counsel.

Plaintiffs also alleged that distribution to the limited partners of a memorandum describing the subordinated debt transaction by counsel for the partnership and the general partner constituted a waiver of the attorney-client privilege with respect to subsequent documents and communications addressing the restructuring and the subordinated debt transaction. However, the court concluded that the memorandum did not contain any information constituting a disclosure of any significant confidential communications between attorney and client and added, that even if it were characterized as a privileged attorney-client communication, based on the showing made by plaintiffs, the court could not find a waiver of the attorney-client privilege by the general partner.

Finally, plaintiffs argued that the general partner could not assert attorney-client privilege with respect to a letter from counsel for a non-plaintiff limited partner to counsel for another non-plaintiff limited partner. The court found that the letter was created and disseminated within the scope of a common interest in the transaction between the general partner and such non-plaintiff limited partners and plaintiffs failed to show why the evidentiary rule protecting confidential communications by one person's attorney to an attorney representing another person in a matter of common interest did not apply to the letter. Therefore, the general partner remained entitled to assert the attorney-client privilege as to the letter.

b. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, C.A. No. 15754-NC (Del. Ch. Mar. 31, 1999)

Plaintiff limited partner moved to compel the production of communications between an attorney and the board of directors of the general partner relating to various transactions challenged by the limited partner. The defendants asserted the attorney-client privilege in opposition to the motion.

After finding that the alleged actions of the defendants, including the inadvertent production of one memo containing legal advice, had not waived the attorney-client privilege, the court held that, unlike the general partnership context in which a partner cannot assert the attorney-client privilege to bar another partner's access to the substance of legal counsel given to the partnership because all partners are presumed to be active managers of the partnership, for a limited partner, who is presumed to be a passive investor, to claim the right to review privileged documents provided to the general partner, the burden rests on the limited partner to show good cause. According to the court, the elements for showing good cause in the limited partnership context are: (i) the assertion of a colorable claim; (ii) the necessity of the information contained in the privileged communication and its unavailability elsewhere; (iii) the extent to which the communication is specified as opposed to a broad request fishing for information; and (iv) the requested documents do not disclose litigation strategies or theories falling under the work product doctrine. The court found that the limited partner failed to allege the need for any specific information that was material to its claims that could not be obtained elsewhere and held that the limited partner had failed to meet its burden under elements (ii) and (iii) of the above-referenced test and thus had failed to show good cause for overcoming the attorney-client privilege.

c. *Continental Ins. Co. v. Rutledge & Co., Inc.*, C.A. No. 15539 (Del. Ch. Jan. 26, 1999)

Plaintiffs had been limited partners in a Delaware limited partnership and had sued the general partner regarding their ability to withdraw from the limited partnership and the proper accounting of monies and securities due to them in light of their withdrawal. In connection with such suit, the limited partners filed a motion to compel the production of documents and deposition testimony regarding legal advice received by or on behalf of the partnership relating to (i) the formation of the partnership, (ii) advice concerning internal partnership affairs, (iii) private equity investments the partnership made and fees that the general partner may have collected, and (iv) any advice or opinions received concerning an alleged amendment of the partnership's terms. The court stated the issue before it as when, if ever, could a litigant who at one point was involved in a fiduciary relationship with an opposing party successfully assert an attorney-client privilege. The court noted that a claim had been made that the limited partnership agreement modified the rights of the partnership, the general partner or the limited partners to assert or waive their or any other entity's attorney-client privilege and, consequently, concluded it was appropriate to import rules of law from the corporate context.

Under these rules, the court held that in order for the fiduciary exception to apply, a litigant must establish that a mutuality of interest existed between the parties and make a showing of good cause and the exception to the attorney-client privilege must not yield an inequitable result. The court defined "good cause" to include (i) the assertion of a colorable claim; (ii) the necessity of the information and the unavailability of the information from another source; (iii) the extent to which the communication is identified as opposed to the extent to which the limited partner is merely fishing for information; and (iv) the requested documents do not disclose strategies or theories relating to the defense of the suit, i.e., documents that would qualify under the work-product doctrine.

Applying this standard to the discovery of pre-litigation advice that the partnership received regarding alleged amendments to the partnership agreement, the court held that any advice of counsel rendered to any of the parties after each party was made aware of the limited partners' intent to withdraw remained privileged and not subject to the fiduciary exception because the interests of the general partner, the limited partners and the partnership diverged at the point in time when it was imminently clear to all parties that the limited partners were attempting to withdraw from the partnership and, thus, the parties no longer shared a mutuality of interests.

With respect to the discovery of legal advice concerning the formation of the partnership, the court denied the limited partners' motion to compel any documents that predated the formation of the partnership based on the court's determination that no fiduciary relationship existed at the time in question. Because no fiduciary relationship existed between the parties prior to the formation of the partnership, no fiduciary exception could apply.

Finally, with respect to the discovery of other legal advice received by the partnership at a time before the limited partners' intention to withdraw from the partnership was known, the court concluded that although a mutuality of interest existed between the parties at the time of the documents sought in discovery, the limited partners failed to make a showing of good cause because plaintiffs either failed to make a particularized showing of necessity or the information sought was otherwise available through non-privileged sources.

6. Attorneys Fees

a. *Venhill Ltd. P'ship. v. Hillman,* C.A. No. 1866-VCS (Del. Ch. June 3, 2008)

Plaintiffs were Venhill Limited Partnership ("Venhill"), a Delaware limited partnership created to serve as an investment vehicle for the benefit of the families of Howard Hillman ("Howard") and Tatnall Hillman ("Tatnall"), and two trusts (the "Trusts") that were limited partners in Venhill. Howard, the principal defendant, served as general partner of Venhill, and Howard, Tatnall and Joe Hill ("Joe"), a cousin, were the three trustees for the Trusts. The litigation related to the substantial investments Howard had caused the Trusts, through Venhill, to make in Auto-trol ("Auto-trol"), a portfolio company owned by Venhill. Howard was effectively on both sides of the Auto-trol transactions because he was CEO and controlled Auto-tel when, as general partner of Venhill, he caused Venhill to make investments in Auto-trol. Although Auto-trol experienced some success following Venhill's acquisition in 1973, the company only survived due to substantial investments by Venhill. By July of 2005, Howard had caused Venhill to make 186 loans to, and invest $85.4 million in, Auto-trol. As early as 1990, Auto-trol began to exhibit strong signs of failure. Consequently, Howard began to cause Venhill to make loans to Auto-trol at rates and upon terms that would not have been available to Auto-trol in the marketplace. Tatnall and Joe were aware that Howard, in his capacity as general partner of Venhill, was causing Venhill to invest substantial sums of money in Auto-trol and expressed their reservations as early as 1994. In spite of their reservations, Tatnall and Joe continued to allow Howard to invest Venhill funds in Auto-trol. Although Tatnall and Joe, under Venhill's partnership agreement, had the power to remove Howard, they did not do so and instead limited Howard's ability unilaterally to cause the Trusts to loan money to Venhill to fund Auto-trol. Nevertheless, although Howard could no longer cause the Trusts to invest in Auto-trol through Venhill, Howard used his discretion as general partner of Venhill to fund Auto-trol's operations using Venhill's remaining capital. Additionally, Howard, acting as CEO for Auto-trol on the one hand and general partner of Venhill on the other, caused Venhill to convert much of the Auto-trol debt held by Venhill into equity. In January 2005, Howard, sensing that he would soon be removed as general partner of Venhill, took a number of actions designed to protect Auto-trol from Venhill's control and to benefit himself. Howard transferred the shares of Auto-trol owned by Venhill to a newly created LLC of which Venhill was the sole member but that Howard controlled as manager. Additionally, Howard caused Venhill to (i) loan Auto-trol $2 million, (ii) pay his personal lawyers, and (iii) reimburse him for the out-of-pocket costs he incurred related to litigation involving the Trusts. Following his removal, Howard continued to support Auto-trol by attempting to force Venhill to subscribe to a stock offering to prevent severe dilution of its equity interest in Auto-trol.

Plaintiffs brought actions against Howard alleging he breached his fiduciary duties of loyalty and care. Plaintiffs sought, *inter alia*, damages for all of the losses suffered by Venhill (including the loss of profits that would have been made if funds were invested consistent with Venhill's other investments), rescission of a promissory note that consolidated all of the debt owed to Venhill into a single note that would not come due until 2020, the cancellation of any security interest in Auto-trol's real property and attorneys fees incurred by plaintiffs in connection with their action.

With respect to their attorneys fees claim, plaintiffs argued that Howard's actions were of such an egregious nature that the bad faith exception to the American Rule should apply and Howard should pay their fees. The court reasoned that the bad faith exception to the American Rule could not apply to every case of intentional fiduciary wrongdoing; otherwise the rule would be eviscerated. Instead the bad faith exception to the American Rule should be reserved for "unusually deplorable behavior." In this case, the court found that the following actions would fall within the bad faith exception: (i) the actions taken by Howard in transferring the equity of Auto-trol to the newly formed LLC, (ii) the coercive stock subscription offering that would have severely diluted Venhill's equity holdings in Auto-trol, and (iii) causing Venhill to make payments to his attorneys. As to these actions the court required that Howard pay plaintiffs' related attorneys fees.

b. *Richmont Capital Partners I, L.P. v. J.R. Invs. Corp.*, C.A. No. 20281 (Del. Ch. May 20, 2004); *Richmont Capital Partners I, L.P. v. Nu-Kote Acquisition Corp.*, C.A. No. 20285 (Del. Ch. May 20, 2004)

Plaintiffs filed two actions in the Court of Chancery. Shortly thereafter, plaintiffs moved voluntarily to dismiss their suits when it became apparent that the scope of the litigation in Delaware might expand to mirror that of litigation already pending in Texas. The court granted the plaintiffs' motions to dismiss over the defendants' objection, but it conditioned dismissal on the payment of the defendants' reasonable attorneys fees and expenses actually and necessarily incurred in the instant actions.

c. *Cantor Fitzgerald, L.P. v. Cantor*, C.A. No. 16297-NC (Del. Ch. May 11, 2001) and (Del. Ch. July 8, 2002)

In an earlier decision in this case, the court ruled that the defendants, three of which were limited partners of a Delaware limited partnership, had committed an egregious breach of the partnership agreement and had violated their duty of loyalty to the partnership by operating a competing business venture. To remedy the breaches of the partnership agreement and the duty of loyalty, the court granted the plaintiff certain declaratory relief and an award of damages measured by the amount of money spent by the plaintiff to seek judicial redress for harm caused by the breaches. This decision related to the defendants' motion seeking relief from judgment and reargument challenging the award of damages award based on attorneys fees.

The defendants argued that it was improper to award the plaintiff attorney fees' both under the American Rule, which is the common law rule that each party involved in litigation will bear only its own attorneys fees regardless of the outcome of the litigation, and under the terms of the partnership agreement, which they argued also provided that each party would bear its own expenses of counsel. The court, citing its broad discretion to tailor remedies to suit the situation and the policy under Delaware law of strictly imposing penalties to discourage disloyalty, stated that the decision to measure damages was an attempt to match directly the cost of the wrongdoing with the clearest proof of the monetary costs to remedy the wrongdoing and was an appropriate remedy for the egregious breach of the duty of loyalty and therefore, reaffirmed the award of damages. The court stated that it viewed the award of damages as distinguishable from traditional fee-shifting but went on to address the defendants' claims that the award of damages measured by attorneys fees was improper under the American Rule and under the partnership agreement and concluded that traditional fee-shifting would have been appropriate in this case as well. With respect to the American Rule, the court stated that bad faith is an exception to the American Rule and found that the defendants' conduct constituted bad faith that would have made an award of attorneys fees appropriate under the American Rule. With respect to the partnership agreement, the court acknowledged that it provided that "[e]ach party shall bear its own expenses for counsel and other out-of-pocket costs in connection with any judicial resolution of a dispute, difference or controversy." However, the court, noting that the provision appeared in middle of a paragraph dealing with arbitration and arbitration procedure and that the defendants themselves sought attorneys fees in this case, stated that in the context of the partnership agreement it seemed disingenuous to stretch the parties' intent to pay their own fees and expenses in a dispute over the terms of the partnership agreement, which may be resolved by arbitration, to a multi-party controversy involving parties not subject to the terms of the partnership agreement. The court went on to state that even had the parties clearly intended that they bear their own fees and expenses under these extraordinary circumstances, the facts of this case would warrant a remedy beyond that contemplated by the parties and that based on the egregious behavior of the defendants in this case it would have been justified in awarding attorneys fees and expenses to the plaintiff under the bad faith exception to the American Rule notwithstanding any contractual provisions arguably to the contrary.

d. *Waterside Partners v. C. Brewer & Co.*, C.A. No. 16121-NC (Del. Ch. Mar. 3, 1999)

Following the announcement of a proposed merger by a Delaware limited partnership, the plaintiff, a limited partnership unitholder, filed an action challenging the terms of the proposed merger. The plaintiff's motion for expedited proceedings and a preliminary injunction prior to a meeting of unitholders to vote on the merger proposal was denied. The merger proposal was then defeated at the meeting and the parties consented to the dismissal of the action as moot. One of the factors in the defeat of the merger proposal apparently was a letter from the plaintiff's securities analyst to the other unitholders urging them to vote against the proposed merger.

The plaintiff then applied for attorneys fees and expenses in connection with the action, including the costs of communicating with other unitholders to inform them of the plaintiff's opposition to the merger proposal. According to the plaintiff, the benefit to the partnership flowing from the defeat of the merger proposal was $17.5 million or more.

The court denied the plaintiff's application, holding that (i) even though the counter-solicitation was effective and brought about the defeat of the merger, there was no Delaware authority supporting the proposition that a successful proxy combatant may seek a court award of fees and expenses and (ii) there was no causal connection between the litigation and the defeat of the merger proposal. According to the court, the counter-solicitation, not the litigation, conferred the benefit on the partnership.

7. Limits on DRULPA Section 17-305 Actions

a. *Soleno Inc. v. Magic Sliders Inc.*, C.A. No. 17321 (Del. Ch. Aug. 18, 1999) and (Del. Ch. Sept. 27, 1999)

Plaintiff limited partner filed an action seeking to compel the general partner to provide certain books and records of a Delaware limited partnership pursuant to Section 17-305 of the DRULPA. In the action relating to the August 18, 1999 opinion, plaintiff sought to expedite the books and records proceeding. Defendants argued that the plaintiff was seeking the partnership's books and records for an improper purpose—namely, to circumvent the discovery procedures in plaintiff's separate action for breach of contract against defendants. After finding that plaintiff's claims in its contract action alleging that the partnership and general partner wrongly withheld amounts from plaintiff could not be brought in a books and records action under DRULPA Section 17-305, the court stated that books and records action should not circumvent the discovery in the contract action because the discovery in the books and records action would be far more limited than the discovery available in the breach of contract case and held that defendants had not provided a reasonable basis for refusing to expedite this proceeding. The Court of Chancery thus granted plaintiff's motion to expedite the proceeding, noting that "this Court routinely accelerates summary proceedings brought pursuant to [DRULPA Section 17-305]." In the September 27, 1999 opinion, after weighing (i) the scope of the plaintiff's request for books and records that would enable it to determine how the general partner derived profit and loss figures of the partnership, (ii) the fact that the plaintiff had not alleged fraud, embezzlement or similar malfeasance of the general partner and (iii) the breadth of access to partnership books and records provided under DRULPA Section 17-305, the court set forth a specific list of materials to be produced by defendants in response to plaintiff's request.

b. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 714 A.2d 96 (Del. Ch. 1998)

After a Delaware limited partnership completed a series of transactions involving its own limited partnership units, plaintiff limited partner filed an action against the general partner and the limited partnership under DRULPA Section 17-305 to gain access to the books and records of the limited partnership. Four months later plaintiffs filed a derivative action on behalf of the limited partnership claiming that the general partner had breached its fiduciary and contractual duties to the limited partnership in carrying out the transactions. The limited partner then moved to amend and supplement the Section 17-305 action to include the fiduciary and contractual breach of duty claims. According to the court, the limited partner sought the amendment in order to tack the breach of fiduciary and contractual duty claims to the Section 17-305 action's earlier filing date and thereby presumptively rebut any defense of laches that the defendants might raise. (Although the defendants produced the books and records sought in the initial proceeding, the parties stipulated that the initial proceeding would not be dismissed pending the resolution of the plaintiff's motion to amend its complaint to add the breach of fiduciary and contractual duty claims.)

In determining the scope of a plaintiff's right to amend a complaint in a Section 17-305 action, the court compared the language of and rights contained in Section 17-305 to analogous right-to-access provisions of the Delaware Uniform Partnership Law (Section 1519) and Delaware General Corporation Law (Section 220) and, based on the similarities between Section 17-305 and DGCL Section 220, including the underlying purpose of each statute of enforcing the right of a passive investor to obtain information from an uncooperative manager, concluded that case law interpreting DGCL Section 220 was the most logical and meaningful source from which to seek relevant precedent. After examining corporate precedent rejecting claims that would expand a DGCL Section 220 hearing beyond its statutory purpose, the court decided that allowing the limited partner to add complex claims of fiduciary or contractual breach of duty would overwhelm the purpose of the special proceeding granted under Section 17-305 and announced, as a general rule, that the court will not entertain outside claims or collateral issues within a Section 17-305 hearing but will hear only those matters that pertain to the limited partner's demand to inspect the books. Having established the general rule that Section 17-305 proceedings may not be amended to add collateral claims or extraneous issues, the court declined to grant plaintiff a special exception to the rule, finding the limited partner would not be unfairly prejudiced by its application because the limited partner would be fully able to attack on the merits a laches defense by the defendants against the limited partner's claims in the derivative action.

c. *Everest Props., Inc. v. Boston Tax Credit Fund II*, C.A. No. 15532 (Del. Ch. Feb. 20, 1997); and *Everest Props., Inc. v. Boston Tax Credit Fund III*, C.A. No. 15532 (Del. Ch. Feb. 20, 1997)

In two related cases in which a limited partner sought access to partnership lists, the court entered an order granting the plaintiff's motion for reasonable acceleration of the discovery and trial schedule. The court noted that a demand for a limited partnership list does not necessarily warrant the same degree of acceleration occasionally ordered in corporate stockholder list cases and indicated that sixty to ninety days would be a reasonable period of time for the defendant partnerships to conduct discovery concerning the plaintiff's purpose for seeking access to the partner lists.

8. Forum Non Conveniens

a. *Yogman v. Trigger Inv'rs, Inc.*, C.A. No. 13044 (Del. Ch. Oct. 15, 1993)

Plaintiff limited partner sought to compel production by the general partner of a Delaware limited partnership of a list of the names and addresses of the partners in the partnership. The defendant general partner sought to have the action dismissed on *forum non conveniens* grounds based on a clause in the partnership agreement selecting New York as the forum for "any dispute arising out of the terms and conditions of this Agreement." The court denied the motion to dismiss finding that the partnership agreement was silent as to a limited partner's right to demand a list of other partners and, thus, the right of a partner in a Delaware limited partnership to seek a list of other partners was based on the DRULPA, not the partnership agreement. Since the partnership agreement did not preclude the suit, the court held that a *forum non conveniens* dismissal would not be granted because the defendant had failed to show the inconvenience of having the case tried in Delaware imposed any real prejudice or burden on the defendant or that New York was so substantially more convenient that dismissal of the Delaware action was justified.

9. Prejudgment Interest

a. *Cantor Fitzgerald, L.P. v. Cantor*, C.A. No. 16297 (Del. June 19, 2003)

In an earlier decision in this case, the Court of Chancery ruled that defendants, three of which were limited partners of a Delaware limited partnership, had committed an egregious breach of the partnership agreement and had violated their duty of loyalty to the partnership by operating a competing business venture. To remedy the breach of the partnership agreement and the duty of loyalty, the court granted plaintiff certain declaratory relief and an award of damages measured by the amount of money spent by plaintiff to seek judicial redress for the harm caused by the breaches. In a subsequent decision in this case, which decision was affirmed by the Delaware Supreme Court, the Court of Chancery granted plaintiff's motion for attorney's fees and expenses.

This decision related to whether plaintiff was entitled to prejudgment interest on the amount paid to plaintiff's attorneys. The court stated that cases involving a breach of the duty of loyalty permit broad, discretionary and equitable remedies, including the award of prejudgment interest and compound interest. The court noted the egregious nature of defendants' breach, and the expensive, expedited litigation in which plaintiff was forced to engage, finding that compounded prejudgment interest was merited in this case.

With respect to the date from which prejudgment interest should accrue, plaintiff argued that the court should award prejudgment interest from the date of the breach, whereas defendants argued that prejudgment interest (if awarded) should accrue incrementally from the date plaintiff paid each of its legal fees. The court ruled that prejudgment interest should be awarded as each bill was paid, noting that the Delaware courts have only awarded prejudgment interest from the date of the wrong in tort cases, and that awarding interest as each bill was paid fairly reflects when the damages were suffered and results in damages that are readily and demonstrably calculable.

10. Expedited Proceedings

a. *In re K-Sea Trans. Partners L.P. Unitholders Litig.*, C.A. No. 6301-VCP (Del. Ch. June 10, 2011) and (Del. Ch. Apr. 4, 2012)

Plaintiffs, holders of common units in K-Sea Transportation Partners L.P. ("K-Sea"), moved to expedite discovery in their application for an injunction to escrow a portion of the consideration to be paid in connection with a merger in which K-Sea would be acquired for cash or a mix of cash and the acquirer's stock. The court noted that a motion to expedite should be granted only if the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury to justify imposing on defendants and the public the extra costs of an expedited proceeding. After reviewing each of plaintiffs' claims, the court concluded that although the complaint asserted at least one sufficiently colorable claim, plaintiffs failed to demonstrate a sufficient threat of irreparable harm.

In late 2010, representatives of K-Sea and the acquirer, Kirby Corporation, met to discuss a potential strategic transaction. Because K-Sea sought an offer that specifically accounted for the controlling interest and incentive distribution rights ("IDRs") of K-Sea's general partner, K-Sea's board of directors (the "Board") submitted the proposed transaction for "Special Approval" by the K-Sea conflicts committee (the "Committee") pursuant to the terms of the K-Sea partnership agreement. After consulting with financial and legal advisors, the Committee gave the transaction "Special Approval" and the Board followed with its own approval. A majority of K-Sea unitholders then entered into support agreements pursuant to which they agreed to vote in favor of the transaction.

Non-employee, independent directors comprised the Committee. Shortly before negotiation of the transaction at issue commenced in late 2010, the Board approved a grant of 15,000 phantom common units to each member of the Committee. The phantom units, which were set to vest over a period of five years, vested immediately in the case of a change in control.

In support of their motion to expedite, plaintiffs made three primary arguments. First, plaintiffs argued that the Committee had a duty to consider, in isolation, the fairness of the portion of the transaction consideration that accounted for the IDRs. Defendants countered that the Committee only had to consider the fairness of the transaction as a whole. The K-Sea partnership agreement required resolution of conflicts to be "fair and reasonable" and "Special Approval" by the Committee was conclusively deemed under the K-Sea partnership agreement to be fair and reasonable so long as K-Sea's general partner disclosed all known material facts to the Committee.

The court concluded that plaintiffs failed to allege facts sufficient to state a colorable claim that the Committee had a duty to consider the fairness of the transaction other than with respect to the transaction as the whole. In support of its conclusion, the court noted that plaintiffs failed to allege a failure to disclose any material facts on the part of the general partner and that the actions of the Committee went above and beyond the requirements of the K-Sea partnership agreement, the Committee having obtained a fairness opinion from its financial advisor. The court also found that plaintiffs failed to present a convincing argument that the K-Sea partnership agreement required the Committee to consider anything other than the fairness of the transaction as a whole.

Second, plaintiffs argued that the Committee members lacked independence because the phantom units granted to such members would vest in the event of a change of control transaction thereby increasing the incentive to provide "Special Approval." Defendants, on the other hand, argued that the vesting of the phantom units aligned the interests of Committee members and common unitholders in obtaining the best price. The court concluded that plaintiffs had stated at least a colorable claim in this instance. In doing so, the court distinguished prior precedent stating that the vesting of options aligns the interests of shareholders and directors in obtaining the highest price. First, the court noted, because the number of phantom units, upon vesting, nearly doubled the number of common units already held by the Committee members, it was possible that the prospect of the immediate vesting of the phantom units may have biased the Committee. Moreover, the court concluded, the timing of the phantom units grant supported an inference that it was made with intent to influence the Committee.

Third, plaintiffs contended that disclosures provided to common unitholders in the relevant registration statement were materially misleading. Preliminarily, plaintiffs argued that the K-Sea partnership agreement did not modify defendants' traditional duty of disclosure. The court, however, rejected this preliminary argument, noting that the K-Sea LP agreement set forth a procedure for merger approval that included provision to the common unitholders of a copy or summary of the merger agreement along with notice of the special meeting or written consent. The court read this provision as reflecting the parties' intent to preempt traditional fiduciary duties of disclosure. Moreover, the court found that even if a traditional duty of disclosure had applied, plaintiffs had not demonstrated that the disclosures about which they complained were misleading.

Because plaintiffs stated at least one colorable claim, the court then turned to whether plaintiffs had demonstrated that they would suffer irreparable harm if expedition was not granted. The court concluded that plaintiffs had not. In doing so, the court found that plaintiffs had not refuted defendants' argument that money damages would be sufficient. First, the court noted its reluctance to enjoin a premium transaction where there was no superior bid and stated that money damages repeatedly have been held to be sufficient to remedy a claim of inadequate transaction price. With these points in mind, the court concluded that because no other offers were reasonably available to K-Sea and because plaintiffs claim focused on the portion of the transaction consideration allocated to the IDRs, money damages were an adequate remedy.

The court also rejected plaintiffs' argument that they were at risk of irreparable harm because nearly all of the economic interest in K-Sea's general partner and the IDRs was owned by single-purpose entities that would essentially be judgment-proof after consummation of the transaction at issue. The court concluded that plaintiffs' claims were too speculative and unsupported by facts that could lead to a reasonable inference that no defendant or those associated with them could satisfy a judgment.

In a subsequent decision pertaining to K-Sea's merger with Kirby Corporation, the Court of Chancery addressed the defendants' motion to dismiss the plaintiffs' complaint. The court first turned to the plaintiffs' claims that the Committee, the Board, K-Sea's general partner and the general partner of K-Sea's general partner breached their fiduciary duties and the K-Sea partnership agreement by approving the merger without evaluating the fairness or reasonableness of the payment for the IDRs and by relying on the "Special Approval" of the Committee, which was comprised of members who improperly held phantom units.

The court noted that the exculpation provisions of the K-Sea partnership agreement required the plaintiffs to demonstrate both that the defendants had breached the K-Sea partnership agreement or their fiduciary duties and, in doing so, acted in bad faith. Turning to the provisions of the K-Sea partnership agreement pertaining to mergers to determine what duties were owed, the court found that the agreement established only one contractual duty with respect to mergers: that K-Sea's general partner must exercise its discretion. The K-Sea partnership agreement permitted K-Sea's general partner to consider whatever factors it chose in exercising its discretion and imposed no requirement to determine that a merger be fair and reasonable. The court further noted that the K-Sea partnership agreement displaced traditional fiduciary duties that ordinarily would constrain K-Sea's general partner in exercising its discretion with a narrower duty not to exercise its discretion in a manner inconsistent with the best interests of K-Sea as a whole, which, according to the court, essentially amounted to a duty not to exercise its discretion in bad faith.

The court then turned to the K-Sea partnership agreement provisions pertaining to "Special Approval." The court rejected the plaintiffs' claim that if the phantom units granted to the members of the Committee rendered the "Special Approval" defective, then the defendants breached their fiduciary duties and the K-Sea partnership agreement by approving the merger in reliance on the defective "Special Approval." In the court's view, a failure to qualify for the "Special Approval" safe harbor did not make the defendants' conduct improper unless the defendants also failed to satisfy the otherwise controlling standard of review—namely, whether K-Sea's general partner exercised its discretion in good faith.

With respect to whether K-Sea's general partner exercised its discretion in good faith, the court found that the complaint alleged facts that could support a finding of bad faith. Specifically, the plaintiffs alleged that the Board caused K-Sea's general partner to refuse to consent to any transaction that did not include a separate payment for the IDRs and that the Board incentivized the Committee to approve the merger by granting the phantom units on the eve of negotiations. The court noted, however, that the K-Sea partnership agreement entitled K-Sea's general partner to a conclusive presumption of good faith whenever it acted in reliance on an expert opinion. The Committee relied on a fairness opinion and the court concluded that it would be unreasonable to infer that K-Sea's general partner did not also rely on the same opinion. Therefore, the court found, K-Sea's general partner was conclusively presumed to have acted in good faith. The court also noted that the implied covenant of good faith and fair dealing could not be used to infer language that contradicts a clear exercise of an express contractual right. As a result, the court dismissed the plaintiffs' claims of breach of fiduciary duty and the K-Sea partnership agreement in connection with approval of the merger.

The court next turned to the plaintiffs' remaining claim alleging breach of the fiduciary duty of disclosure. The court noted that, because of the exculpation provision of the K-Sea partnership agreement, to state a claim the plaintiffs needed to allege facts to support a reasonable inference that the defendants, in authorizing a materially misleading disclosure, acted in bad faith. The plaintiffs first claimed that a statement in the Form S-4 that the consideration to be exchanged in the merger represented a 9.56% increase over the amount originally offered was misleading because a significant portion of that increase was allocated to the IDR payment. The court rejected this argument, noting that the Form S-4 contained a detailed discussion regarding the increase in the amount of consideration. The plaintiffs next contended that a statement in the Form S-4 that the members of the Committee would not personally benefit from the merger in a manner different from unitholders was materially misleading. The court rejected this argument and in doing so relied on its prior opinion, in which the court found this statement to be generally true and noted that the Form S-4 disclosed the grant of the phantom units. The court therefore dismissed the plaintiffs' disclosure claim.

b. *Madison Real Estate Immobbilien-Anlagegesellschaft Beschränkt Haftende KG v. GENO One Financial Place L.P.*, (Del. Ch. Feb. 22, 2006)

This case arose from an unregulated tender offer for a portion of the limited partnership interests of a Delaware limited partnership. After some partnership interests had been tendered to plaintiff, another company, Meridian 10, made a competing, and more attractive, offer. Because of provisions in the partnership agreement, the general partner took the position that it could not consent to the plaintiff's admission to the limited partnership until January 1 of the following year, unless the plaintiff obtained new transfer agreements from those who had already tendered. The plaintiffs sought an expedited hearing for consideration of their motion for a preliminary injunction to prevent the general partner from consenting to the transfer of partnership interests to Meridian 10 and compelling the general partner to consent to the transfers to itself.

The court denied the plaintiff's motion for expedited proceedings. It held that the plaintiffs had not made a sufficiently colorable claim, nor shown a sufficient possibility of a threatened irreparable injury, to justify the additional burden and expense, on both the defendants and the public, of expedited proceedings. The plaintiff's claim was not sufficiently colorable because the partnership agreement gave the general partner the broad duty to investigate any substituted limited partner before consenting to a transfer of partnership interests, and the general partner would probably be justified in refusing to make special accommodations (such as giving retroactive consent) to facilitate the plaintiff's lower priced tender offer. The plaintiff had not shown irreparable injury because it was in control of its own, unregulated, offer. Because the tender offer materials used by the plaintiff were not in the record, the court was unable to determine the exact effect of the general partner's consent on plaintiff's ability to complete the purchase of the tendered partnership interests. However, if the right to purchase the tendered shares was not conditioned on the general partner's consent, it could purchase without irreparable injury. If its right to purchase was dependent on the general partner's consent, the court would not exercise its equitable powers to correct plaintiff's own flawed contract.

11. Standing

a. *Lucas v. Hanson*, C.A. No. 9424-ML (Del. Ch. July 1, 2014)

Plaintiff, the operating managing manager of the general partner of a Delaware limited partnership (the "Partnership"), was convicted by an Iowa court for theft and ongoing criminal conduct associated with Plaintiff's expenditure of Partnership funds and liquidation of Partnership assets. Plaintiff filed an action in the Chancery Court of the State of Delaware seeking declaratory and injunctive relief from the Iowa court's ruling that required the distribution of Partnership assets to current and former limited partners of the Partnership. Plaintiff argued that the ruling, among other things, was an attempt to regulate the internal affairs of a Delaware entity.

Plaintiff conceded that the complaint did not allege that he was a limited partner of the Partnership – a requirement to establish standing, but asserted that was merely an oversight. Noting that on a motion to dismiss the court cannot look outside the complaint for facts to support it, the Master in Chancery (the "MC") recommended that the court dismiss plaintiff's complaint without prejudice on the basis that plaintiff lacked standing to bring the action. The MC also recommended that the court grant defendant's motion to dismiss for want of personal jurisdiction over defendants. The MC acknowledged that a defendant may waive a defense based on personal jurisdiction by expressly consenting to jurisdiction by contract, which will eliminate the need for a minimum contacts analysis. However, because plaintiff did not file a copy of the partnership agreement with the court, the MC recommended that the court grant defendants' motion to dismiss without prejudice.

b. *Hillman v. Hillman*, 2006 WL 2434231 (Nov. 16, 2006)

The plaintiff was general partner of Venhill Limited Partnership L.P., a Delaware limited partnership ("Venhill"). Two trusts served as the limited partners of Venhill. The plaintiff, in his capacity as general partner, invested 1% of the initial capital and each of the trusts contributed 49.5% of the initial capital. The limited partners challenged the plaintiff's actions in causing Venhill to invest a substantial amount of Venhill's assets in Auto-trol ("Auto-trol"), a company founded and controlled by the plaintiff. Unable to resolve the dispute over Venhill's investment in Auto-trol, the limited partners removed the plaintiff as general partner.

The plaintiff filed suit seeking declaratory judgment that upon his removal he had converted his general partner interest into a limited partner interest in Venhill. The suit also alleged that the limited partners breached fiduciary duties owed to him as a limited partner by the actions they took following his removal. The court concluded that Venhill's limited partnership agreement (the "Agreement") did not provide a general partner the right to "elect" to become a limited partner when removed by the limited partners and thus dismissed his claim for a declaratory judgment that he was a limited partner. The court then discussed what rights the plaintiff possessed following his removal.

The court first noted that the Agreement did not provide what a removed general partner would receive in consideration of its interest upon removal. It then reviewed the DRULPA provisions and related legislative history governing the withdrawal of a general partner. Under Section 17-604, a "withdrawing partner" upon withdrawal will be entitled to receive any distribution to which it was entitled under the partnership agreement and if not otherwise provided for in the partnership agreement, the partner shall be entitled to receive the fair value of its partnership interest. The plaintiff argued that Section 17-604 applied to all types of withdrawals by a general partner, while the defendants argued that Section 17-604 was intended to apply only to *voluntary* withdrawals made pursuant to Sections 17-602 and 17-603. The court agreed with the defendants and concluded that the narrower reading of Section 17-604 presented fewer conflicts and was "more consistent with the structure and language of the statute and the legislative history." Thus, Section 17-604 did not apply to the plaintiff because he did not voluntarily withdrawal under Section 17-602.

Having concluded that Section 17-604 did not apply to the plaintiff, the court sought to determine what effect the plaintiff's involuntary withdrawal would have on his economic stake in the partnership. The court noted that under Section 17-1105, if DRULPA is silent on an issue, "an applicable provision of the Delaware Uniform Partnership Law in effect on July 11, 1999 (the "DUPL") and the rules of law and equity… shall govern." Turning to the DUPL, the court first noted that it did not explicitly address the scenario of a partner who is expelled pursuant to a partnership agreement that permits both his expulsion and the continuation of the partnership business thereafter. Rather, the court found that the DUPL confronted this issue obliquely in Section 1538(a) which entitled an expelled partner to receive the net amounts due from the partnership provided he was discharged from all partnership liabilities by agreement or payment. Turning to the commentary on the uniform act that formed the basis of the DUPL, the court concluded that the amount an expelled partner would be entitled to receive under Section 1538(a) should be equivalent to "fair value." The court thus held that the provisions of the DUPL that were most relevant to the facts before it were best read as pointing to a fair value payout. The court bolstered this conclusion by looking to the Delaware Revised Uniform Partnership Act (the

"DRUPA") which generally superseded DUPL except that the DUPL rather than the DRUPA continued to be linked to the DRULPA. The court stated that the DRUPA provided the best indication of what equity as the ultimate default required in the context of the present case and found that under the DRUPA, the plaintiff would also be entitled to the fair value of his economic interest.

Finally, because the plaintiff was removed as a general partner and all of the plaintiff's other claims related to the partnership's conduct following his removal, the plaintiff lacked standing and his other claims for breach of fiduciary and contractual duties were also dismissed.

K. General Construction and Application of Partnership Agreements

1. *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*, C.A. No. 11053-VCL (Del. Ch. Dec. 16, 2015)

This case involved a Delaware limited partnership (the "Partnership") that was formed for the limited purpose of purchasing shares of Facebook, Inc.'s stock before its anticipated IPO. The limited partnership agreement governing the Partnership (the "LPA") provided that any distributions would be made to limited partners on the basis of their percentage interest in the Partnership. The percentage interest was measured by the number of units held by each partner as divided by the total number of outstanding units. One investor in the Partnership, Passport Special Master Fund, L.P. ("Passport Fund"), executed a side letter (the "Side Letter") with the Partnership's general partner (the "GP") that purported to grant Passport Fund preferential rights. After purchasing 452,515 pre-IPO Facebook shares, the GP caused the Partnership to transfer one Facebook share per unit to certain limited partners (the "Favored LPs"). As a result, other limited partners (the "Disfavored LPs") received less than one share per unit or nothing at all. Upon discovering the preferential transfer, certain limited partners demanded the withdrawal or resignation of the GP. The GP agreed to withdraw and a successor general partner (the "Successor GP") was elected at a special meeting of the limited partners. The Successor GP sent a demand letter to the Favored LPs for the return of the Facebook shares that they received as a result of the preferential transfer. The Favored LPs failed to return the shares or otherwise repay the Partnership. The Disfavored LPs, the Successor GP and the Partnership filed suit against the Favored LPs, asserting claims for (i) breach of the LPA, (ii) conversion and (iii) unjust enrichment. Plaintiffs also sought a declaratory judgment that the preferential distributions violated the LPA, as well as recovery of attorneys' fees and costs under the terms of the LPA. Defendants moved to dismiss the Complaint.

The Court of Chancery first analyzed plaintiffs' breach of contract claim. Finding that defendants were parties to a contract (the LPA), the court analyzed whether plaintiffs sufficiently alleged a breach of the LPA. The court found that the plain language of the LPA's distribution provisions contemplated distributions to the partners "as a class, not as one-off transfers to certain limited partners" and that each partner would share in any distribution based on that partner's percentage interest. Thus, the court held that plaintiffs sufficiently pled a breach of contract and harm suffered, given that they received distributions in an amount less than what they were entitled to by virtue of their percentage interests in the Partnership.

To defeat plaintiffs' breach of contract claim, defendants first argued that they had an ownership interest in the Partnership's underlying Facebook shares, and thus received nothing more than what they were entitled to. The court disagreed, reasoning that the limited partners owned partnership interests, rather than rights to specific partnership assets. The court noted that Section 17-101 of the Delaware LP Act defines "partnership interest" as "a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets." The court noted that the LPA reiterated the aforementioned statutory provisions, and found that no partner owned specific Partnership assets, nor could a partner seek to establish ownership rights in Partnership assets, whether by an action for partition or otherwise. The court also noted that the Private Placement Memorandum and Subscription Agreement issued to prospective investors in the Partnership stated that investors would not necessarily receive one Facebook stock for each unit they purchased.

The court then addressed defendants' argument that they received a ratable distribution in accordance with the terms of the LPA. The court rejected that argument, reasoning that the number of units a limited partner held is only an input into the percentage interest calculation, whereas the output—the percentage interest—was determinative as to what distributions the partners were entitled to. Finding that the total number of Facebook shares held by the Partnership was less than the total number of outstanding partnership units, the court reasoned that each partnership unit was entitled to only a fraction of one Facebook share, as opposed to one whole share.

Defendants further argued that Section 17-607(b) of the Delaware LP Act provided the exclusive means for challenging a distribution. The court first reasoned that Section 17-607 applied to distributions, rather than preferential transfers, and thus was inapplicable to the disputed transfer. The court also reasoned that Section 17-607(b) did not provide the exclusive means of challenging a distribution, but rather applied only to an asserted violation of Section 17-607(a). Finding that plaintiffs claimed a breach of the LPA's distribution provisions, rather than a violation Section 17-607(a), the court held that Section 17-607(b) did not preclude plaintiffs from enforcing the distribution provisions of the LPA. The court also rejected defendants' reliance on Techmer Accel Holdings, LLC v. Amer, 2010 WL 5564043 (Del. Ch. Dec. 29, 2010), in support of their arguments that (i) Sections 17-607 and 17-804 function to bar any other restrictions on distributions, and (ii) Section 17-607 applies exclusively until a partnership dissolves. The court noted that Delaware law presumes that provisions in a limited partnership agreement are separate and independent of statutory rights, and that while Section 17-607(a) imposes one limitation on distributions, it is not the exclusive limitation. The court again noted that 17-607 was inapplicable in any event given that the disputed transfer was not a distribution, and thus rejected defendants' Section 17-607 argument.

Defendants also argued that the LPA's dispute resolution provision established a 10-day contractual limitations period for bringing claims. The court found that the meaning of the provision was ambiguous as to whether it was intended to operate as a limitations period, and thus could not foreclose the lawsuit at this stage of the litigation. Moreover, the court noted policy concerns with enforcing such a short contractual limitations period, stating "to the extent that extrinsic evidence clarifies the ambiguity and demonstrates that it was intended to operate as a limitations period, it is possible that a ten-day limitations period could be unreasonable."

The court then considered the defenses of Passport Fund pertaining to the Side Letter, which Passport Fund argued granted them certain rights in specific assets of the Partnership. As an initial matter, the court held that an integration clause in a Subscription Agreement executed subsequent to the Side Letter nullified the Side Letter, reasoning that the Side Letter was superseded by the terms of the Subscription Agreement.

The court went on to reason that even if the Side Letter were effective, the Partnership would be bound only to the extent that the GP was authorized under the LPA to grant Passport Fund the rights contained in the Side Letter. The court first held that a provision in the Side Letter granting Passport Fund rights to specific assets of the Partnership was invalid. The court reasoned that the GP was not authorized by the LPA to grant such a right and that Passport Fund was aware of this lack of authorization, given that it acknowledged reading and understanding the terms of the LPA when it executed the Subscription Agreement. Moreover, the court held that the Side Letter could not bind the other non-party limited partners absent an amendment to the LPA. The court found that the LPA could not be amended by its own terms absent the consent of the majority of materially adversely affected partners, thus precluding its unilateral amendment by virtue of the Side Letter.

Passport Fund also argued that the GP was authorized to grant the rights contained in the Side Letter under a provision of the LPA that allowed the GP to conduct business with individual limited partners. The court rejected that argument, finding that the provision did not contemplate granting specific limited partners special rights, but rather allowed for the GP to contract with limited partners in alternative capacities, such as entering into a lending agreement with a limited partner. Passport Fund also argued that the LPA allowed for the GP to issue partnership securities with different rights, thus permitting the rights granted under the Side Letter. The court reasoned that although the GP was permitted to issue new securities with different rights, it was not permitted to grant special rights in partnership units to specific limited partners that other partners holding the same class of units did not enjoy. Accordingly, the court denied defendants' motion to dismiss plaintiffs' claim for breach of contract.

2. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, No. 547, 2012 (Del. Aug. 26, 2013); *Policemen's Annuity & Benefit Fund of Chicago v. DV Realty Advisors LLC*, C.A. No. 7204-VCN (Del. Ch. Nov. 27, 2013)

In an appeal before the Delaware Supreme Court of a decision by the Court of Chancery validating the removal of the general partner of a Delaware limited partnership (the "Partnership"), the general partner raised two issues: that the Court of Chancery improperly found that the limited partners (the "LPs") believed in good faith that removing the general partner was in the best interests of the Partnership and that certain "red flags" raised by an advisor to the Partnership did not sufficiently support the court's finding that the LPs removed the general partner in good faith. The Delaware Supreme Court affirmed the Court of Chancery's judgment.

The Supreme Court initially stated that reviewing a conclusion of good faith involved both questions of law and fact—the ultimate determination is one of law, while the basis for that determination is factual and must be clearly erroneous to be overturned. In analyzing the definition of good faith, the Supreme Court stated that the term "good faith" was undefined; however, it had never held that the UCC definition of good faith, applied in this case by the Court of Chancery below, applied to limited partnership agreements ("LPAs"). Instead, the Supreme Court held that the application of the definition of good faith utilized in *Brinckerhoff v. Enbridge Energy Company, Inc.* was appropriate in this case. *Brinckerhoff* stated that actions were not taken in good faith if they were "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."

In this case, the partnership agreement required the LPs to determine, in good faith, that removing the general partner was "necessary in the best interest of the [Partnership]." In addressing the first issue, the Supreme Court found the record showed that the general partner repeatedly breached its contractual obligations under the partnership agreement to deliver timely audited financial statements. Therefore, the Supreme Court found that the Court of Chancery was correct in determining that this failure by the general partner provided the LPs with a good faith belief that it was necessary in the best interest of the Partnership to remove the general partner as general partner. However, because the good faith standard in the partnership agreement was "purely subjective," the Supreme Court stated that the Court of Chancery's determination that the standard included elements of objectivity was incorrect. This incorrect determination, however, did not change the outcome. The Supreme Court did not address the second issue because it found that the LPs had a sufficient good faith basis for removing the general partner based on its failure to delivery timely audited financial statements.

In a follow-on decision, the Court of Chancery was presented with the question of whether the general partner became a limited partner of the Partnership upon its removal or, alternatively, retained only an economic interest in the Partnership. In addressing this issue, the court first noted that under DRULPA, unless a partnership agreement provides otherwise, a person may be admitted to a partnership as a limited partner only upon the consent of all of the limited partners. Because none of the limited partners consented to the general partner being admitted as a limited partner upon its removal as general partner, the court found that there was no statutory basis for the former general partner's position that it became a limited partner upon its removal.

Turning to the LPA, the court considered the removal provisions which provided that in the event the general partner was removed, the general partner would retain its capital account with half of such capital account to be distributed within thirty days of removal and the other half to be maintained on the same basis as any other limited partner's capital account. The court found that, for such a major issue in partnership governance, these provisions could not be read to provide that the general partner would become a limited partner upon its removal. Thus, the court held that upon its removal the general partner had only an economic interest in the Partnership. In its holding, the court noted that its interpretation of the LPA was consistent with revenue laws pursuant to which a former partner would be treated as a partner for tax purposes.

The court also addressed whether the proper date for valuing the removed general partner's capital account should be the first valuation date following the general partner's removal or, as argued by the removed general partner, a date that preceded the general partner's removal. The LPA did not provide any express guidance on the timing of valuation, and the court found that the focus must be on reasonableness and that the first valuation date following removal more accurately reflected the economic realities at the time of removal. The removed general partner further sought to add to its capital account a loan for which it was a co-borrower with the Partnership and for a guarantee provided by a principal of the removed general partner. The LPA provided that the capital account of a partner would be increased by the amount of any of the liabilities of the Partnership that were assumed by a partner. Because the removed general partner was a co-borrower on the loan and not ultimately liable (it was entitled to contribution from the Partnership) and because the guarantee was not made by the general partner itself, neither the loan nor the guarantee was determined to have increased the removed general partner's capital account.

3. *Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, C.A. No. 7092-VCP (Del. Ch. Dec. 20, 2012)

In this case, the Delaware Court of Chancery was presented with a motion to dismiss numerous claims by certain limited partners of Tremont Opportunity Fund II, L.P., a Delaware limited partnership (the "Fund"), against Tremont Partners, Inc., a Connecticut corporation and the general partner of the Fund (the "General Partner"), Tremont Group Holdings, Inc., a Delaware corporation and the parent of the General Partner (the "Parent"), and certain individuals that were officers, directors, managers and principal decision makers of the General Partner and the Parent (the "Individual Defendants"). The claims were all related to losses connected with an investment by the Fund in a hedge fund (the "Hedge Fund") that invested most of its assets in Bernard Madoff's ponzi scheme. The General Partner was also the general partner of the Hedge Fund. In the context of this motion to dismiss, the court addressed, among other things, whether (i) the court had jurisdiction over the Individual Defendants, (ii) an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims, (iii) certain claims were derivative or direct and whether the derivative claims should be permitted notwithstanding a settlement in an action involving similar claims filed by other limited partners of the Fund in the United States District Court for the Southern District of New York (the "New York Case"), (iv) plaintiffs could maintain a valid breach of contract claim under the partnership agreement of the Fund and a private placement memorandum (the "PPM") relating to interests in the Fund on which plaintiffs' allegedly relied, (v) defendants' breached the implied covenant of good faith and fair dealing and (vi) whether the Parent could be liable for aiding and abetting the General Partner's alleged breach of fiduciary duty.

The court first addressed whether it could exercise personal jurisdiction over the Individual Defendants. The partnership agreement of the Fund included a clause pursuant to which the parties thereto consented to the exclusive jurisdiction of the Delaware courts. However, the court observed that the Individual Defendants were not parties to the partnership agreement of the Fund simply by virtue of being directors, officers, managers or decision makers of the General Partner and thus they were not bound by such provision. Plaintiffs' further claimed that the court had jurisdiction under Delaware's long-arm statute, but the court granted the Individual Defendants' motion to dismiss on this issue, finding that participation in the formation of the Fund and having management positions in the Fund did not cause the Individual Defendants to have contacts with the State of Delaware so extensive and continuing that exercising personal jurisdiction would be fair and consistent with state policy. The court also found that the alleged wrongs did not arise out of conduct that occurred within the State of Delaware, and therefore, the court did not have personal jurisdiction on that basis under the Delaware long-arm statute.

The court next turned to defendants' argument that an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims for breach of contract, breach of fiduciary duty, negligent misrepresentation and unjust enrichment. This provision essentially exculpated the General Partner and the Parent for any losses or expenses except those resulting from gross negligence, willful misfeasance, bad faith or reckless disregard of duties under the partnership agreement of the Fund. Plaintiffs claimed that they adequately pled facts that would support a finding of gross negligence. The court referred to the definition of "gross negligence" in the civil context as "a higher level of negligence representing an extreme departure from the ordinary standard of care." The court further indicated that gross negligence is a decision "so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion." The court stated that, under the law of entities, gross negligence "involves a devil-may-care attitude or indifference to duty amounting to recklessness." In order to prevail on a claim of gross negligence, the court stated that a plaintiff must plead and prove that the defendant was "recklessly uninformed" or acted "outside the bounds of reason." Plaintiffs' generally claimed that defendants committed gross negligence by failing to supervise, monitor and manage investments by the Hedge Fund in the Madoff ponzi scheme and instead blindly and recklessly handed over their responsibility to Madoff without performing any due diligence. The court observed that while no Delaware case has addressed whether failure to heed "warning signs" can constitute gross negligence in the partnership context, the analysis in *Forsythe v. ESC Fund Mgmt. Co. (U.S.)* was instructive. The court noted that in *Forsythe*, a motion to dismiss that accused the general partner of failing to oversee an affiliate that was delegated management responsibility for the subject limited partnership was denied. The court found that in this case, defendants' conduct was arguably more egregious than that at issue in *Forsythe*, and therefore, the court denied the motion to dismiss based on the exculpation provision.

The court next addressed whether plaintiffs' breach of fiduciary duty and unjust enrichment claims were derivative or direct claims. The court applied the test set forth in the corporate case of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, which requires answering two questions in making this determination: (1) who suffered the alleged harm; and (2) who would receive the benefit of any recovery or other remedy. The court noted that these claims related to a diminution in the value of the Fund and the Hedge Fund resulting from the Madoff ponzi scheme. According to the court, these injuries were suffered by the Fund and the Hedge Fund, and only indirectly by plaintiffs, and thus, they were derivative in nature. With respect to these claims and all other derivative claims asserted by plaintiffs, including, among others, claims of negligent misrepresentation and intentional misrepresentation, plaintiffs argued that their claims must have been direct because they elected to opt-out of the settlement in the New York Case. The court found, however, that opting-out of a settlement cannot convert a derivative claim to a direct claim. The court further held that because the settlement released defendants with respect to derivative claims, the court was bound by res judicata and thus granted the motion to dismiss.

Plaintiffs alternatively argued that principles of equity warranted disregarding the distinction between their direct and derivative claims. Although the court acknowledged that there was some authority under the *Cencom* and the *Anglo American* limited partnership cases that principles of equity could warrant disregarding a distinction between direct and derivative claims, the court found that those cases involved unique circumstances and there were no similar circumstances in the present case that warranted disregarding the derivative nature of plaintiffs' claims.

The court then discussed defendants' motion to dismiss plaintiffs' claim that defendants breached the partnership agreement of the Fund and the PPM because they allegedly failed to analyze, evaluate and monitor the Madoff-related investments in any manner whatsoever and failed to perform any meaningful due diligence or to monitor the Hedge Fund's investments. The court looked to the PPM, which expressly provided that the General Partner would monitor the Fund's investments and evaluate information regarding the personnel, history and background of professional investment management firms in selecting managers of the Fund. The court also assessed the partnership agreement of the Fund, which provided that the General Partner and its affiliates were not obligated to do or perform any act or thing in connection with the business of the Fund not expressly set forth in the partnership agreement of the Fund. The court found that this provision conflicted with another provision in the partnership agreement of the Fund, which provided that the PPM did not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading. In applying well settled Delaware principles of contract interpretation, the court found that because of this conflict, the partnership agreement of the Fund was ambiguous as to whether it incorporated the promises made in the PPM that were allegedly breached. Because any ambiguity must be resolved in favor of the nonmoving party, the court denied defendants' motion to dismiss the breach of contract claim.

With respect to plaintiffs' claim that defendants' breached the implied covenant of good faith and fair dealing, the court stated that plaintiffs' must have alleged (1) a specific obligation implied in the partnership agreement of the Fund, (2) a breach of that obligation, and (3) resulting damages. Plaintiffs alleged that the General Partner had an obligation to refrain from unreasonable conduct and had an implied contractual obligation to collect, analyze and evaluate information when selecting investment managers and to monitor their performance after any such selection. The court held that this allegation was conclusory and did not amount to pleading a specific implied contractual obligation as required to survive a motion to dismiss. Accordingly, the court granted defendants' motion to dismiss this claim.

Finally, the court addressed plaintiffs' claim that the Parent aided and abetted the General Partner's alleged breach of fiduciary duty. To make a valid aiding and abetting claim, the court indicated that plaintiffs must demonstrate: (1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) that damages to plaintiffs resulted from the concerted action of the fiduciary and the nonfiduciary. The court noted that the General Partner undoubtedly owed fiduciary duties to the limited partners of the Fund. With respect to the third element, the court indicated that, under Delaware law, the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal. In this case, the court found that the General Partner could be considered the Parent's agent, and the General Partner's knowledge could be imputed to the Parent. Thus, the court found that the third element was satisfied. The court did not address the fourth element and denied defendants' motion to dismiss this claim.

4. *MICH II Holdings LLC v. Schron*, C.A. No. 6840-VCP (June 29, 2012) and (Aug. 7, 2012)

Plaintiffs, who were members of two Delaware LLCs, brought this action for breach of fiduciary duty and breach of the LLCs' operating agreements against the LLCs' manager. In this decision, the court addressed a motion to stay or dismiss this action in favor of an earlier-filed lawsuit in New York, which the manager brought against the owners of plaintiffs and certain related entities. The court first addressed a forum selection clause in the LLCs' operating agreements, which required that claims against the two LLCs be brought exclusively in Delaware. However, since this action was against the manager of the LLCs, not the LLCs, the court held that the forum selection clause did not apply. The court then analyzed whether to stay the proceedings under the McWane doctrine and granted defendant's motion to stay, finding that the New York action was filed first, the New York litigation and Delaware actions had substantially similar parties and issues, and the New York courts were capable of rendering prompt and potentially complete justice.

In a subsequent decision in this action, the court considered plaintiffs' motion for reargument on five separate grounds. The court denied all of plaintiffs' grounds for reargument except for plaintiffs' request to allow a claim that the manager has improperly withheld distributions allegedly owed to plaintiffs to proceed in Delaware in parallel with the New York litigation. The court stated that a challenge to the self-help actions taken by the manager of two Delaware LLCs to the detriment of holders of minority interests in those LLCs raises potentially important issues that should be addressed in a timely manner. The court granted plaintiffs' motion for reconsideration of this claim based on its determination that this claim was sufficiently discrete and separable from the issues presented in the New York litigation, which minimized the risk of wasteful, overlapping proceedings and conflicting judgments with the New York litigation.

5. *RPRS Gaming, L.P. v. HP Gaming Partners L.P.*, C.A. No. 6359-VCP (Del. Ch. June 13, 2012)

This case involved a proposed expansion (the "Proposed Expansion") of a casino in Philadelphia owned by a Delaware limited partnership. In this declaratory judgment action, plaintiff, a limited partner, sought a declaration, among other things, that the Proposed Expansion required supermajority approval of the management committee of the partnership, which would provide plaintiff with a blocking vote. Under the partnership's limited partnership agreement (the "LPA"), the Proposed Expansion, which would result in total project costs of $537 million, would require supermajority approval if the cost of the Proposed Expansion fell outside the approved range of 85% to 133% of "Budgeted Development Costs." The crux of the dispute among the parties was the correct measure of Budgeted Development Costs under the LPA.

Defendants, who consisted of the general partner and the only other limited partner of the partnership, moved for partial summary judgment and raised four arguments in support of their motion. First, defendants argued that Budgeted Development Costs were either $472.5 million, which is the estimated cost of the project included in a documents agreed among the parties in 2005, or $474 million, which was contemplated by a 2009 plan modifying the original casino construction plan in the aftermath of the 2008 financial crisis. Plaintiff asserted that Budgeted Development Costs were set at $742 million in 2008 pursuant to an amendment to the LPA. The LPA required the general partner to estimate Budgeted Development Costs after the award of a license by the Pennsylvania Gaming Control Board (the "PGCB"). Since the PGCB did not award a license to the partnership until 2008, the court rejected defendants' contention that the Budgeted Development Costs were established in 2005. The court concluded, however, that there were genuine issues of material fact with respect to whether $474 million or $742 million was the correct measure of Budgeted Development Costs and therefore denied defendants' summary judgment motion on this issue.

Defendants also argued that, notwithstanding the amount of the Budgeted Development Costs, the Proposed Expansion fell under an exception to the requirement for management committee supermajority approval for project modifications with respect to which "no material decrease to the scope of the [casino] will result." The court, noting that both "material" and "scope" were not defined terms in the LPA, held that it could not determine, as a matter of law, whether the Proposed Expansion materially decreased the scope of the casino.

Next, defendants raised the defense of equitable estoppel, which requires that defendants prove they reasonably relied on the conduct of plaintiff and suffered a prejudicial change of position as a result of their reliance. Defendants contended that plaintiff's prior approval of a different expansion plan for the casino equitably estopped plaintiff from blocking the Proposed Expansion. The court rejected this argument, noting that the partnership was free to complete the construction of the expansion in accordance with the plan approved by plaintiff and finding that defendants failed to prove either reasonable reliance or a prejudicial change of position.

Finally, defendants argued that plaintiff could not block the Proposed Expansion because to do so would be unreasonable and would thus violate a provision of the LPA providing that no approval or consent to a management committee decision be unreasonably withheld or delayed. Defendants averred that plaintiff would use its blocking vote to coerce defendants to modify the economics of the partnership in favor of plaintiff, which defendants contended would constitute an unreasonable withholding of plaintiff's consent. As with the defendants' first and second arguments, the court concluded it could not decide at this stage whether, as a matter of law, plaintiff's actions were unreasonable.

6. *Brinckerhoff v. Enbridge Energy Co., Inc.*, C.A. No. 5526-VCN (Del. Ch. Sept. 30, 2011) and (Del. Ch. May 25, 2012)

This case involved a challenge to a transaction between Enbridge Energy Partners, L.P. (the "Partnership") and Enbridge, Inc. ("Enbridge"), the entity that controlled the Partnership's general partner. The case was before the Court of Chancery on a motion to dismiss and, finding that the partnership agreement of the Partnership effectively shielded the general partner and its affiliates from liability for an interested transaction as long as they acted in good faith and finding that plaintiff had not alleged actions constituting bad faith on the part of any defendant, the court dismissed all of the claims. The challenged transaction was a joint venture between the Partnership and Enbridge involving the construction and operation of a pipeline which the Partnership had originally conceived. After the Partnership had taken various steps to advance the project including negotiating and obtaining permits and tariff agreements, Enbridge approached the Partnership to discuss obtaining an interest in the project through a joint venture. Enbridge proposed that it would contribute to the cost of the project and that the Partnership and Enbridge would share in the project's profits based solely upon their relative capital contributions. Thus, under Enbridge's proposal, the Partnership would not receive any compensation in return for already owning the project, the work it had already put into it and the money it had already expended. Enbridge suggested that it would contribute 75% of the cost of the project and the Partnership would contribute 25% and so the project would be owned in these proportions. After receiving this proposal, the Partnership's general partner formed a special committee consisting of three independent members of the general partner's board. The special committee was asked to determine whether the joint venture was "fair and reasonable to the Partnership and its unitholders" and to make a recommendation to the board on behalf of the Partnership with respect to the proposed transaction. The special committee hired legal and financial advisors. Its banker's retainer letter stated that it was retained to render an opinion as to whether the terms of the joint venture were "representative of an arm's length transaction." The special committee met several times and was advised by its banker that the terms of the joint venture were "representative, in all material respects, of those that would have been obtained by the Partnership in an arm's length transaction." The banker also opined that the Partnership should retain as much equity in the project as possible. In light of the banker's findings, the special committee approved the joint venture agreement, provided that the Partnership would hold a 1/3 equity stake rather than 25%. Plaintiff challenged the transaction on four counts, both derivatively and directly. Count one alleged that defendants breached their express and implied duties under the partnership agreement by causing the Partnership to enter into an agreement that was financially unfair to the Partnership. Count two alleged that defendants other than the general partner aided and abetted the general partner's breach of its duties. Count three alleged that defendants breached the implied covenant of good faith and fair dealing, and Count four alleged that two defendants, to the extent they were not liable for breaching their duties under the partnership agreement, tortiously interfered with the partnership agreement and were thereby unjustly enriched. Defendants responded that the partnership agreement expressly permitted the general partner to enter into a transaction with a related entity, such as Enbridge, as long as the terms of that transaction were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties." Defendants argued that the joint venture met that standard, that their investment banker opined that the joint venture was representative of an arm's length transaction and further that under the partnership agreement, the general partner was allowed to rely conclusively on the banker's opinion. Defendants further argued that there was no cause of action for aiding and abetting a breach of contractually imposed duties, that the implied covenant of good faith and fair dealing was inapplicable because the partnership agreement expressly addressed the duties of defendants and, finally, since none of defendants breached their duties under the partnership agreement, there could be no tortious interference claim. In its analysis, the court first concluded that the Tooley test should apply to a partnership claim and that under that test, because any benefit would go to the partnership rather than to the individual partners, the claims were derivative in nature. However, the court also concluded that a demand would have been futile since a majority of the general partner's board was not independent. Turning to the specific claims, the court first held that defendant who supplied all the employees to the general partner and the Partnership but had no control over the general partner or the Partnership owed no fiduciary duties to those entities. The court therefore dismissed all claims against that entity. In analyzing the remaining claims, the court focused on the provisions of the partnership agreement that permitted related party transactions as long as they were on terms "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties," that provided that no Indemnitee (which included all defendants) would have any liability to any partner or other person as a result of any act or omission if such Indemnitee acted in good faith and that authorized the general partner to rely on investment bankers as to matters that the general partner reasonably believed to be within their professional or expert competence and provided that any action taken by the general partner in reliance on their advice would be conclusively presumed to have been done in good faith. Based on these provisions and the facts alleged, the court concluded that plaintiff had not alleged facts indicating bad faith. The general partner was protected through its good faith reliance on the investment banker's finding. Similarly, the court also found plaintiff had failed to plead facts indicating that the general partner's board acted in bad faith. They established an independent committee, hired independent counsel and bankers, met several times and negotiated a higher percentage participation for the Partnership than that which was originally offered.

With regard to plaintiffs' challenge to the work of the banker, the court noted that the valuation methodology and comparable transaction analyses that an investment banker undertakes are properly within the discretion of the banker. The court also noted that at the time of the joint venture it would be reasonable for the general partner's board to conclude that it did not want to put a large majority of the Partnership's capital into a single venture and thus it was better to participate in the project with Enbridge. With regard to Enbridge, the court held that it could not have been said to have negotiated in bad faith since it negotiated with the general partner's special committee. The court then noted that claims for aiding and abetting, as well as tortious interference, require an underlying breach. As there was none, these claims were also dismissed. Finally, the court rejected plaintiff's implied covenant claim finding that, even if it were possible to plead breach of the implied covenant where a plaintiff had failed to plead a bad faith claim, plaintiff had failed to do so here. In this regard, the court noted that the implied covenant addresses "only events that could not reasonably have been anticipated at the time the parties contracted." In contrast, the court found that the parties to the partnership agreement thought about related party transactions and the general partner's reliance upon investment banker opinions and explicitly addressed those issues.

On remand by order of the Delaware Supreme Court to determine the sufficiency of the plaintiff's claims for reformation or rescission on a motion to dismiss, the Court of Chancery first concluded that the plaintiff's request for reformation or rescission was waived because the plaintiff failed to raise any arguments with respect to either remedy in his briefs or at oral arguments. Nevertheless, because of uncertainty surrounding the scope of the remand order, the Court of Chancery also addressed the substance of the plaintiff's claim for reformation or rescission.

Turning to the plaintiff's claim for reformation, the court found that the plaintiff stated a claim that was potentially remediable through reformation. The partnership agreement permitted conflicted transactions that were "fair and reasonable" to the Partnership, and the partnership agreement deemed transactions that were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties" to be fair and reasonable. The court noted that it has previously interpreted similar language to require something akin, if not equivalent to, entire fairness review. Because the entire fairness standard cannot be satisfied by reliance on an investment banker's opinion on a motion to dismiss, the court concluded that the plaintiff had adequately plead that the joint venture was not fair to the Partnership.

The court noted, however, that the reformation that the plaintiff sought—a reduction in Enbridge's share in the joint venture—was rarely sought and obtained. The court expressed hesitation because, by reducing Enbridge's share in the joint venture, the reformation remedy sought would reduce the cash flow Enbridge would receive and essentially redirect it to the Partnership, a result the court likened to garnishment. Despite its misgivings, the court concluded that because the partnership agreement only provided exculpation against money damages, and because the plaintiff adequately plead entitlement to an equitable remedy, the plaintiff's claim for reformation should survive a motion to dismiss.

Next, the court held that the plaintiff had not stated a claim for rescission. The court noted that the plaintiff made no arguments in favor of rescission and its counsel conceded at oral argument that reformation was the crux of this remand. In addition, the court found that the plaintiff failed to meet its burden of demonstrating that all parties to the transaction could be restored to the positions they occupied prior to the transaction. The plaintiff offered no explanation regarding how the court could rescind a joint venture agreement to construct a pipeline once such construction was complete. The court therefore dismissed the plaintiff's claim for rescission.

7. *Dawson v. Pittco Capital Partners, L.P.*, C.A. No. 3148-VCN (Del. Ch. Apr. 30, 2012)

Plaintiffs ("Plaintiffs") were minority holders of preferred membership interests (the "Preferred Interests") in LaneScan, LLC, a Delaware limited liability company ("LaneScan"), who brought various claims related to a merger (the "Merger") by LaneScan with Vehicle Safety and Compliance, LLC ("VSAC"), pursuant to which their Preferred Interests were severely diluted. Plaintiffs also held secured notes in LaneScan (the "Notes"). Defendants consisted of other preferred members of LaneScan (the "Investor Defendants") and directors appointed by such members (the "Director Defendants" and together with the Investor Defendants, "Defendants"). The Merger was proposed to the members of LaneScan by a letter (the "Letter") which explained LaneScan's dire financial circumstances and included a written consent to be executed by the members consenting to the Merger (the "Consent"). The Letter also stated that each LaneScan member would be required to contribute their Notes to VSAC (the "Compelled Contribution"). Further, the Consent included an amendment to the LLC agreement of LaneScan whereby the Return of Capital Provision (as defined below) would be eliminated in its entirety (the "Amendment"). The Director Defendants and the Investor Defendants, consisting of a majority of the board members and a majority of the holders of the Preferred Interests, as required under the terms of the LLC agreement of LaneScan, approved the Merger and, in connection therewith, the Compelled Contribution and the Amendment. Plaintiffs (1) claimed that Defendants did not have the power to effect the Compelled Contribution, (2) claimed that Defendants breached the LLC agreement of LaneScan in adopting the Amendment and breached certain duties to Plaintiffs in adopting the Amendment and approving the Compelled Contribution and (3) brought intentional misconduct and gross negligence claims relating to the Merger, the Compelled Contribution and the Amendment. It is important to note with respect to all of these claims that the court found that Defendants' motivation in approving the Merger, the Amendment and the Compelled Contribution was to salvage value from LaneScan, which according to the court, may have become insolvent if the Merger was not consummated.

Before addressing each of the foregoing claims by Plaintiffs, the court first rejected Plaintiffs' claim that the Investor Defendants constituted a control group, which could result in the Investor Defendants owing fiduciary duties to the minority equity holders of LaneScan. The court noted that a number of equity holders can collectively form a control group where those equity holders are connected in some legally significant way—e.g., by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal, but found that Plaintiffs had not proven there was a legally significant connection between the Investor Defendants sufficient to establish a control group.

With respect to the Notes, Plaintiffs argued that Defendants did not have the power to effect the Compelled Contribution. Defendants countered that the Compelled Contribution could be effected in connection with the Merger without regard as to whether that power was express in the LLC agreement because a Merger may eliminate "vested rights" of equity holders of pre-merger entities, including those rights in the nature of debt. The court indicated that the cases cited by Defendants for this argument all involved rights related to equity interests (e.g., voting, options, preferences and dividends). The court said that parties to contracts are free to provide that contractual rights and obligations will not survive a merger, but they must do so in "clear and unambiguous terms." The court held that Plaintiffs had two separate relationships with LaneScan, one as holders of Preferred Interests and another as holders of the Notes, and that the Notes conferred a separate set of rights from those related to the Preferred Interests. The court found that neither the LLC agreement of LaneScan nor the Notes stated in "clear and unambiguous terms" that the Notes could be eliminated in connection with a merger. Although the Director Defendants argued that the LLC agreement of LaneScan gave them broad authority to manage LaneScan, the court found that such grant of broad authority did not constitute "clear and unambiguous" authority to eliminate the Notes. Similarly, the court found that a drag-along provision requiring members to "execute all documents containing the same terms and conditions as those executed by holders of Preferred Interests and as reasonably directed" in connection with a "Company Sale" (and Plaintiffs conceded that the Merger was a Company Sale) also was not "clear and unambiguous" so as to permit the Compelled Contribution. Defendants lastly argued with respect to the Notes that the Compelled Contribution was appropriate and permissible because LaneScan was approaching insolvency and the Notes would not have had any value if the Merger was not consummated. The court found that while this argument may be relevant in a fiduciary duty context, a company's financial distress does not grant its directors and owners powers they do not otherwise possess. Accordingly, the court granted Plaintiffs' request for a declaratory judgment that the Notes remain valid, enforceable and outstanding following the Merger.

The court next turned to the Amendment, which removed a provision providing in relevant part that "[n]otwithstanding anything to the contrary" in the LLC agreement of LaneScan, in the event of a Company Sale, the buyer shall cause LaneScan to distribute in cash to the holders of Preferred Interests an amount equal to their unreturned capital contribution (the "Return of Capital Provision"). The amendment provision of the LLC agreement provides that the LLC agreement could be amended by written instrument adopted by a majority of the board of directors of LaneScan (the "Amendment Provision"). Plaintiffs argued that Defendants breached the LLC agreement of LaneScan by eliminating the Return of Capital Provision in adopting the Amendment, essentially arguing that, because of the "notwithstanding" language in the Return of Capital Provision, the Amendment Provision did not apply to the Return of Capital Provision. The court held that this claim failed because the Amendment Provision was not inconsistent with the Return of Capital Provision and thus the board had the authority to amend the Return of Capital Provision pursuant to the Amendment Provision. Plaintiffs further argued that Defendants breached the implied covenant of good faith and fair dealing by adopting the Amendment. In citing prior implied covenant cases, the court stated that the implied covenant requires contracting parties to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to a contract from receiving the fruits of the bargain. The court indicated that even discretionary rights must be exercised in good faith. Further, the court mentioned that the implied covenant also acts to import terms into a contract to analyze unanticipated developments or to fill gaps. However, if the contract speaks directly to an issue in dispute, the court noted that the contract terms would control and the implied covenant would not apply. The court found that in this case there was no gap to fill in that the Amendment Provision granted broad power to the board to amend the LLC agreement of LaneScan. The court found that Plaintiffs' bad faith claim also failed because the directors were motivated to approve the Merger, the Amendment and the Compelled Contribution by the threat of LaneScan's insolvency.

The court next addressed Plaintiffs' claims that Defendants committed intentional misconduct in consenting to the Merger, the Compelled Contribution and the Amendment and that the Director Defendants were grossly negligent in approving the Merger. With respect to these claims, the court first assessed whether Defendants had any such duties. The LLC agreement of LaneScan provided that "[n]o Member, Director or Officer shall have any duty to any Member or [LaneScan], except as expressly set forth herein . . . . Except as expressly set forth herein . . . no Member, Director or Officer of [LaneScan] shall be liable to [LaneScan] or to any Member for any loss or damage sustained by [LaneScan] or any Member, unless the loss or damage shall have been the result of gross negligence, fraud or intentional misconduct of such Member, Director or Officer . . . ." The court referred to the Fisk Ventures v. Segal, C.A. No. 3017-CC (Del. Ch. May 7, 2008), case, which involved similar provisions, and found that the first sentence eliminated all duties that could be eliminated under the LLC Act and that the second sentence would apply only if other provisions in the LLC agreement created fiduciary or contractual duties, but the second sentence did not operate so as to create any duties. Thus, the court indicated, the second sentence was a "just in case" measure. In any case, the court found that even if Defendants were subject to a duty not to act with gross negligence and to refrain from intentional misconduct, those claims would fail because

Plaintiffs did not properly plead a gross negligence claim and because intentional misconduct requires an examination of Defendants' state of mind and even assuming Defendants were conflicted and the deal process fell short of best practices, this was not direct proof of intentional misconduct. As noted above, the court found that Defendants' motivation for the Merger, the Amendment and the Compelled Contribution was to salvage value for LaneScan. Plaintiffs also brought fiduciary duty claims against an officer of LaneScan. However, although a provision in the LLC agreement of LaneScan expressly provided that the officers owed certain duties to LaneScan, the court found that those duties were owed to LaneScan only and not to the holders of Preferred Interests. Because Plaintiffs did not bring any derivative claims, these claims also failed.

Lastly, the court addressed Defendants' argument that the doctrine of laches should deny all of Plaintiffs' claims. The court stated that to prevail on this argument the court must find (i) that a plaintiff had knowledge of a claim, (ii) that the plaintiff had unreasonably delayed in bringing the claim and (iii) that prejudice resulted. Because Defendants failed to demonstrate any prejudice, the court denied Defendants' request.

8. *In re Estate of Everett T. Conaway*, C.A. No. 6056-VCG (Del. Ch. Feb. 15, 2012)

In this declaratory judgment action, the petitioner asked the Court of Chancery to determine whether the terms of a limited partner's revocable trust and last will and testament superseded a transfer restriction in a limited partnership agreement and whether the petitioner validly withheld its consent pursuant to such transfer restriction. The petitioner, as trustee of a revocable trust, held a 30% limited partnership interest in EJKC Partnership, L.P. (the "Partnership"). Everett T. Conaway ("Everett"), as trustee of the Everett T. Conaway Revocable Trust (the "ETC Trust"), held a 69% limited partnership interest in the Partnership. Confam, Inc., the general partner of the Partnership (the "GP"), owned the remaining 1% interest in the Partnership. The petitioner and Everett each held 50% ownership stakes in the GP.

The limited partnership agreement of the Partnership provided that a limited partner could not transfer its interest in the Partnership without the consent of the GP and the non-transferring limited partner. In his will, Everett bequeathed household furnishings to the respondent and the rest, residue and remainder of his estate to the ETC Trust. The ETC Trust terminated upon receiving the remainder of Everett's estate and, under the terms of the ETC Trust, Everett's interest in the Partnership was to pass to the respondent. The terms of the ETC Trust further provided that the balance of the ETC Trust corpus and any accumulated income was to go to the petitioner.

Everett did not obtain the consent of the GP or the consent of the petitioner to the transfer of the Partnership interest to the respondent. After Everett's death, the petitioner filed this action and contended that, without the requisite consent, the purported transfer to the respondent was void and, as residuary beneficiary of the ETC Trust, it was sole owner of all interests, including the interest of the GP, in the Partnership. The respondent contended that the petitioner's withholding of consent to the transfer (i) constituted self-dealing and a breach of fiduciary duty, (ii) constituted an unreasonable restraint on alienation and (iii) ran afoul of Everett's intent as a testator.

After briefly discussing the contractual freedom afforded under DRULPA, the court found the language of the transfer restriction to be clear and unambiguous. As a result, the court concluded, the purported transfer to the respondent did not comply with the terms of the transfer restriction and was therefore invalid.

Turning to the respondent's arguments for invalidating the transfer restriction, the court declined to determine whether the petitioner's dual roles as a general and limited partner required it to meet fiduciary obligations when exercising its consent right in the context of a transfer because, even assuming the full panoply of fiduciary duties applied, mere exercise of a contractual right, the purpose of which was to preserve the original partnership structure absent unanimous consent, did not constitute a breach of fiduciary duty. The court also noted that it would be inequitable to conclude that by transferring his ownership interest in the GP to the petitioner, Everett could impose fiduciary obligations requiring the petitioner to consent to a transfer it would otherwise oppose pursuant to its contractual rights under the limited partnership agreement.

The court also concluded that the transfer restriction was not an unreasonable restraint on alienation. The purpose of the Partnership was to permit Everett to make transfers to the petitioner with limited tax consequences and the transfer restriction sought to preserve this purpose. The court also found unpersuasive the respondent's argument that Everett's intent as a testator should control. The court noted that a testator's intent controls interpretation of a testator's will. Such intent, however, cannot change preexisting contractual obligations. Thus, according to the court, Everett's subsequent amendment to his testamentary scheme could not invalidate his pre-existing contractual obligations pursuant to the limited partnership agreement of the Partnership.

9. *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, C.A. No. 5501-CS (Del. Ch. Aug. 8, 2011)

Defendant, Lerner Master Fund, LLC ("Lerner"), provided a $40,000,000 seed investment to Paige Opportunity Partners, L.P., a Delaware limited partnership (the "Hedge Fund"), a new hedge fund formed by one of the plaintiffs, Michele Paige ("Michele"). In connection with Lerner's investment in the Hedge Fund, Lerner entered into a Revenue Sharing Agreement to govern the relationship between Lerner and the Hedge Fund's Manager (the "Seeder Agreement"). Pursuant to the Seeder Agreement, Lerner had the right to share in the fees generated by the Hedge Fund, and, in return, Lerner agreed that it would not withdraw its capital for at least three years, except that Lerner could withdraw its capital immediately if Paige GP, LLC, the general partner of the Hedge Fund (the "General Partner"), committed certain proscribed actions set forth in Section 6.4 of the Seeder Agreement. Under Section 8.02 of the limited partnership agreement of the Hedge Fund (the "Partnership Agreement" and together with the Seeder Agreement, the "Agreements") limited partners were permitted to withdraw capital only on certain dates and in certain amounts, and depending upon the date of withdrawal, the withdrawal would be subject to penalties. The general withdrawal scheme set forth in Section 8.02 of the Partnership Agreement included Section 8.02(b) of the Partnership Agreement, the so-called "Gate Provision," which limited capital withdrawals to 20% of the total amount in the Hedge Fund in any given six-month period. Section 8.02(d) of the Partnership Agreement, however, provided that the General Partner could waive or modify the conditions relating to withdrawals for certain large or strategic investors. The central issue before the court was whether the Hedge Fund could use the Gate Provision to prevent Lerner from withdrawing all of its capital upon the expiration of the three year lock-up period.

The only investor in the Hedge Fund, other than Lerner, was Michele, who invested $40,000 in the Hedge Fund. Nearly two years after the formation of the Hedge Fund, the Hedge Fund had yet to make any investments in the distressed and special situation investments it was set up to invest in. Eventually, Lerner determined that it was not going to receive any fees under the Seeder Agreement and decided to cut its losses and withdraw its capital on October 31, 2010, the third anniversary of its investment. To this end, Lerner informed Michele and Christopher Paige, general counsel of the Hedge Fund ("Christopher," and together with Michele, the "Paiges"), of its decision and requested that the Paiges be mindful of the liquidity required to redeem Lerner's interest in the Hedge Fund. In response to Lerner's withdrawal request, Christopher sent Lerner a "hostile" nine-page single-spaced letter (the "March 2010 Letter") suggesting that the Paiges would take unilateral action harmful to Lerner if it did not agree to their settlement demands. In the March 2010 Letter, the Paiges suggested that Lerner could withdraw immediately (on March 1, 2010, six months prior to the expiration of the three year lock-up period) if Lerner agreed to pay 5% of its total capital balance plus legal and accounting fees. Also, the Paiges suggested that they would use the Gate Provision to lock up Lerner's capital. Following receipt of the March 2010 Letter, Lerner sought to obtain certain information from the Hedge Fund. The information requested was never provided to Lerner. Two months later, the Paiges filed this action, seeking a declaratory judgment that (i) the Gate Provision allowed the General Partner to restrict Lerner's ability to withdraw all of its capital on October 31, 2010 notwithstanding the Seeder Agreement and (ii) they were entitled to indemnification from the Hedge Fund for pursuing the action. Prior to answering the Paiges' complaint, Lerner filed an action in a New York state court seeking damages for, among other things, fraud and breach of fiduciary duty. On July 30, 2010, Lerner filed its answer and counterclaim. The counterclaim contained the following four counts: (1) breach of contract against the Paiges for failing to allow Lerner to withdraw all of its investment, violating their fiduciary duties, and not honoring Lerner's information rights, (2) a declaratory judgment count to enforce its right to withdraw all of its capital without application of the withdrawal restrictions contained in the Partnership Agreement, (3) breach of fiduciary duty against the Paiges, and (4) a claim for judicial dissolution under Section 17-802 of the DRULPA.

The court addressed the parties' contractual claims first and stated that the claims come down to two main issues: (1) whether the withdrawal provisions in the Partnership Agreement applied to Lerner at all in light of the Seeder Agreement and (2) whether the Paiges breached the Seeder Agreement in a way that would have allowed Lerner to withdraw immediately without penalty. The court stated that the resolution of the foregoing issues were governed by New York law. The Paiges argued that the Seeder Agreement did not amend the Partnership Agreement and therefore the Gate Provision would apply to Lerner. In support of their position, the Paiges pointed to (1) Section 9.8 of the Seeder Agreement, which states that it does not amend the Partnership Agreement, (2) the negotiating history of Section 9.8 of the Seeder Agreement, which, according to the Paiges, showed that they refused Lerner's request to add language stating that the Seeder Agreement amended the Partnership Agreement and (3) the fact that the Seeder Agreement does not conflict with the Partnership Agreement. In response, Lerner argued that the Seeder Agreement trumped the Partnership Agreement. In support of its position, Lerner pointed to (1) a principle under New York contract law that provides that if two documents govern the relationship between parties and one is "specifically prepared for the transaction and the other is a general form," the specific document takes precedence over the general, (2) the overall structure of the Partnership Agreement and the Seeder Agreement, because the Partnership Agreement provides for three specific instances in which the General Partner can modify the Partnership Agreement for certain investors, each of which was addressed by the Seeder Agreement, (3) the unreasonableness of reading the two agreements as suggested by the Paiges because after three years the Paiges could run the Hedge Fund however they wanted and Lerner would be trapped by the Gate Provision and (4) the negotiation history among the parties, which, according to Lerner, supported its reading of the Agreements.

The court stated that the Agreements were ambiguous as to the applicability of the Gate Provision to Lerner but found that the reading suggested by Lerner was the more reasonable reading based on the text of the Agreements. The court based its conclusion on the following: (1) because the Partnership Agreement specifically contemplated that the General Partner could modify the Partnership Agreement's terms for certain large investors, the Seeder Agreement did not need to specifically amend the Partnership Agreement, (2) based on the Paiges' reading, if Lerner violated the withdrawal provisions, it would be liable for damages under both Agreements, (3) reading the Agreements as suggested by the Paiges lead to unreasonable results because even if Lerner were entitled to withdraw under Section 6.4 of the Seeder Agreement due to a proscribed action by the General Partner, Lerner could still be held liable for a withdrawal fee under the Partnership Agreement, and after the three year period, when the Seeder Agreement terminated, Lerner would be deprived of the protections of Section 6.4 and yet could not withdraw without penalty even if Michele or the General Partner committed a proscribed action. Since both parties' readings were reasonable, the court also examined the negotiating history to try to determine which meaning was intended. In reviewing the negotiating history, the court concluded that the negotiating history supported Lerner's position. The court pointed to Michele's own statement that the Seeder Agreement operated much like a side letter and therefore it was not necessary to add contractual language acknowledging the amendment of the Partnership Agreement. Thus, the court concluded that Lerner's withdrawal rights were governed by the Seeder Agreement, consequently following the expiration of the three-year lock up period, Lerner was entitled to an immediate return of its invested capital and the Paiges' refusal to do so constituted a breach of contract.

The court also considered Lerner's claim that the Paiges and their affiliates breached their fiduciary duties by permitting the Gate Provision to apply to Lerner. Section 8.02(d) of the Partnership Agreement provided the General Partner with the authority to, in its sole discretion, waive or modify conditions relating to withdrawals for certain large or strategic investors. Thus, Lerner argued, if the application of the Gate Provision to Lerner were not justified by a proper purpose, but rather motivated solely by the self-interest of Michele and her affiliates, the General Partner had a fiduciary obligation to waive the Gate Provision and its failure to do so was a breach of fiduciary duty. The Paiges advanced two arguments as to the fiduciary duty claim. First, the Paiges argued that Lerner sought to improperly impose fiduciary duties on persons who do not owe such duties. Second, the Paiges argued that there was no breach of fiduciary duty because the Partnership Agreement provided the General Partner with the authority to waive or modify the withdrawal conditions in its "sole discretion." As to whether certain defendants owed fiduciary duties to Lerner, Paige argued that neither Michele, Christopher nor Paige Capital Management LLC (the investment manager) owed any fiduciary duties to the Partnership. The court found that Michelle, in her capacity as the managing member of the general partner of the Hedge Fund, exerted sufficient control over the General Partner to owe fiduciary duties to the Hedge Fund and its limited partners under the In re USACafes, LP Litigation line of cases, which hold that a director, member or officer of an entity serving as a general partner of a limited partnership owes fiduciary duties directly to such partnership and its limited partners. With respect to Christopher, who was not an officer, director or member of the general partner, the court declined to extend the USACafes principle.

Similarly, the court refused to find that Paige Capital Management LLC owed fiduciary duties to the Hedge Fund.

The Paiges also argued that Michele and the General Partner did not owe any fiduciary duties to the Hedge Fund because the decision to apply the Gate Provision presented a conflict of interest for the Paiges. Michele argued that because the General Partner and those who controlled it owed fiduciary duties to the General Partner and its members and because a decision to waive the Gate Provision would injure the General Partner and its members, Michele and the General Partner were in an impossible position. The court rejected this argument and reasoned that a decision by a fiduciary in a conflicted situation is subjected to a more searching form of judicial review, not less, and, accordingly, the court concluded that fiduciary duties would apply to the Paiges' decision to apply the Gate Provision to Lerner.

The Paiges also argued that there was no breach because the Partnership Agreement permitted the General Partner to act in its sole discretion. The court rejected this argument and stated that a bare statement of "sole discretion" that does not define the term merely means the person provided with the sole discretion has the singular authority to consider and decide an issue and does not absolve such person of the duty to act for a proper fiduciary purpose. Thus, the court concluded that traditional fiduciary duties applied to the decision to apply the Gate Provision to Lerner and found that it was not a justifiable fiduciary act. An expert at trial testified that a "Gate" provision is typically used to prevent a "run on the bank," which would require a hedge fund to sell off assets, possibly at a discount, and reduce the value of the interests of those investors left behind. In this case, Michele was the only other investor in the Hedge Fund and the court found that satisfying Lerner's withdrawal request would not affect her investment. Further, the economics of the deal supported the conclusion that Michele was motivated by self-interest because if the Gate Provision were applied to Lerner, the Paiges would collect over $400,000 in fees the following year.

The Paiges also argued that even if the decision to apply the Gate Provision to Lerner was self-interested, they were statutorily exculpated under Section 17-1101(e) of the DRULPA, which provides: "Unless otherwise provided in a partnership agreement, a partner or other person shall not be liable to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement for breach of fiduciary duty for the partner's or other person's good faith reliance on the provisions of the partnership agreement." The court rejected this argument stating that Section 17-1101(e) is best read "as ensuring that fiduciaries who take action to advance a proper partnership purpose but do so based on a good faith misreading of the agreement are not tagged for liability for a breach of fiduciary duty." Thus, because the court did not believe the Paiges' interpretation of the Partnership Agreement was a good faith interpretation, but rather a pretext for self-enrichment, they were not entitled to the protections of Section 17-1101(e) and the court concluded they had breached their fiduciary duties by failing to waive the Gate Provision for Lerner.

Lerner had also argued that certain conduct by the Paiges triggered its right under Section 6.4 to withdraw all of its capital prior to the expiration of the three year lock-up period in the Seeder Agreement. Specifically, Lerner argued that the Paiges breached certain information rights set forth in the Seeder Agreement thereby triggering its rights under Section 6.4. Although the court found that the information rights provisions contained in the Seeder Agreement had been breached, it found that Section 6.4 was not triggered because Lerner failed to provide the Paiges with proper notice and an opportunity to cure under New York law. Lerner also argued that the March 2010 Letter was part of an "extortionate scheme" on the part of the Paiges to use their role as a fiduciary to control Lerner's capital, which triggered its right to withdraw capital immediately under Section 6.4. The court concluded that the letter was a "heated settlement letter" that expressed an intent to commit a breach of fiduciary duty at a later date, but the letter itself did not constitute a breach of fiduciary duty. Thus, the court rejected Lerner's claim that it had a right to withdraw prior to the expiration of the three-year lock-up period.

The court rejected the Paiges' claim that Lerner violated the implied covenant of good faith and fair dealing by engaging in a course of conduct that caused the Paiges not to be able to pursue their investment strategy or attract new investors. The court found that Lerner's conduct—in making clear to the Paiges that it would withdraw its capital at the expiration of the three year lock-up period was an exercise of a contractual right—and the exercise of such a right could not be a violation of the implied covenant of good faith and fair dealing.

The court also rejected the Paiges' defamation claim in which the Paiges argued they were defamed (i) by the filing of the summons with Notice in New York that listed fraud among its allegations and (ii) due to Lerner's counsel making statements to the media that Lerner did not know where the Hedge Fund was investing its money, which statements ended up on a website that covered hedge funds. The court agreed with the arguments made by Lerner that the summons was covered by a litigation privilege in New York. Further, as to the report on the website, the court found that the statements were "substantially accurate" and "substantially true" and therefore the defamation claims were not valid.

Finally, the Paiges also sought a declaratory judgment that they would be entitled to indemnification for the expenses of the litigation and any losses suffered as a result of the litigation. The Paiges argued that although they initially initiated the suit, Lerner substantially expanded the scope of the litigation with its counterclaims. The court disagreed, finding that the counterclaims were compulsory and had to be filed in response to the initial claim. The Paiges also argued that they should be entitled to indemnification because they did not engage in "willful misconduct, gross negligence, or violation of applicable laws." The court rejected this claim because it did not believe that the decision not to raise the Gates was made in good faith but rather was made to advance the Paiges' selfish ends. Thus, based on all of the foregoing, the court ordered the Paiges to return Lerner's capital with appropriate pre-judgment interest and the court concluded that all of the Paiges' claims failed.

10. *Archstone Partners, L.P. v. Lichtenstein*, C.A. No. 4465-CC (Del. Ch. July 10, 2009)

Plaintiffs were investors in the Steel Partners II family of funds (the "Funds"), including Steel Partners II (Onshore) LP (the "Partnership"), a Delaware limited partnership. A number of investors in the Funds submitted redemption requests aggregating to approximately 38% of the Funds' assets under management. In order to address the problems that such a large redemption would cause, the governing bodies of the Funds determined to temporarily suspend redemptions from the Funds. The investors of the Funds were then presented with a plan pursuant to which each investor would receive, in full satisfaction of their investments in the Funds, a cash distribution plus the option to (1) receive units in a publicly traded limited partnership to which assets of the Funds would be transferred or (2) receive a pro rata distribution of securities held by the Funds (collectively, the "Plan").

In a prior decision, the Court of Chancery had denied plaintiffs' motion to enjoin the Plan on the grounds that plaintiffs had failed to establish a sufficient threat of imminent and irreparable injury. This decision addressed plaintiffs' motion for certification of an interlocutory appeal of the court's prior decision.

In seeking the injunction, plaintiffs had argued that dispersing the Funds' assets in accordance with the Plan would cause irreparable harm because plaintiffs could obtain greater value in an orderly liquidation. The court stated that plaintiffs failed to define what such a liquidation would look like, failed to convince the court that such a liquidation would produce an amount greater for plaintiffs than what they would receive under the Plan, and "[m]ore importantly . . . [P]laintiffs have utterly failed to establish their right to force such a liquidation, or even that such liquidation is likely." The court stated that although plaintiffs may wish to take control of the Funds and conduct a liquidation rather than receiving in-kind distributions, they are not entitled to do so on contractual or statutory grounds. The court noted that even if the Plan was not implemented, plaintiffs would receive the same result under the Funds' constituent agreements as they would under the second option of the Plan. Thus, plaintiffs had not established a sufficient threat of irreparable injury and their application for certification of an interlocutory appeal was denied.

In rendering its decision, the court discussed a provision in the partnership agreement of the Partnership that provided a right to the general partner of the Partnership, in its sole discretion, to terminate an interest of a limited partner if continued participation of such limited partner "would be detrimental to the Partnership or its interests or would interfere with the business of the Partnership . . . ." The managing member of the general partner of the Partnership had submitted an affidavit in connection with the court's prior decision stating that he made a determination that it was in the best interest of the Partnership to redeem those limited partners that did not wish to continue with a restructured entity. The court stated that it is reasonable to infer from this statement that the general partner of the Partnership would likely be able to determine that the standard under above-referenced section of the partnership agreement of the Partnership was met and that plaintiffs, to the extent they were not redeemed pursuant to their own requests, could have their interests in the Partnership terminated. Thus, the court found that plaintiffs likely would not have a successful challenge to this action.

11. *BASF Corp. v. POSM II Props. P'ship., L.P.*, C.A. No. 3608-VCS (Del. Ch. Mar. 3, 2009)

Plaintiff BASF Corporation ("BASF"), a limited partner of a Delaware limited partnership, brought this action against the partnership and the general partner for a declaration that its right to withdraw from the partnership and to have its partnership interest bought out by the general partner had been triggered. The purpose of the partnership as articulated in its partnership agreement was to own a petrochemical facility (the "Plant"). When the partnership was formed, in addition to the partnership agreement, the general partner entered into a supplementary agreement with each limited partner setting forth such limited partner's capital contribution obligations and other matters. BASF's supplementary agreement provided that if the general partner were to become aware "that the Plant no longer is to be operated by [Lyondell Chemical Company ("Lyondell")] or its Affiliates (as defined in the Partnership Agreement), it shall so notify [BASF], such notification to be given at any time up to thirty days after the date of such change in operation. Upon receipt of such notice, [BASF], shall have ninety days to notify [POSM II Properties] that it wishes to withdraw from the partnership." The supplementary agreement then provided a mechanism for purchase of BASF's partnership interest upon such a withdrawal. Following a "going private" transaction in which all of Lyondell's stock was acquired by a privately held chemical group, BASF attempted to invoke this right to withdraw. BASF argued that the change in control of Lyondell was a change in the operator of the Plant or, alternatively, that Lyondell's new corporate parent, rather than Lyondell, was actually operating the Plant. This opinion addressed defendants' motion to dismiss.

In considering the first of BASF's arguments, the court found that the plain language of the supplementary agreement contemplated a situation in which Lyondell or one of its affiliates was no longer operating the Plant rather than a change in control of Lyondell. BASF argued that the change in control of Lyondell resulted in Lyondell having a sole stockholder that controlled Lyondell and was in a position to influence Lyondell and therefore indirectly operate the Plant. The court stated that this did not, in and of itself, mean that Lyondell was no longer operating the Plant, nor did the change in the ownership of Lyondell's equity render it a different company. The court stated that if the supplementary agreement were construed as BASF suggested, it would mean that there was a change in the operator of the Plant and that a withdrawal right existed whenever Lyondell's stockholder base changed in some significant way or its stockholders or any third party influenced the operation of the Plant. The court further stated that had the parties intended to give BASF withdrawal rights upon a change in control of Lyondell, they could have included an express provision in the supplementary agreement granting BASF this right upon an acquisition of Lyondell by another company, changes to the board or management of Lyondell or modification of the capital structure of Lyondell. The court stated that BASF's withdrawal right under the supplementary agreement is only triggered if Lyondell no longer operates the Plant, which Lyondell may continue to do even if it experiences a change in control of its equity. The court thus refused to adopt BASF's argument for an expansive interpretation of the withdrawal provision in the supplementary agreement. The court also rejected BASF's alternative argument that Lyondell's corporate parent was in fact operating the Plant. The court noted that BASF did not plead any facts suggesting that Lyondell's officers and employees were no longer directly managing and operating the Plant or that operations of the Plant were changed in any way after the acquisition of Lyondell by a single owner.

12. *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955 (Del. Ch. 2004)

Defendants were co-portfolio managers and limited partners of an investment fund formed as a Delaware limited partnership. The fund was operated by two subsidiaries of Lazard Frères & Co. LLC, one of which was the general partner of the fund and the other of which was the investment manager of the fund. Defendants severed their relations with the investment fund very abruptly by terminating their employment without prior notice and then allegedly put pressure on Lazard to transfer the assets of the fund to a new fund that defendants intended to form at a competitor of Lazard. In the period in which defendants were contemplating their departure, defendants continued to function on behalf of the fund, did not disclose they were thinking about leaving and made general statements about the high quality of Lazard as an employer and that they enjoyed their jobs. Following defendants' departure, Lazard was unable to replace defendants as portfolio managers in a sufficiently timely manner and, instead of acceding to defendants' wishes and transferring the assets of the fund to defendants' new fund, Lazard elected to dissolve the fund. The fund and its general partner and investment manager then sued defendants for, among other things, breach of fiduciary duty owed to the fund and the partners who invested in the fund, breach of the partnership agreement of the fund and breach of the investment management agreement between the fund and the investment manager. Defendants moved to dismiss for failure to state a claim upon which relief upon which relief could be granted.

The court first addressed the breach of fiduciary duty claim. While the court acknowledged that defendants owed fiduciary duties to the fund and its investors in connection with the investment discretion entrusted to defendants, the court held that these fiduciary duties did not extend to a duty not to resign and begin a competing business without providing adequate prior notice to allow the fund to replace defendants. The court refused to impose a fiduciary duty on defendants not to leave the fund without suitable replacements where defendants were not contractually restricted from doing so. The court stated that to impose such a duty would inequitably grant plaintiffs' with an important right that they did not bargain and pay for. The court thus dismissed this claim.

The court also dismissed several of plaintiffs' claims of breach of the partnership agreement and the investment management agreement. Plaintiffs' claims included a claim that defendants assumed the same duties as the general partner of the partnership by signing subscription agreements to invest in the fund as limited partners and a claim that defendants were bound to act in accordance with the standard of care in the indemnification provision of the partnership agreement because they fell within the coverage of the indemnification provision as members of the general partner. The court did not dismiss, however, plaintiffs' claim that defendants breached the confidentiality provision of the partnership agreement, which they were subject to as limited partners, by using confidential information in establishing the competing fund and granted plaintiffs' request for discovery to determine if defendants had misused such confidential information.

13. *Solow v. Aspect Res. LLC,* C.A. No. 20397 (Del. Ch. Oct. 19, 2004)

Plaintiff was the limited partner of Aspect/SHS Limited Partnership (the "Partnership") holding a 99% partnership interest and defendants were the general partner of the Partnership and certain controlling persons of the defendant general partner. Plaintiff had brought suit alleging that defendants fraudulently induced him to become a partner in the Partnership and then breached the partnership agreement and their fiduciary duties in the conduct of the Partnership's business. Plaintiff also sought a constructive trust as to profits defendants accrued from their breach of contract and fiduciary duty. Defendants moved to dismiss certain claims and for summary judgment as to others. Finding that the plaintiff had not adequately pled facts that, if true, would prove that defendant made false statements, the court dismissed the fraud in the inducement claim. The court also dismissed all of the breach of contract claims against the controlling persons of the general partner finding that the plaintiff had pled no facts, or argued any law, that would indicate that a person that is not a party to a contract could be liable for a breach thereof. With respect to the breach of fiduciary duty claim, the court found that the same bad acts giving rise to the breach of contract claims allegedly gave rise to the breach of fiduciary duty claims and held that because the fiduciary duty counts in the complaint arose not from general fiduciary principles but from specific contractual obligations agreed upon by the parties, the fiduciary duty claims were precluded by the contract claims. The plaintiff had somewhat greater success with regard to the court's summary judgment holdings. Because the court found there were still genuine issues of material fact with respect to whether the plaintiff was offered an opportunity to participate in another investment as required by the partnership agreement, summary judgment on that claim was denied, and for the same reason, plaintiff's claim for constructive trust upon the profits made by defendants in connection with such investment also survived the motion for summary judgment.

14. *Interactive Corp. v. Vivendi Universal, S.A.*, C.A. No. 20260 (Del. Ch. July 6, 2004)

Vivendi Universal, S.A. ("Vivendi") and USA Interactive ("USA") entered into joint venture in the form of a Delaware limited liability limited partnership with the name Vivendi Universal Entertainment LLLP ("VUE") to which USA contributed its entertainment assets and Vivendi contributed the entertainment assets of Universal Studios, Inc. USA and a USA subsidiary were the limited partners of VUE and a Vivendi subsidiary was the general partner of VUE. The partnership agreement of VUE provided for USA to receive, among other things, certain common interests and preferred interests in VUE in return for the contribution of its entertainment assets. Certain of the preferred interests received by USA entitled USA to quarterly cash distributions at a 3.6% rate per annum of their face value without regard to partnership income. The preferred interests issued to USA were the only preferred interests issued in VUE.

This litigation centered on whether the partnership agreement of VUE required VUE to make tax distributions to USA with respect to its preferred interests. Section 8.02 of the partnership agreement provided that VUE was required to make annual tax distributions to each partner in an amount equal to the amount of taxable income allocated to such partner for such taxable year pursuant to Section 7.02 of the partnership agreement multiplied by a statutory tax rate. Section 7.02 provided, among other things, for the allocation of income to the holders of the preferred interests up to a return of 5% per annum on the face value of their preferred interests. The court noted that the original draft of the partnership agreement prepared by Vivendi provided that tax distributions would be at the general partner's discretion and subject to terms of any loan agreement or indenture to which VUE was a party. Following receipt of this draft, USA's vice chairman and Vivendi's CFO had a conversation in which Vivendi's CFO rejected USA's vice chairman's demand for mandatory tax distributions with respect to the preferred interests. Thereafter, the attorneys for Vivendi and the attorneys for USA, with the attorneys for Vivendi holding the pen throughout negotiations, exchanged several drafts of revised versions of Section 8.02 which first reflected a change from discretionary tax distributions to mandatory tax distribution and later reflected the removal of the limitations with respect to compliance with any loan agreement or indenture to which VUE was a party. Following notification by Vivendi that it did not believe that VUE was obligated to pay tax distributions with respect to the preferred interests, USA filed this action seeking specific performance of the partnership agreement as well as a declaratory judgment regarding the interpretation of Sections 7.02 and 8.02. Vivendi counterclaimed, seeking a declaratory judgment that the plain meaning of the partnership agreement did not require VUE to make tax distributions with respect to the preferred interests and alternatively for reformation of the partnership agreement based on mutual or unilateral mistake. USA then moved for judgment on the pleadings.

In ruling on USA's motion, the court stated that the principles of contract interpretation in Delaware are well settled. In deciding a contract interpretation dispute, the court will first examine the entire agreement to determine whether the parties' intent can be discerned from the express words used or, alternatively, whether its terms are ambiguous. If the contract is clear on its face, the court will rely solely on the clear, literal meaning of those words. The court will not consider extrinsic evidence when a contract is unambiguous and will not attempt to discern the intent of the parties. If the contract appears ambiguous, that is fairly susceptible of different interpretations, the court will consider extrinsic evidence, including evidence of intent, in order to uphold the reasonable shared expectations of the parties at the time of contracting.

In this case, the court held Section 8.02 plainly on its face provided for mandatory tax distributions with respect to USA's preferred interests. Vivendi, noting the mandate that courts should construe contracts so as to give effect to all of their provisions, pointed to several sections of the partnership agreement that it alleged, when read in connection with Section 8.02, make Section 8.02 ambiguous. Vivendi's arguments included arguments based on interpretations of the Internal Revenue Code and an argument that the section of the partnership agreement that provided for quarterly cash distributions on certain preferred interests was intended to cover all of the tax liability incurred by the holders of the preferred interests as a result of the allocation of income under Section 7.02, although this intention was not expressed anywhere in the partnership agreement. The court rejected each of Vivendi's arguments and concluded that, given that the language of Section 8.02 was unambiguous and not susceptible of another reading and that its clear reading did not conflict with any other provision of the partnership agreement, Section 8.02 required tax distributions to be made with respect to the preferred interests.

The court then turned to Vivendi's counterclaim for reformation of the partnership agreement based on mutual or unilateral mistake. The court stated that one claiming mistake must argue that, notwithstanding that a contract is clear on its face, the court should enforce another meaning of the contract because the contract's "clear meaning" is not really the meaning the parties intended. The court further stated that the doctrine of mistake must be applied narrowly to ensure contracting parties that in only limited circumstances will the court look beyond the four corners of a negotiated contract and this was especially true in this case because the partnership agreement was an integrated document. The court added that regardless of whether mutual or unilateral mistake is being claimed, the party claiming the mistake must allege a specific prior agreement that differs materially from the written agreement. The court found that nowhere in Vivendi's counterclaims was there any pleading of a prior agreement with respect to Section 8.02, noting that a prior disagreement was not a substitute for alleging a prior agreement. The court added that nothing else in the record supported an allegation of a specific prior agreement between USA and Vivendi to form the basis of a mistake claim and held that Vivendi's mutual and unilateral mistake claims failed as a matter of law. The court thus granted USA's motion for judgment on the pleadings.

15. *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, C.A. No.259-N (Del. Ch. June 22, 2004)

This case arose out of a dispute between the partners of several Delaware limited partnerships over the interpretation and enforcement of identical buy/sell provisions and related "waterfall" calculations governing the distribution of partnership proceeds in a series of partnership agreements. The partnerships were formed at various times from 1996 to 1999 to acquire, own and operate real property developed and used as recreational vehicle or mobile home communities. A different affiliate of Lehman Brothers, Inc. ("Lehman") served as both 1% general partner and a 74% limited partner of each partnership (collectively, the "PAMI Partners") and the other 25% limited partner was EMB/NHC, L.L.C. ("NHC"), which manages the properties.

On January 8, 2004, NHC invoked the buy/sell provisions of the partnership agreements. According to the partnerships' books and records, NHC's offer, in the event NHC was the buyer, would have resulted in payments to the PAMI Partners aggregating approximately $70 million for their partnership interests and, in the event NHC was the seller, would have resulted in payments to NHC aggregating $5.7 million for its partnership interests. The PAMI Partners responded on February 5, 2004 by purportedly electing to be the buyer of NHC's partnership interests but, based on the books and records kept by Lehman, only offered to pay NHC $1.5 million for its partnership interests. On February 9, 2004, NHC notified the PAMI Partners that it considered the PAMI Partners' election to buy a counteroffer and therefore a repudiation of the partnership agreements. NHC then purported to close on its purchase of the PAMI Partners' partnership interests and deposited the purchase price for the PAMI Partners' partnership interests in escrow. The PAMI Partners then filed this lawsuit seeking an order compelling NHC to perform as seller under the buy/sell provisions, and NHC counterclaimed for a declaration that its buy/sell election based on its offer price was valid and fully enforceable, thereby giving NHC the right to buy the PAMI Partners' partnership interests.

The court found that Lehman knew that the waterfall calculations it used to respond to the NHC's buy/sell notices did not reflect the partnership books and records and were not performed in accordance with the partnership agreements in several respects. One area of disagreement regarding the waterfall calculations was Lehman's argument that, notwithstanding the separate structures of the partnerships, the waterfall calculations should be performed on a consolidated basis, which would allow Lehman to make up losses in one partnership from profits realized in another. The court rejected Lehman's argument, finding that the record did not contain substantial evidence of any agreement among the partners to treat the partnerships as a single, consolidated entity for any purpose, including, in particular, the waterfall calculation.

The court concluded that NHC had the contractual right to act as buyer in accordance with the buy/sell provisions, finding that the totality of Lehman's response to the buy/sell notices from NHC was so inconsistent with the clear terms of the partnership agreements that it constituted either a repudiation of those contracts or an improper counteroffer. The court held that Lehman repudiated the partnership agreements by stating unequivocally that it would perform only on terms different than those required by the partnership agreements and, in doing so, Lehman unilaterally sought to alter both the present and reasonably anticipated future relations created by the partnership agreements and tried to use its superior economic power to impose a non-contractual understanding on NHC in lieu of the agreements between the parties. Under the theory that once a party repudiates or breaches a contract, it cannot claim the benefits of that contract, the court held that Lehman could not enforce its elections to be the buyer under the buy/sell provisions. In addition, the court held that Lehman's elections to be the buyer materially varied the terms of NHC's offer and thus were ineffective acceptances. While purporting to accept, Lehman made clear that it would not abide by the explicit terms of the partnership agreements in determining what it was obligated to pay, would not recognize or base its payment on the partnerships' books and records and would litigate and assert that NHC was entitled to nothing if NHC refused to agree to its terms. The court concluded that Lehman thereby rejected NHC's offer and made a counteroffer and that, because the partnership agreements provided that if the recipient of a buy/sell notice does not timely accept as the buyer, the party giving the notice shall be the buyer, NHC was the buyer. The court also awarded attorneys fees and costs to NHC pursuant to a provision in the partnership agreements that entitled a partner to attorneys fees and costs if such partner obtains a judgment against any other partner for breach of the partnership agreement.

Because the court had already found that Lehman's conduct amounted to a repudiation of the partnership agreements, the court declined to address NHC's claim that Lehman's conduct constituted a breach of the implied covenant of good faith and fair dealing. The court agreed with NHC, however, that had Lehman's conduct not been found to be in breach of a specific provision of the partnership agreements, it would have been in breach of the implied covenant, finding that Lehman's conduct in responding to the buy/sell notices was undertaken in bad faith and in knowing disregard of NHC's rights under the partnership agreement and was designed to exert economic coercion on NHC.

The court stated that its holding was not based on a finding of breach of fiduciary duty by Lehman because NHC chose to rely on its contractual rights under the partnership agreements instead of bringing suit to complain about Lehman's fiduciary conduct, but the court noted that there was evidence in the record from which the court could infer that Lehman acted in breach of its duty of loyalty in its dealings with NHC and the partnerships.

16. *Sutter Opportunity Fund 2 LLC v. FFP Real Estate Trust*, 838 A.2d 1123 (Del. Ch. 2003)

Several investment funds bought partnership units in FFP Partners L.P., a Delaware limited partnership ("FFP"), whose business was managing real estate. In order to protect FFP's tax status as a pass-through entity, FFP's partnership agreement (the "Agreement") imposed a 4.9% limit on the amount of partnership units any "person" could "constructively own." According to the terms of the Agreement, investors attempting to acquire more than 4.9% of FFP's partnership units would merely engage in void transfers with the units they attempted to acquire immediately exchanged for "excess units" to be held in an "excess unit trust." Owners of excess units had no partnership rights except the right to name a beneficiary to the trust or to sell the excess units at a price no higher than that for which they were bought, with the express permission of the partnership. However, the investment funds colluded first in attempts to circumvent the ownership cap and then in an attempt to eliminate the ownership cap. The Agreement further provided that only limited partners holding at least a 10% ownership interest could propose amendments to the Agreement. The plaintiff investors together proposed such an amendment, and, at the request of one of the plaintiffs, Cede & Co., the nominal owner of the plaintiffs' partnership units, submitted the same proposal. When the plaintiff investors filed a Schedule 13D in relation to their acquisition of partnership units, FFP responded by demanding information on the plaintiffs' interrelationships and holding of units. The plaintiffs refused the request and filed suit, seeking to compel a meeting of limited partners to vote on their proposed repeal of the ownership cap.

The plaintiffs first argued that the Agreement required FFP to treat Cede & Co. as the limited partner proposing the amendment because Cede & Co. was the registered owner of the units that the plaintiffs ultimately owned. Since Cede & Co. was the nominal owner of 95% of the units of FFP, the plaintiffs claimed, the 10% threshold for proposing amendments had been satisfied. Noting the absurd results to which the plaintiffs' arguments might lead, Vice Chancellor Lamb held that FFP was entitled to look through the agent, Cede & Co., to determine the ownership interest of its principals.

The plaintiffs further argued that their 11.6% aggregate ownership interest entitled them to propose amendments without regard to Cede & Co., denying that any one of them constructively owned more than 4.9% of outstanding FFP units or that their units were subject to the forfeiture provision embodied in the ownership cap. Although the plaintiffs admitted that they were a 13(d) group and therefore a "person," as defined in the Agreement, they argued that, since the tax law definition of constructive ownership used in the Agreement did not attribute to a Section 13(d) group ownership of interests held by members of that group, the group here was likewise not the constructive owner of the units held by its members. Nonetheless, Vice Chancellor Lamb quickly concluded that the plaintiffs themselves remained persons under the Agreement who remained subject to the ownership cap and who together constructively owned a forbidden amount of units.

The Vice Chancellor went on to reject the plaintiffs' arguments that (a) under the Agreement's broad definition of constructive ownership, a unitholder might accidentally violate the ownership cap and (b) the Agreement's broad definition of constructive ownership would prevent anyone from ever satisfying the 10% ownership threshold for proposing amendments. Talk of accidental infractions did not help these plaintiffs, who were fully aware of each other's ownership interests and who knowingly colluded to avoid the membership cap. Similarly, the court indicated that any unitholder could solicit proxies or consents to reach the 10% threshold, so the plaintiffs' arguments lacked merit.

Arguments that FFP had waived its right to enforce the ownership cap were refuted both by the language of the Agreement and the facts of the case. Moreover, even if FFP had waived the relevant provision, the plaintiffs' unclean hands would bar them from a remedy. The court went on to dismiss as "insubstantial" the plaintiffs' arguments that (a) the transfer provision violated Article VIII of the Uniform Commercial Code and (b) that the excess unit trust was not a valid trust.

Summary judgment was granted to the defendants. The plaintiffs could not vote the units they held in violation of the ownership cap.

17. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 795 A.2d 1 (Del. Ch. 2001), *aff'd in part, rev'd in part*, 817 A.2d 160 (Del. 2002), *on remand*, (Del. Ch. July 8, 2003)

In a decision after trial, the court ruled on plaintiffs' challenge to, and defendants purported defenses of, three transactions: a reverse split of partnership units, an option plan and an odd lot sale. The court had previously determined that the limited partnership agreement at issue supplanted the otherwise applicable default fiduciary duties relating to the challenged transactions, and the court noted this meant that the limited partnership agreement therefore became the sole source of protection for the public unitholders of the partnership. The question before the court was, in essence, whether or not the subject transactions were made in compliance with the requirements of the limited partnership agreement. The court noted that under the circumstances the general partner and other fiduciary defendants can rightly be expected to follow the partnership agreement "scrupulously." The court also reaffirmed that where the general partner controlled the contractual drafting process, any ambiguities in the partnership agreement would be construed against the general partner. The specific question with respect to the odd lot sale (in which the general partner bought all odd lots tendered by unitholders) was whether that sale was an "issuance" with respect to which the general partner was authorized to act at its sole discretion and to consider only factors it deemed relevant or a sale or other transaction between the partnership and the general partner which had to be on substantially the same terms available from an unaffiliated third party. The court concluded, based on the nature of the transaction and on the general partner's treatment of it prior to the litigation, that it was a sale and not an issuance and that as there was no evidence that it was on substantially third party terms it did not comply with the requirements of the partnership agreement. In addition, under the partnership agreement the general partner's audit committee was required to review and approve the sale and the court found that although there had been an ad hoc separate vote of the outside directors, such a vote was not an adequate proxy for genuine audit committee review. However, with respect to the issuances in connection with the reverse split and option plan, the court concluded that the more deferential provisions of the partnership agreement applied, that no audit committee approval was required and that the transactions had been made in compliance with the partnership agreement. As a defense to claims relating to the odd lot sale, the defendants had attempted to rely on Section 17-1101(d)(1) of the DRULPA, which essentially provides that a general partner is not liable for its good faith reliance on the provisions of a limited partnership agreement. The court noted that it was an open question as to whether that section would protect a general partner who in good faith, but erroneously, relied on ambiguous provisions of a limited partnership agreement. But the court concluded that the provisions at issue were not ambiguous and therefore, following the teaching of *Continental Ins. Co. v. Rutledge & Co., Inc.*, the court held that Section 1101(d)(1) did not protect the general partner's erroneous reliance on an unambiguous provision--whether or not in good faith. The court also rejected the general partner's reliance on counsel defense both because the general partner did not follow the advice it was given and because it had not acted in good faith. However, as to remedy, the court declined to impose rescission as requested by the plaintiff. It declined to do so because, among other things, the plaintiff had done nothing to challenge the subject transactions for over a year after they occurred and because the court was not convinced the subject transactions were a conscious scheme to entrench the general partner's control and enrich its affiliate. Therefore, the court ordered an award of monetary damages.

In an appeal of this decision, the Delaware Supreme Court affirmed the judgment of the Court of Chancery that (a) the contractual fiduciary duties of entire fairness contained in the partnership agreement applied to the odd lot sale, (b) the defendants who controlled the general partner were jointly and severally liable with the general partner because they aided and abetted the general partner's breach of the contractually created fiduciary duties of entire fairness, (c) the Court of Chancery has the discretion not to grant rescission where the plaintiff unjustifiably delays in seeking that remedy, provided that the court articulates and orders a reasonable alternative remedy and (d) the Court of Chancery has the discretion to award compound interest on the resulting damage remedy. The Supreme Court reversed the judgment of the Court of Chancery, however, regarding the calculation of the damages awarded to the plaintiffs. The Supreme Court determined that the value of the control of the partnership acquired by the defendants that resulted from the defendants' wrongful conduct was not properly compensated for by the award of damages because the Court of Chancery did not account properly for a control premium in its calculation of damages. The Supreme Court remanded the case to the Court of Chancery for proceedings to quantify how the odd lot sale would have been consummated had the defendants adhered to the entire fairness standard and procedures in the partnership agreement and to award one or more various equitable remedies to compensate the plaintiffs for the control premium. The Supreme Court stated that where there is a breach of loyalty, as in this case, the scope of recovery is not to be determined narrowly because the strict imposition of penalties under Delaware law is designed to discourage disloyalty.

While the scope of Section 17-1101(d)(2) of DRULPA was not before the Supreme Court, the Court stated that notwithstanding this fact, it felt compelled to note that the Court of Chancery's dictum in an earlier decision in this case that Section 17-1101(d)(2) of DRULPA expressly authorizes the elimination of fiduciary duties in a partnership agreement was not a correct statement of law. Rather, the Supreme Court pointed out that neither Section 17-1101(d)(2) nor any other provision of DRULPA explicitly provides that a limited partnership agreement may eliminate the fiduciary duties or liabilities of a general partner and that the underlying general principle in Delaware is that scrupulous adherence to fiduciary duties is normally expected. The Supreme Court also noted the historic cautionary approach of Delaware courts that efforts by a fiduciary to escape a fiduciary duty, whether by a corporate director or officer or other type of trustee, should be scrutinized searchingly.

In the remand of this case to the Court of Chancery following the Delaware Supreme Court's decision, the Court of Chancery awarded monetary damages to compensate the partnership for the increased security over the control of the partnership that the general partner achieved in the odd lot sale. The court arrived at the award based on comparable companies, discounted cash flow, net asset value and market value analyses of the value of the partnership and then added a control premium to the valuation, which resulted in a 154% premium over the market price paid in the odd lot sale. The court determined not to revisit its previous decision to deny rescission and, because the court had found rescission to be unwarranted, also found an award of rescissory damages to be unwarranted. The court also refused to sterilize the general partner's voting rights with respect to the units it acquired in the odd lot sale, stating that too much time had passed for it to be equitable to strip the general partner of its voting rights with respect to these units.

18. *Telstra Corp. Ltd. v. Dynegy, Inc.*, C.A. No. 19369 (Del. Ch. Mar. 4, 2003)

The plaintiff, Telstra Corporation Ltd. ("Telstra"), was one of three limited partners in a Delaware limited partnership. The general partner and the two other limited partners were wholly-owned subsidiaries of Dynegy, Inc. ("Dynegy"). The partnership agreement gave Telstra the right to require Dynegy or the partnership to purchase its interest in the partnership during the first two years of the partnership. The amount Telstra was entitled to receive upon the exercise of its put option was the value of Telstra's capital account at the end of the month immediately preceding the exercise of the put option. The partnership agreement also provided that upon the occurrence of certain triggering events, the partners' capital accounts would be increased or decreased to reflect appreciation or depreciation in the partnership's asset values (i.e., a "book up" or "book down"). One triggering event was a disproportionate contribution of capital to the partnership by the partners.

This case arose following a capital call by the partnership in July 2000. Dynegy funded its pro rata portion of the capital call but Telstra did not make a capital contribution and claimed that the capital call was unauthorized because it had been issued without the approval of the managing board of the partnership, as required by the partnership agreement. In August 2000, Telstra exercised its put option and Dynegy accepted Telstra's exercise of the put option and advised Telstra that the partnership had determined that Telstra's capital account at the end of July had been "booked down" to zero based on the disproportionate capital contributions of the partners. Telstra claimed that there was no basis for "booking down" the value of its capital account and filed suit alleging breach of contract and breach of fiduciary duty. This decision was issued in connection with motions for summary judgment.

The court's analysis of the breach of contract claim focused on whether the capital call was valid and whether the partnership was entitled to "book down" the value of Telstra's capital account and the court found that the capital call was invalid because it had not been approved by the managing board and that in the absence of a valid capital call, the partnership could not accept Dynegy's capital contribution. Based on this finding, the court concluded there had been no disproportionate capital contributions and thus there was no basis for a "book-down" of Telstra's capital account. The court further stated that even if the capital call had been valid, because Telstra's capital contribution was not due until after the end of July, there would have been no disproportionate capital contributions at the end of July and no basis to "book down" at such time. The court granted Telstra's motion for summary judgment on the issue of whether it is entitled to the value of its capital account at the end of July without a "book down" but determined that a trial was necessary to determine the proper value of Telstra's capital account.

Telstra also alleged breach of fiduciary duty by the general partner and demanded the equitable remedies of rescission or rescissory damages and an award of attorneys fees. The court found that all of Telstra's claims related to the general partner's performance of its contractual duties under the partnership agreement in connection with Telstra's exercise of the put option and held that Telstra's attempt to recover rescissory damages and attorneys fees was inappropriate in this context. The court stated that the remedies of rescission and rescissory damages were available in connection with claims such as fraudulent inducement, unjust enrichment and self-dealing but not in this case where the claims were all essentially based in contract. The court also found that there was no evidence of bad faith by Dynegy that would justify Telstra's demand for attorneys fees. The court thus granted the defendants' motion for summary judgment on Telstra's fiduciary duty claims.

19. *In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351 (Del. Ch. 2002)

Limited partners sued the general partners, which were affiliated with one another, of a Delaware limited partnership for breach of fiduciary duty and breach of contract and sued an affiliate of the general partners for aiding and abetting breaches of fiduciary duty. Plaintiffs' claims stemmed from actions taken by the general partners in connection with an offering of preferred units having superior claims to capital and income distributions, including the amendment of the partnership agreement without limited partner approval to subordinate the contractual distribution rights of the existing limited partners to those new claims and a subsequent sale of partnership property also without limited partner approval. Before the court were cross-motions for partial summary judgment.

The court granted the plaintiffs' motion with respect to their claim that the general partners breached the partnership agreement by amending it to provide a preferential right to capital and income distributions to holders of preferred units without limited partner approval. The defendants argued that a provision in the partnership agreement that permitted the general partners to sell additional partnership interests on such terms and conditions and with such rights and obligations as the general partners determined implicitly granted the general partners the authority to amend the partnership agreement as necessary to secure the rights of the new limited partners and that the amendment provision of the partnership agreement supported that interpretation. The court disagreed and held that reading the provision to empower the general partners unilaterally to create a different class of limited partner units that do not merely dilute but subordinate the rights of existing limited partners required reading into the provision a more sweeping implicit meaning than emerged from a reading of the explicit terms thereof.

The court stated that it would expect a partnership agreement to articulate clearly the general partners' power to create a new class of units with superior rights and amend the partnership agreement unilaterally to create those rights and found that Section 17-302(a) of DRULPA, and the history of its amendments, reinforced the need for an explicit grant of authority for the exercise of such powers. The court also rejected the defendants' reliance on the amendment provision of the partnership agreement. The amendment provision provided that any amendment which would adversely affect (other than as permitted in the additional partnership interests provision) certain rights of investor limited partners required the written consent of all investor limited partners. The court found that by its plain terms the effect of the reference to the additional partnership interests provision was solely to exempt an amendment related thereto from the unanimous written consent requirement, not permit it unilaterally.

The court also denied both cross-motions on the plaintiffs' claim that the sale of certain real estate properties without limited partner approval violated the partnership agreement. Under the terms of the partnership agreement, limited partner approval was required to approve a sale of all or substantially all of the assets of the partnership. The defendants first argued that because the sold properties were owned by a subsidiary of the partnership, they did not constitute property of the partnership that was subject to the limited partner approval requirement. The court rejected this argument finding that when the applicable provision was interpreted in conjunction with other provisions of the partnership agreement, it was clear that the sold properties were considered a partnership asset, regardless of the fact that they were held indirectly by a partnership subsidiary and that such reading was also consistent with the language contained in the prospectus for the preferred units offering. With regard to the parties' dispute over whether the sold properties constituted all or substantially all of the assets of the partnership, the court found that such a determination involves a subjective inquiry comprised of both qualitative and quantitative considerations and that the deficiencies in the record at the summary judgment stage precluded the court from making a decision prior to trial.

20. *R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, C.A. No. 17449 (Del. Ch. Apr. 10, 2001)

Plaintiffs challenged an already consummated reorganization of a limited partnership which separated the ownership of a single public limited partnership into the old public limited partnership and a new privately-traded limited partnership. Plaintiffs challenged the reorganization on several grounds: first, that it did not receive the requisite approval by the public unitholders; second, that defendants breached their fiduciary duties in structuring the reorganization in an unfair manner; and third, that the defendants made materially misleading disclosures. Plaintiffs' first claim was based on the fact that the defendants needed to amend the partnership agreement of the existing limited partnership in order to implement the reorganization and the defendants presented the proposed amended and restated partnership agreement containing all of the proposed amendments to the public unitholders for their approval in a single vote and provided that it would be approved if it received the affirmative vote of a majority of the public unitholders. Plaintiff argued, however, that one provision of the proposed restatement of the partnership agreement could only be accomplished by a unanimous vote and that therefore the entirety of the proposed amendment, including all the remaining provisions which could otherwise have been approved by a majority vote of the public unitholders, was never validly adopted and must be declared void. The court agreed with plaintiffs that one provision of the amendment could only be put into effect by unanimous vote. However, the court rejected plaintiffs' argument that the entirety of the amendment was therefore void. The court cited several bases for this decision including the "severability" provisions of both the original partnership agreement and the proposed amendment and restatement and the fact that the general partner removed the one provision that required unanimous approval from the final restated and amended partnership agreement. With respect to the severability issue, the court cited several legislative cases supporting the proposition that if part of one legislative bill required a majority vote and another part a supermajority vote and only the majority vote were obtained, so long as the matters were of a severable nature, the part that received the requisite approval would be valid notwithstanding the fact that the remaining part would be void. The court also rejected plaintiffs attempt to limit that principle to the legislative context finding that it applied equally in the private contract context and was consistent with the approach Delaware has historically taken to the regulation of economic activity which rests on "flexibility and efficiency, not unjustified rigidity." In their fiduciary duty claim, plaintiffs had argued that the reorganization was motivated solely to advantage the majority unitholder and corporate parent of the general partner without conferring any benefit on the public unitholders. The defendants moved to dismiss this claim on the grounds that the public unitholders had approved the transaction in accordance with the criteria set forth in the original limited partnership agreement which displaced any default fiduciary duties that would otherwise have applied to the transaction. Plaintiffs countered that the requirements of the limited partnership agreement including the vote requirement were in addition to, not in substitution for, the general partner's common law fiduciary obligations and pointed to the absence of any language expressly restricting the operation of default fiduciary duties in the operative section of the partnership agreement. The court held that in deciding whether default fiduciary duties were preempted by contractual provisions it was required to determine whether the application of default fiduciary duties could be reconciled with the practical and efficient operation of the terms of the limited partnership agreement; where such a reconciliation was possible, the court would apply default fiduciary duties in the absence of clear language disclaiming their applicability. "But where the use of default fiduciary duties would intrude upon the contractual rights or expectations of the general partner or be insensible in view of the contractual mechanisms governing the transactions under consideration, the court will eschew fiduciary concepts and focus on a purely contractual analysis of the dispute." However, the court held that it did not need to answer that question for the present case because, based on corporate law principles, it concluded that if the challenged transactions received an informed, uncoerced majority vote of the public unitholders that vote would obviate any generalized fairness inquiry and insulate the general partner from contractual or fiduciary liability. Thus, the court held that plaintiffs' fiduciary claim turned on the adequacy of the general partner's disclosures. Plaintiffs had challenged a number of the general partner's disclosures as false or misleading. The court dismissed a number of these claims. However, it held that certain of the claims were sufficient to withstand a motion to dismiss. Thus, the court denied defendants' motion to dismiss those disclosure claims and the fiduciary duty claim which turned on the adequacy of the disclosure.

21. *Continental Ins. Co. v. Rutledge & Co., Inc.*, C.A. No. 15539 (Del. Ch. Jan. 10, 2000) and (Del. Ch. Feb. 15, 2000)

In responding to cross-motions for summary judgment, the court addressed the issue of whether the partners of a Delaware limited partnership orally amended the partnership agreement to temporarily suspend a limited partner's withdrawal rights. The limited partnership, formed to raise and invest capital, had an initial investment strategy to invest in public equity. However, in accordance with the partnership agreement, the general partner caused the partnership to change its investment strategy to invest primarily in private equity. Subsequent to the change in investment strategy, a limited partner, under new ownership, decided to divest itself of its interest in the limited partnership and sent the general partner notice of its intent to withdraw from the limited partnership, as permitted in the partnership agreement. However, the general partner claimed that at the time the investment strategy was changed, the partners had orally agreed to amend the limited partnership agreement to temporarily suspend the withdrawal rights of the limited partner in order for the limited partnership to hold its private, illiquid investments for a sufficient length of time that would allow it to sell such investments for maximum profit. The court first looked to the partnership agreement itself which contained a provision indicating that amendments of the partnership agreement required the written consent of all partners. In rejecting the general partner's argument that the partnership agreement does not require amendments to be in writing, the court noted that while another provision of the partnership agreement seemed to authorize unilateral amendments by the general partner, a writing was required to suspend the limited partner's withdrawal rights because such provision only permitted unilateral amendments that did not adversely affect the limited partner. The court further held that even assuming that the general partner could unilaterally amend the partnership agreement, it still would not uphold the alleged oral modification because the general partner had failed to meet its high evidentiary burden of proving the change with specificity and directness. The court then stated that even if the general partner had met its evidentiary burden, it still would not have found the oral modification binding due to lack of consideration.

Upon the general partner's motion for reargument, the court held that its summary judgment in favor of the limited partner on the issue of the contractual right to withdraw was proper. The court found that the general partner had failed to show that the court misunderstood material facts or applied the wrong legal standard.

22. *Arvida/JMB Partners, L.P. v. Vanderbilt Income and Growth Assocs., L.L.C.*, C.A. No. 15238 (Del. Ch. May 23, 1997), *aff'd*, 712 A.2d 475 (Del. 1998)

In a case arising from an attempt to remove and replace the general partner of a limited partnership after the plaintiff had acquired approximately a 20% interest in the limited partnership through a tender offer, the court considered (i) whether the plaintiff had acquired voting rights as a subsequent assignee of limited partnership interests and (ii) whether the general partner had breached its contractual or fiduciary duties by refusing to consent to the plaintiff's admission as a limited partner. After trial, the court found the provisions regarding the assignment of voting rights from limited partners and assignees to subsequent assignees to be ambiguous and consequently applied the contractual construction principle of *contra proferentum* to give effect to the parties' reasonable expectations based on the terms of the agreements. In doing so, the court determined that a reasonable investor in the limited partnership could have read the relevant provisions to provide that subsequent assignees would have voting rights. Therefore, the court held that the plaintiff had the right to vote. With respect to the general partner's denial of consent to the admission of the plaintiff as a limited partner, the court held that the plaintiff had failed to demonstrate that the general partner had breached its contractual or fiduciary duties. The partnership agreement permitted the general partner to grant or deny consent to the admission of a limited partner in its "sole and absolute discretion." In light of this standard, the court concluded that the only limitation on the general partner's discretion was implied contractual covenant of good faith and held that the plaintiff had failed to show bad faith because the general partner had sufficient reasons to conclude that the plaintiff would not be a suitable partner.

23. *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, C.A. No. 15388 (Del. Ch. Aug. 13, 1997), aff'd, 708 A.2d 989 (Del. 1998)

Plaintiff limited partnership alleged that defendant limited partner, by obtaining a personal communications service ("PCS") license through its affiliate and by entering into an agreement to resell PCS, had breached the non-compete clause contained in the limited partnership agreement. The partnership agreement prohibited limited partners from engaging in "any and all service authorized by the FCC under Part 22 of its cellular rules as promulgated under the Cellular Radio Decisions." PCS did not exist at the time the partners entered into the partnership agreement and when the FCC did provide for PCS regulation, it did so under part 24, not part 22, of the FCC's cellular rules. The partnership contended that the terms of the partnership agreement were intended to preclude competition with the partnership in any form, not just competition based on the use of technologies in existence at the time of contracting. The limited partner argued that the precise terms of the partnership agreement should control and moved to dismiss the action for failure to state a claim upon which relief can be granted.

Based on fundamental principles of contract construction, the court found the non-compete clause to be unambiguous and thus subject to interpretation by its express terms without reference to extrinsic evidence. Because PCS was not regulated under part 22 of the FCC's cellular rules, court held the partnership agreement did not prohibit limited partners from competing with the partnership in PCS. The partnership had also claimed that even if the express terms of the non-compete clause did not include PCS, the agreement contained an implicit obligation of limited partners not to compete through the use of technology such as PCS and requested that the court enforce this implicit obligation to uphold the reasonable expectations of the parties in entering into the agreement. However, the court was unable to conclude that the parties, at the time of contracting, would have proscribed the provision of PCS and thus refused to imply such an obligation and granted the defendant limited partner's motion to dismiss.

The Supreme Court, in a *de novo* review, affirmed the holding of the Court of Chancery finding that, in light of the unambiguous terms of the partnership agreement, the court was not compelled to conclude that had the partners thought to address the subject, they more likely than not would have agreed to include PCS in the partnership agreement's non-compete clause.

24. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37 (Del. 1998)

A Delaware limited partnership was formed for the purpose of acquiring and did acquire all the stock of a certain corporation. Approximately 1850 investors became limited partners in the limited partnership by executing the limited partnership agreement. The limited partnership's ownership of stock in the corporation dropped from 100% to approximately 67% after an initial public offering of the corporation's stock. The plaintiff limited partners sued the general partner and related entities for breach of fiduciary duty for failing either to attempt to sell the limited partnership's stock in the corporation or the corporation as a whole for a control premium. The defendants then proposed a plan of withdrawal and dissolution, which would give each limited partner the option of either exchanging all or part of its interest in the partnership for cash through a public offering of the corporation's stock or receiving at a later date its proportionate interest in the stock of the corporation. Implementation of the plan required certain amendments to the partnership agreements, and the defendants filed proxy materials with the Securities and Exchange Commission and began soliciting proxies in support of the plan. The plaintiffs then amended their complaint to allege that the proposed amendments to the partnership agreement necessary to carry out the plan did not comply with the requirements for amendment contained in the partnership agreement. The defendants countered that they were complying with the amendment procedures under the partnership agreement and offered the original offering memorandum for the partnership interests as extrinsic evidence supporting their interpretation of the partnership agreement.

The plaintiffs sought a preliminary injunction enjoining the general partner from implementing the proposed plan of withdrawal and dissolution. The Court of Chancery granted the preliminary injunction, and the defendants made an interlocutory appeal of the preliminary injunction to the Supreme Court.

The Supreme Court found that the provisions of the limited partnership agreement addressing the amendment process were ambiguous, at best, and held that the case raised the following question of first impression in Delaware: whether an ambiguity in a partnership agreement between a general partner and 1850 limited partners should be construed against the general partner as in the case of certain corporate documents involving the rights of investors or insurance contracts involving the rights of insureds, or whether extrinsic evidence should be considered to resolve the ambiguity as in the case of an ambiguous, bilateral contract.

In this case, the court concluded on the record presented that the limited partners were presented with a "take it or leave it" offer with no opportunity to negotiate the provisions of the partnership agreement and therefore found that the partnership agreement was not a negotiated bilateral contract. As a result, the court affirmed the decision of the Court of Chancery, holding that, based on the principle of *contra proferentem*, any ambiguous terms in the partnership agreement should be construed against the general partner as the entity solely responsible for the articulation of those terms. The court added that the consideration of extrinsic evidence assumes there is some connection between the expectations of the contracting parties revealed by that evidence and the way contract terms were articulated by those parties. Therefore, unless extrinsic evidence can speak to the intent of all parties to a contract, it provides an incomplete guide with which to interpret contractual language.

25. *US West, Inc. v. Time Warner Inc.*, C.A. No. 14555 (Del. Ch. June 6, 1996)

A limited partner sought an injunction preventing the managing general partner from acquiring a competing corporation outside of its capacity as managing partner. The limited partner claimed that (i) the acquisition would breach a non-competition provision of the partnership agreement; (ii) the acquisition would breach the managing partner's duty of loyalty to the partnership; and (iii) that it was fraudulently induced to invest in the partnership by the non-disclosure of material information at the time of its investment.

The court found that the non-competition provision was ambiguous but interpreted it in such a manner that the acquisition by the managing partner was not violative of the provision, based on the reasonable construction of the provision relied upon by the managing partner and the fact that the limited partner knew, or should have known, of this construction. The fiduciary duty of loyalty was not breached because the acquisition did not foreclose an opportunity of the partnership and the managing partner was making a good faith attempt to meet its obligation of loyalty. Finally, the limited partner failed to prove that the managing partner consciously intended to mislead it by not disclosing the information in question and failed to prove that the disclosure of such information would have been a material factor in the limited partner's decision to invest in the partnership. For these reasons, the limited partner's claim was dismissed with prejudice.

26. *Kansas RSA 15 Ltd. P'ship v. SBMS RSA, Inc.*, C.A. No. 13986 (Del. Ch. Mar. 8, 1995)

The general partner and owner of 99% of the limited partnership units of a Delaware limited partnership sought a judicial declaration that it had the legal power to enter into a transaction by which substantially all of the assets of the partnership would be exchanged for the assets of an unrelated partnership engaged in a comparable business. The 1% limited partner of the partnership filed a counterclaim asserting that under the DRULPA the exchange transaction required a unanimous vote of all the partners unless the partnership agreement provided otherwise and asserted that the partnership agreement at issue did not. Both parties then moved for summary judgment.

The court held that, unlike the DGCL which affords the holders of a majority of the corporation's voting securities a right to authorize the sale of substantially all assets, in the partnership context, absent a contrary provision in the partnership agreement, if the sale of all or substantially all the partnership's assets is outside the partnership's usual course of business the default rule under DUPL Section 1509(b), which governs the rights of general partners in the absence of governing law in the DRULPA, requires unanimous action of the partners. Finding the question of whether the proposed transaction was within the partnership's usual course of business to be a question of fact requiring a trial on its merits, the court denied the summary judgment motions of both parties.

27. *Star Cellular Tel. Co., Inc. v. Baton Rouge CGSA, Inc.*, C.A. No. 12507 (Del. Ch. July 30, 1993), *aff'd*, 647 A.2d 382 (Del. 1994)

Two limited partners brought an action claiming that the merger of the former general partner into the present general partner effected an impermissible transfer of the general partner's interest under the limited partnership agreement. The limited partnership agreement, however, did not specifically include mergers in the anti-transfer clause, and the court found that the word "transfer" had no generally prevailing meaning and that the extrinsic evidence proffered by the parties did not support either's interpretation. Turning to the law relating to anti-assignment provisions, the court noted that such provisions were usually intended to prevent the nonconsensual introduction of a stranger into the transaction which the court found had not occurred in the challenged merger. The court also found that the merger did not materially increase the risks to or otherwise harm the limited partners, and, based on the foregoing, the court declined to attribute to the contracting parties an intent to include the merger within the class of prohibited transfers.

28. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II. L.P.*, C.A. No. 12449 (Del. Ch. July 28, 1992), rev'd on procedural grounds, 624 A.2d 1199 (Del. 1993)

Plaintiff was a limited partner in two investment partnerships organized by Morgan Stanley (referred to as Fund I and Fund II). Prior to an investment by Fund II, the limited partners would make capital contributions to Fund II usually on a pro rata basis according to the limited partners' capital commitment to Fund II. Fund II then would use the contributed capital to make the investment. The plaintiff and another Fund I limited partner commenced actions in New York and then Delaware challenging Fund I's liquidation of its investments in certain companies. Following the commencement of the Fund I suits, the general partner of Fund II notified plaintiff on three occasions that it had decided to exclude the plaintiff from participating in certain new investments by Fund II based on a provision in the partnership agreement vesting the general partner with that power if in the general partner's discretion the limited partner's participation could have a material adverse effect on the entity in which the investment was being made, Fund II or Morgan Stanley. Plaintiff brought suit alleging that the general partner's actions were retaliatory and in bad faith and, hence, breached the partnership agreement and the fiduciary duty of the general partner.

The court granted the defendant's motion for judgment on the pleadings. In so doing, it ruled that the general partner, in order to exclude the plaintiff from further investment opportunities, must have made a reasonable and good faith determination that such participation would have a material adverse effect. The court then concluded that the general partner had met this standard because it had acted in good faith and because plaintiff's participation could cause Fund II to be considered less valuable as an investment vehicle since other entities might become reluctant to invest with Fund II based on plaintiff's demonstrated willingness to sue entities involved in an investment. On appeal, however, the Delaware Supreme Court reversed on procedural grounds holding that plaintiff's bad faith claim raised an issue of material fact which precluded judgment on the pleadings.

L. Doctrine of Recoupment

1. *TIFD III-X LLC v. Fruehauf Prod. Co.*, C.A. No. 20488-NC (Del. Ch. June 28, 2004)

TIFD III-X LLC ("TIFD") was the sole limited partner and Fruehauf Production Company, LLC ("Fruehauf") was the general partner of a Delaware limited partnership. The partnership agreement of the partnership provided that Fruehauf was entitled to 1% of the partnership's distributions until a certain calculation comparing the limited partner's capital contributions to the economic benefits it received from the partnership yielded a positive balance, after which Fruehauf would be entitled to 24% of the partnership's distributions. Following a dispute between TIFD and Fruehauf as to the partnership agreement's distribution provisions, TIFD exercised its right to cause the dissolution of the partnership and filed this action seeking a declaratory judgment regarding the proper interpretation of the distribution provisions. As one of its responses, Fruehauf filed a recoupment claim alleging that TIFD breached the partnership agreement in several respects many years ago to the economic detriment of the partnership. Fruehauf asserted that in the liquidation of the partnership, the partnership's books and records should reflect the value of the recoupment claim, which would allow Fruehauf to receive a greater share of the liquidating distributions of the partnership. TIFD moved for judgment on the pleadings on the recoupment claim.

The court explained that recoupment is a common-law, equitable doctrine that permits a defendant to assert a defensive claim aimed at reducing the amount of damages recoverable by a plaintiff and stated that to prevail on a recoupment claim, (i) the defendant, among other things, must show that the recoupment claim arises out of the same transaction or occurrence as the plaintiff's suit, (ii) the recoupment claim must be purely a defensive set-off and must not seek affirmative recovery from the plaintiff and (iii) the primary damages claim and the recoupment claim must involve the same litigants. The court noted that the alleged breaches underlying Fruehauf's recoupment claim were derivative claims which belonged to the partnership rather than Fruehauf. The court also noted that such alleged breaches, if brought as independent claims, would be barred by the statute of limitations but that a recoupment claim is not subject to the statute of limitations.

Fruehauf first took the position that, as the party responsible for liquidating the partnership's assets, it had the contractual right under the partnership agreement to itself determine the extent to which the breaches caused a reduction of the liquidating distributions to which it was entitled. The court found no authority under the partnership agreement or DRULPA allowing Fruehauf, as general partner, to determine unilaterally that the financial data upon which partnership distributions were based should include a hypothetical adjustment based on what Fruehauf believed the partnership's balance sheet would have looked like in the absence of the alleged breaches. The partnership agreement contained specific provisions regarding the calculation of distributions, including the requirement that partnership financial data be prepared using generally accepted accounting principles. The court stated that under generally accepted accounting principles the breach claims would almost certainly be appraised at zero because such claims were time-barred. In addition, the court concluded that Fruehauf's claim did not constitute a recoupment claim because, rather than seeking to have a court mitigate a potential monetary award against it, Fruehauf was attempting to use the claim to get a declaratory judgment that it had the authority to take the alleged breaches into account in calculating the amount of the liquidating distributions.

Fruehauf alternatively claimed that the court should determine the value of the recoupment claim in calculating the amount of the liquidating distributions. The court concluded that Fruehauf's recoupment claim did not meet the requirement that a recoupment claim arise out of the same transaction as the plaintiff's claim because TIFD's alleged breaches of the partnership agreement were factually unrelated to TIFD's claim for a declaratory judgment for interpretation of the partnership agreement's distribution provisions, which arose out of the dispute between the parties regarding these provisions. The court stated that the central purpose of the doctrine of recoupment is to avoid needless delay and unnecessary litigation by permitting a defendant to assert in one action any defenses it may have arising out of the same factual core as the plaintiff's claims. Where the plaintiff's claim and the defendant's recoupment claim are factually unrelated, the defendant should not be permitted to assert a recoupment claim because it would turn a narrow equitable doctrine into a broad license to revive a relationship's worth of stale grievances. The court stated that investors of capital ought to be able to exercise their contractual and statutory rights to dissolve business entities without fear that every derivative damage claim that ever arose during the life of the entity will be resuscitated for the purpose of determining the proper distribution of the entity's assets and further stated that Delaware's public policy encourages the timely assertion of claims involving the internal affairs of business entities, which provides certainty to investors and fair treatment to fiduciaries who would otherwise be forced to defend claims at a time when exculpatory evidence and accurate memories may not be available. The court thus granted TIFD's motion for judgment on the pleadings and dismissed Fruehauf's recoupment claim.

M. Distributions

1. *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*, C.A. No. 11053-VCL (Del. Ch. Dec. 16, 2015)

This case involved a Delaware limited partnership (the "Partnership") that was formed for the limited purpose of purchasing shares of Facebook, Inc.'s stock before its anticipated IPO. The limited partnership agreement governing the Partnership (the "LPA") provided that any distributions would be made to limited partners on the basis of their percentage interest in the Partnership. The percentage interest was measured by the number of units held by each partner as divided by the total number of outstanding units. One investor in the Partnership, Passport Special Master Fund, L.P.

(“Passport Fund”), executed a side letter (the “Side Letter”) with the Partnership’s general partner (the “GP”) that purported to grant Passport Fund preferential rights. After purchasing 452,515 pre-IPO Facebook shares, the GP caused the Partnership to transfer one Facebook share per unit to certain limited partners (the “Favored LPs”). As a result, other limited partners (the “Disfavored LPs”) received less than one share per unit or nothing at all. Upon discovering the preferential transfer, certain limited partners demanded the withdrawal or resignation of the GP. The GP agreed to withdraw and a successor general partner (the “Successor GP”) was elected at a special meeting of the limited partners. The Successor GP sent a demand letter to the Favored LPs for the return of the Facebook shares that they received as a result of the preferential transfer. The Favored LPs failed to return the shares or otherwise repay the Partnership. The Disfavored LPs, the Successor GP and the Partnership filed suit against the Favored LPs, asserting claims for (i) breach of the LPA, (ii) conversion and (iii) unjust enrichment. Plaintiffs also sought a declaratory judgment that the preferential distributions violated the LPA, as well as recovery of attorneys’ fees and costs under the terms of the LPA. Defendants moved to dismiss the Complaint.

The Court of Chancery first analyzed plaintiffs’ breach of contract claim. Finding that defendants were parties to a contract (the LPA), the court analyzed whether plaintiffs sufficiently alleged a breach of the LPA. The court found that the plain language of the LPA’s distribution provisions contemplated distributions to the partners “as a class, not as one-off transfers to certain limited partners” and that each partner would share in any distribution based on that partner’s percentage interest. Thus, the court held that plaintiffs sufficiently pled a breach of contract and harm suffered, given that they received distributions in an amount less than what they were entitled to by virtue of their percentage interests in the Partnership.

To defeat plaintiffs’ breach of contract claim, defendants first argued that they had an ownership interest in the Partnership’s underlying Facebook shares, and thus received nothing more than what they were entitled to. The court disagreed, reasoning that the limited partners owned partnership interests, rather than rights to specific partnership assets. The court noted that Section 17-101 of the Delaware LP Act defines “partnership interest” as “a partner’s share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets.” The court noted that the LPA reiterated the aforementioned statutory provisions, and found that no partner owned specific Partnership assets, nor could a partner seek to establish ownership rights in Partnership assets, whether by an action for partition or otherwise. The court also noted that the Private Placement Memorandum and Subscription Agreement issued to prospective investors in the Partnership stated that investors would not necessarily receive one Facebook stock for each unit they purchased.

The court then addressed defendants’ argument that they received a ratable distribution in accordance with the terms of the LPA. The court rejected that argument, reasoning that the number of units a limited partner held is only an input into the percentage interest calculation, whereas the output—the percentage interest—was determinative as to what distributions the partners were entitled to. Finding that the total number of Facebook shares held by the Partnership was less than the total number of outstanding partnership units, the court reasoned that each partnership unit was entitled to only a fraction of one Facebook share, as opposed to one whole share.

Defendants further argued that Section 17-607(b) of the Delaware LP Act provided the exclusive means for challenging a distribution. The court first reasoned that Section 17-607 applied to distributions, rather than preferential transfers, and thus was inapplicable to the disputed transfer. The court also reasoned that Section 17-607(b) did not provide the exclusive means of challenging a distribution, but rather applied only to an asserted violation of Section 17-607(a). Finding that plaintiffs claimed a breach of the LPA’s distribution provisions, rather than a violation Section 17-607(a), the court held that Section 17-607(b) did not preclude plaintiffs from enforcing the distribution provisions of the LPA. The court also rejected defendants’ reliance on Techmer Accel Holdings, LLC v. Amer, 2010 WL 5564043 (Del. Ch. Dec. 29, 2010), in support of their arguments that (i) Sections 17-607 and 17-804 function to bar any other restrictions on distributions, and (ii) Section 17-607 applies exclusively until a partnership dissolves. The court noted that Delaware law presumes that provisions in a limited partnership agreement are separate and independent of statutory rights, and that while Section 17-607(a) imposes one limitation on distributions, it is not the exclusive limitation. The court again noted that 17-607 was inapplicable in any event given that the disputed transfer was not a distribution, and thus rejected defendants’ Section 17-607 argument.

Defendants also argued that the LPA's dispute resolution provision established a 10-day contractual limitations period for bringing claims. The court found that the meaning of the provision was ambiguous as to whether it was intended to operate as a limitations period, and thus could not foreclose the lawsuit at this stage of the litigation. Moreover, the court noted policy concerns with enforcing such a short contractual limitations period, stating "to the extent that extrinsic evidence clarifies the ambiguity and demonstrates that it was intended to operate as a limitations period, it is possible that a ten-day limitations period could be unreasonable."

The court then considered the defenses of Passport Fund pertaining to the Side Letter, which Passport Fund argued granted them certain rights in specific assets of the Partnership. As an initial matter, the court held that an integration clause in a Subscription Agreement executed subsequent to the Side Letter nullified the Side Letter, reasoning that the Side Letter was superseded by the terms of the Subscription Agreement.

The court went on to reason that even if the Side Letter were effective, the Partnership would be bound only to the extent that the GP was authorized under the LPA to grant Passport Fund the rights contained in the Side Letter. The court first held that a provision in the Side Letter granting Passport Fund rights to specific assets of the Partnership was invalid. The court reasoned that the GP was not authorized by the LPA to grant such a right and that Passport Fund was aware of this lack of authorization, given that it acknowledged reading and understanding the terms of the LPA when it executed the Subscription Agreement. Moreover, the court held that the Side Letter could not bind the other non-party limited partners absent an amendment to the LPA. The court found that the LPA could not be amended by its own terms absent the consent of the majority of materially adversely affected partners, thus precluding its unilateral amendment by virtue of the Side Letter.

Passport Fund also argued that the GP was authorized to grant the rights contained in the Side Letter under a provision of the LPA that allowed the GP to conduct business with individual limited partners. The court rejected that argument, finding that the provision did not contemplate granting specific limited partners special rights, but rather allowed for the GP to contract with limited partners in alternative capacities, such as entering into a lending agreement with a limited partner. Passport Fund also argued that the LPA allowed for the GP to issue partnership securities with different rights, thus permitting the rights granted under the Side Letter. The court reasoned that although the GP was permitted to issue new securities with different rights, it was not permitted to grant special rights in partnership units to specific limited partners that other partners holding the same class of units did not enjoy. Accordingly, the court denied defendants' motion to dismiss plaintiffs' claim for breach of contract.

2. *Techmer Accel Holdings, LLC v. Amer*, C.A. No. 4905-VCN (Del. Ch. Dec. 29, 2010) and (Del. Ch. Feb. 8, 2011)

This case involved a suit by a creditor and certain of its affiliates against Crescent Private Capital L.P., a Delaware limited partnership ("Crescent"), Crescent's general partner ("Crescent GP"), and Crescent GP's managing member. As a result of a transaction in which the creditor acquired Crescent's last portfolio company, the creditor had a potential claim for indemnification against Crescent. Crescent distributed most of the proceeds from the transaction to its partners, but retained funds in excess of the potential indemnification liability. The creditor later made a claim against Crescent for indemnification, and while a related arbitration proceeding was pending, certificates of cancellation were filed on behalf of Crescent and Crescent GP terminating their status as legal entities. Plaintiffs then brought this action alleging that Crescent was wound up in contravention of DRULPA Section 17-804 by failing to make adequate provision for Crescent's liabilities before the filing of its certificate of cancellation and seeking the nullification of its certificate of cancellation and the appointment of a receiver pursuant to DRULPA Section 17-805 to manage the affairs of Crescent. Defendants contended that there was no violation of Section 17-804 because Section 17-804 applies only to distributions following the dissolution of a limited partnership and Crescent made no distributions following its dissolution.

In its decision, the court addressed the parties' cross-motions for summary judgment. The court began its analysis with an interpretation of the statutory language of Section 17-804 to determine whether Section 17-804 only applies to distributions occurring after the dissolution of a limited partnership. The court noted that under the canons of statutory interpretation the threshold question was whether Section 17-804 is ambiguous. The court first looked at whether Section 17-804 is ambiguous based on a susceptibility to alternate interpretations and concluded that Section 17-804 is not ambiguous, pointing to language in Section 17-804 that makes clear that its limitations and requirements apply only to "[a] limited partnership which has dissolved" and "[u]pon the winding up" of a limited partnership's affairs. The court also considered whether ambiguity might exist on the basis that the plain language of Section 17-804 produces unreasonable consequences in light of legislative intent. The court stated that under a literal reading of Section 17-804, a limited partnership could largely avoid the limitations of Section 17-804 by making a distribution to its partners prior to dissolution and, so long as the distribution did not violate Section 17-607 (which governs partner distributions before dissolution), the distribution would fall outside the scope of Section 17-804. The court held that, although a literal reading of Section 17-804 "creates the potential for offensive behavior," Section 17-804 makes clear that the legislature intended different methods of protecting creditors based on the status of the limited partnership—that is, Section 17-804 clearly applies only upon the dissolution of a limited partnership and Section 17-607 affords protection to creditors prior to dissolution.

Having concluded that Section 17-804 applies only upon the dissolution of a limited partnership, the court then turned to the issue of whether Crescent had dissolved prior to the date of the distribution to its partners. Defendants contended that Crescent dissolved on April 30, 2009, which was the expiration date of the ten-year term of Crescent set forth in its partnership agreement. Plaintiffs, on the other hand, argued that Crescent's dissolution and winding up began as early as April 2007 based on other potential events of dissolution. The court concluded that dissolution occurred at the latest on April 21, 2009 when the certificate of cancellation of Crescent GP was filed. The court, however, was unable to determine on the record before it whether Crescent's dissolution had occurred at an earlier point in time. Since the court could not determine whether Crescent had dissolved prior to the partner distribution, it also was unable to determine whether the contested distribution was subject to Section 17-804. Because Crescent had approximately $59,000 in assets left undistributed at the time its certificate of cancellation was filed, the court did conclude, however, that Crescent had not complied with the requirement under DRULPA Section 17-203 that its winding up be completed before the filing of its certificate of cancellation.

The court then addressed plaintiffs' requests to nullify the certificates of cancellation of Crescent and Crescent GP and to appoint a receiver to manage Crescent's affairs. Under DRULPA Section 17-805, a court may appoint a receiver only when a certificate of cancellation has been filed on behalf of a limited partnership and the party requesting appointment shows good cause. In this case, the court concluded that good cause to appoint a receiver existed because Crescent, having outstanding liabilities and retained assets when its certificate of cancellation was filed, failed to settle and close its business properly. The court, however, rejected plaintiffs' request to nullify the certificates of cancellation, finding instead that appointment of a receiver provided the necessary relief under the circumstances.

In a subsequent decision by the court, the court addressed defendants' motion for reargument of the court's appointment of a receiver under DRULPA Section 17-805. In support of their motion, defendants offered evidence that Crescent did not have assets that had not been disposed of at the time of the filing of its certificate of cancellation. The approximately $59,000 in assets that earlier facts had indicated remained in Crescent at the time it certificate of cancellation was filed had in fact been distributed to Crescent's accounting firm in payment for preparation of Crescent's final tax return and to Crescent GP in partial payment of management fees payable. The court stated that even if it accepted the new evidence as true, it would not change the court's conclusion that Crescent had not made a proper settlement of its unfinished business as required by DRULPA Section 17-203 because it had not made reasonable provision under DRULPA Section 17-804 to pay its indemnification obligation to plaintiffs. The court thus rejected defendants' motion for reargument.

3. *Archstone Partners, L.P. v. Lichtenstein*, C.A. No. 4465-CC (Del. Ch. July 10, 2009)

Plaintiffs were investors in the Steel Partners II family of funds (the "Funds"), including Steel Partners II (Onshore) LP (the "Partnership"), a Delaware limited partnership. A number of investors in the Funds submitted redemption requests aggregating to approximately 38% of the Funds' assets under management. In order to address the problems that such a large redemption would cause, the governing bodies of the Funds determined to temporarily suspend redemptions from the Funds. The investors of the Funds were then presented with a plan pursuant to which each investor would receive, in full satisfaction of their investments in the Funds, a cash distribution plus the option to (1) receive units in a publicly traded limited partnership to which assets of the Funds would be transferred or (2) receive a pro rata distribution of securities held by the Funds (collectively, the "Plan").

In a prior decision, the Court of Chancery had denied plaintiffs' motion to enjoin the Plan on the grounds that plaintiffs had failed to establish a sufficient threat of imminent and irreparable injury. This decision addressed plaintiffs' motion for certification of an interlocutory appeal of the court's prior decision.

In seeking the injunction, plaintiffs had argued that dispersing the Funds' assets in accordance with the Plan would cause irreparable harm because plaintiffs could obtain greater value in an orderly liquidation. The court stated that plaintiffs failed to define what such a liquidation would look like, failed to convince the court that such a liquidation would produce an amount greater for plaintiffs than what they would receive under the Plan, and "[m]ore importantly . . . [P]laintiffs have utterly failed to establish their right to force such a liquidation, or even that such liquidation is likely." The court stated that although plaintiffs may wish to take control of the Funds and conduct a liquidation rather than receiving in-kind distributions, they are not entitled to do so on contractual or statutory grounds. The court noted that even if the Plan was not implemented, plaintiffs would receive the same result under the Funds' constituent agreements as they would under the second option of the Plan. Thus, plaintiffs had not established a sufficient threat of irreparable injury and their application for certification of an interlocutory appeal was denied.

In rendering its decision, the court discussed a provision in the partnership agreement of the Partnership that provided a right to the general partner of the Partnership, in its sole discretion, to terminate an interest of a limited partner if continued participation of such limited partner "would be detrimental to the Partnership or its interests or would interfere with the business of the Partnership . . . ." The managing member of the general partner of the Partnership had submitted an affidavit in connection with the court's prior decision stating that he made a determination that it was in the best interest of the Partnership to redeem those limited partners that did not wish to continue with a restructured entity. The court stated that it is reasonable to infer from this statement that the general partner of the Partnership would likely be able to determine that the standard under above-referenced section of the partnership agreement of the Partnership was met and that plaintiffs, to the extent they were not redeemed pursuant to their own requests, could have their interests in the Partnership terminated. Thus, the court found that plaintiffs likely would not have a successful challenge to this action.

4. *Pomeranz v. Museum Partners, L.P.*, C.A. No. 20211 (Del. Ch. Jan. 24, 2005)

Plaintiffs, who were limited partners of a Delaware limited partnership, brought this action against the general partner and the majority limited partner of the partnership alleging breach of partnership agreement and breach of fiduciary duty in connection with the withdrawal of the majority limited partner from the partnership. The majority limited partner's withdrawal purportedly triggered a right to a distribution equal to the majority limited partner's pro rata share of the partnership's liquidation value. The partnership did not have sufficient cash at the time of the withdrawal to make the distribution and instead entered into a withdrawal agreement with the majority limited partner that was extraordinarily favorable to the majority limited partner. Plaintiffs had originally filed their complaint against only the general partner and did not add the majority limited partner as a defendant until over three years had elapsed following the withdrawal. The majority limited partner moved to dismiss the action against it as being time-barred.

Among plaintiffs' claims was a claim based on DRULPA Section 17-607, which provides in relevant part that "[u]nless otherwise agreed, a limited partner who receives a distribution from a limited partnership shall have no liability under [DRULPA] or other applicable law for the amount of the distribution after the expiration of 3 years from the date of the distribution." Plaintiffs argued that the payments under the withdrawal agreement were distributions and had been received by the majority limited partner within three years of the majority limited partner's addition to the complaint. The court held that Section 17-607 was inapplicable in this case but noted that even if it were applicable, the entry into the withdrawal agreement, pursuant to which the majority limited partner compromised its demand for a cash payment, was the "distribution" to the majority limited partner and thus the three year period would have begun to run for purposes of Section 17-607 on the date the withdrawal agreement was entered into, rather than on the dates the payments were made under the withdrawal agreement.

N. Capital Contributions

1. *Harris v. RHH Partners, LP*, C.A. No. 1198-VCN (Del. Ch. Mar. 30, 2010)

In a subsequent decision in a case in which the Chancery Court had ordered the judicial dissolution of a Delaware limited partnership, the court addressed a motion for reargument by the general partner of the partnership. In its prior decision, the court found that the general partner had failed to make a $1,000 capital contribution required under the partnership agreement and thus held that the general partner's liquidating distribution in the partnership would be offset by a $1,000 charge. The general partner argued in his motion that the reference in the introductory language of the partnership agreement to the receipt of "mutual covenants . . . and other valuable consideration" relieved the general partner of any obligation to make a capital contribution pursuant to a subsequent provision of the partnership agreement.

The court denied the general partner's motion, interpreting the introductory language of the partnership agreement to refer "either to the mutual promises exchanged between the general partner and the limited partner or to some *other* valuable consideration tendered at the time of formation." According to the court, there was no indication that the introductory paragraph addressed the substance of a subsequent provision of the partnership agreement stating that the general partner "shall contribute" $1000. The court noted that, in this context, "shall" had "both future and mandatory aspects" and as a result, if the contribution had been made, the text of the contribution provision would have (or at least should have) been different. The court also noted there was "overwhelming evidence" that the general partner had not made the capital contribution. The general partner's motion was thus denied.

2. *In re LJM2 Co-Invest., L.P. Ltd. Partners Litig.*, C.A. No. 300-N (Del. Ch. Dec. 21, 2004)

In another case spawned by the Enron bankruptcy, the plaintiff, a liquidating trust formed in connection with the bankruptcy of LJM2 Co-Investment, L.P. (the "Partnership") and the trustee of the trust brought an action against the limited partners of the Partnership to enforce the obligation of the limited partners to make capital contributions to the Partnership sufficient to pay former bank creditors of the Partnership who were the sole beneficiaries of the liquidating trust. The case arose in the context of a loan to the Partnership and an agreement by the general partner to call capital from the limited partners in the event that the Partnership defaulted on payment of the loan. The Partnership did default and the general partner made a capital call in December 2001 on the limited partners (the "December Capital Call"). However, prior to the effectiveness of the December Capital Call, the limited partners removed the general partner, appointed a new general partner that purported to rescind the December Capital Call and purported to amend the partnership agreement to require a majority interest of limited partners to approve any further capital calls. The case came before the court on a motion to dismiss and the court denied the motion to dismiss as to all counts. Plaintiffs had alleged numerous bases on which the limited partners would be obligated to make capital contributions pursuant to the December Capital Call as well as pursuant to a capital call made in September 2003 (the "September Capital Call") ranging from claims based on Section 17-502 of the DRULPA to claims for breach of the credit agreement between the Partnership and the bank creditors, tortious interference with contract, aiding and abetting a breach of fiduciary duty and unjust enrichment. However, the court focused its discussion on whether the defendants had effectively compromised or rescinded the December 2001 Capital Call and whether the purported amendment to the Partnership's limited partnership agreement was effective to require the consent of a majority interest of the limited partners to the September Capital Call.

In addressing the effectiveness of the amendment, the court noted that the partnership agreement provided that it could be amended in any respect upon agreement by the majority limited partners. However, this power to amend was subject to a limitation that no amendments could change the percentage in interest of the limited partners necessary for any consent "required hereunder to the taking of any action" unless such amendment were approved by the requisite percentage in interest. The question thus presented to the court was whether the default unanimity requirement found in Section 17-502(b)(1), which requires the consent of all partners to compromise the obligation of a partner to make a capital contribution unless otherwise provided in the partnership agreement, was "required hereunder" within the meaning of the amendment section of the partnership agreement. Noting that in the corporate law context it was clear that the DGCL was a part of the certificate of incorporation of every Delaware company, the court concluded that the unanimity requirement of Section 17-502(b)(1) was in effect incorporated by reference into the partnership agreement. Thus, the court held that the purported amendment of that section by less than the consent of all of the limited partners was ineffective (the court also noted that the purported use of a power of attorney by the general partner on behalf of all the limited partners to approve the amendment was similarly ineffective to bind the non-consenting limited partners). The court also considered whether the December Capital Call could be rescinded and whether that would be different from a compromise and concluded that the power to rescind is not the same as the power to compromise. The court noted, however, that the complaint fairly alleged facts supporting the argument that the action taken by the successor general partner to rescind the December Capital Call was both a breach of contract and a breach of fiduciary duty sufficient to render that action ineffective. Further, the court found that the plaintiffs had alleged sufficient facts for the court to conclude that the September Capital Call could be enforced without regard to the majority limited partner consent provisions found in the purported amendment. Finally, the court agreed with plaintiffs that they had alleged sufficient facts to provide a basis for reasonable reliance by the creditors on the capital contribution obligation of the limited partners within the meaning of Section 17-502(b)(1) of the DRULPA.

O. Mergers

1. Fair Value of Interests

a. *In re Inergy L.P. Unitholder Litig.*, Cons. C.A. No. 5816-VCP (Del. Ch. Oct. 29, 2010)

In this case, unitholders of Inergy L.P., a Delaware master limited partnership ("Inergy"), sought to enjoin a merger between Inergy Holdings L.P., the owner of Inergy's general partner and also a Delaware master limited partnership ("Holdings"), and a wholly-owned subsidiary of Holdings' general partner. Inergy had a two-tiered capital structure consisting of common units held primarily by public investors and Incentive Distribution Rights ("IDRs") held exclusively by Holdings. Inergy was not a constituent party to the merger, but was a party to the merger agreement pursuant to which it would issue new common units to Holdings. In exchange, Holdings was to transfer the IDRs to Inergy to be cancelled. In the final step, Holdings was to exchange the Inergy units for its own units held by its unitholders. As a result, former Holdings unitholders would become Inergy unitholders owning 39.6% of outstanding Inergy units and Holdings would become a private entity.

The plaintiffs sought a preliminary injunction on two bases. First, they claimed a breach of Inergy's limited partnership agreement because no vote of Inergy unitholders was sought with respect to the merger. Second, plaintiffs contended that an unfair and unreasonable process to select an unfair and dilutive transaction price constituted a breach of the LP agreement and the fiduciary duties of the directors of Inergy's general partner.

The Inergy LP agreement gave Inergy the power to "merge or consolidate" subject to the consent of a majority of Inergy unitholders. The court concluded that whether Inergy unitholders were entitled to vote turned on whether Inergy was actively "merging" or "consolidating" with another entity. Although Inergy was a party to the merger agreement, it was not a constituent party to the proposed merger. Therefore, the court concluded it was not merging or consolidating and Inergy unitholders were not entitled to vote. In addition, the court analogized the proposed merger to a triangular merger in the corporate context and noted that in such a scenario Delaware law did not require a vote by shareholders of the non-merging parent corporation. The court also invoked the doctrine of independent legal significance to support its conclusion, noting that the fact that Inergy could have completed the transaction in a manner that conferred the right to vote on its unitholders did not mean it had to do so.

On the second claim, the court noted that the Inergy LP agreement provided a number of potentially relevant standards of care. Section 7.6(e) of the agreement prohibited transfers of property from Inergy to Inergy's general partner (or an affiliate of its general partner) unless such transfers were "fair and reasonable." Section 7.9(a) likewise provided that any resolution of a conflict of interest between Inergy and its general partner (or an affiliate of its general partner) did not breach the LP agreement if such resolution were "fair and reasonable." Section 7.9(a) further provided, however, that actions taken by Inergy's general partner, if taken "in the absence of bad faith," did not breach the LP agreement. Finally, section 7.10(d) modified, waived or limited any standard of care imposed by the LP agreement or applicable law to permit Inergy's general partner to act under the LP agreement, provided that such action was "reasonably believed . . . to be in, or not inconsistent with, the best interests of" Inergy.

The plaintiffs argued section 7.6(e)'s "fair and reasonable" standard governed. The defendants countered that section 7.9(a) and its "bad-faith" carve out applied. Alternatively, the defendants argued that any standard set forth in the LP agreement must be applied in light of section 7.10(d)'s "reasonable belief" standard. The court agreed with defendant's last argument, concluding that section 7.10(d) "expressly and unambiguously" limited any duty imposed by the Inergy LP agreement. The court declined to decide which standard, section 7.6(e) or 7.9(a), controlled because it concluded that in light of section 7.10(d), under either, the plaintiffs failed to demonstrate a likelihood of success on the merits.

In support of their fiduciary claim, plaintiffs argued that the independent special committee (the "ISC") appointed to negotiate the transaction on behalf of Inergy unitholders lacked proper procedural safeguards because it was comprised of only one member. Moreover, plaintiffs argued, the sole ISC member did not properly understand his responsibilities. The court rejected both arguments. First, the court stated that there was no requirement that a body such as the ISC have more than one member and, with respect to this particular transaction, noted that only one member of the board of Inergy's general partner was truly independent of the transaction. The court then cited numerous facts demonstrating that the ISC member understood his role.

The plaintiffs next contended that the ISC chose conflicted legal and financial advisors who were unable to render independent advice. Specifically, the plaintiffs focused on a financial advisor having extensive prior dealings with Inergy and its CEO. The court noted several factors that supported the conclusion that the ISC's selection was both reasonable and in Inergy's best interests. The plaintiffs also complained of a meeting between the ISC member and Inergy's CEO during the negotiations, but the court found there to be a legitimate reason for the meeting. Finally, the plaintiffs argued that the ISC's decision to pursue a transaction that did not require a unitholder vote evidenced bad faith. In rejecting this argument, the court relied on its earlier discussion of unitholder voting rights and also noted that the ISC relied on legal advice in making the decision.

Finally, the plaintiffs attacked the transaction price in a number of respects. First, they alleged the transaction required Inergy to pay an excessive exchange premium. The court first noted that an exchange premium was to be expected in a transaction of this type in light of the benefit to Inergy from the cancellation of the IDRs. The plaintiffs argued that the exchange ratio should be more favorable. The court, however, accorded little weight to the testimony on this subject by the plaintiff's expert because such expert did not conduct his own independent analysis, conducted his work in a rushed manner, and raised minor quibbles rather than pointing to major flaws. Noting that the transaction arose out of serious, arms-length negotiations over a number of weeks, the court concluded the plaintiffs failed to demonstrate a likelihood of success in their challenge to the transaction price.

b. *Ramunno v. Capano*, C.A. No. 18798-NC (Del. Ch. Feb. 10, 2006)

Plaintiff, in his capacity as the trustee of four trusts that together held 12.1% of a limited partnership, brought this action to determine the fair value of the trusts' minority interests in connection with a merger of the limited partnership into a new limited partnership and the consequent extinction of the trusts' interests. At the time of the merger, a majority of the equity interests in the original limited partnership was controlled by two brothers, each of whom was a limited partner. A corporation controlled by one of the brothers served as general partner of the original limited partnership. The new limited partnership resulting from the merger was controlled by the two brothers who had held the majority interest in the old limited partnership, and in such capacity, had caused the merger that squeezed out the trusts. The two brothers, each of whom was a defendant (as was the corporate general partner), had placed a $268,889 value on the interests of the trusts at the time of the merger.

The original limited partnership had been formed by the two defendant brothers, plus a third brother. The third brother had transferred a portion of his interest in the original limited partnership to plaintiff as trustee of the trusts, which were for the benefit of his children. Defendants claimed that no fiduciary duties were owed to plaintiff because the trusts were assignees of limited partner interests and never attained limited partner status. Under the terms of the partnership agreement of the original limited partnership, the general prohibition on transfers without consent did not extend to inter-family transfers (including transfers to trusts for the benefit of children of the transferee). Defendants, however, cited plaintiff's failure to comply with the requirement under the partnership agreement that the transferee execute a counterpart of the partnership agreement. The court found that defendants' past treatment of the transferees, the ability to freely assign interests to family members and the defendants' failure to raise the issue previously amounted to a waiver of the ability to challenge plaintiff's status as a limited partner.

In its consideration of the fair value of the interests held by plaintiff, the court focused on (i) the fair value of the property owned by the original limited partnership; (ii) the rate of interest to be applied against the failure of the third brother to meet a capital call (prior to the transfer of his limited partner interest); and (iii) the proper treatment of a loan made to the original limited partnership by a corporation owned by the defendant brothers. As to the value of the property, the court adopted an appraisal commissioned by an independent third party near the time of the most recent leasing of the property, as increased by inflation, but not, as urged by plaintiff, increased by the value of potential expansion of the property, which the court found to be speculative. As to the second consideration, the court determined that the uncured shortfall in the third brother's capital account allocable to the portion of the third brother's interest transferred to the trusts must be taken into account in determining the fair value of the trusts' interests. The court rejected plaintiff's argument that the interest rate to be applied to the shortfall amount was the rate set in the partnership agreement of the original limited partnership for loans made by the partnership to its limited partners. Such a rate would not adequately account for the venture risk to which the assets were subject and would be fundamentally unfair to those partners whose funds were at risk. Instead, the discount rate set by the above-mentioned appraiser for the risk and cost of capital was used. A third consideration was a loan from a corporation controlled by the defendant brothers to the original limited partnership, which, while not evidenced by a note, was found by the court to be an obligation of the partnership. The loan was reflected on the books the original limited partnership for several years but was removed from the books at the time that the defendant brothers decided to take a bad debt deduction on their personal income tax returns. After the merger, however, the loan appeared on the books of the new limited partnership and defendants argued that it should be included as a partnership debt in the calculation of the value of the trusts' interests. Plaintiff countered that reentering the loan on the partnership's books constituted a self-interested act in breach of defendants' fiduciary duties and, in addition, that collection of the debt was time-barred and that waiver of the statute of limitations defense by defendants on behalf of the original limited partnership would be a breach of duties. The court determined that neither the lack of payments on the debt, nor the fact that the loan did not appear on the lending corporation's books as a collectible or on the partnership's books as an obligation, meant that the debt had been released. The court stated, however, that the statute of limitations (which was shorter because the debt was not evidenced by a negotiable instrument) could be a viable defense if this issue was viewed as a debt collection matter. In the opinion of the court, however, this should not be viewed as a debt collection. Instead of treating the debt as an obligation of the partnership, the court determined that, despite the fact that the defendant brothers wrote off the loan for their personal benefit, the amount of the loan should be treated as a capital contribution of the defendant brothers for purposes of determining the fair value of the trusts' interests. According to the court, under regular accounting expectations, a related party loan that is written off should be treated as a capital contribution, even if it was questionable whether equitable principles should save the defendant brothers from the consequences of their self-interested actions. If it were treated otherwise, plaintiff would have received a windfall. In addition to the foregoing, the court included the original limited partnership's cash and cash equivalents, prepaid expenses, accounts payable, accrued expenses and outstanding mortgage on the property in determining the fair value of the trusts' interests. On the basis of these considerations, the court held that the fair value of the trusts' interest was $586,665.

P. Forfeiture of Interests

1. *Hillman v. Hillman,* 2006 WL 2434231 (Nov. 16, 2006)

The plaintiff was general partner of Venhill Limited Partnership L.P., a Delaware limited partnership ("Venhill"). Two trusts served as the limited partners of Venhill. The plaintiff, in his capacity as general partner, invested 1% of the initial capital and each of the trusts contributed 49.5% of the initial capital. The limited partners challenged the plaintiff's actions in causing Venhill to invest a substantial amount of Venhill's assets in Auto-trol ("Auto-trol"), a company founded and controlled by the plaintiff. Unable to resolve the dispute over Venhill's investment in Auto-trol, the limited partners removed the plaintiff as general partner.

The plaintiff filed suit seeking declaratory judgment that upon his removal he had converted his general partner interest into a limited partner interest in Venhill. The suit also alleged that the limited partners breached fiduciary duties owed to him as a limited partner by the actions they took following his removal. The court concluded that Venhill's limited partnership agreement (the "Agreement") did not provide a general partner the right to "elect" to become a limited partner when removed by the limited partners and thus dismissed his claim for a declaratory judgment that he was a limited partner. The court then discussed what rights the plaintiff possessed following his removal.

The court first noted that the Agreement did not provide what a removed general partner would receive in consideration of its interest upon removal. It then reviewed the DRULPA provisions and related legislative history governing the withdrawal of a general partner. Under Section 17-604, a "withdrawing partner" upon withdrawal will be entitled to receive any distribution to which it was entitled under the partnership agreement and if not otherwise provided for in the partnership agreement, the partner shall be entitled to receive the fair value of its partnership interest. The plaintiff argued that Section 17-604 applied to all types of withdrawals by a general partner, while the defendants argued that Section 17-604 was intended to apply only to *voluntary* withdrawals made pursuant to Sections 17-602 and 17-603. The court agreed with the defendants and concluded that the narrower reading of Section 17-604 presented fewer conflicts and was "more consistent with the structure and language of the statute and the legislative history." Thus, Section 17-604 did not apply to the plaintiff because he did not voluntarily withdrawal under Section 17-602.

Having concluded that Section 17-604 did not apply to the plaintiff, the court sought to determine what effect the plaintiff's involuntary withdrawal would have on his economic stake in the partnership. The court noted that under Section 17-1105, if DRULPA is silent on an issue, "an applicable provision of the Delaware Uniform Partnership Law in effect on July 11, 1999 (the "DUPL") and the rules of law and equity… shall govern." Turning to the DUPL, the court first noted that it did not explicitly address the scenario of a partner who is expelled pursuant to a partnership agreement that permits both his expulsion and the continuation of the partnership business thereafter. Rather, the court found that the DUPL confronted this issue obliquely in Section 1538(a) which entitled an expelled partner to receive the net amounts due from the partnership provided he was discharged from all partnership liabilities by agreement or payment. Turning to the commentary on the uniform act that formed the basis of the DUPL, the court concluded that the amount an expelled partner would be entitled to receive under Section 1538(a) should be equivalent to "fair value." The court thus held that the provisions of the DUPL that were most relevant to the facts before it were best read as pointing to a fair value payout. The court bolstered this conclusion by looking to the Delaware Revised Uniform Partnership Act (the "DRUPA") which generally superseded DUPL except that the DUPL rather than the DRUPA continued to be linked to the DRULPA. The court stated that the DRUPA provided the best indication of what equity as the ultimate default required in the context of the present case and found that under the DRUPA, the plaintiff would also be entitled to the fair value of his economic interest.

Finally, because the plaintiff was removed as a general partner and all of the plaintiff's other claims related to the partnership's conduct following his removal, the plaintiff lacked standing and his other claims for breach of fiduciary and contractual duties were also dismissed.

Q. Step Transaction and Independent Legal Significance

1. *Ellis v. OTLP GP, LLC*, C.A. No. 10495-VCN (Del. Ch. Jan. 30, 2015)

Plaintiffs, limited partner unitholders of Oiltanking Partners, L.P. ("Oiltanking"), brought an action to challenge the proposed merger of Oiltanking with defendant Enterprise Products Partners L.P. ("Enterprise"), which owned about two-thirds of Oiltanking's limited partner interests. Before the court was plaintiffs' motion to expedite the action in order to seek a preliminary injunction to halt the upcoming merger vote.

In June 2014, Enterprise approached Marquard & Bahls AG ("M&B"), which owned all of Oiltanking's general partner, OTLP GP, LLC ("GP") along with a two-thirds interest in Oiltanking, about purchasing M&B's interest in Oiltanking and acquiring all of Oiltanking. M&B was open to selling its interest, but did not want to participate in any deal that would require the support of the unaffiliated common unitholders, a class which included the plaintiffs. Under Oiltanking's Limited Partnership Agreement (the "Agreement"), the majority of common unitholders (excluding the general partner and its affiliates) were required to approve any merger during the "subordination period," which was expected to end mid-November 2014. After the subordination period ended, the unaffiliated common unitholders were not entitled to a class vote on any merger. The Agreement also purported to eliminate all fiduciary duties save for those defined in the Agreement.

During negotiations for the sale of its ownership interests, M&B advised Enterprise that it should wait until the end of the subordination period to acquire the publicly held common units if it wanted to avoid a class vote on the merger. M&B then agreed to sell its interest in GP and its two-thirds interest in Oiltanking to Enterprise, a deal which closed on October 1. Shortly before closing, Enterprise notified Oiltanking of its intention to acquire the remainder of Oiltanking's limited partner interests at a price below what it paid M&B for its units. GP referred the consideration issue to the conflicts committee established under the Agreement, which negotiated a price that was increased but still lower than that paid to M&B. The subordination period subsequently ended and Enterprise proposed a vote on the merger by a simple majority of the common units, the outcome of which was preordained given its two-thirds interest.

Plaintiffs' first argument for an injunction was that since Enterprise's acquisition was announced during the subordination period, the class voting standard applicable during that period should apply to the upcoming merger vote. They alleged the Agreement was ambiguous on this issue, since it did not specify the voting standard that would apply with respect to when an item for voting is announced, and that defendants breached the implied covenant of good faith and fair dealing in determining no class vote was required. The court found the Agreement to be unambiguous, since plaintiffs gave no reason why the voting standard should not be determined by reference to the time of the vote. Further, the failure of the Agreement's drafters to subject announcements of merger, as opposed to votes on a merger, to certain requirements did not implicate the implied covenant. The implied covenant supplies terms to fill gaps in express provisions of an agreement, but the voting provisions of the Agreement were clear and nothing about the timing of the announcement of the acquisition or merger vote defeated the common unitholders' expectations under the Agreement.

Plaintiffs further contended that M&B's sale of its interest and Enterprise's pursuit of a merger should be treated as a single transaction under the step-transaction doctrine. They argued that M&B breached its fiduciary duties to them by telling Enterprise that it would not participate in a transaction requiring a class vote, in an attempt to bypass its obligations to provide a class vote on the merger. The court found the step-transaction doctrine inapplicable. M&B was not a party to the merger and did not structure the merger – Enterprise decided to purchase M&B's interest and then took advantage of the timeline espoused in the Agreement. M&B had every right to tell Enterprise that it wanted no involvement with a class vote, and GP could not be deemed to have breached fiduciary duties because its affiliate M&B made a decision it was entitled to make. In addition, the court found that even if the step-transaction doctrine were applicable, M&B, GP and Enterprise did nothing out of the ordinary to defeat the class vote, merely allowing the subordination period to expire. When Enterprise obtained M&B's interest on October 1st, it was bound to honor the class vote requirement until the subordination period expired, which it did. The fact that the merger announcement occurred during the subordination period did not trigger a class vote.

Finally, plaintiffs challenged GP's handling of Enterprise's merger offer, suggesting either that GP should not have told Enterprise in June about the consequences of the expiration of the subordination period or that it was not exculpated under the Agreement because it did not seek the best possible merger price for the common unitholders. The court rejected these arguments, since the plaintiffs failed to explain how GP violated its fiduciary duties through its disclosure to Enterprise and since GP abided by the Agreement in determining the merger consideration. The lesser consideration plaintiffs received was merely an inevitable consequence of how the Agreement was drafted. Having rejected each of the plaintiffs' claims, the court denied their motion to expedite.

2. *In re Inergy L.P. Unitholder Litig.*, Cons. C.A. No. 5816-VCP (Del. Ch. Oct. 29, 2010)

In this case, unitholders of Inergy L.P., a Delaware master limited partnership ("Inergy"), sought to enjoin a merger between Inergy Holdings L.P., the owner of Inergy's general partner and also a Delaware master limited partnership ("Holdings"), and a wholly-owned subsidiary of Holdings' general partner. Inergy had a two-tiered capital structure consisting of common units held primarily by public investors and Incentive Distribution Rights ("IDRs") held exclusively by Holdings. Inergy was not a constituent party to the merger, but was a party to the merger agreement pursuant to which it would issue new common units to Holdings. In exchange, Holdings was to transfer the IDRs to Inergy to be cancelled. In the final step, Holdings was to exchange the Inergy units for its own units held by its unitholders. As a result, former Holdings unitholders would become Inergy unitholders owning 39.6% of outstanding Inergy units and Holdings would become a private entity.

The plaintiffs sought a preliminary injunction on two bases. First, they claimed a breach of Inergy's limited partnership agreement because no vote of Inergy unitholders was sought with respect to the merger. Second, plaintiffs contended that an unfair and unreasonable process to select an unfair and dilutive transaction price constituted a breach of the LP agreement and the fiduciary duties of the directors of Inergy's general partner.

The Inergy LP agreement gave Inergy the power to "merge or consolidate" subject to the consent of a majority of Inergy unitholders. The court concluded that whether Inergy unitholders were entitled to vote turned on whether Inergy was actively "merging" or "consolidating" with another entity. Although Inergy was a party to the merger agreement, it was not a constituent party to the proposed merger. Therefore, the court concluded it was not merging or consolidating and Inergy unitholders were not entitled to vote. In addition, the court analogized the proposed merger to a triangular merger in the corporate context and noted that in such a scenario Delaware law did not require a vote by shareholders of the non-merging parent corporation. The court also invoked the doctrine of independent legal significance to support its conclusion, noting that the fact that Inergy could have completed the transaction in a manner that conferred the right to vote on its unitholders did not mean it had to do so.

On the second claim, the court noted that the Inergy LP agreement provided a number of potentially relevant standards of care. Section 7.6(e) of the agreement prohibited transfers of property from Inergy to Inergy's general partner (or an affiliate of its general partner) unless such transfers were "fair and reasonable." Section 7.9(a) likewise provided that any resolution of a conflict of interest between Inergy and its general partner (or an affiliate of its general partner) did not breach the LP agreement if such resolution were "fair and reasonable." Section 7.9(a) further provided, however, that actions taken by Inergy's general partner, if taken "in the absence of bad faith," did not breach the LP agreement. Finally, section 7.10(d) modified, waived or limited any standard of care imposed by the LP agreement or applicable law to permit Inergy's general partner to act under the LP agreement, provided that such action was "reasonably believed . . . to be in, or not inconsistent with, the best interests of" Inergy.

The plaintiffs argued section 7.6(e)'s "fair and reasonable" standard governed. The defendants countered that section 7.9(a) and its "bad-faith" carve out applied. Alternatively, the defendants argued that any standard set forth in the LP agreement must be applied in light of section 7.10(d)'s "reasonable belief" standard. The court agreed with defendant's last argument, concluding that section 7.10(d) "expressly and unambiguously" limited any duty imposed by the Inergy LP agreement. The court declined to decide which standard, section 7.6(e) or 7.9(a), controlled because it concluded that in light of section 7.10(d), under either, the plaintiffs failed to demonstrate a likelihood of success on the merits.

In support of their fiduciary claim, plaintiffs argued that the independent special committee (the "ISC") appointed to negotiate the transaction on behalf of Inergy unitholders lacked proper procedural safeguards because it was comprised of only one member. Moreover, plaintiffs argued, the sole ISC member did not properly understand his responsibilities. The court rejected both arguments. First, the court stated that there was no requirement that a body such as the ISC have more than one member and, with respect to this particular transaction, noted that only one member of the board of Inergy's general partner was truly independent of the transaction. The court then cited numerous facts demonstrating that the ISC member understood his role.

The plaintiffs next contended that the ISC chose conflicted legal and financial advisors who were unable to render independent advice. Specifically, the plaintiffs focused on a financial advisor having extensive prior dealings with Inergy and its CEO. The court noted several factors that supported the conclusion that the ISC's selection was both reasonable and in Inergy's best interests. The plaintiffs also complained of a meeting between the ISC member and Inergy's CEO during the negotiations, but the court found there to be a legitimate reason for the meeting. Finally, the plaintiffs argued that the ISC's decision to pursue a transaction that did not require a unitholder vote evidenced bad faith. In rejecting this argument, the court relied on its earlier discussion of unitholder voting rights and also noted that the ISC relied on legal advice in making the decision.

Finally, the plaintiffs attacked the transaction price in a number of respects. First, they alleged the transaction required Inergy to pay an excessive exchange premium. The court first noted that an exchange premium was to be expected in a transaction of this type in light of the benefit to Inergy from the cancellation of the IDRs. The plaintiffs argued that the exchange ratio should be more favorable. The court, however, accorded little weight to the testimony on this subject by the plaintiff's expert because such expert did not conduct his own independent analysis, conducted his work in a rushed manner, and raised minor quibbles rather than pointing to major flaws. Noting that the transaction arose out of serious, arms-length negotiations over a number of weeks, the court concluded the plaintiffs failed to demonstrate a likelihood of success in their challenge to the transaction price.

3. *Twin Bridges Ltd. P'ship v. Draper*, C.A. No. 2351 (Del. Ch. Sept. 14, 2007)

This case, although involving a dispute over the governance of a family owned limited partnership, raises significant issues of limited partnership law including whether the step transaction principal applied to the analysis of transactions under tax law should be applied to an amendment of a partnership agreement and subsequent merger so that the two are viewed as a single transaction, whether the doctrine of independent legal significance applies to Delaware limited partnerships, whether a supermajority provision in a partnership agreement can be reduced or eliminated by amendment with a lesser vote and whether a general partner can violate its fiduciary duty, and limited partners can aid and abet that violation, by proposing and adopting amendments to a partnership agreement that eliminate the general partners' fiduciary duties in connection with certain interested transactions. The partnership at issue had two general partners, Schutt and Draper, with joint authority to make all major decisions regarding the partnership. As the two general partners disagreed on the management of the partnership's principal asset, the Partnership was effectively in gridlock with respect to the development of that asset. Schutt and limited partners who collectively held 87% of the economic interests and voting power in the partnership decided to pursue a solution without Draper and the two limited partners who were his sons. This they did, without prior notice to Draper or his sons, by executing written consents to amend the partnership agreement to add a provision authorizing the partnership to merge with approval of partners holding two-thirds of the partnership interests and then approving the merger of the partnership into a newly formed limited partnership with a different governing structure. On the same day they effected the merger, Schutt and the limited partners aligned with her filed a declaratory judgment action seeking a declaration of the validity of the amendment to the partnership agreement, the merger of the partnership into another Delaware limited partnership and the merger agreement pursuant to which the merger was effected. Draper and his sons asserted counterclaims for breach of contract, a declaration of invalidity of the amendment and merger, breach of fiduciary duty against Schutt and a claim for aiding and abetting a breach of fiduciary duty against the limited partners aligned with Schutt.

With regard to the question of the validity of the amendment and merger, plaintiffs argued that the partnership agreement specified the requirements for amendment, the amendment complied with those requirements, the merger was approved pursuant to the requirements of the amended partnership agreement and that under the doctrine of independent legal significance, the validity of the amendment should be analyzed separately from the validity of the merger and, as separately analyzed, both were valid acts under the relevant provisions of the partnership agreement and the DRULPA. The defendants countered that the amendment and the merger, although technically creating a new partnership with a new partnership agreement, in substance effected a further amendment of the old partnership agreement. Therefore, plaintiffs maintained, the two parts of the transaction should be treated as one integrated transaction under the step transaction doctrine and, when so viewed, would be found to violate the provisions of the original partnership agreement. In analyzing this issue, the court agreed with the defendants that it was appropriate to view the two transactions as one. In so holding, the court cited only one case in which the Delaware Court of Chancery applying New York law treated two separate corporate transactions as one. The court bolstered its conclusion relying on the general concept that equity looks not at the form of an arrangement but at its substance. In addition, the court stated that whether the doctrine of independent legal significance applies in the context of a limited partnership dispute was an open question in Delaware and concluded because of its resolution of the substantive issues it did not need to address that question. It presumably came to this conclusion because, although it accepted the defendants' position that the amendment and subsequent merger should be treated as an integrated transaction with the result that the partnership agreement of the new partnership was analyzed as if it were an amendment of the old partnership agreement, the court concluded that it was a permissible amendment. In this regard, the defendants had argued that as part of the new governance structure one of the limited partners in the old partnership had become a general partner of the new partnership – in order to provide a tie breaking vote – and that this constituted an amendment to the original partnership agreement that allowed the limited partners to take part in the control of the business of the partnership which, pursuant to the amendment provision of the original partnership agreement, required the consent of all of the general and limited partners. However, the court found that the person at issue who had been a limited partner in the original partnership had in fact become a general partner of the new partnership and it was in its capacity as a general partner rather than in its capacity as a limited that it was taking part in the control of the business of the partnership. Thus, its change of status did not implicate the unanimity requirement of the amendment provision. Defendants had also argued, under the Delaware corporate rule that a supermajority provision in a charter cannot be reduced or eliminated by a lesser vote than the specified supermajority, that the plaintiffs could not amend the provision in the partnership agreement that required the approval of all general partners for all major decisions affecting the partnership business by a vote that did not include all of the general partners. The plaintiffs responded that pursuant to Section 17-302(f) of the DRULPA, a limited partnership agreement may be amended as provided in the agreement and that the challenged amendment had been adopted in accordance with the two-thirds vote required for amendments under the partnership agreement and was therefore valid. The court, finding that the conceptual underpinnings of Delaware's corporation law and limited partnership law were different and that there was no provision in the DRULPA comparable to Section 242(b)(4) of the Delaware General Corporation Law (which requires any alteration, amendment or repeal of a supermajority vote requirement in a certificate of incorporation to be accomplished with the approval of the same supermajority), rejected defendants' position and dismissed their claims for breach of contract and failure to comply with the merger provisions of the DRULPA.

R. Amendments; Supermajority Provisions

1. *Bean v. Fursa Capital Partners, LP*, C.A. No. 7566-VCP (Del. Ch. Feb. 28, 2013)

Plaintiff, a limited partner in Fursa Capital Partners, LP, a Delaware limited partnership (the "Partnership"), sued the Partnership and its general partner, Fursa Advisors LLC (the "GP") for failing to receive audited financial statements as required by the Partnership's Limited Partnership Agreement (the "LP Agreement"). Plaintiff sought specific performance and alleged breach of contract and misrepresentation. The court granted plaintiff's request to review financial statements for years not barred by laches, denied plaintiff's motion for summary judgment on the breach of contract claim and granted defendants' motion to dismiss the claim of misrepresentation.

Both the LP Agreement and a private placement offering memorandum ("PPM") for the Partnership, an investment fund, stated that the Partnership would send audited annual financial statements to all partners within 120 days of the end of the fiscal year. Plaintiff sought to obtain these statements but did not receive the statements for years 2008-2011. Plaintiff filed suit in May 2012.

The court addressed the misrepresentation claim first. The court held that plaintiff essentially alleged a claim of promissory fraud, as he averred that defendants knew at the time they made the representations in the LP Agreement and the PPM that they had no intention of providing the audited annual financial statements. The court found that a promissory fraud claim requires plaintiff to plead specific facts, which plaintiff failed to do. Further, the facts suggested that defendants delivered the statements for years 2005 through 2008. Finally, if defendants made the alleged misrepresentations at the time they entered into the LP Agreement and PPM, then plaintiff engaged in impermissible bootstrapping of the fraud claim to his breach of contract claim, as the contract claim rested entirely on the representation regarding defendants' contractual obligations. The court granted defendants' motion to dismiss the misrepresentation claim.

The court then addressed the breach of contract claim, holding that the request for the 2008 statements was barred by laches. Under the LP Agreement, the action accrued on April 30 of each year for the previous years' financial statements. Because plaintiff did not file his complaint until May 24, 2012, his claim for the 2008 statement was barred by laches and the analogous 3-year statute of limitations. The court rejected plaintiff's arguments regarding fraudulent concealment as he alleged no facts to support the claim. However, the court held that the requests for the 2009-2011 statement were not time-barred because it was reasonably conceivable that plaintiff did not unreasonably delay in bringing the action, as he alleged that he attempted to make several demands to the Partnership for the statements. The court also addressed plaintiff's motion for summary judgment on the breach of contract claim. The LP Agreement appeared clear to the court in that it required the delivery of audited financial statements; however, defendants asserted that they validly amended the LP Agreement to no longer require the delivery of the statements. The LP Agreement permitted the GP to amend the agreement in any manner that did not adversely affect any partner's rights in any material respect without that partner's consent. Defendants did not inform plaintiff of the amendment. The court found that a genuine issue of material fact existed as to the validity of the amendment of the LP Agreement and, therefore, denied plaintiff's motion for summary judgment.

2. *Dawson v. Pittco Capital Partners, L.P.,* C.A. No. 3148-VCN (Del. Ch. Apr. 30, 2012)

Plaintiffs ("Plaintiffs") were minority holders of preferred membership interests (the "Preferred Interests") in LaneScan, LLC, a Delaware limited liability company ("LaneScan"), who brought various claims related to a merger (the "Merger") by LaneScan with Vehicle Safety and Compliance, LLC ("VSAC"), pursuant to which their Preferred Interests were severely diluted. Plaintiffs also held secured notes in LaneScan (the "Notes"). Defendants consisted of other preferred members of LaneScan (the "Investor Defendants") and directors appointed by such members (the "Director Defendants" and together with the Investor Defendants, "Defendants"). The Merger was proposed to the members of LaneScan by a letter (the "Letter") which explained LaneScan's dire financial circumstances and included a written consent to be executed by the members consenting to the Merger (the "Consent"). The Letter also stated that each LaneScan member would be required to contribute their Notes to VSAC (the "Compelled Contribution"). Further, the Consent included an amendment to the LLC agreement of LaneScan whereby the Return of Capital Provision (as defined below) would be eliminated in its entirety (the "Amendment"). The Director Defendants and the Investor Defendants, consisting of a majority of the board members and a majority of the holders of the Preferred Interests, as required under the terms of the LLC agreement of LaneScan, approved the Merger and, in connection therewith, the Compelled Contribution and the Amendment. Plaintiffs (1) claimed that Defendants did not have the power to effect the Compelled Contribution, (2) claimed that Defendants breached the LLC agreement of LaneScan in adopting the Amendment and breached certain duties to Plaintiffs in adopting the Amendment and approving the Compelled Contribution and (3) brought intentional misconduct and gross negligence claims relating to the Merger, the Compelled Contribution and the Amendment. It is important to note with respect to all of these claims that the court found that Defendants' motivation in approving the Merger, the Amendment and the Compelled Contribution was to salvage value from LaneScan, which according to the court, may have become insolvent if the Merger was not consummated.

Before addressing each of the foregoing claims by Plaintiffs, the court first rejected Plaintiffs' claim that the Investor Defendants constituted a control group, which could result in the Investor

Defendants owing fiduciary duties to the minority equity holders of LaneScan. The court noted that a number of equity holders can collectively form a control group where those equity holders are connected in some legally significant way—e.g., by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal, but found that Plaintiffs had not proven there was a legally significant connection between the Investor Defendants sufficient to establish a control group.

With respect to the Notes, Plaintiffs argued that Defendants did not have the power to effect the Compelled Contribution. Defendants countered that the Compelled Contribution could be effected in connection with the Merger without regard as to whether that power was express in the LLC agreement because a Merger may eliminate "vested rights" of equity holders of pre-merger entities, including those rights in the nature of debt. The court indicated that the cases cited by Defendants for this argument all involved rights related to equity interests (e.g., voting, options, preferences and dividends). The court said that parties to contracts are free to provide that contractual rights and obligations will not survive a merger, but they must do so in "clear and unambiguous terms." The court held that Plaintiffs had two separate relationships with LaneScan, one as holders of Preferred Interests and another as holders of the Notes, and that the Notes conferred a separate set of rights from those related to the Preferred Interests. The court found that neither the LLC agreement of LaneScan nor the Notes stated in "clear and unambiguous terms" that the Notes could be eliminated in connection with a merger. Although the Director Defendants argued that the LLC agreement of LaneScan gave them broad authority to manage LaneScan, the court found that such grant of broad authority did not constitute "clear and unambiguous" authority to eliminate the Notes. Similarly, the court found that a drag-along provision requiring members to "execute all documents containing the same terms and conditions as those executed by holders of Preferred Interests and as reasonably directed" in connection with a "Company Sale" (and Plaintiffs conceded that the Merger was a Company Sale) also was not "clear and unambiguous" so as to permit the Compelled Contribution. Defendants lastly argued with respect to the Notes that the Compelled Contribution was appropriate and permissible because LaneScan was approaching insolvency and the Notes would not have had any value if the Merger was not consummated. The court found that while this argument may be relevant in a fiduciary duty context, a company's financial distress does not grant its directors and owners powers they do not otherwise possess. Accordingly, the court granted Plaintiffs' request for a declaratory judgment that the Notes remain valid, enforceable and outstanding following the Merger.

The court next turned to the Amendment, which removed a provision providing in relevant part that "[n]otwithstanding anything to the contrary" in the LLC agreement of LaneScan, in the event of a Company Sale, the buyer shall cause LaneScan to distribute in cash to the holders of Preferred Interests an amount equal to their unreturned capital contribution (the "Return of Capital Provision"). The amendment provision of the LLC agreement provides that the LLC agreement could be amended by written instrument adopted by a majority of the board of directors of LaneScan (the "Amendment Provision"). Plaintiffs argued that Defendants breached the LLC agreement of LaneScan by eliminating the Return of Capital Provision in adopting the Amendment, essentially arguing that, because of the "notwithstanding" language in the Return of Capital Provision, the Amendment Provision did not apply to the Return of Capital Provision. The court held that this claim failed because the Amendment Provision was not inconsistent with the Return of Capital Provision and thus the board had the authority to amend the Return of Capital Provision pursuant to the Amendment Provision. Plaintiffs further argued that Defendants breached the implied covenant of good faith and fair dealing by adopting the Amendment. In citing prior implied covenant cases, the court stated that the implied covenant requires contracting parties to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to a contract from receiving the fruits of the bargain. The court indicated that even discretionary rights must be exercised in good faith. Further, the court mentioned that the implied covenant also acts to import terms into a contract to analyze unanticipated developments or to fill gaps. However, if the contract speaks directly to an issue in dispute, the court noted that the contract terms would control and the implied covenant would not apply. The court found that in this case there was no gap to fill in that the Amendment Provision granted broad power to the board to amend the LLC agreement of LaneScan. The court found that Plaintiffs' bad faith claim also failed because the directors were motivated to approve the Merger, the Amendment and the Compelled Contribution by the threat of LaneScan's insolvency.

The court next addressed Plaintiffs' claims that Defendants committed intentional misconduct in consenting to the Merger, the Compelled Contribution and the Amendment and that the Director Defendants were grossly negligent in approving the Merger. With respect to these claims, the court first assessed whether Defendants had any such duties. The LLC agreement of LaneScan provided that "[n]o Member, Director or Officer shall have any duty to any Member or [LaneScan], except as expressly set forth herein . . . . Except as expressly set forth herein . . . no Member, Director or Officer of [LaneScan] shall be liable to [LaneScan] or to any Member for any loss or damage sustained by [LaneScan] or any Member, unless the loss or damage shall have been the result of gross negligence, fraud or intentional misconduct of such Member, Director or Officer . . . ." The court referred to the *Fisk Ventures v. Segal*, C.A. No. 3017-CC (Del. Ch. May 7, 2008), case, which involved similar provisions, and found that the first sentence eliminated all duties that could be eliminated under the LLC Act and that the second sentence would apply only if other provisions in the LLC agreement created fiduciary or contractual duties, but the second sentence did not operate so as to create any duties. Thus, the court indicated, the second sentence was a "just in case" measure. In any case, the court found that even if Defendants were subject to a duty not to act with gross negligence and to refrain from intentional misconduct, those claims would fail because Plaintiffs did not properly plead a gross negligence claim and because intentional misconduct requires an examination of Defendants' state of mind and even assuming Defendants were conflicted and the deal process fell short of best practices, this was not direct proof of intentional misconduct. As noted above, the court found that Defendants' motivation for the Merger, the Amendment and the Compelled Contribution was to salvage value for LaneScan. Plaintiffs also brought fiduciary duty claims against an officer of LaneScan. However, although a provision in the LLC agreement of LaneScan expressly provided that the officers owed certain duties to LaneScan, the court found that those duties were owed to LaneScan only and not to the holders of Preferred Interests. Because Plaintiffs did not bring any derivative claims, these claims also failed.

Lastly, the court addressed Defendants' argument that the doctrine of laches should deny all of Plaintiffs' claims. The court stated that to prevail on this argument the court must find (i) that a plaintiff had knowledge of a claim, (ii) that the plaintiff had unreasonably delayed in bringing the claim and (iii) that prejudice resulted. Because Defendants failed to demonstrate any prejudice, the court denied Defendants' request.

3. *Twin Bridges Ltd. P'ship v. Draper*, C.A. No. 2351 (Del. Ch. Sept. 14, 2007)

This case, although involving a dispute over the governance of a family owned limited partnership, raises significant issues of limited partnership law including whether the step transaction principal applied to the analysis of transactions under tax law should be applied to an amendment of a partnership agreement and subsequent merger so that the two are viewed as a single transaction, whether the doctrine of independent legal significance applies to Delaware limited partnerships, whether a supermajority provision in a partnership agreement can be reduced or eliminated by amendment with a lesser vote and whether a general partner can violate its fiduciary duty, and limited partners can aid and abet that violation, by proposing and adopting amendments to a partnership agreement that eliminate the general partners' fiduciary duties in connection with certain interested transactions. The partnership at issue had two general partners, Schutt and Draper, with joint authority to make all major decisions regarding the partnership. As the two general partners disagreed on the management of the partnership's principal asset, the Partnership was effectively in gridlock with respect to the development of that asset. Schutt and limited partners who collectively held 87% of the economic interests and voting power in the partnership decided to pursue a solution without Draper and the two limited partners who were his sons. This they did, without prior notice to Draper or his sons, by executing written consents to amend the partnership agreement to add a provision authorizing the partnership to merge with approval of partners holding two-thirds of the partnership interests and then approving the merger of the partnership into a newly formed limited partnership with a different governing structure. On the same day they effected the merger, Schutt and the limited partners aligned with her filed a declaratory judgment action seeking a declaration of the validity of the amendment to the partnership agreement, the merger of the partnership into another Delaware limited partnership and the merger agreement pursuant to which the merger was effected. Draper and his sons asserted counterclaims for breach of contract, a declaration of invalidity of the amendment and merger, breach of fiduciary duty against Schutt and a claim for aiding and abetting a breach of fiduciary duty against the limited partners aligned with Schutt.

With regard to the question of the validity of the amendment and merger, plaintiffs argued that the partnership agreement specified the requirements for amendment, the amendment complied with those requirements, the merger was approved pursuant to the requirements of the amended partnership agreement and that under the doctrine of independent legal significance, the validity of the amendment should be analyzed separately from the validity of the merger and, as separately analyzed, both were valid acts under the relevant provisions of the partnership agreement and the DRULPA. The defendants countered that the amendment and the merger, although technically creating a new partnership with a new partnership agreement, in substance effected a further amendment of the old partnership agreement. Therefore, plaintiffs maintained, the two parts of the transaction should be treated as one integrated transaction under the step transaction doctrine and, when so viewed, would be found to violate the provisions of the original partnership agreement. In analyzing this issue, the court agreed with the defendants that it was appropriate to view the two transactions as one. In so holding, the court cited only one case in which the Delaware Court of Chancery applying New York law treated two separate corporate transactions as one. The court bolstered its conclusion relying on the general concept that equity looks not at the form of an arrangement but at its substance. In addition, the court stated that whether the doctrine of independent legal significance applies in the context of a limited partnership dispute was an open question in Delaware and concluded because of its resolution of the substantive issues it did not need to address that question. It presumably came to this conclusion because, although it accepted the defendants' position that the amendment and subsequent merger should be treated as an integrated transaction with the result that the partnership agreement of the new partnership was analyzed as if it were an amendment of the old partnership agreement, the court concluded that it was a permissible amendment. In this regard, the defendants had argued that as part of the new governance structure one of the limited partners in the old partnership had become a general partner of the new partnership – in order to provide a tie breaking vote – and that this constituted an amendment to the original partnership agreement that allowed the limited partners to take part in the control of the business of the partnership which, pursuant to the amendment provision of the original partnership agreement, required the consent of all of the general and limited partners. However, the court found that the person at issue who had been a limited partner in the original partnership had in fact become a general partner of the new partnership and it was in its capacity as a general partner rather than in its capacity as a limited that it was taking part in the control of the business of the partnership. Thus, its change of status did not implicate the unanimity requirement of the amendment provision. Defendants had also argued, under the Delaware corporate rule that a supermajority provision in a charter cannot be reduced or eliminated by a lesser vote than the specified supermajority, that the plaintiffs could not amend the provision in the partnership agreement that required the approval of all general partners for all major decisions affecting the partnership business by a vote that did not include all of the general partners. The plaintiffs responded that pursuant to Section 17-302(f) of the DRULPA, a limited partnership agreement may be amended as provided in the agreement and that the challenged amendment had been adopted in accordance with the two-thirds vote required for amendments under the partnership agreement and was therefore valid. The court, finding that the conceptual underpinnings of Delaware's corporation law and limited partnership law were different and that there was no provision in the DRULPA comparable to Section 242(b)(4) of the Delaware General Corporation Law (which requires any alteration, amendment or repeal of a supermajority vote requirement in a certificate of incorporation to be accomplished with the approval of the same supermajority), rejected defendants' position and dismissed their claims for breach of contract and failure to comply with the merger provisions of the DRULPA.

4. *In re LJM2 Co-Invest., L.P. Ltd. Partners Litig.*, C.A. No. 300-N (Del. Ch. Dec. 21, 2004)

In another case spawned by the Enron bankruptcy, the plaintiff, a liquidating trust formed in connection with the bankruptcy of LJM2 Co-Investment, L.P. (the "Partnership") and the trustee of the trust brought an action against the limited partners of the Partnership to enforce the obligation of the limited partners to make capital contributions to the Partnership sufficient to pay former bank creditors of the Partnership who were the sole beneficiaries of the liquidating trust. The case arose in the context of a loan to the Partnership and an agreement by the general partner to call capital from the limited partners in the event that the Partnership defaulted on payment of the loan. The Partnership did default and the general partner made a capital call in December 2001 on the limited partners (the "December Capital Call"). However, prior to the effectiveness of the December Capital Call, the limited partners removed the general partner, appointed a new general partner that purported to rescind the December Capital Call and purported to amend the partnership agreement to require a majority interest of limited partners to approve any further capital calls. The case came before the court on a motion to dismiss and the court denied the motion to dismiss as to all counts.

Plaintiffs had alleged numerous bases on which the limited partners would be obligated to make capital contributions pursuant to the December Capital Call as well as pursuant to a capital call made in September 2003 (the "September Capital Call") ranging from claims based on Section 17-502 of the DRULPA to claims for breach of the credit agreement between the Partnership and the bank creditors, tortious interference with contract, aiding and abetting a breach of fiduciary duty and unjust enrichment. However, the court focused its discussion on whether the defendants had effectively compromised or rescinded the December 2001 Capital Call and whether the purported amendment to the Partnership's limited partnership agreement was effective to require the consent of a majority interest of the limited partners to the September Capital Call.

In addressing the effectiveness of the amendment, the court noted that the partnership agreement provided that it could be amended in any respect upon agreement by the majority limited partners. However, this power to amend was subject to a limitation that no amendments could change the percentage in interest of the limited partners necessary for any consent "required hereunder to the taking of any action" unless such amendment were approved by the requisite percentage in interest. The question thus presented to the court was whether the default unanimity requirement found in Section 17-502(b)(1), which requires the consent of all partners to compromise the obligation of a partner to make a capital contribution unless otherwise provided in the partnership agreement, was "required hereunder" within the meaning of the amendment section of the partnership agreement. Noting that in the corporate law context it was clear that the DGCL was a part of the certificate of incorporation of every Delaware company, the court concluded that the unanimity requirement of Section 17-502(b)(1) was in effect incorporated by reference into the partnership agreement. Thus, the court held that the purported amendment of that section by less than the consent of all of the limited partners was ineffective (the court also noted that the purported use of a power of attorney by the general partner on behalf of all the limited partners to approve the amendment was similarly ineffective to bind the non-consenting limited partners). The court also considered whether the December Capital Call could be rescinded and whether that would be different from a compromise and concluded that the power to rescind is not the same as the power to compromise. The court noted, however, that the complaint fairly alleged facts supporting the argument that the action taken by the successor general partner to rescind the December Capital Call was both a breach of contract and a breach of fiduciary duty sufficient to render that action ineffective. Further, the court found that the plaintiffs had alleged sufficient facts for the court to conclude that the September Capital Call could be enforced without regard to the majority limited partner consent provisions found in the purported amendment. Finally, the court agreed with plaintiffs that they had alleged sufficient facts to provide a basis for reasonable reliance by the creditors on the capital contribution obligation of the limited partners within the meaning of Section 17-502(b)(1) of the DRULPA.

5. *Gelfman v. Weeden Inv'rs, L.P.*, C.A. No. 18519 (Del. Ch. Aug. 23, 2001) and (Del. Ch. July 12, 2004)

This case involved defendants' motion to dismiss a complaint filed against the general partner and certain members of its board of directors and top management alleging breach of the partnership agreement and breach of the fiduciary duty of loyalty. Plaintiffs were certain former employees and outside investors who owned partnership units and alleged that the general partner took a series of actions designed to concentrate ownership of the partnership in the hands of employees and management. The challenged actions included creation of a new class of callable partnership units, payment of various distributions of capital to enable certain favored investors to exercise an option to subscribe for additional callable units at book value, a proposed amendment to the partnership agreement that would cause the conversion of all original partnership units to callable units and give the general partner discretion to cash out certain units at book value, and institution of a compelled redemption program whereby callable units held by outside investors would be subject to redemption.

In analyzing plaintiffs' claims, the court noted that the drafters of the partnership agreement clearly recognized the right afforded by Section 1101(d) of DRULPA to restrict the fiduciary duties that, as a default matter, govern the general partner and its directors in managing the partnership. However, the court found that the drafters had not swept away all default fiduciary duties but rather had eliminated some and kept others. Specifically, the court found that one provision of the partnership agreement provided that where the general partner was permitted or required to take action in its sole discretion, in good faith or under any other express standard, the general partner was to act under such express standard and would not be subject to any other conflicting standard imposed by the partnership agreement or agreements contemplated therein and further provided that any default standard of care or duty imposed under applicable law (including DRULPA) would be modified, waived or limited as required to permit the general partner to act in accordance with the authority granted to it under the partnership agreement. However, this same provision also included additional language limiting the waiver of default principles of fiduciary duty to actions taken by the general partner that did not constitute gross negligence or willful or wanton misconduct and were not reasonably believed by the general partner to be inconsistent with the overall purposes of the partnership. The court determined that while these provisions did not remove all of the fiduciary duties of the general partner, they did preclude the application of the traditional entire fairness standard that would otherwise apply to a conflict transaction and substituted a scienter-based standard of loyalty that required a showing of gross negligence, wanton or willful misconduct or action in bad faith. Based upon such analysis, the court found that while the payment of the capital distributions was proper under the terms of the partnership agreement, the facts as pled by plaintiffs supported an inference that the general partner's decision to implement the unit subscription plans was made in bad faith and violated the retained fiduciary duties. The sheer magnitude of the subscription plans, the book value offering price and the heavy concentration of ownership of partnership units placed in affiliates of the general partner led the court to reach this conclusion.

The court also rejected defendants' motion to dismiss plaintiffs' challenge to the conversion amendment and the compelled redemption program finding that they involved a clear conflict between affiliates of the general partner and outside investors who held partnership units and were not governed by the sole discretion standard. Rather, they were subject to the partnership agreement's requirement that when resolving a conflict of interest the general partner was required to consider various factors affecting the partnership and the parties to the conflict and act in good faith in reaching a resolution. The court also found that the retained fiduciary duties referenced above applied to the general partner's decision and held that the general partner's acts supported an inference that the general partner acted in bad faith to transfer wealth from non-employee unitholders to its control persons and to grant power to itself to determine which unitholders would be deprived of their partnership interests at less than fair market value. Finally, the court held that the general partner's decision to make the conversion amendment subject to the approval of all holders of the original partnership units did not provide a ratification safe harbor because the vote was controlled by the employee unitholders.

In a subsequent disposition of this case, the court found for the defendants on several claims, but the plaintiffs prevailed on their claims regarding dilution related to certain units bought by the outside directors of the corporate general partner and the forced redemption at book value of their units.

Plaintiff bought claims regarding the alleged losses they had suffered by virtue of dilution of their ownership interest in connection with additional unit sales to employees, former employees and outside directors. The court noted that in an earlier decision it had held that the general partner's decision to issue additional units was governed by the "sole discretion" standard subject to the proviso that the general partner's exercise of the sole discretion could give rise to liability or injunctive relief if the general partner's actions constituted gross negligence, willful or wanton misconduct, or were reasonably believed to be inconsistent with the overall purposes of the Partnership. The court found that this standard was generally very deferential to the general partner and, consequently, held that all of the issuances of units to both employees and former employees had sufficient rational justification to come within the scope of the general partner's discretion. However, the court came to a different conclusion with respect to the majority of unit purchases by the outside directors holding that "[b]y deciding to permit the general partner's outside directors to acquire new units at a favorable price and by denying the same opportunity to Outside Investors, the defendants breached their contractual duties. This decision…was not undertaken in good faith but instead as quid pro quo for the outside directors' willing assent to the issuance of a large number of new units to management and employees." Overall, "[a] conscious decision to enrich the outside directors in order to facilitate their support for issuances of large numbers of new units to employees amounts to conduct that the General Partner must have reasonably known was inconsistent with the purposes of the Partnership." Thus, the plaintiffs prevailed on their dilution claim with respect to the issuance of most of the new units to the outside directors. (With respect to a subsequent issuance to the outside directors of a relatively small amount of units, the court concluded that it could be considered a fair part of the outside directors' compensation). The plaintiffs received as a remedy a damage award reflecting the increased distributions they would have received had the outside directors not been permitted to reinvest their returned capital in the new unit purchases.

As to the involuntary redemption of the plaintiffs' partnership units, the court held that a different section of the partnership agreement and therefore a different contractual standard applied since, by the admission of the parties, in considering and effecting the redemption, the general partner and its directors faced a conflict between their own personal interests and those of the plaintiff limited partners. The court noted that settled principles of Delaware law require not only that any restriction on the fiduciary duties of a general partner be clearly stated in the partnership agreement but also that "the general partner comply with the substitute contractual standard of conduct as a prerequisite to taking advantage of the contractual alleviation of his fiduciary duties." Here, "the cursory and uninformed process by which they [the general partner and its directors] reached their decisions did not comply with the requirements of the partnership agreement governing the resolution of conflicts of interest by the general partner, and therefore the default fiduciary standard of entire fairness applied to their conduct, a standard that the defendants do not come close to satisfying." Even if the defendants had complied with the requirements of the partnership agreement, Vice Chancellor Strine indicated that he could arguably rest his decision on the grounds of gross negligence alone under the contractual terms of the partnership agreement: "For the defendants to have consciously chosen to deprive unit holders of their property at a price they knew to be below fair market value, but to have made no exploration at all of precisely how far below fair market value the book value in fact was is a failure in care that is extraordinary and can be fairly characterized as gross in nature." "What emerges from the record is a process in which a group of insiders (managers and directors) place their own personal self-interest above their contractual duty to refrain from bad faith conduct towards the partnership." Moreover, "if the future of the firm as a profit-generating entity requires the departure of some owners, the minimally acceptable standard of good faith action would seem to require, in the absence of a contractual right to force out certain owners at a different price, that the firm pay any equity owner being forced out fair market value for their equity share." The court also rejected defendants' claim that the vote of the unit holders cured any procedural defects. The court found that the vote process used was an "illusory protection at best" and tainted by disclosures that were materially deficient. The court noted that Delaware's law of ratification requires that there be an "informed vote of the relevant class that is untainted by material conflicts." Thus, the plaintiffs prevailed on their redemption claim, and they received as a remedy the fair market value of their units before the redemption schedule was implemented.

6. *Sutter Opportunity Fund 2 LLC v. FFP Real Estate Trust*, 838 A.2d 1123 (Del. Ch. 2003)

Several investment funds bought partnership units in FFP Partners L.P., a Delaware limited partnership ("FFP"), whose business was managing real estate. In order to protect FFP's tax status as a pass-through entity, FFP's partnership agreement (the "Agreement") imposed a 4.9% limit on the amount of partnership units any "person" could "constructively own." According to the terms of the Agreement, investors attempting to acquire more than 4.9% of FFP's partnership units would merely engage in void transfers with the units they attempted to acquire immediately exchanged for "excess units" to be held in an "excess unit trust." Owners of excess units had no partnership rights except the right to name a beneficiary to the trust or to sell the excess units at a price no higher than that for which they were bought, with the express permission of the partnership. However, the investment funds colluded first in attempts to circumvent the ownership cap and then in an attempt to eliminate the ownership cap. The Agreement further provided that only limited partners holding at least a 10% ownership interest could propose amendments to the Agreement. The plaintiff investors together proposed such an amendment, and, at the request of one of the plaintiffs, Cede & Co., the nominal owner of the plaintiffs' partnership units, submitted the same proposal. When the plaintiff investors filed a Schedule 13D in relation to their acquisition of partnership units, FFP responded by demanding information on the plaintiffs' interrelationships and holding of units. The plaintiffs refused the request and filed suit, seeking to compel a meeting of limited partners to vote on their proposed repeal of the ownership cap.

The plaintiffs first argued that the Agreement required FFP to treat Cede & Co. as the limited partner proposing the amendment because Cede & Co. was the registered owner of the units that the plaintiffs ultimately owned. Since Cede & Co. was the nominal owner of 95% of the units of FFP, the plaintiffs claimed, the 10% threshold for proposing amendments had been satisfied. Noting the absurd results to which the plaintiffs' arguments might lead, Vice Chancellor Lamb held that FFP was entitled to look through the agent, Cede & Co., to determine the ownership interest of its principals.

The plaintiffs further argued that their 11.6% aggregate ownership interest entitled them to propose amendments without regard to Cede & Co., denying that any one of them constructively owned more than 4.9% of outstanding FFP units or that their units were subject to the forfeiture provision embodied in the ownership cap. Although the plaintiffs admitted that they were a 13(d) group and therefore a "person," as defined in the Agreement, they argued that, since the tax law definition of constructive ownership used in the Agreement did not attribute to a Section 13(d) group ownership of interests held by members of that group, the group here was likewise not the constructive owner of the units held by its members. Nonetheless, Vice Chancellor Lamb quickly concluded that the plaintiffs themselves remained persons under the Agreement who remained subject to the ownership cap and who together constructively owned a forbidden amount of units.

The Vice Chancellor went on to reject the plaintiffs' arguments that (a) under the Agreement's broad definition of constructive ownership, a unitholder might accidentally violate the ownership cap and (b) the Agreement's broad definition of constructive ownership would prevent anyone from ever satisfying the 10% ownership threshold for proposing amendments. Talk of accidental infractions did not help these plaintiffs, who were fully aware of each other's ownership interests and who knowingly colluded to avoid the membership cap. Similarly, the court indicated that any unitholder could solicit proxies or consents to reach the 10% threshold, so the plaintiffs' arguments lacked merit.

Arguments that FFP had waived its right to enforce the ownership cap were refuted both by the language of the Agreement and the facts of the case. Moreover, even if FFP had waived the relevant provision, the plaintiffs' unclean hands would bar them from a remedy. The court went on to dismiss as "insubstantial" the plaintiffs' arguments that (a) the transfer provision violated Article VIII of the Uniform Commercial Code and (b) that the excess unit trust was not a valid trust.

Summary judgment was granted to the defendants. The plaintiffs could not vote the units they held in violation of the ownership cap.

7. *In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351 (Del. Ch. 2002)

Limited partners sued the general partners, which were affiliated with one another, of a Delaware limited partnership for breach of fiduciary duty and breach of contract and sued an affiliate of the general partners for aiding and abetting breaches of fiduciary duty. Plaintiffs' claims stemmed from actions taken by the general partners in connection with an offering of preferred units having superior claims to capital and income distributions, including the amendment of the partnership agreement without limited partner approval to subordinate the contractual distribution rights of the existing limited partners to those new claims and a subsequent sale of partnership property also without limited partner approval. Before the court were cross-motions for partial summary judgment.

The court granted the plaintiffs' motion with respect to their claim that the general partners breached the partnership agreement by amending it to provide a preferential right to capital and income distributions to holders of preferred units without limited partner approval. The defendants argued that a provision in the partnership agreement that permitted the general partners to sell additional partnership interests on such terms and conditions and with such rights and obligations as the general partners determined implicitly granted the general partners the authority to amend the partnership agreement as necessary to secure the rights of the new limited partners and that the amendment provision of the partnership agreement supported that interpretation. The court disagreed and held that reading the provision to empower the general partners unilaterally to create a different class of limited partner units that do not merely dilute but subordinate the rights of existing limited partners required reading into the provision a more sweeping implicit meaning than emerged from a reading of the explicit terms thereof.

The court stated that it would expect a partnership agreement to articulate clearly the general partners' power to create a new class of units with superior rights and amend the partnership agreement unilaterally to create those rights and found that Section 17-302(a) of DRULPA, and the history of its amendments, reinforced the need for an explicit grant of authority for the exercise of such powers. The court also rejected the defendants' reliance on the amendment provision of the partnership agreement. The amendment provision provided that any amendment which would adversely affect (other than as permitted in the additional partnership interests provision) certain rights of investor limited partners required the written consent of all investor limited partners. The court found that by its plain terms the effect of the reference to the additional partnership interests provision was solely to exempt an amendment related thereto from the unanimous written consent requirement, not permit it unilaterally.

The court also denied both cross-motions on the plaintiffs' claim that the sale of certain real estate properties without limited partner approval violated the partnership agreement. Under the terms of the partnership agreement, limited partner approval was required to approve a sale of all or substantially all of the assets of the partnership. The defendants first argued that because the sold properties were owned by a subsidiary of the partnership, they did not constitute property of the partnership that was subject to the limited partner approval requirement. The court rejected this argument finding that when the applicable provision was interpreted in conjunction with other provisions of the partnership agreement, it was clear that the sold properties were considered a partnership asset, regardless of the fact that they were held indirectly by a partnership subsidiary and that such reading was also consistent with the language contained in the prospectus for the preferred units offering. With regard to the parties' dispute over whether the sold properties constituted all or substantially all of the assets of the partnership, the court found that such a determination involves a subjective inquiry comprised of both qualitative and quantitative considerations and that the deficiencies in the record at the summary judgment stage precluded the court from making a decision prior to trial.

8. *Cantor Fitzgerald, L.P. v. Cantor*, C.A. No. 18101 (Del. Ch. Nov. 5, 2001)

In another action in a series of related cases, Cantor Fitzgerald, L.P., and its general partner, sought a declaratory judgment that an exchange offer with respect to the limited partners' partnership units and a series of amendments to the partnership agreement did not constitute a breach of the general partner's fiduciary duty nor violate Delaware law and that the amendments were valid. This decision addressed a motion to dismiss defendants' counterclaims and a motion for judgment on the pleadings. The court denied the motion to dismiss and entered a declaratory judgment order applicable to this action and certain related actions.

In its analysis of the exchange offer and the amendments, the court noted that the partnership agreement defined the rights and duties owed by one party to another and DRULPA merely provided the default rules with respect to fiduciary duty where the partnership agreement was silent on the matter. Following this principle, the court evaluated the conduct of the partnership and the general partner against the provisions of the partnership agreement.

The exchange offer allowed limited partners to exchange their partnership units for a new class of partnership units that would give the holder a right to a distribution of shares in a subsidiary of the partnership. The court found that the exchange offer was structured as a distribution of partnership property and because the partnership agreement permitted the partnership to distribute partnership property to the limited partners, the exchange offer in concept did not violate the provisions of the partnership agreement and, therefore, was not a breach of the general partner's fiduciary duty of loyalty.

The court also held that the amendments were facially valid and the amendment process did not violate the partnership agreement and did not constitute a violation of the duty of loyalty. The court rejected defendants' argument that the amendments improperly extinguished certain fiduciary duties owed by the general partner by giving the general partner the right to take certain actions in its sole discretion. Noting the established principle that the parties to a partnership agreement may set the duties, or lack thereof, owed by one party to another by contract, the court found that the partnership agreement, as amended, provided that although any particular provision may grant the general partner authority to act in its sole discretion, the general partner's actions remained subject to the requirement that the general partner abide by its duty of loyalty and exercise good faith in making all determinations. With respect to the enactment of amendments, the partnership agreement required a two-thirds vote of all partners in favor of an amendment in the case of an amendment that applied in a substantially similar manner to all classes of partnership units and a two-thirds vote of each affected class in the case of all other amendments. The court found that the amendments approved by the limited partners applied to all the limited partners in a substantially similar manner and, thus, held that a two-thirds vote of all partners was sufficient. The court rejected defendants' contention that conditioning participation in the exchange offer on approving the amendments constituted vote buying or coercion and found that the limited partners were free at all times to weigh the benefits and the costs of the transaction and to reject the exchange offer and vote against the amendments if that result was their best option.

Although the court found the amendments to be facially valid, it withheld ruling on defendants' arguments that one amendment improperly subjected the defendants to violation of the corporate opportunity doctrine and that certain terms of the amendments violated the 1996 settlement agreement reached between the parties in resolution of their prior litigation. The court held that a determination on these arguments would have to await an attempted enforcement of the amendments by plaintiffs because the court could only judge the application of the amendments in specific factual settings, but the court noted that the parties' future conduct must comply with the terms of the partnership agreement and the settlement agreement.

9. *R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, C.A. No. 17449 (Del. Ch. Apr. 10, 2001)

Plaintiffs challenged an already consummated reorganization of a limited partnership which separated the ownership of a single public limited partnership into the old public limited partnership and a new privately-traded limited partnership. Plaintiffs challenged the reorganization on several grounds: first, that it did not receive the requisite approval by the public unitholders; second, that defendants breached their fiduciary duties in structuring the reorganization in an unfair manner; and third, that the defendants made materially misleading disclosures. Plaintiffs' first claim was based on the fact that the defendants needed to amend the partnership agreement of the existing limited partnership in order to implement the reorganization and the defendants presented the proposed amended and restated partnership agreement containing all of the proposed amendments to the public unitholders for their approval in a single vote and provided that it would be approved if it received the affirmative vote of a majority of the public unitholders. Plaintiff argued, however, that one provision of the proposed restatement of the partnership agreement could only be accomplished by a unanimous vote and that therefore the entirety of the proposed amendment, including all the remaining provisions which could otherwise have been approved by a majority vote of the public unitholders, was never validly adopted and must be declared void. The court agreed with plaintiffs that one provision of the amendment could only be put into effect by unanimous vote. However, the court rejected plaintiffs' argument that the entirety of the amendment was therefore void. The court cited several bases for this decision including the "severability" provisions of both the original partnership agreement and the proposed amendment and restatement and the fact that the general partner removed the one provision that required unanimous approval from the final restated and amended partnership agreement. With respect to the severability issue, the court cited several legislative cases supporting the proposition that if part of one legislative bill required a majority vote and another part a supermajority vote and only the majority vote were obtained, so long as the matters were of a severable nature, the part that received the requisite approval would be valid notwithstanding the fact that the remaining part would be void. The court also rejected plaintiffs attempt to limit that principle to the legislative context finding that it applied equally in the private contract context and was consistent with the approach Delaware has historically taken to the regulation of economic activity which rests on "flexibility and efficiency, not unjustified rigidity." In their fiduciary duty claim, plaintiffs had argued that the reorganization was motivated solely to advantage the majority unitholder and corporate parent of the general partner without conferring any benefit on the public unitholders. The defendants moved to dismiss this claim on the grounds that the public unitholders had approved the transaction in accordance with the criteria set forth in the original limited partnership agreement which displaced any default fiduciary duties that would otherwise have applied to the transaction. Plaintiffs countered that the requirements of the limited partnership agreement including the vote requirement were in addition to, not in substitution for, the general partner's common law fiduciary obligations and pointed to the absence of any language expressly restricting the operation of default fiduciary duties in the operative section of the partnership agreement. The court held that in deciding whether default fiduciary duties were preempted by contractual provisions it was required to determine whether the application of default fiduciary duties could be reconciled with the practical and efficient operation of the terms of the limited partnership agreement; where such a reconciliation was possible, the court would apply default fiduciary duties in the absence of clear language disclaiming their applicability. "But where the use of default fiduciary duties would intrude upon the contractual rights or expectations of the general partner or be insensible in view of the contractual mechanisms governing the transactions under consideration, the court will eschew fiduciary concepts and focus on a purely contractual analysis of the dispute." However, the court held that it did not need to answer that question for the present case because, based on corporate law principles, it concluded that if the challenged transactions received an informed, uncoerced majority vote of the public unitholders that vote would obviate any generalized fairness inquiry and insulate the general partner from contractual or fiduciary liability. Thus, the court held that plaintiffs' fiduciary claim turned on the adequacy of the general partner's disclosures. Plaintiffs had challenged a number of the general partner's disclosures as false or misleading. The court dismissed a number of these claims. However, it held that certain of the claims were sufficient to withstand a motion to dismiss. Thus, the court denied defendants' motion to dismiss those disclosure claims and the fiduciary duty claim which turned on the adequacy of the disclosure.

10. *Continental Ins. Co. v. Rutledge & Co., Inc.*, C.A. No. 15539 (Del. Ch. Jan. 10, 2000) and (Del. Ch. Feb. 15, 2000)

In responding to cross-motions for summary judgment, the court addressed the issue of whether the partners of a Delaware limited partnership orally amended the partnership agreement to temporarily suspend a limited partner's withdrawal rights. The limited partnership, formed to raise and invest capital, had an initial investment strategy to invest in public equity. However, in accordance with the partnership agreement, the general partner caused the partnership to change its investment strategy to invest primarily in private equity. Subsequent to the change in investment strategy, a limited partner, under new ownership, decided to divest itself of its interest in the limited partnership and sent the general partner notice of its intent to withdraw from the limited partnership, as permitted in the partnership agreement. However, the general partner claimed that at the time the investment strategy was changed, the partners had orally agreed to amend the limited partnership agreement to temporarily suspend the withdrawal rights of the limited partner in order for the limited partnership to hold its private, illiquid investments for a sufficient length of time that would allow it to sell such investments for maximum profit. The court first looked to the partnership agreement itself which contained a provision indicating that amendments of the partnership agreement required the written consent of all partners. In rejecting the general partner's argument that the partnership agreement does not require amendments to be in writing, the court noted that while another provision of the partnership agreement seemed to authorize unilateral amendments by the general partner, a writing was required to suspend the limited partner's withdrawal rights because such provision only permitted unilateral amendments that did not adversely affect the limited partner. The court further held that even assuming that the general partner could unilaterally amend the partnership agreement, it still would not uphold the alleged oral modification because the general partner had failed to meet its high evidentiary burden of proving the change with specificity and directness. The court then stated that even if the general partner had met its evidentiary burden, it still would not have found the oral modification binding due to lack of consideration.

Upon the general partner's motion for reargument, the court held that its summary judgment in favor of the limited partner on the issue of the contractual right to withdraw was proper. The court found that the general partner had failed to show that the court misunderstood material facts or applied the wrong legal standard.

11. *Sonet v. Timber Co., L.P.*, 722 A.2d 319 (Del. Ch. 1998)

This case arose from the plan of a publicly traded Delaware limited partnership to convert to a REIT through a merger. Under the terms of the merger agreement, partnership units would be converted into shares of the REIT on a one-to-one basis. The general partner of the partnership, however, in lieu of the 2% interest and certain incentive distribution rights it had in the partnership, would receive REIT shares equal to 27% of the total shares outstanding. The partnership agreement provided that the general partner had the power to structure mergers in its sole discretion, subject, however, to the requirement that a supermajority of unitholders must approve any merger. Plaintiff unitholder claimed that the general partner, in addition to complying with the terms of the partnership agreement, was required to exercise common law fiduciary duties, namely the duty of loyalty, to unitholders in structuring the merger.

In dismissing the plaintiff's claims for failure to state a claim upon which relief can be granted, the court stated that, in the limited partnership context, "principles of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain." According to the court, "under limited partnership law a claim of breach of fiduciary duty must first be analyzed in terms of the operative governing instrument--the partnership agreement--and only where that document is silent or ambiguous, or where principles of equity are implicated, will a [c]ourt begin to look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence." Because the court found that the partnership agreement clearly modified the common law fiduciary duties otherwise applicable to the general partner in structuring a merger, the court concluded that the partnership had "plainly opted out of the statutory default scheme" of traditional fiduciary duties and therefore limited its review of the general partner's conduct to an examination of the compliance of the general partner with the terms of the partnership agreement.

The plaintiff also argued, in the alternative, that the general partner had voluntarily assumed fiduciary duties outside of the partnership agreement by appointing a special committee to oversee the merger, presumably in an effort to gain the support of the partners in the vote on the merger by creating the appearance of fair dealing. In presenting this argument, the plaintiff relied on the court's holding in the *Cencom* case, in which the court held that a general partner, by circulating a disclosure statement that informed limited partners that an independent counsel had been retained to assure the integrity of a transaction, voluntarily assumed a duty to ensure that the limited partners could rely on the general partner's representations with respect to the independent counsel. The court distinguished this case from the *Cencom* case by the fact that the general partner in this case had not made affirmative disclosures to the unitholders regarding the fairness and independence of the special committee. The court characterized the alternative claim of the plaintiff as a "potential disclosure claim" and, in the absence of affirmative disclosures, dismissed the claim as not being ripe for adjudication.

In a subsequent proceeding in which the plaintiff challenged the disclosures in the proxy statement soliciting unitholder approval of the REIT conversion, the court held that because the unitholders had contracted away their right to seek judicial review of the REIT conversion based upon substantive fiduciary duty principles and had contracted for, in place of such a right, the protection of a supermajority approval of the transaction, the court would apply a most stringent disclosure standard, enforced by careful judicial scrutiny, to assure that the unitholders' vote had meaning.

12. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37 (Del. 1998)

A Delaware limited partnership was formed for the purpose of acquiring and did acquire all the stock of a certain corporation. Approximately 1850 investors became limited partners in the limited partnership by executing the limited partnership agreement. The limited partnership's ownership of stock in the corporation dropped from 100% to approximately 67% after an initial public offering of the corporation's stock. The plaintiff limited partners sued the general partner and related entities for breach of fiduciary duty for failing either to attempt to sell the limited partnership's stock in the corporation or the corporation as a whole for a control premium. The defendants then proposed a plan of withdrawal and dissolution, which would give each limited partner the option of either exchanging all or part of its interest in the partnership for cash through a public offering of the corporation's stock or receiving at a later date its proportionate interest in the stock of the corporation. Implementation of the plan required certain amendments to the partnership agreements, and the defendants filed proxy materials with the Securities and Exchange Commission and began soliciting proxies in support of the plan. The plaintiffs then amended their complaint to allege that the proposed amendments to the partnership agreement necessary to carry out the plan did not comply with the requirements for amendment contained in the partnership agreement. The defendants countered that they were complying with the amendment procedures under the partnership agreement and offered the original offering memorandum for the partnership interests as extrinsic evidence supporting their interpretation of the partnership agreement.

The plaintiffs sought a preliminary injunction enjoining the general partner from implementing the proposed plan of withdrawal and dissolution. The Court of Chancery granted the preliminary injunction, and the defendants made an interlocutory appeal of the preliminary injunction to the Supreme Court.

The Supreme Court found that the provisions of the limited partnership agreement addressing the amendment process were ambiguous, at best, and held that the case raised the following question of first impression in Delaware: whether an ambiguity in a partnership agreement between a general partner and 1850 limited partners should be construed against the general partner as in the case of certain corporate documents involving the rights of investors or insurance contracts involving the rights of insureds, or whether extrinsic evidence should be considered to resolve the ambiguity as in the case of an ambiguous, bilateral contract.

In this case, the court concluded on the record presented that the limited partners were presented with a "take it or leave it" offer with no opportunity to negotiate the provisions of the partnership agreement and therefore found that the partnership agreement was not a negotiated bilateral contract. As a result, the court affirmed the decision of the Court of Chancery, holding that, based on the principle of contra proferentem, any ambiguous terms in the partnership agreement should be construed against the general partner as the entity solely responsible for the articulation of those terms. The court added that the consideration of extrinsic evidence assumes there is some connection between the expectations of the contracting parties revealed by that evidence and the way contract terms were articulated by those parties. Therefore, unless extrinsic evidence can speak to the intent of all parties to a contract, it provides an incomplete guide with which to interpret contractual language.

13. *U-H Acquisition Co. v. Barbo*, C.A. No. 13279 (Del. Ch. Jan. 31, 1994)

Plaintiffs commenced a consent solicitation in an attempt to acquire a group of limited partnerships. The general partners of the partnerships responded by adopting amendments to the partnership agreements significantly restricting the ability of the limited partners to act by written consent. The plaintiffs then filed suit to challenge the validity of the amendments to the partnership agreements, alleging that the adoption of the amendments constituted a breach of the general partners' fiduciary duties and seeking a declaratory judgment that the amendments were null and void. None of the plaintiffs were limited partners of any of the partnerships, although one of the limited partners had acquired an interest in a partnership as an assignee but had not been admitted as a substituted limited partner.

The court dismissed the claims of the plaintiffs for lack of standing. It held that in order to maintain a claim for breach of fiduciary duty, the plaintiffs must first show that they were owed such a fiduciary duty and because none of the plaintiffs (including the assignee) had a right to vote by written consent, they had no standing to bring a claim alleging breach of fiduciary duty relating to the exercise of a right to vote by written consent. In addition, certain aspects of the plaintiffs' claims were found to be derivative in nature, which required, among other things, the plaintiffs to be partners at the time of bringing the action under Section 17-1002 of the DRULPA. (DRULPA Sections 17-1001 and 17-1002 were amended in 1998 to specifically authorize an assignee of a partnership interest to bring a derivative action.) Finally, the request for declaratory judgment was dismissed because, after the dismissal of the breach of fiduciary duty claim, no independent basis for equitable jurisdiction existed to support a declaratory judgment action in the Court of Chancery. (DRULPA Section 17-111 was adopted later in 1994 to provide jurisdiction in the Court of Chancery for all actions relating to the interpretation or enforcement of partnership agreements.)

14. *Boesky v. CX Partners, L.P.*, C.A. Nos. 9739, 9744, 9748 (Del. Ch. Apr. 28, 1988)

Certain limited partners sought to enjoin a non-pro rata liquidating distribution proposed by the partnership's liquidator (who had been appointed upon the withdrawal of the general partner). The proposed distribution sought to exclude the objecting limited partners from receipt of liquidating distributions based on the liquidator's belief that they were involved in wrongdoing and would ultimately be found liable for damages to the partnership. Implementation of the non-pro rata distribution required either the adoption of an amendment of the partnership agreement or a breach of its explicit terms allegedly dictated by the liquidator's fiduciary obligations. However, amendments to the partnership agreement were required to be approved by the "general partner," and the court concluded that under the terms of the partnership agreement the liquidator did not possess the power of a general partner to approve an amendment concerning distributions. Accordingly, the proposed amendment could not properly be adopted. Similarly, the court concluded that although the non-pro rata distribution did not constitute a breach of fiduciary duty, it did constitute an unenforceable breach of the partnership agreement. Consequently, the court preliminarily enjoined the making of liquidating distributions.

The court also addressed certain issues relating to creditors' rights in connection with liquidating distributions. In this regard, it noted that prior to making distributions to partners, the DRULPA allowed a liquidator to pay creditors or establish reserves. In the absence of legislative history amplifying the procedure for establishing reserves, the court looked to the corporate law for guidance and concluded that if the liquidator established reserves, a creditor would be entitled to adequate security and such security could in appropriate cases be afforded by the general assets left in the partnership. However, if the liquidator chose to make a distribution to partners before all creditors had been paid or actually funded, dollar for dollar, in segregated reserves, the liquidator would bear the burden of proving the adequacy of the proposed security. The court also noted that in appropriate cases a promise to repay a distribution by a creditworthy limited partner if required to satisfy creditors' claims, coupled with an undertaking by such limited partner to submit to the jurisdiction of the Delaware Court of Chancery to resolve any related disputes, could constitute adequate security for contingent, unliquidated claims against the partnership.

S. Authority of General Partners in Conflict Situations

1. *Thompson Door Co., Inc. v. Haven Fund*, 351 A.2d 864 (Del. 1976)

In this case decided before the adoption of DRULPA, plaintiff was a Delaware limited partnership with three general partners, only one of whom authorized this legal proceeding to recover money damages for an alleged breach of contract by defendant. The other two general partners were officers of the defendant, and as such, had conflicted interests. The question before the Delaware Supreme Court was whether one general partner had the authority to cause the partnership to sue.

The court stated that while it is settled law that majority rule governs the management of ordinary partnership affairs, that rule does not apply to commencement of litigation under the facts present in this case. The court held that, given the divided loyalty of two of the three general partners of the partnership, the third general partner had the authority to bring this action. The court stated further that if the law were otherwise, valuable rights of the partnership might be lost.

T. Partner Withdrawals

1. *Seibold v. Camulos Partners LP*, C.A. No. 5176-CS (Del. Ch. Sept. 17, 2012)

In this action, the plaintiff sought the return of capital he had invested in a hedge fund, Camulos Partners LP (the "Fund"), in connection with his withdrawal as a limited partner of the Fund. In addition to being an investor in the Fund, the plaintiff was also a founding partner of the Fund, a member of Camulos Partners GP LLC, the general partner of the Fund (the "General Partner"), and a partner and employee of Camulos Capital LP, the investment manager of the Fund (the "Investment Manager" and together with the Fund and the General Partner, "Camulos"). Dissatisfied with his career prospects at the Fund, the plaintiff sought to terminate his employment in order to start a competing fund, eventually named Noroton Event Driven Opportunity Fund LP ("Noroton"). In the months preceding his departure, the plaintiff downloaded a large number of Camulos files that he thought would be helpful in establishing Noroton.

After his resignation from the various positions he held at Camulos, the plaintiff requested the return of his $3.2 million capital investment in the Fund as well as the $1.45 million it had gained in value. Around this time, Camulos learned of the plaintiff's downloading activities. Believing that the plaintiff had breached various agreements, including the Fund's limited partnership agreement and a confidentiality agreement entered into by the plaintiff as an employee of the Investment Manager, the Investment Manager deposited the plaintiff's withdrawal proceeds into its own operating account to offset any claims against the plaintiff.

The plaintiff filed suit to recover the withdrawal proceeds, alleging breach of the Fund's partnership agreement by the Fund and the General Partner and tortious interference with contract and unjust enrichment with respect to the Investment Manager. Camulos counterclaimed, alleging, among other things, breach of fiduciary duty arising out of the plaintiff's non-return, improper use and disclosure of the downloaded information.

In response to the plaintiff's claim that Camulos breached the Fund's partnership agreement by failing to turn over his withdrawal proceeds, Camulos claimed that the proceeds were properly withheld pursuant to a provision of the partnership agreement permitting suspension of withdrawals under "extraordinary circumstances." The court disagreed with Camulos that the plaintiff's departure constituted an "extraordinary circumstance." Rather, the court concluded that the withdrawal suspension provision must be read in the context of the entire partnership agreement. Specifically, the partnership agreement required that "extraordinary circumstances" be related to the Fund in a way that would warrant suspending withdrawals, such as circumstances where it was impossible to fairly value the Fund's assets due to extreme market conditions.

The court also rejected Camulos' contention that a provision of the partnership agreement permitting the General Partner to act in its sole discretion displaced the "extraordinary circumstances" standard. In the court's view, the "extraordinary circumstances" standard was an exception to the general partner's ability to act in its sole discretion. Otherwise, according to the court, the "extraordinary circumstances" standard would be rendered superfluous. Camulos also argued that the Investment Manager was not liable for tortious interference because it was acting pursuant to authority delegated to it by the General Partner under the investment management agreement. The court rejected this claim, noting that General Partner had delegated to the Investment Manager only the authority to oversee the day-to-day trading activities of the Fund.

With respect to Camulos' counterclaim for breach of fiduciary duty, the court first noted that the fiduciary duties the plaintiff owed in his capacity as a Camulos partner and employee were essentially co-extensive. Calumos first claimed that the plaintiff misused the information he downloaded but the court declined to address this claim because it concerned facts identical to those raised by Camulos' claim that the plaintiff had breached his confidentiality agreement. Camulos next claimed that the plaintiff solicited its customers while still an employee of Camulos but the court found no evidence supporting this claim. Camulos' final breach of fiduciary duty claim alleged that the plaintiff prepared to compete while still a Camulos employee. The court agreed that the plaintiff breached his duty by downloading Camulos files for his own use but concluded that Camulos had not demonstrated any harm resulting from the breach.

2. *Wimbledon Fund LP—Absolute Return Fund Series v. SV Special Situations Fund LP*, C.A. No. 4780-VCS (Del. Ch. June 14, 2010) and (Del. Ch. Feb. 4, 2011)

This decision of the Chancery Court on cross-motions for summary judgment involved a dispute between an investment fund, SV Special Situations Fund LP (the "Fund"), and one of its limited partners, Wimbledon Fund LP-Absolute Fund Series ("Wimbledon"). The partnership agreement of the Fund restricted a limited partner from withdrawing from the Fund for one year from its initial investment, and any such withdrawal could only occur on June 30 or December 31. Wimbledon sought to withdraw from the Fund before the expiration of the one year lock up period by sending the Fund a request to withdraw effective on June 30, 2008. The Fund did not consent or object to Wimbledon's request on or before June 30, 2008. In September 2008, the Fund acknowledged Wimbledon's withdrawal request in a short letter. On October 31, 2008, the Fund notified all of its limited partners that it was suspending all pending and future withdrawal requests. Wimbledon argued that the suspension did not apply to its withdrawal because (a) its requested withdrawal was effective on June 30, 2008, which was prior to the announced suspension, and (b) despite its premature request, its request was effective because the Fund consented in the September 2008 letter to its early withdrawal.

Under DRULPA Section 17-603, "[a] limited partner may withdraw from a limited partnership only at the time or upon the happening of events specified in the partnership agreement and in accordance with the partnership agreement." Under the terms of the Fund's partnership agreement, the only means by which Wimbledon could withdraw from the Fund on June 30, 2008 was by the Fund's express consent. As discussed by the court, an express waiver exists "where it is clear from the language used that the party is intentionally renouncing a right that it is aware of," and an implied waiver is found "only if there is a clear, unequivocal, and decisive act of the party demonstrating relinquishment of the right." While the September 2008 letter acknowledged Wimbledon's redemption request and indicated that the redemption would be made on an in-kind basis, the court found that it did not include a clear representation that the Fund voluntarily and intentionally waived Wimbledon's duty to remain a member of the Fund for at least one year. According to the court, the language in the letter was ambiguous at best, "and ambiguous acts cannot form the basis for a waiver."

Further, the court held that, even if the September 2008 letter indicated that the Fund would effect Wimbledon's withdrawal as of December 31, 2008, such pending request was suspended by the October 31, 2008 notice. The court found that the Fund's partnership agreement plainly provided that "the General Partner shall have the right, in its sole discretion, to suspend all capital withdrawals to Partners" under certain circumstances. According to the court, nothing in the partnership agreement's language limited the Fund's suspension authority to prospective withdrawals, and construing the language otherwise would render that section "meaningless." Because the Fund was authorized under its partnership agreement to suspend pending withdrawal requests, the court held that the suspension was effective as to Wimbledon when the Fund delivered the October 2008 letter. Therefore, the court denied Wimbledon's motion for summary judgment and granted the Fund's motion for summary judgment.

Following the Chancery Court's initial decision, the Delaware Supreme Court remanded the case back to the Chancery Court based on an appeal by Wimbledon to supplement the record with two additional documents Wimbledon subsequently discovered. The first document was a September 29, 2008 capital account statement from HSBC, the Fund's administrator, that indicated that Wimbledon's entire capital account balance was withdrawn from the Fund in July, 2008. The second documents was the Fund's 2008 Form K-1 for Wimbledon that showed Wimbledon's ending capital investment in the Fund for the year 2008 was zero. The Chancery Court concluded that based on the Chancery Court's rules of procedure the supplemental evidence should not be considered and the Chancery Court's initial decision should remain in effect. In the event the Supreme Court later determined that the Chancery Court must consider Wimbledon's supplemental evidence, the Chancery Court held that the supplemental evidence did raise genuine issues of material fact as to whether Wimbledon withdrew from the Fund prior to the Fund's suspension of withdrawals such that Wimbledon's and the Fund's motions for summary judgment should be denied. The court held that the supplemental evidence supported a reasonable inference that the Fund had waived the one year lock up period and actually effected Wimbledon's withdrawal prior to the October 2008 letter suspending withdrawals. The court went on to state that if Wimbledon's withdrawal was effective prior to the October 2008 letter, it would not have been a partner at the time of the October 2008 letter and since the Fund's partnership agreement only provided the Fund the right to suspend withdraws of partners, the October 2008 letter would not have been effective with respect to Wimbledon, even though Wimbledon had not yet received any distribution in respect of its withdrawal.

U. Implied Covenants

1. *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, C.A. No. 10093-VCL (Del. Ch. Aug. 20, 2015)

This case arose from allegations by plaintiff that the conflicts committees of certain related entities failed to act in good faith when approving a corporate reorganization (the "Transaction") of publicly traded entities that resulted in Kinder Morgan, Inc. ("Parent") emerging as the sole publicly traded entity and two entities controlled by Parent—Kinder Morgan Energy Partners, L.P. (the "Partnership") and Kinder Morgan Management, LLC ("GP Delegate"), the delegatee of the management authority held by the general partner (the "GP") of the Partnership—becoming indirect subsidiaries of Parent. As part of the Transaction, Parent paid unitholders of the Partnership and shareholders of GP Delegate roughly equivalent consideration with GP Delegate shareholders receiving their consideration tax-free, despite the shares in GP Delegate trading at a discount to the Partnership's common units. Because Parent was acquiring 100% ownership of the Partnership and also controlled the Partnership through the GP, the Transaction created a conflict of interest for the GP. According to the Partnership's limited partnership agreement (the "LPA"), the GP could address this conflict by seeking special approval of a majority of the members of the Partnership's conflicts committee. The conflicts committees of the GP and GP Delegate consisted of members of the board of directors of the GP who were not officers or employees of the GP, GP Delegate or their affiliates.

Plaintiffs alleged that the members of the conflicts committees were conflicted because of their simultaneous roles on both committees and compounded this conflict by only engaging a single financial adviser and single set of legal advisors to assess the Partnership and GP Delegate aspects of the Transaction. As a result of this conflict, the committees allegedly failed to act in good faith by (i) completing the negotiation and evaluation of the Transaction on a compressed timeline, (ii) agreeing to GP Delegate's shareholders receiving greater net consideration (after taxes were calculated) than the Partnership's unitholders despite the historical discount on GP Delegate shares and (iii) focusing on provisions in the merger agreement that were unlikely to have much real-world consequence instead of negotiating a greater premium for the Partnership's unitholders or more relevant unitholder protections.

The court, relying on Delaware Supreme Court precedent interpreting identical limited partnership agreement provisions, held that default fiduciary duties had been eliminated in the LPA and therefore no claim of a breach of fiduciary duties existed. The LPA instead imposed contractual obligations on the GP to act in manner that it reasonably believed to be in, or not inconsistent with, the best interests of the Partnership. The standard imposed by the LPA required the conflicts committee to make a determination as to the fairness of the Transaction to, and the best interests of, the Partnership, and not the Partnership's unitholders. Since plaintiffs' allegations were focused on the effect of the Transaction on the Partnership's unitholders rather than the effect on the Partnership, the court dismissed the claims. The court also dismissed plaintiffs' claim that the GP breached the implied covenant of good faith and fair dealing because the allegations failed to identify a sufficient conflict faced by members of the conflicts committees.

2. *Allen v. El Paso Pipeline GP Co., L.L.C.*, C.A. No. 7520-VCL (Del. Ch. June 20, 2014)

This decision follows the Court of Chancery's prior decision granting plaintiffs' motion to certify a class consisting of all the limited partners (the "Unitholders") of El Paso Pipeline Partners, L.P., a publicly traded Delaware master limited partnership (the "Partnership"), wherein the court also found that plaintiffs' claims were not exclusively derivative and could support a direct characterization.

After completion of discovery, the court heard this case on defendants' motion for summary judgment. Plaintiffs had challenged whether a "drop-down" transaction (the "Drop-Down") between the Partnership and El Paso Corporation, the parent of the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"), violated the express terms of the Partnership's limited partnership agreement (the "LPA") and the implied covenant of good faith and fair dealing, or in the alternative, aided and abetted those breaches. The crux of plaintiffs' argument was that although the LPA eliminated all fiduciary duties of the General Partner and replaced them with contractual duties, the General Partner breached the LPA by not considering the best interests of the Unitholders when approving the Drop-Down; specifically, plaintiffs alleged that certain incentive distribution rights (the "IDRs") owned by the General Partner caused the Drop-Down to be economically dilutive to Unitholders. Thus, the court analyzed whether the manner by which the Drop-Down was approved was either an express breach of the LPA or a breach of the implied covenant of good faith and fair dealing.

In basic terms, the General Partner's contractual duties were divided into three categories: when it was acting in its individual capacity, when it was acting as general partner in a non-conflict of interest transaction and when it was acting as general partner in a conflict of interest transaction. When in a conflicted transaction, the General Partner had several options by which such a conflicted transaction could be approved without breaching the LPA, one of which was by special approval. Special approval could be obtained by a majority vote of the members of a conflicts committee—in this case, three outside members of the board of directors of the General Partner—acting in good faith. The LPA defined "good faith" for such purposes as the members' subjective belief that the conflict of interest transaction was in the best interest of the Partnership. The court noted, however, that it could only infer a party's subjective intent from external indications and, therefore, objective factors necessarily informed the court's analysis. With respect to the best interest prong of this contractual good faith standard, the court found that the LPA only required the conflicts committee to believe subjectively that the Drop-Down was in the best interest of the Partnership—leaving the conflicts committee free to consider the full universe of entity constituencies and not consider only the equity owners of the Partnership (which would be the case if traditional fiduciary duties applied).

The court went on to grant summary judgment on plaintiffs' LPA breach claim even under the plaintiff-friendly summary judgment standard of review, for the following reasons: (i) plaintiffs had conceded that the Partnership was not harmed by, or paid an excessive price for, the Drop-Down; (ii) all members of the conflicts committee testified that they subjectively believed the Drop-Down benefited the Partnership as an entity; (iii) the conflicts committee met formally six times and had consulted with financial and legal advisors familiar with the industry and the Partnership (with the financial advisor present at each meeting and presenting at three of the meetings); and (iv) the conflicts committee investigated the IDRs as they related to the Drop-Down and still determined that the Drop-Down was in the best interest of the Partnership, and ultimately conferred some benefit to the Unitholders (although not as great a benefit as received by the General Partner). The court noted that, at best, the evidence supported an inference that the conflicts committee performed its job poorly, not that it did not subjectively believe that the Drop-Down was in the best interest of the Partnership. Accordingly, there was no breach of the LPA.

Next, the court addressed plaintiffs' claim that the General Partner breached the implied covenant of good faith and fair dealing in approving the Drop-Down because the conflicts committee relied on a fairness opinion that did not value the consideration Unitholders actually received. The court began its analysis by explaining that the implied covenant does not create a free-floating duty of good faith, but is a cautiously applied gap-filler to ensure parties' reasonable expectations are fulfilled. In applying the implied covenant, a court must follow a three-step analysis. First, contract construction: the court must examine the contract to determine whether a gap exists and if the contract speaks directly on an issue, there is no gap. Second, even if a gap exists, the court should avoid filling intentional gaps (i.e., a term that the parties rejected ex ante or after negotiations decided should be omitted) and only fill unintentional gaps (i.e., a term that parties failed to consider during negotiations or was so fundamental did not need to be expressed) so as to avoid rewriting a contract that a party deems unfair in hindsight. Third, if the gap should be filled (a cautious enterprise that should be rarely used) the court must look to the past to determine what the parties would have agreed to themselves had they considered the issue in their original bargaining position, not what the court deems to be fair at the time of the wrong.

Here, plaintiffs' implied covenant claim relied heavily on Gerber v. Enter. Prods. Hldgs., LLC, a Delaware Supreme Court case. In brief, the Gerber court faced a situation where a master limited partnership agreement replaced traditional fiduciary duties with contractual duties and limited partners challenged a general partner's approval of a conflicted transaction. Notably, the limited partnership agreement provided that the general partner would be conclusively presumed to have acted in good faith if it relied on a fairness opinion from a financial advisor without detailing what such fairness opinion should include. The general partner relied on a fairness opinion with respect to the challenged transaction, however, the fairness opinion failed to fully evaluate important aspects of the transaction and their effects on the consideration received by limited partners. The Supreme Court held that had the parties at the time of contracting addressed the specific standards required of a fairness opinion they would have agreed that any fairness opinion needed to fully evaluate whether the consideration was fair to the limited partners. Thus, the general partner was not entitled to the conclusive presumption of good faith because its reliance on the inadequate fairness opinion violated the implied covenant.

Plaintiffs' contended that, similarly, the fairness opinion obtained by the conflicts committee here did not consider all the elements of the consideration from the standpoint of the Unitholders because the dilutive effects of the IDRs were omitted from the financial advisor's fairness opinion calculus. The court, however, rejected this contention and found that Gerber did not control this case because there was no such conclusive presumption requirement for the Drop-Down approval; rather, what was required under the LPA was approval by the conflicts committee in their subjective belief that the Drop-Down was in the best interest of the Partnership.

The court began its implied covenant analysis with the contract construction step, which is where the court also concluded its analysis because the special approval process had no fairness opinion related gap, as was the case in Gerber. In so ruling, the court found that deploying the implied covenant to impose on the parties a fairness opinion requirement similar to Gerber would fundamentally rewrite the LPA by changing the conflict committee's inquiry from best interests of the Partnership to fairness to the Unitholders and expanding the scope of judicial review from subjective good faith of the conflicts committee to compliance with an obligation to obtain a fairness opinion that would satisfy a court after the fact. Because the LPA's special approval process did not require a fairness opinion there was no gap to fill.

Moreover, for illustrative purposes only, the court proceeded through the next steps of the implied covenant analysis and considered what the parties would have agreed to at the time of contracting. Examining the LPA in terms of the Partnership's prospectus from its initial public offering the court concluded that the drafters of the LPA anticipated numerous conflict of interest transactions and created a dispute resolution method that would limit potential litigation and after-the-fact judicial review. Therefore, assuming the question had been raised during negotiations whether the Unitholders should have the ability to challenge the special approval process by litigating whether the conflicts committee obtained a fairness opinion that satisfied a test of reasonableness, met certain requirements, or otherwise complied with some form of objective standard, the record before the court suggested that such a provision would have been rejected. That being the case, summary judgment was granted for defendants' on the implied covenant claim.

Finally, the court granted summary judgment with respect to plaintiffs' aiding and abetting claim. The court held that since the LPA eliminated all fiduciary duties this was a pure breach of contract claim and the general rule in Delaware is that there is no claim available for aiding and abetting claim a breach of contract. In sum, defendants' motion for summary judgment was granted in toto.

3. *In re El Paso Pipeline Partners, L.P. Derivative Litig*., C.A. No. 7141-VCL (Del. Ch. June 12, 2014) and (Del. Ch. Apr. 20, 2015)

This case involved a master limited partnership drop-down transaction. El Paso Corporation ("El Paso Parent"), the sponsor and indirect controlling entity of El Paso Pipeline Partners, L.P. (the "MLP") sold part of its interest in two entities to the MLP in a transaction that constituted a conflict of interest. Plaintiffs sued defendants alleging, among other things, breach of the MLP's limited partnership agreement (the "MLP LPA"), breach of the implied covenant of good faith and fair dealing and aiding and abetting. The court previously dismissed the additional allegations in a bench ruling. Plaintiffs and defendants each moved for summary judgment.

In 2010, El Paso Parent offered to sell the MLP 51% of its interest in an entity ("Southern LNG") that owned a liquefied natural gas ("LNG") terminal and the entity ("Elba Express") that owned the natural gas pipeline that connected the LNG terminal to interstate pipelines (the "Drop-Down"). At the time of the Drop-Down proposal, shale gas discoveries had led to higher levels of production and lower gas prices, weakening the market for imported LNG. However, Southern LNG and Elba Express maintained services agreements ("Services Agreements") that provided revenue regardless of any actual storage or transport of LNG. The plaintiffs focused on two issues with regard to the Service Agreements: (i) the counterparties were judgment-proof special purpose entities with no assets and (ii) the Services Agreements were backed by guarantees that only covered roughly 20% of the revenue that the Services Agreements might generate (collectively, the "Risks").

After the Drop-Down was proposed, the MLP determined that the transaction posed a conflict of interest for the general partner of the MLP and sought "Special Approval" by way of a conflicts committee, as contemplated by the MLP LPA. The conflicts committee met five times over the course of two months and received input from a financial advisor, then unanimously approved the Drop-Down proposal. Unbeknownst to the conflicts committee, El Paso Parent turned down a right of first refusal option to purchase LNG assets for itself at the time the Drop-Down was proposed. El Paso Parent and the members of the general partner's board who know about the right of first refusal offer did not disclose its existence to the conflicts committee.

The court first addressed plaintiffs' claim that the defendants breached the express terms of the MLP LPA and granted defendants' motion to dismiss. The court determined that Section 7.9(a) of the MLP LPA required the general partner to proceed in one of four contractually specified ways (including seeking "Special Approval") when faced with making a decision that involved a conflict of interest. Because the Drop-Down implicated a conflict of interest, Section 7.9(a) controlled, and the general partner had sought Special Approval, defined by the MLP LPA as "approval by a majority of the members of the Conflicts Committee acting in good faith." Under settled Delaware law, the standard for good faith is a subjective, not objective, belief that the determination or action is in the best interests of the company. The record supported the fact that the conflicts committee understood the state of the LNG market, was informed about the terms of the Service Agreements and guarantees and considered the revenue risk involved in the Drop-Down proposal. While reasonable minds could differ on the weight that the conflicts committee should have placed on the Risks, the court found that the conflict committee's judgment and process was not so extreme or egregious that it could support a potential finding of bad faith. Further, the conflicts committee had no knowledge of El Paso Parent's failure to consummate its right of first refusal to purchase LNG assets and, therefore, could not have acted in bad faith based on facts it did not know.

The court then addressed the plaintiffs' claims that the general partner breached the implied covenant of good faith and fair dealing by "intentionally" concealing the information about El Paso Parent's refusal to purchase LNG assets and, again, granted defendants' motion to dismiss. The court initially clarified that the MLP LPA's "good faith" standard did not override the implied covenant, noting that the implied covenant is intended to be a gap-filler. In applying the implied covenant, the court stated that it must determine (i) whether there was a gap to be filled, (ii) whether the implied covenant should be used to fill the gap and (iii) how to fill the gap. Here, the court determined a gap existed because the MLP LPA was silent on whether the general partner was required to volunteer information to the conflicts committee. However, the court declined to use the implied covenant to infer an affirmative disclosure obligation. The court recognized that the Supreme Court in *Gerber v. Enter. Prods. Hldgs., LLC,* 67 A.3d 400 (Del. 2013) had stated that a failure to volunteer information could constitute a breach of the implied covenant, but noted that statement was dictum. In this case, the MLP LPA expanded the general partner's freedom to act, specifically eliminated all fiduciary duties of the general partner (which would traditionally include disclosure obligations), did not include a contractual duty to disclose information and affirmatively renounced the traditional corporate opportunity doctrine. The court coupled these facts with plaintiffs' failure to identify any indication that the parties to the MLP LPA believed that the general partner would volunteer information to the conflicts committee and declined to permit plaintiffs to use the implied covenant to create a disclosure requirement.

The court dismissed the aiding and abetting claims, noting that secondary liability could not exist when the underlying causes of action had been dismissed.

In the post-trial opinion, the court addressed plaintiffs' challenge to a "dropdown" transaction whereby the parent corporation in a master limited partnership structure, El Paso Corporation ("El Paso Parent"), sold interests in two of its subsidiaries to El Paso Pipeline Partners, L.P. (the "MLP"). The court found that the MLP's general partner, in engaging in the transaction with El Paso Parent, had violated the MLP's limited partnership agreement. The court held that members of a committee of independent members of the general partner's board (the "Committee") who approved the transaction via "special approval" failed to form the requisite subjective belief that the dropdown transaction was in the best interests of the MLP.

Plaintiffs originally challenged two dropdown transactions, which the court referred to as the "Spring Dropdown" and the "Fall Dropdown." The court previously had granted defendants' motion for summary judgment as to the Spring Dropdown and partially denied defendants' motion for summary judgment as to the Fall Dropdown, finding that questions of material fact existed requiring a trial as to the state of mind of the members of the Committee when approving the Fall Dropdown. The court noted that it expected that the Committee members and their financial advisor would provide a credible account of how they evaluated the Fall Dropdown, negotiated with El Paso Parent and ultimately determined that the transaction was in the best interests of the MLP. However, that is not what the court found. Rather, the court found that the Committee members went against their better judgment and did what El Paso Parent wanted and not what they believed was in the best interests of the MLP. The court rejected trial testimony of the Committee members that they believed the transaction was in the best interests of the MLP, finding that the testimony was rehearsed, not credible, and inconsistent with their contemporaneous emails and deposition testimony. Specifically, the court pointed to various internal assessments by Committee members suggesting they believed that the actual value of the assets was lower than the price proposed by El Paso Parent – and accepted by the Committee – and also that it was not in the best interest of the MLP to acquire additional interests in the subsidiary, which related to the importation of liquefied natural gas, a market that appeared to be in decline. Consequently, the court determined that the MLP had paid $171 million more for one of the assets that it acquired than it would have if the general partner had not breached the limited partnership agreement.

The court also expressed concern regarding the process followed, and the work product generated, by the Committee's banker. Specifically, the court noted that the banker met with El Paso Parent's management before meeting with the Committee, did not emphasize certain relevant information in their presentation and failed either to follow the same approach in the Fall Dropdown as in the Spring Dropdown or bring the inconsistency to the Committee's attention, all in an effort to make the Spring Dropdown look as attractive as possible. The court noted that the banker's entire fee was contingent on delivering a fairness opinion, suggesting that the banker did what it could to justify the Fall Dropdown, get to closing and collect its contingent fee.

The court also found that the Committee was unduly focused on accretion of distributable cash to the holders of the common units, when they should have been focused on carrying out their known contractual obligation to determine whether the Fall Dropdown was in the best interests of the MLP. In its prior opinion, the court had noted that the contractual standard under the limited partnership agreement was whether a proposed transaction was in the best interests of the MLP, which meant that the Committee could consider constituencies including employees, creditors, suppliers, customers, the general partner, IDR holders and "of course" the limited partners. In this post-trial opinion, however, the court made clear that in considering the interests of the limited partners, it was not sufficient for the Committee members to focus only on whether a proposed transaction was accretive to cash distributions. Rather, the Committee and its banker should have engaged in a rigorous valuation analysis that took into account prior transactions involving the same assets. The court noted that the Fall Dropdown related to two separate assets that the Committee should have evaluated separately, and had it done so, it would have realized that it was paying more than it agreed to pay for one of the assets when it was the only asset in the proposed transaction.

Based on these findings, the court held that the Committee members did not conclude that the Fall Dropdown was "in the best interests of [the MLP]" as required by the MLP's limited partnership agreement and, therefore, the MLP's general partner breached the MLP's limited partnership agreement by engaging in the Fall Dropdown. The court awarded damages in the amount that the

MLP paid for the interest acquired in the Fall Dropdown that exceeded what it would have paid had the general partner not breached the MLP's limited partnership agreement.

4. *Gerber v. Enter. Holdings, LLC*, C.A. No. 5989 (Del. June 10, 2013)

This case involved the purchase in 2007 by Enterprise GP Holdings, L.P., a master limited partnership (the "Partnership"), of Texas Eastern Products Pipeline Company, LLC ("Teppco GP"), the general partner of Teppco Partners, LP ("Teppco LP"). In 2009, defendants caused the Partnership to sell Teppco GP to Enterprise Products Partners, L.P. ("Enterprise Products LP") (the "Transaction"), and then later on the same day caused the Partnership to sell Teppco LP to Enterprise Products LP in a separate transaction (the "Teppco LP Sale"). The consideration received by the Partnership for the 2009 Sale was only 9% of the Partnership's original purchase price. In 2010 the Partnership merged with another limited liability company ("MergeCo") and no longer exists (the "2010 Merger").

Plaintiff, a former limited partner of the Partnership and current holder of interests in the parent of MergeCo, challenged the Transaction and the 2010 Merger on behalf of the Partnership as unfair to the Partnership, claiming defendants breached fiduciary duties in approving the Transaction and the 2010 Merger. The limited partnership agreement of the Partnership (the "LPA") eliminated common law fiduciary duties of Enterprise Products Holdings, LLC, the general partner of the Partnership (the "General Partner"), and its board of directors, as permitted by Section 17-1101(d) of DRULPA. Under the LPA, a conflict of interest between the General Partner and the Partnership would be permitted, deemed approved by all partners of the Partnership, and not constitute a breach of the LPA or any duty if the course of action was approved by "Special Approval" of a majority of members of the Partnership's Audit and Conflicts Committee (the "Committee"). The Committee was a committee of the Board of Directors of the General Partner composed of three or more directors meeting the independence, qualification and experience requirements established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by the New York Stock Exchange (the "NYSE"). Further, a provision in the LPA created a "conclusive presumption" that the General Partner acted in "good faith" when acting or not acting in reliance upon an opinion of experts as to matters the General Partner reasonably believed were within the expert's professional or expert competence.

The Court of Chancery held that plaintiff failed to state a claim and granted defendants' motion to dismiss under Rule 12(b)(6). Plaintiff appealed and the Supreme Court of Delaware affirmed in part, reversed in part, and remanded.

The court held that the Court of Chancery erred in determining that the contractual "conclusive presumption" of good faith barred a claim under the implied covenant of good faith and fair dealing. The court adopted the Court of Chancery's reasoning in *ASB Allegiance Real Estate Fund v. Scion Breckenridge Mgmt. Member, LLC,* 50 A.3d 434 (Del. Ch. 2012), holding that the contractual duty of "good faith" looked to the parties as situated at the time of the wrong, while the implied covenant looks to the past and what the parties would have agreed to themselves if they had considered the issue at the time of contracting. Moreover, Section 17-1101(d) of DRULPA explicitly prohibits a provision in a partnership agreement that eliminates the implied covenant.

Because the conclusive presumption only applied to the contractual duty of good faith, and not the implied covenant, the court considered whether plaintiff pled sufficient facts that, if true, would establish the General Partner breached the implied covenant when approving the Transaction or the 2010 Merger. Although the Committee obtained a fairness opinion regarding the Transaction, the opinion did not address whether holders of the Partnership's limited partnership interests received fair consideration for their Teppco GP interest, but instead only addressed the total consideration paid in both the Transaction and the Teppco LP Sale. The court held that, had the parties addressed the issue when contracting, they would have agreed that a fairness opinion must address whether the consideration received specifically for Teppco GP was fair in order for the conclusive presumption to apply to approval of the Transaction.

The General Partner received a fairness opinion for the 2010 Merger as well. However, the Vice Chancellor held that the complaint pled that a principal purpose of the 2010 Merger was to terminate claims relating to the 2007 transaction and the Transaction, and the fairness opinion did not independently value these claims in assessing the fairness of the consideration. The court held that had the parties addressed the issue when contracting, they would have agreed that in order for the conclusive presumption to apply to approval of the 2010 Merger, a fairness opinion must address the value of derivative claims when terminating such claims was a principal purpose of the merger.

Although the conclusive presumption did not apply, if the General Partner satisfied the Special Approval process there would be no breach of the LPA. Because the Committee obtained a fairness opinion for the Transaction and for the 2010 Merger, the contractual duty of good faith was satisfied, but the implied covenant independently applied to the Special Approval process as well. The Court of Chancery held that the complaint sufficiently alleged that the General Partner selected the Special Approval process for the Transaction in bad faith in breach of the implied covenant because plaintiff would not have agreed that the Committee could rely on a flawed fairness opinion to grant Special Approval. That holding stands as law because defendants did not cross-appeal from that determination. The court similarly held that the limited partnership interest holders would not have agreed to allow the General Partner to terminate their interest through a merger intended to eliminate valuable claims without considering the value of such claims. The court held that with respect to both the Transaction and the 2010 Merger, the complaint stated a cognizable claim that the General Partner breached the implied covenant, and the Court of Chancery reversibly erred in dismissing the claims. The court remanded for the Court of Chancery to consider the secondary liability claims for tortious interference with contract rights and aiding and abetting the General Partner's breach of contract.

5. *Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, C.A. No. 7092-VCP (Del. Ch. Dec. 20, 2012)

In this case, the Delaware Court of Chancery was presented with a motion to dismiss numerous claims by certain limited partners of Tremont Opportunity Fund II, L.P., a Delaware limited partnership (the "Fund"), against Tremont Partners, Inc., a Connecticut corporation and the general partner of the Fund (the "General Partner"), Tremont Group Holdings, Inc., a Delaware corporation and the parent of the General Partner (the "Parent"), and certain individuals that were officers, directors, managers and principal decision makers of the General Partner and the Parent (the "Individual Defendants"). The claims were all related to losses connected with an investment by the Fund in a hedge fund (the "Hedge Fund") that invested most of its assets in Bernard Madoff's ponzi scheme. The General Partner was also the general partner of the Hedge Fund. In the context of this motion to dismiss, the court addressed, among other things, whether (i) the court had jurisdiction over the Individual Defendants, (ii) an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims, (iii) certain claims were derivative or direct and whether the derivative claims should be permitted notwithstanding a settlement in an action involving similar claims filed by other limited partners of the Fund in the United States District Court for the Southern District of New York (the "New York Case"), (iv) plaintiffs could maintain a valid breach of contract claim under the partnership agreement of the Fund and a private placement memorandum (the "PPM") relating to interests in the Fund on which plaintiffs' allegedly relied, (v) defendants' breached the implied covenant of good faith and fair dealing and (vi) whether the Parent could be liable for aiding and abetting the General Partner's alleged breach of fiduciary duty.

The court first addressed whether it could exercise personal jurisdiction over the Individual Defendants. The partnership agreement of the Fund included a clause pursuant to which the parties thereto consented to the exclusive jurisdiction of the Delaware courts. However, the court observed that the Individual Defendants were not parties to the partnership agreement of the Fund simply by virtue of being directors, officers, managers or decision makers of the General Partner and thus they were not bound by such provision. Plaintiffs' further claimed that the court had jurisdiction under Delaware's long-arm statute, but the court granted the Individual Defendants' motion to dismiss on this issue, finding that participation in the formation of the Fund and having management positions in the Fund did not cause the Individual Defendants to have contacts with the State of Delaware so extensive and continuing that exercising personal jurisdiction would be fair and consistent with state policy. The court also found that the alleged wrongs did not arise out of conduct that occurred within the State of Delaware, and therefore, the court did not have personal jurisdiction on that basis under the Delaware long-arm statute.

The court next turned to defendants' argument that an exculpation provision in the partnership agreement of the Fund barred plaintiffs' claims for breach of contract, breach of fiduciary duty, negligent misrepresentation and unjust enrichment. This provision essentially exculpated the General Partner and the Parent for any losses or expenses except those resulting from gross negligence, willful misfeasance, bad faith or reckless disregard of duties under the partnership agreement of the Fund. Plaintiffs claimed that they adequately pled facts that would support a finding of gross negligence. The court referred to the definition of "gross negligence" in the civil context as "a higher level of negligence representing an extreme departure from the ordinary standard of care." The court further indicated that gross negligence is a decision "so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion." The court stated that, under the law of entities, gross negligence "involves a devil-may-care attitude or indifference to duty amounting to recklessness." In order to prevail on a claim of gross negligence, the court stated that a plaintiff must plead and prove that the defendant was "recklessly uninformed" or acted "outside the bounds of reason." Plaintiffs' generally claimed that defendants committed gross negligence by failing to supervise, monitor and manage investments by the Hedge Fund in the Madoff ponzi scheme and instead blindly and recklessly handed over their responsibility to Madoff without performing any due diligence. The court observed that while no Delaware case has addressed whether failure to heed "warning signs" can constitute gross negligence in the partnership context, the analysis in *Forsythe v. ESC Fund Mgmt. Co. (U.S.)* was instructive. The court noted that in *Forsythe*, a motion to dismiss that accused the general partner of failing to oversee an affiliate that was delegated management responsibility for the subject limited partnership was denied. The court found that in this case, defendants' conduct was arguably more egregious than that at issue in *Forsythe*, and therefore, the court denied the motion to dismiss based on the exculpation provision.

The court next addressed whether plaintiffs' breach of fiduciary duty and unjust enrichment claims were derivative or direct claims. The court applied the test set forth in the corporate case of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, which requires answering two questions in making this determination: (1) who suffered the alleged harm; and (2) who would receive the benefit of any recovery or other remedy. The court noted that these claims related to a diminution in the value of the Fund and the Hedge Fund resulting from the Madoff ponzi scheme. According to the court, these injuries were suffered by the Fund and the Hedge Fund, and only indirectly by plaintiffs, and thus, they were derivative in nature. With respect to these claims and all other derivative claims asserted by plaintiffs, including, among others, claims of negligent misrepresentation and intentional misrepresentation, plaintiffs argued that their claims must have been direct because they elected to opt-out of the settlement in the New York Case. The court found, however, that opting-out of a settlement cannot convert a derivative claim to a direct claim. The court further held that because the settlement released defendants with respect to derivative claims, the court was bound by res judicata and thus granted the motion to dismiss.

Plaintiffs alternatively argued that principles of equity warranted disregarding the distinction between their direct and derivative claims. Although the court acknowledged that there was some authority under the *Cencom* and the *Anglo American* limited partnership cases that principles of equity could warrant disregarding a distinction between direct and derivative claims, the court found that those cases involved unique circumstances and there were no similar circumstances in the present case that warranted disregarding the derivative nature of plaintiffs' claims.

The court then discussed defendants' motion to dismiss plaintiffs' claim that defendants breached the partnership agreement of the Fund and the PPM because they allegedly failed to analyze, evaluate and monitor the Madoff-related investments in any manner whatsoever and failed to perform any meaningful due diligence or to monitor the Hedge Fund's investments. The court looked to the PPM, which expressly provided that the General Partner would monitor the Fund's investments and evaluate information regarding the personnel, history and background of professional investment management firms in selecting managers of the Fund. The court also assessed the partnership agreement of the Fund, which provided that the General Partner and its affiliates were not obligated to do or perform any act or thing in connection with the business of the Fund not expressly set forth in the partnership agreement of the Fund. The court found that this provision conflicted with another provision in the partnership agreement of the Fund, which provided that the PPM did not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading. In applying well settled Delaware principles of contract interpretation, the court found that because of this conflict, the partnership agreement of the Fund was ambiguous as to whether it incorporated the promises made in the PPM that were allegedly breached. Because any ambiguity must be resolved in favor of the nonmoving party, the court denied defendants' motion to dismiss the breach of contract claim.

With respect to plaintiffs' claim that defendants' breached the implied covenant of good faith and fair dealing, the court stated that plaintiffs' must have alleged (1) a specific obligation implied in the partnership agreement of the Fund, (2) a breach of that obligation, and (3) resulting damages.

Plaintiffs alleged that the General Partner had an obligation to refrain from unreasonable conduct and had an implied contractual obligation to collect, analyze and evaluate information when selecting investment managers and to monitor their performance after any such selection. The court held that this allegation was conclusory and did not amount to pleading a specific implied contractual obligation as required to survive a motion to dismiss. Accordingly, the court granted defendants' motion to dismiss this claim.

Finally, the court addressed plaintiffs' claim that the Parent aided and abetted the General Partner's alleged breach of fiduciary duty. To make a valid aiding and abetting claim, the court indicated that plaintiffs must demonstrate: (1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) that damages to plaintiffs resulted from the concerted action of the fiduciary and the nonfiduciary. The court noted that the General Partner undoubtedly owed fiduciary duties to the limited partners of the Fund. With respect to the third element, the court indicated that, under Delaware law, the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal. In this case, the court found that the General Partner could be considered the Parent's agent, and the General Partner's knowledge could be imputed to the Parent. Thus, the court found that the third element was satisfied. The court did not address the fourth element and denied defendants' motion to dismiss this claim.

6. *In re Encore Energy Partners LP Unitholder Litig.*, C.A. No. 6347-VCP (Del. Ch. Aug. 31, 2012)

This case involved a class action by former unitholders of Encore Energy Partners LP (the "Partnership") who challenged the use of a "Special Approval" process that was employed by the general partner of the Partnership to approve a conflict transaction pursuant to which Vanguard Natural Resources, LLC ("Vanguard") acquired all of the outstanding common units of the Partnership in a unit-for-unit exchange (the "Merger"), where Vanguard's indirect subsidiary was the Partnership's general partner. Plaintiffs argued that the general partner of the Partnership, its board of directors and Vanguard breached their duties under the partnership agreement by proposing, approving and consummating the Merger. The defendants moved to dismiss.

In its analysis, the court first addressed what duties were owed by the defendants. The court referred to the partnership agreement of the Partnership, which essentially provided that none of the defendants had any duties or liabilities, including fiduciary duties, to the Partnership or any limited partner except as expressly set forth in the partnership agreement. The partnership agreement expressly provided that any actions taken by the general partner or any of its affiliates shall be made in "good faith." Thus, the court found that the defendants owed a contractual duty of good faith. However, the court also noted a specific mechanism in the partnership agreement for resolution of conflict transactions, which provided in relevant part that in the event there was a potential conflict of interest, any course of action by the general partner or its affiliates would be permitted and deemed approved by all partners, and would not constitute a breach of the partnership agreement or of any duty stated or implied by law or equity, if the course of action in respect of such conflict of interest was approved by "Special Approval." "Special Approval" was defined in the partnership agreement as "approval by a majority of the members of the Conflicts Committee acting in good faith." In turn, "good faith" was defined to require that the person taking the action "believe that the determination or other action is in the best interests of the Partnership." Based on prior cases, the court interpreted this language as requiring plaintiffs to allege facts from which one could reasonably infer that the defendants subjectively believed that they were acting against the Partnership's interests. The court held that because the alleged wrongdoing related to the conflicted transaction—the Merger—and the partnership agreement provided a mechanism for approving a conflicted transaction, a determination that the Merger received valid Special Approval would compel a finding that no defendant breached the partnership agreement. Thus, the relevant question was whether the conflicts committed approved the Merger acting in subjective good faith.

The complaint alleged facts essentially in support of an argument that the conflicts committee was an ineffectual negotiator and did not get a good price for the units in the Partnership. Although the court acknowledged that the complaint alleged that the conflicts committee ran a "shoddy negotiation process," the court found that it did not allege sufficient facts from which one could reasonably infer that the conflicts committee subjectively believed they were acting contrary to the Partnership's interests by approving the Merger. In its finding, the court highlighted that the conflicts committee retained and relied on the advice of independent legal counsel and a competent financial advisor before approving the final merger agreement. On these basis, the court found that the approval by the conflicts committee of the Merger satisfied the definition of "good faith," thus immunizing the defendants' actions from challenge under the terms of the partnership agreement.

The court next turned to plaintiffs' claim that the defendants violated the implied covenant and that plaintiffs' allegations of ineffective bargaining demonstrated that the conflicts committee did not exercise its discretion in good faith in conducting negotiations with Vanguard. The court noted that although the plaintiffs were correct that the defendants' discretionary use of Special Approval implicated the implied covenant, the plaintiffs incorrectly suggested that the implied covenant required a duty of objective fairness or effectiveness. The court indicated that, to have a successful claim, the plaintiffs would have to demonstrate that the allegedly "feckless" negotiations frustrated the fruits of the bargain that the parties reasonably expected. The court held that it could not infer from the terms of the partnership agreement that the use of Special Approval would be conditioned on achieving an objectively "fair and reasonable" value for plaintiffs' units.

The court also found an alternative and independent reason why the plaintiffs did not state a valid claim under the implied covenant. The court noted that the implied covenant would only apply to the general partner of the Partnership, which was the party to the agreement, and the general partner was given an express right under the partnership agreement to rely on the opinions of investment bankers. The court held that it could reasonably be inferred that the general partner relied on the fairness opinion provided by the investment bankers engaged by the conflict committee.

7. *Brinckerhoff v. Enbridge Energy Co., Inc.*, C.A. No. 5526-VCN (Del. Ch. Sept. 30, 2011) and (Del. Ch. May 25, 2012)

This case involved a challenge to a transaction between Enbridge Energy Partners, L.P. (the "Partnership") and Enbridge, Inc. ("Enbridge"), the entity that controlled the Partnership's general partner. The case was before the Court of Chancery on a motion to dismiss and, finding that the partnership agreement of the Partnership effectively shielded the general partner and its affiliates from liability for an interested transaction as long as they acted in good faith and finding that plaintiff had not alleged actions constituting bad faith on the part of any defendant, the court dismissed all of the claims. The challenged transaction was a joint venture between the Partnership and Enbridge involving the construction and operation of a pipeline which the Partnership had originally conceived. After the Partnership had taken various steps to advance the project including negotiating and obtaining permits and tariff agreements, Enbridge approached the Partnership to discuss obtaining an interest in the project through a joint venture. Enbridge proposed that it would contribute to the cost of the project and that the Partnership and Enbridge would share in the project's profits based solely upon their relative capital contributions. Thus, under Enbridge's proposal, the Partnership would not receive any compensation in return for already owning the project, the work it had already put into it and the money it had already expended. Enbridge suggested that it would contribute 75% of the cost of the project and the Partnership would contribute 25% and so the project would be owned in these proportions. After receiving this proposal, the Partnership's general partner formed a special committee consisting of three independent members of the general partner's board. The special committee was asked to determine whether the joint venture was "fair and reasonable to the Partnership and its unitholders" and to make a recommendation to the board on behalf of the Partnership with respect to the proposed transaction. The special committee hired legal and financial advisors. Its banker's retainer letter stated that it was retained to render an opinion as to whether the terms of the joint venture were "representative of an arm's length transaction." The special committee met several times and was advised by its banker that the terms of the joint venture were "representative, in all material respects, of those that would have been obtained by the Partnership in an arm's length transaction." The banker also opined that the Partnership should retain as much equity in the project as possible. In light of the banker's findings, the special committee approved the joint venture agreement, provided that the Partnership would hold a 1/3 equity stake rather than 25%. Plaintiff challenged the transaction on four counts, both derivatively and directly. Count one alleged that defendants breached their express and implied duties under the partnership agreement by causing the Partnership to enter into an agreement that was financially unfair to the Partnership. Count two alleged that defendants other than the general partner aided and abetted the general partner's breach of its duties. Count three alleged that defendants breached the implied covenant of good faith and fair dealing, and Count four alleged that two defendants, to the extent they were not liable for breaching their duties under the partnership agreement, tortiously interfered with the partnership agreement and were thereby unjustly enriched. Defendants responded that the partnership agreement expressly permitted the general partner to enter into a transaction with a related entity, such as Enbridge, as long as the terms of that transaction were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties." Defendants argued that the joint venture met that standard, that their investment banker opined that the joint venture was representative of an arm's length transaction and further that under the partnership agreement, the general partner was allowed to rely conclusively on the banker's opinion. Defendants further argued that there was no cause of action for aiding and abetting a breach of contractually imposed duties, that the implied covenant of good faith and fair dealing was inapplicable because the partnership agreement expressly addressed the duties of defendants and, finally, since none of defendants breached their duties under the partnership agreement, there could be no tortious interference claim. In its analysis, the court first concluded that the *Tooley* test should apply to a partnership claim and that under that test, because any benefit would go to the partnership rather than to the individual partners, the claims were derivative in nature. However, the court also concluded that a demand would have been futile since a majority of the general partner's board was not independent. Turning to the specific claims, the court first held that defendant who supplied all the employees to the general partner and the Partnership but had no control over the general partner or the Partnership owed no fiduciary duties to those entities. The court therefore dismissed all claims against that entity. In analyzing the remaining claims, the court focused on the provisions of the partnership agreement that permitted related party transactions as long as they were on terms "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties," that provided that no Indemnitee (which included all defendants) would have any liability to any partner or other person as a result of any act or omission if such Indemnitee acted in good faith and that authorized the general partner to rely on investment bankers as to matters that the general partner reasonably believed to be within their professional or expert competence and provided that any action taken by the general partner in reliance on their advice would be conclusively presumed to have been done in good faith. Based on these provisions and the facts alleged, the court concluded that plaintiff had not alleged facts indicating bad faith. The general partner was protected through its good faith reliance on the investment banker's finding. Similarly, the court also found plaintiff had failed to plead facts indicating that the general partner's board acted in bad faith. They established an independent committee, hired independent counsel and bankers, met several times and negotiated a higher percentage participation for the Partnership than that which was originally offered.

With regard to plaintiffs' challenge to the work of the banker, the court noted that the valuation methodology and comparable transaction analyses that an investment banker undertakes are properly within the discretion of the banker. The court also noted that at the time of the joint venture it would be reasonable for the general partner's board to conclude that it did not want to put a large majority of the Partnership's capital into a single venture and thus it was better to participate in the project with Enbridge. With regard to Enbridge, the court held that it could not have been said to have negotiated in bad faith since it negotiated with the general partner's special committee. The court then noted that claims for aiding and abetting, as well as tortious interference, require an underlying breach. As there was none, these claims were also dismissed. Finally, the court rejected plaintiff's implied covenant claim finding that, even if it were possible to plead breach of the implied covenant where a plaintiff had failed to plead a bad faith claim, plaintiff had failed to do so here. In this regard, the court noted that the implied covenant addresses "only events that could not reasonably have been anticipated at the time the parties contracted." In contrast, the court found that the parties to the partnership agreement thought about related party transactions and the general partner's reliance upon investment banker opinions and explicitly addressed those issues.

On remand by order of the Delaware Supreme Court to determine the sufficiency of the plaintiff's claims for reformation or rescission on a motion to dismiss, the Court of Chancery first concluded that the plaintiff's request for reformation or rescission was waived because the plaintiff failed to raise any arguments with respect to either remedy in his briefs or at oral arguments. Nevertheless, because of uncertainty surrounding the scope of the remand order, the Court of Chancery also addressed the substance of the plaintiff's claim for reformation or rescission.

Turning to the plaintiff's claim for reformation, the court found that the plaintiff stated a claim that was potentially remediable through reformation. The partnership agreement permitted conflicted transactions that were "fair and reasonable" to the Partnership, and the partnership agreement deemed transactions that were "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties" to be fair and reasonable. The court noted that it has previously interpreted similar language to require something akin, if not equivalent to, entire fairness review. Because the entire fairness standard cannot be satisfied by reliance on an investment banker's opinion on a motion to dismiss, the court concluded that the plaintiff had adequately plead that the joint venture was not fair to the Partnership.

The court noted, however, that the reformation that the plaintiff sought—a reduction in Enbridge's share in the joint venture—was rarely sought and obtained. The court expressed hesitation because, by reducing Enbridge's share in the joint venture, the reformation remedy sought would reduce the cash flow Enbridge would receive and essentially redirect it to the Partnership, a result the court likened to garnishment. Despite its misgivings, the court concluded that because the partnership agreement only provided exculpation against money damages, and because the plaintiff adequately plead entitlement to an equitable remedy, the plaintiff's claim for reformation should survive a motion to dismiss.

Next, the court held that the plaintiff had not stated a claim for rescission. The court noted that the plaintiff made no arguments in favor of rescission and its counsel conceded at oral argument that reformation was the crux of this remand. In addition, the court found that the plaintiff failed to meet its burden of demonstrating that all parties to the transaction could be restored to the positions they occupied prior to the transaction. The plaintiff offered no explanation regarding how the court could rescind a joint venture agreement to construct a pipeline once such construction was complete. The court therefore dismissed the plaintiff's claim for rescission.

8. *Gerber v. Enter. Prods. Holdings, LLC,* C.A. No. 5989-VCN (Del. Ch. Jan. 6, 2012)

Plaintiff brought a purported class action challenging two transactions: the sale by Enterprise GP Holdings, L.P. ("EPE") of Texas Eastern Products Pipeline Company, LLC ("TEPPCO GP") to Enterprise Products Partners, L.P. ("Enterprise Products") (the "2009 Sale") and the merger of EPE into a wholly owned subsidiary of Enterprise Products (the "Merger"). Plaintiff alleged that in 2007, EPE had purchased TEPPCO GP for approximately $1.9 billion (the "2007 Purchase") and that under the terms of the 2009 Sale EPE received approximately $100 million in compensation. In accordance with the procedure in the EPA partnership agreement, the 2009 Sale had been submitted to the Audit, Conflict and Governance Committee (the "ACG Committee") of EPE's general partner ("EPE GP"). In connection with its review of the 2009 Sale, the ACG Committee hired Morgan Stanley & Co. who opined that the consideration to be paid pursuant to the 2009 Sale was fair from a financial point of view to EPE and to the public limited partners of EPE. The ACG Committee approved the 2009 Sale and recommended it to the full Board which subsequently approved the 2009 Sale. Morgan Stanley was also hired by the ACG Committee to render an opinion on the Merger and they opined that the Merger exchange ratio was fair from a financial point of view. In his complaint, plaintiff alleged that defendants breached their express and implied duties under EPE's partnership agreement by causing EPE to undertake the 2009 Sale and also by causing EPE to enter into the Merger without valuing legal claims relating to the 2007 Purchase or the 2009 Sale (the "Claims"). Plaintiff also alleged that various controlling persons of Enterprise Products tortiously interfered with the EPE partnership agreement by causing EPE to undertake the 2009 Sale and the Merger and that those defendants were thereby unjustly enriched. In addition, plaintiff alleged that all defendants other than EPE GP aided and abetted the breaches of express and implied duties by EPE GP. Defendants moved to dismiss all claims. The court began by considering whether certain of plaintiff's claims were direct or derivative, noting that claims that an entity has entered into a transaction that was essentially "a bad deal" are typically derivative and also that a merger will typically deprive the merged entity's former equity holders of standing to pursue derivative claims. The court recognized, however, that when a principal purpose of a merger is the inequitable termination of derivative claims, those claims may be brought as direct claims following consummation of the merger, and the court held that plaintiff had met its burden of pleading facts from which the court could infer that a principal purpose of the Merger was the termination of the Claims. The court then turned to defendants' motion to dismiss all claims for failure to state a claim. In analyzing defendants' motion to dismiss, the court began with the proposition that absent contractual modification, a general partner and certain persons affiliated with the general partner such as the general partner's board of directors and controller each owe fiduciary duties to the limited partnership. The court noted, however, that the EPE partnership agreement modified the fiduciary duties of EPE GP and its affiliates. Specifically, the partnership agreement provided that if a conflict transaction were approved by the ACG Committee ("Special Approval"), then it would be deemed approved by all partners and not constitute a breach of the partnership agreement or any law. Based on this provision, the court held that plaintiff's first count did not state a claim for breach of an express fiduciary duty against any defendant. However, the court also noted that the implied covenant of good faith and fair dealing constrained the Special Approval process. Under the implied covenant, the court found that EPE GP was required to act in good faith if it exercised its discretionary authority to use the Special Approval process to take advantage of the contractual duty limitation provided by the partnership agreement, and the court found that the complaint could fairly be read to allege that EPE GP acted in bad faith when it choose to use the Special Approval process. However, the court found that in connection with the 2009 Sale the ACG Committee had received a fairness opinion from Morgan Stanley and that EPE GP had relied on the Morgan Stanley fairness opinion in deciding whether to use the Special Approval process. The court also found that the EPE partnership agreement provided that when EPE GP relied on an expert report such as the Morgan Stanley fairness opinion, it was conclusively presumed to have acted in good faith. The court held that a plaintiff could not plead that a defendant has breached the implied covenant when defendant was conclusively presumed by the terms of a contract to have acted in good faith. The court therefore dismissed the claims relating to the 2009 Sale. For the same reason, it dismissed the claims relating to the Merger, which had also received Special Approval in reliance upon a Morgan Stanley fairness opinion. Finally, because it found no underlying breach, it dismissed the secondary liability claims as well resulting in the dismissal of all of plaintiff's claims.

9. *Lonergan v. EPE Holdings LLC*, C.A. No. 5856-VCL (Del. Ch. Oct. 11, 2010)

Plaintiff, a holder of LP units in defendant Enterprise GP Holdings, L.P. ("Holdings"), sought to expedite the hearing on his application for a preliminary injunction to enjoin the merger of Holdings with a subsidiary of Enterprise Products Partners, L.P. ("EPD"). The court noted that a motion to expedite should only be granted if the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra costs of an expedited preliminary injunction proceeding. After reviewing each of the plaintiff's claims, the court concluded that the complaint failed to assert a sufficiently colorable claim.

EPD is, and Holdings was, a publicly-traded Delaware master limited partnership. Holdings controlled EPD through its one-hundred percent ownership of EPD's general partner. Distributions to Holdings unitholders derived primarily from Holdings' ownership of all the incentive distribution rights ("IDRs") in EPD. IDRs are a form of pay for performance whereby the percentage of cash received by holders of IDRs increases as distributions from the partnership increase. IDRs' claim to partnership cash flow, however, can reduce the trading price of LP units and thereby make such LP units a less attractive source of new money or acquisition currency.

To address the negative effect of the IDRs and implications arising from proposed federal tax legislation, EPD proposed the merger to the Holdings Audit, Conflicts and Governance Committee (the "Audit Committee"). As a result of the merger, Holdings LP units would be converted into EPD LP units, the IDRs would be cancelled, and control of EPD would remain essentially unchanged, with Holdings' general partner becoming general partner of EPD. The Audit Committee had full power to negotiate and accept or reject any deal. Over the course of two months of negotiations, the initial exchange ratio of 1.377 EPD units for each Holdings unit rose to 1.50. As part of the merger, EPCO, an affiliated entity and beneficial owner of seventy-six percent of Holdings LP units and twenty-seven percent of EPD LP units, also waived a percentage of distributions to which it was entitled for a period of five years following consummation of the transaction. After the Audit Committee's financial advisor opined that the transaction was fair from a financial perspective, the Audit Committee gave "Special Approval" for purposes of the Holdings LP agreement.

The court found that the Holdings LP agreement eliminated all fiduciary duties leaving only the contractual standards set forth therein and the implied covenant of good faith and fair dealing. The court also found that the complaint did not identify any provision of the Holdings LP agreement that the merger might violate, but rather relied solely on the implied covenant of good faith and fair dealing. Plaintiff's claims fell essentially into two categories: (1) Revlon-type claims alleging failure to seek an alternative transaction; and (2) Lynch-type claims insisting on majority-of-the-minority approval of the merger. But the court found that "plaintiff [sought] to cloak familiar breach of fiduciary duty theories in the guise of the implied covenant of good faith and fair dealing." The court rejected plaintiff's attempt to do so, concluding that "[t]o use the implied covenant to replicate fiduciary review would vitiate the limited reach of the concept of the implied duty of good faith and fair dealing."

The court further noted that section 7.9(a) of the Holdings LP agreement established "four alternative standards of review" to permit and approve conflict of interest transactions. Because the Holdings LP agreement set forth two other alternative methods of approval in addition to provisions contemplating majority-of-the-minority approval and Revlon best-offer-reasonably-available standards of review, the court concluded section 7.9 disposed of plaintiff's claim that the implied covenant of good faith and fair dealing required compliance with either Revlon or Lynch.

Next, the court addressed plaintiff's claim that the implied covenant constrained the Special Approval process of the Audit Committee. To state a colorable claim under this theory, the court noted, the "plaintiff would need to allege particularized facts from which this Court could infer that the members of the Audit Committee acted arbitrarily or in bad faith." The court concluded plaintiff failed to do so. First, plaintiff did not challenge the disinterestedness or independence of the Audit Committee members. Second, the deal process, the terms negotiated by the Audit Committee, and the financial analyses conducted by the Audit Committee's financial advisor did not indicate arbitrary or bad faith conduct. Finally, section 7.10(b) of the Holdings LP agreement "conclusively presumed" action in reliance on an expert opinion, as was the case here, "to have been done . . . in good faith."

Finally, plaintiff also alleged defendants "violated the implied covenant of good faith and fair dealing by failing to disclose all material information reasonably available in connection with the LP unitholder vote." Ordinarily a general partner of a limited partnership owes fiduciary duties that include a duty of disclosure. Because the Holdings LP agreement eliminated all fiduciary duties, the court found that no fiduciary duty of disclosure remained. The complaint did not identify a contractual duty to disclose material information in connection with the merger, and the court refused to infer a disclosure obligation under the implied covenant of good faith and fair dealing. The court also found nothing inequitable about the level of disclosure provided (a meeting notice and a copy or summary of the merger agreement) and therefore concluded that this was not a situation where "compelling fairness" required it to invoke the implied covenant.

V. Good Faith/Bad Faith

1. *Allen v. El Paso Pipeline GP Co., L.L.C.*, C.A. No. 7520-VCL (Del. Ch. June 20, 2014)

This decision follows the Court of Chancery's prior decision granting plaintiffs' motion to certify a class consisting of all the limited partners (the "Unitholders") of El Paso Pipeline Partners, L.P., a publicly traded Delaware master limited partnership (the "Partnership"), wherein the court also found that plaintiffs' claims were not exclusively derivative and could support a direct characterization.

After completion of discovery, the court heard this case on defendants' motion for summary judgment. Plaintiffs had challenged whether a "drop-down" transaction (the "Drop-Down") between the Partnership and El Paso Corporation, the parent of the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"), violated the express terms of the Partnership's limited partnership agreement (the "LPA") and the implied covenant of good faith and fair dealing, or in the alternative, aided and abetted those breaches. The crux of plaintiffs' argument was that although the LPA eliminated all fiduciary duties of the General Partner and replaced them with contractual duties, the General Partner breached the LPA by not considering the best interests of the Unitholders when approving the Drop-Down; specifically, plaintiffs alleged that certain incentive distribution rights (the "IDRs") owned by the General Partner caused the Drop-Down to be economically dilutive to Unitholders. Thus, the court analyzed whether the manner by which the Drop-Down was approved was either an express breach of the LPA or a breach of the implied covenant of good faith and fair dealing.

In basic terms, the General Partner's contractual duties were divided into three categories: when it was acting in its individual capacity, when it was acting as general partner in a non-conflict of interest transaction and when it was acting as general partner in a conflict of interest transaction. When in a conflicted transaction, the General Partner had several options by which such a conflicted transaction could be approved without breaching the LPA, one of which was by special approval. Special approval could be obtained by a majority vote of the members of a conflicts committee—in this case, three outside members of the board of directors of the General Partner—acting in good faith. The LPA defined "good faith" for such purposes as the members' subjective belief that the conflict of interest transaction was in the best interest of the Partnership. The court noted, however, that it could only infer a party's subjective intent from external indications and, therefore, objective factors necessarily informed the court's analysis. With respect to the best interest prong of this contractual good faith standard, the court found that the LPA only required the conflicts committee to believe subjectively that the Drop-Down was in the best interest of the Partnership—leaving the conflicts committee free to consider the full universe of entity constituencies and not consider only the equity owners of the Partnership (which would be the case if traditional fiduciary duties applied).

The court went on to grant summary judgment on plaintiffs' LPA breach claim even under the plaintiff-friendly summary judgment standard of review, for the following reasons: (i) plaintiffs had conceded that the Partnership was not harmed by, or paid an excessive price for, the Drop-Down; (ii) all members of the conflicts committee testified that they subjectively believed the Drop-Down benefited the Partnership as an entity; (iii) the conflicts committee met formally six times and had consulted with financial and legal advisors familiar with the industry and the Partnership (with the financial advisor present at each meeting and presenting at three of the meetings); and (iv) the conflicts committee investigated the IDRs as they related to the Drop-Down and still determined that the Drop-Down was in the best interest of the Partnership, and ultimately conferred some benefit to the Unitholders (although not as great a benefit as received by the General Partner). The court noted that, at best, the evidence supported an inference that the conflicts committee performed its job poorly, not that it did not subjectively believe that the Drop-Down was in the best interest of the Partnership. Accordingly, there was no breach of the LPA.

Next, the court addressed plaintiffs' claim that the General Partner breached the implied covenant of good faith and fair dealing in approving the Drop-Down because the conflicts committee relied on a fairness opinion that did not value the consideration Unitholders actually received. The court began its analysis by explaining that the implied covenant does not create a free-floating duty of good faith, but is a cautiously applied gap-filler to ensure parties' reasonable expectations are fulfilled. In applying the implied covenant, a court must follow a three-step analysis. First, contract construction: the court must examine the contract to determine whether a gap exists and if the contract speaks directly on an issue, there is no gap. Second, even if a gap exists, the court should avoid filling intentional gaps (i.e., a term that the parties rejected ex ante or after negotiations decided should be omitted) and only fill unintentional gaps (i.e., a term that parties failed to consider during negotiations or was so fundamental did not need to be expressed) so as to avoid rewriting a contract that a party deems unfair in hindsight. Third, if the gap should be filled (a cautious enterprise that should be rarely used) the court must look to the past to determine what the parties would have agreed to themselves had they considered the issue in their original bargaining position, not what the court deems to be fair at the time of the wrong.

Here, plaintiffs' implied covenant claim relied heavily on Gerber v. Enter. Prods. Hldgs., LLC, a Delaware Supreme Court case. In brief, the Gerber court faced a situation where a master limited partnership agreement replaced traditional fiduciary duties with contractual duties and limited partners challenged a general partner's approval of a conflicted transaction. Notably, the limited partnership agreement provided that the general partner would be conclusively presumed to have acted in good faith if it relied on a fairness opinion from a financial advisor without detailing what such fairness opinion should include. The general partner relied on a fairness opinion with respect to the challenged transaction, however, the fairness opinion failed to fully evaluate important aspects of the transaction and their effects on the consideration received by limited partners. The Supreme Court held that had the parties at the time of contracting addressed the specific standards required of a fairness opinion they would have agreed that any fairness opinion needed to fully evaluate whether the consideration was fair to the limited partners. Thus, the general partner was not entitled to the conclusive presumption of good faith because its reliance on the inadequate fairness opinion violated the implied covenant.

Plaintiffs' contended that, similarly, the fairness opinion obtained by the conflicts committee here did not consider all the elements of the consideration from the standpoint of the Unitholders because the dilutive effects of the IDRs were omitted from the financial advisor's fairness opinion calculus. The court, however, rejected this contention and found that Gerber did not control this case because there was no such conclusive presumption requirement for the Drop-Down approval; rather, what was required under the LPA was approval by the conflicts committee in their subjective belief that the Drop-Down was in the best interest of the Partnership.

The court began its implied covenant analysis with the contract construction step, which is where the court also concluded its analysis because the special approval process had no fairness opinion related gap, as was the case in Gerber. In so ruling, the court found that deploying the implied covenant to impose on the parties a fairness opinion requirement similar to Gerber would fundamentally rewrite the LPA by changing the conflict committee's inquiry from best interests of the Partnership to fairness to the Unitholders and expanding the scope of judicial review from subjective good faith of the conflicts committee to compliance with an obligation to obtain a fairness opinion that would satisfy a court after the fact. Because the LPA's special approval process did not require a fairness opinion there was no gap to fill.

Moreover, for illustrative purposes only, the court proceeded through the next steps of the implied covenant analysis and considered what the parties would have agreed to at the time of contracting. Examining the LPA in terms of the Partnership's prospectus from its initial public offering the court concluded that the drafters of the LPA anticipated numerous conflict of interest transactions and created a dispute resolution method that would limit potential litigation and after-the-fact judicial review. Therefore, assuming the question had been raised during negotiations whether the Unitholders should have the ability to challenge the special approval process by litigating whether the conflicts committee obtained a fairness opinion that satisfied a test of reasonableness, met certain requirements, or otherwise complied with some form of objective standard, the record before the court suggested that such a provision would have been rejected. That being the case, summary judgment was granted for defendants' on the implied covenant claim.

Finally, the court granted summary judgment with respect to plaintiffs' aiding and abetting claim. The court held that since the LPA eliminated all fiduciary duties this was a pure breach of contract claim and the general rule in Delaware is that there is no claim available for aiding and abetting claim a breach of contract. In sum, defendants' motion for summary judgment was granted in toto.

2. *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, No. 547, 2012 (Del. Aug. 26, 2013); *Policemen's Annuity & Benefit Fund of Chicago v. DV Realty Advisors LLC*, C.A. No. 7204-VCN (Del. Ch. Nov. 27, 2013)

In an appeal before the Delaware Supreme Court of a decision by the Court of Chancery validating the removal of the general partner of a Delaware limited partnership (the "Partnership"), the general partner raised two issues: that the Court of Chancery improperly found that the limited partners (the "LPs") believed in good faith that removing the general partner was in the best interests of the Partnership and that certain "red flags" raised by an advisor to the Partnership did not sufficiently support the court's finding that the LPs removed the general partner in good faith. The Delaware Supreme Court affirmed the Court of Chancery's judgment.

The Supreme Court initially stated that reviewing a conclusion of good faith involved both questions of law and fact—the ultimate determination is one of law, while the basis for that determination is factual and must be clearly erroneous to be overturned. In analyzing the definition of good faith, the Supreme Court stated that the term "good faith" was undefined; however, it had never held that the UCC definition of good faith, applied in this case by the Court of Chancery below, applied to limited partnership agreements ("LPAs"). Instead, the Supreme Court held that the application of the definition of good faith utilized in *Brinckerhoff v. Enbridge Energy Company, Inc.* was appropriate in this case. *Brinckerhoff* stated that actions were not taken in good faith if they were "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."

In this case, the partnership agreement required the LPs to determine, in good faith, that removing the general partner was "necessary in the best interest of the [Partnership]." In addressing the first issue, the Supreme Court found the record showed that the general partner repeatedly breached its contractual obligations under the partnership agreement to deliver timely audited financial statements. Therefore, the Supreme Court found that the Court of Chancery was correct in determining that this failure by the general partner provided the LPs with a good faith belief that it was necessary in the best interest of the Partnership to remove the general partner as general partner. However, because the good faith standard in the partnership agreement was "purely subjective," the Supreme Court stated that the Court of Chancery's determination that the standard included elements of objectivity was incorrect. This incorrect determination, however, did not change the outcome. The Supreme Court did not address the second issue because it found that the LPs had a sufficient good faith basis for removing the general partner based on its failure to delivery timely audited financial statements.

In a follow-on decision, the Court of Chancery was presented with the question of whether the general partner became a limited partner of the Partnership upon its removal or, alternatively, retained only an economic interest in the Partnership. In addressing this issue, the court first noted that under DRULPA, unless a partnership agreement provides otherwise, a person may be admitted to a partnership as a limited partner only upon the consent of all of the limited partners. Because none of the limited partners consented to the general partner being admitted as a limited partner upon its removal as general partner, the court found that there was no statutory basis for the former general partner's position that it became a limited partner upon its removal.

Turning to the LPA, the court considered the removal provisions which provided that in the event the general partner was removed, the general partner would retain its capital account with half of such capital account to be distributed within thirty days of removal and the other half to be maintained on the same basis as any other limited partner's capital account. The court found that, for such a major issue in partnership governance, these provisions could not be read to provide that the general partner would become a limited partner upon its removal. Thus, the court held that upon its removal the general partner had only an economic interest in the Partnership. In its holding, the court noted that its interpretation of the LPA was consistent with revenue laws pursuant to which a former partner would be treated as a partner for tax purposes.

The court also addressed whether the proper date for valuing the removed general partner's capital account should be the first valuation date following the general partner's removal or, as argued by the removed general partner, a date that preceded the general partner's removal. The LPA did not provide any express guidance on the timing of valuation, and the court found that the focus must be on reasonableness and that the first valuation date following removal more accurately reflected the economic realities at the time of removal. The removed general partner further sought to add to its capital account a loan for which it was a co-borrower with the Partnership and for a guarantee provided by a principal of the removed general partner. The LPA provided that the capital account of a partner would be increased by the amount of any of the liabilities of the Partnership that were assumed by a partner. Because the removed general partner was a co-borrower on the loan and not ultimately liable (it was entitled to contribution from the Partnership) and because the guarantee was not made by the general partner itself, neither the loan nor the guarantee was determined to have increased the removed general partner's capital account.

3. *Allen v. Encore Energy Partners, L.P.*, C.A. No. 534, 2012 (Del. July 22, 2013)

This was an appeal of the Court of Chancery's dismissal of a class action complaint by former unitholders of Encore Energy Partners LP (the "Partnership") who challenged the use of a "Special Approval" process that was employed by the general partner of the Partnership to approve a conflict transaction pursuant to which Vanguard Natural Resources, LLC ("Vanguard") acquired all of the outstanding common units of the Partnership in a unit-for-unit exchange (the "Merger"), where Vanguard's indirect subsidiary was the Partnership's general partner. Plaintiffs argued that the general partner of the Partnership, its board of directors and Vanguard (collectively, the "Defendants") breached their duties under the partnership agreement by proposing, approving and consummating the Merger. The Delaware Supreme Court affirmed the Court of Chancery's decision.

In its analysis, the court first addressed what duties were owed by the Defendants. Like the Court of Chancery, the court found that the partnership agreement eliminated all fiduciary duties of the board members of the general partner and Vanguard except as expressly set forth in the partnership agreement. However, the partnership agreement did establish a contractual duty to act in good faith when the general partner or its affiliates made a determination or took an action. The court also referred to a provision in the partnership agreement requiring the general partner to consent before the Partnership could merge with another entity and concluded that when determining to consent to a merger, the general partner and its affiliates must act in accordance with this contractual duty of good faith. "Good faith" was defined as a "belie[f] that the determination or other action is in the best interests of the Partnership." However, the partnership agreement also provided a "safe harbor" for resolution of conflict transactions, which essentially provided that action taken by the general partner or its affiliates would not constitute a breach of the partnership agreement or of any duty if it received "Special Approval," which consisted of approval by a majority of the members of the Conflicts Committee acting in good faith. Further, if "Special Approval" were sought, the partnership agreement provided that "it shall be presumed that, in making its decision, the Conflicts

Committee acted in good faith . . . [and] the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption . . . .”

The court then turned to the question of whether plaintiff sufficiently pled that the Defendants breached their contractual duty of good faith. The court applied well-settled contract interpretation principles to give meaning to a contractual duty requiring a “belie[f] that the determination or other action is in the best interests of the Partnership.” According to *Black’s Law Dictionary*, the court noted that “believe” means to “feel certain about the truth of; to accept as true.” The court contrasted this with “reasonably believe” which was defined therein to mean to believe “under circumstances in which a reasonable person would believe.” Because some partnership agreements use “believe” while others use “reasonably believe,” the court discerned that the parties intentionally distinguished these two standards. Therefore, the court confirmed the Court of Chancery’s decision in finding that this required subjective belief.

The court then addressed the Court of Chancery’s holding that plaintiff must have shown that the Defendants subjectively believed that they were acting *against* the Partnership’s interests to adequately plead a breach of the contractual duty to act in good faith. Plaintiff argued that, to the contrary, it is possible for a person to breach a subjective good faith standard without subjectively believing that his actions were *against* the best interests of the Partnership. The court essentially agreed with plaintiff by finding that it is possible that a defendant may not subjectively believe that an action is in the partnership’s best interests, but nonetheless does not subjectively believe that the action is against the partnership’s best interests. The court noted that a person who “intentionally fails to act in the face of a known duty to act” neither subjectively believes his decision is in the best interests of the partnership nor subjectively believes he is affirmatively acting against the best interests of the partnership. However, the court continued, to intentionally fail to act in the face of a known duty, there must be a “duty” in the first place and the partnership agreement of the Partnership replaced common law fiduciary duties with a contractual duty of subjective good faith. Therefore, to plead a breach of the contractual duty of subjective good faith under the partnership agreement of the Partnership, the court indicated that plaintiff had to plead facts that would enable a court reasonably to infer that the Conflicts Committee members did not subjectively believe that the Merger was in the Partnership’s best interests, which could be accomplished by showing either that they believed they were acting *against* the Partnership’s best interests when approving the Merger or that they consciously disregarded their duty to form a subjective belief that the merger was in the Partnership’s best interests.

With regard to how a plaintiff could plead a defendant’s state of mind, the court determined that the Chancery Court was not correct in finding that the objective reasonableness of the Conflicts Committee’s determination was not relevant to a subjective standard. The court cited to prior case law in finding that some actions may objectively be so egregiously unreasonable that they seem essentially inexplicable on any ground other than subjective bad faith. The court highlighted that it may also be reasonable to infer subjective bad faith in less egregious transactions when a plaintiff alleges objective facts indicating that a transaction was not in the best interests of the partnership and that the directors knew of those facts. Although distinct from an objective “reasonable person” standard, the court found that objective factors may inform an analysis of a defendant’s subjective belief to the extent they bear on defendant’s credibility when asserting that belief. In this case, plaintiff merely alleged facts that showed that the Conflicts Committee members may have negotiated poorly and that the counteroffer made by the Conflicts Committee was below the median of the investment banker’s analysis but his claims did not permit a reasonable inference that they subjectively believed they were acting against the Partnership’s best interests. The court also found that the complaint did not allege any facts from which the court could reasonably infer that the Conflicts Committee members consciously disregarded their contractual duty. In this regard, allegations that the Conflicts Committee should have made a higher counteroffer or negotiated better did not support a reasonable inference that they consciously disregarded a duty to form a subjective belief that the transaction was in the Partnership’s best interests.

Finally, the court addressed plaintiff’s claim that obtaining Special Approval could not insulate Vanguard from liability for causing the general partner to depress the value of the units in the Partnership in anticipation of the merger. The court found that plaintiff failed to state a claim against the Defendants because plaintiff’s complaint only stated a single claim relating to the merger—not that these other actions constituted independent breaches.

4. *Gerber v. Enter. Holdings, LLC*, C.A. No. 5989 (Del. June 10, 2013)

This case involved the purchase in 2007 by Enterprise GP Holdings, L.P., a master limited partnership (the "Partnership"), of Texas Eastern Products Pipeline Company, LLC ("Teppco GP"), the general partner of Teppco Partners, LP ("Teppco LP"). In 2009, defendants caused the Partnership to sell Teppco GP to Enterprise Products Partners, L.P. ("Enterprise Products LP") (the "Transaction"), and then later on the same day caused the Partnership to sell Teppco LP to Enterprise Products LP in a separate transaction (the "Teppco LP Sale"). The consideration received by the Partnership for the 2009 Sale was only 9% of the Partnership's original purchase price. In 2010 the Partnership merged with another limited liability company ("MergeCo") and no longer exists (the "2010 Merger").

Plaintiff, a former limited partner of the Partnership and current holder of interests in the parent of MergeCo, challenged the Transaction and the 2010 Merger on behalf of the Partnership as unfair to the Partnership, claiming defendants breached fiduciary duties in approving the Transaction and the 2010 Merger. The limited partnership agreement of the Partnership (the "LPA") eliminated common law fiduciary duties of Enterprise Products Holdings, LLC, the general partner of the Partnership (the "General Partner"), and its board of directors, as permitted by Section 17-1101(d) of DRULPA. Under the LPA, a conflict of interest between the General Partner and the Partnership would be permitted, deemed approved by all partners of the Partnership, and not constitute a breach of the LPA or any duty if the course of action was approved by "Special Approval" of a majority of members of the Partnership's Audit and Conflicts Committee (the "Committee"). The Committee was a committee of the Board of Directors of the General Partner composed of three or more directors meeting the independence, qualification and experience requirements established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by the New York Stock Exchange (the "NYSE"). Further, a provision in the LPA created a "conclusive presumption" that the General Partner acted in "good faith" when acting or not acting in reliance upon an opinion of experts as to matters the General Partner reasonably believed were within the expert's professional or expert competence.

The Court of Chancery held that plaintiff failed to state a claim and granted defendants' motion to dismiss under Rule 12(b)(6). Plaintiff appealed and the Supreme Court of Delaware affirmed in part, reversed in part, and remanded.

The court held that the Court of Chancery erred in determining that the contractual "conclusive presumption" of good faith barred a claim under the implied covenant of good faith and fair dealing. The court adopted the Court of Chancery's reasoning *in ASB Allegiance Real Estate Fund v. Scion Breckenridge Mgmt. Member, LLC*, 50 A.3d 434 (Del. Ch. 2012), holding that the contractual duty of "good faith" looked to the parties as situated at the time of the wrong, while the implied covenant looks to the past and what the parties would have agreed to themselves if they had considered the issue at the time of contracting. Moreover, Section 17-1101(d) of DRULPA explicitly prohibits a provision in a partnership agreement that eliminates the implied covenant.

Because the conclusive presumption only applied to the contractual duty of good faith, and not the implied covenant, the court considered whether plaintiff pled sufficient facts that, if true, would establish the General Partner breached the implied covenant when approving the Transaction or the 2010 Merger. Although the Committee obtained a fairness opinion regarding the Transaction, the opinion did not address whether holders of the Partnership's limited partnership interests received fair consideration for their Teppco GP interest, but instead only addressed the total consideration paid in both the Transaction and the Teppco LP Sale. The court held that, had the parties addressed the issue when contracting, they would have agreed that a fairness opinion must address whether the consideration received specifically for Teppco GP was fair in order for the conclusive presumption to apply to approval of the Transaction.

The General Partner received a fairness opinion for the 2010 Merger as well. However, the Vice Chancellor held that the complaint pled that a principal purpose of the 2010 Merger was to terminate claims relating to the 2007 transaction and the Transaction, and the fairness opinion did not independently value these claims in assessing the fairness of the consideration. The court held that had the parties addressed the issue when contracting, they would have agreed that in order for the conclusive presumption to apply to approval of the 2010 Merger, a fairness opinion must address the value of derivative claims when terminating such claims was a principal purpose of the merger.

Although the conclusive presumption did not apply, if the General Partner satisfied the Special Approval process there would be no breach of the LPA. Because the Committee obtained a fairness opinion for the Transaction and for the 2010 Merger, the contractual duty of good faith was satisfied, but the implied covenant independently applied to the Special Approval process as well. The Court of Chancery held that the complaint sufficiently alleged that the General Partner selected the Special Approval process for the Transaction in bad faith in breach of the implied covenant because plaintiff would not have agreed that the Committee could rely on a flawed fairness opinion to grant Special Approval. That holding stands as law because defendants did not cross-appeal from that determination. The court similarly held that the limited partnership interest holders would not have agreed to allow the General Partner to terminate their interest through a merger intended to eliminate valuable claims without considering the value of such claims. The court held that with respect to both the Transaction and the 2010 Merger, the complaint stated a cognizable claim that the General Partner breached the implied covenant, and the Court of Chancery reversibly erred in dismissing the claims. The court remanded for the Court of Chancery to consider the secondary liability claims for tortious interference with contract rights and aiding and abetting the General Partner's breach of contract.

5. *Norton v. K-Sea Transp. Partners, L.P.*, C.A. No. 6301 (Del. May 28, 2013)

In this decision of the Delaware Supreme Court pertaining to K-Sea Transportation Partners L.P.'s ("K-Sea") merger with Kirby Corporation ("Kirby"), the court addressed the Court of Chancery's grant of defendants' motion to dismiss plaintiffs' complaint, reviewing that decision de novo and affirming it.

At the core of the dispute, plaintiffs alleged that K-Sea's general partner, K-Sea General Partner L.P. ("K-Sea GP"), received excessive consideration for certain incentive distribution rights that it held when K-Sea was purchased by Kirby (the "IDR Payment"), thereby breaching its fiduciary duties under the K-Sea limited partnership agreement (the "LPA"). Plaintiffs did not allege that K-Sea GP breached the implied covenant of good faith and fair dealing.

The court found that the LPA established contractual fiduciary duties regarding mergers that displaced traditional fiduciary duties. K-Sea GP was required to exercise its discretion in approving any proposed merger and could consider any factors it chose in exercising that discretion. Additionally, K-Sea GP was indemnified under the LPA if it acted in "good faith," which, under the LPA, meant that K-Sea GP had to reasonably believe that its actions were in the best interests of, or not inconsistent with, the best interests of K-Sea.

The LPA also provided a permissive "safe harbor" for transactions that included potential conflicts of interest, including a permissive special approval process using a conflicts committee (the "Conflicts Committee") and also indicated that, if K-Sea GP's resolution of a conflict of interest was fair and reasonable or deemed to be fair and reasonable, then the resolution of the conflict would not breach the LPA. Finally, the LPA provided a conclusive presumption that K-Sea GP acted in good faith if it relied on a competent expert's opinion.

The court addressed whether plaintiffs' complaint established a breach of the LPA's "good faith" standard, stating that it would not need to address whether a grant of phantom units to the members of the Conflicts Committee invalidated the permissive special approval process if plaintiffs could not establish a breach of the good faith standard. The court found that the Conflicts Committee obtained an expert's opinion that stated that the consideration paid by Kirby to K-Sea's common unitholders was financially fair. No party challenged the expert's competence. Under the terms of the LPA, the expert was not required to address Kirby's IDR Payment to K-Sea GP separately from whether the overall merger was fair to K-Sea as a whole. The court found that the expert's opinion indirectly addressed the fairness of the IDR Payment by opining that the overall merger consideration paid was financially fair. K-Sea GP relied on that fairness opinion. Therefore, the court found that K-Sea GP was conclusively presumed to have acted in good faith when it approved the merger and sent it to the unitholders for a vote and affirmed the Court of Chancery's grant of defendant's motion to dismiss.

III. LIMITED LIABILITY COMPANIES

A. Fiduciary Duties

1. Fiduciary Duties of Managers and Managing Members

a. *Matthew v. Laudamiel*, C.A. No. 5957-VCN (Del. Ch. Sept. 28, 2015)

Aeosphere LLC (the "Company") was originally formed by Stewart Matthew ("Matthew") to develop a project called the Scent Opera, as well as collaborate with Fläkt Woods Group SA ("FWGSA"), which was interested in integrating scenting technology into its commercial air handling business. Perfumer Christophe Laudamiel ("Laudamiel") agreed to create the fragrances for the Company, and became a co-CEO. Roberto Capua ("Capua") provided funding to the Company, leaving both Matthew and Laudamiel with a 35% membership interest and Capua with a 30% membership interest. Under the limited liability company agreement of the Company (the "LLC Agreement"), certain actions, such as terminating Matthew's employment and winding up Aeosphere, required a unanimous vote of the co-CEOs, with Capua having other meaningful voting rights as a manager of the Company. The Company struggled to develop a functional product, and interpersonal strife led to Laudamiel and Capua choosing to dissolve the Company and continue with a new venture called DreamAir LLC ("DreamAir").

After protracted litigation, Matthew maintained at trial numerous claims against Laudamiel for breach of contract, breach of fiduciary duties, conversion and unjust enrichment. The court noted that earlier opinions dictated the result of Matthew's contract claims. Matthew did not vote to terminate his employment agreement, wind up Aeosphere or divide the assets where the LLC Agreement expressly required his vote on those actions. Moreover, Laudamiel shared confidential information with FWSGA in contravention of the LLC Agreement. Although the court acknowledged that Laudamiel was proceeding as a self-represented litigant, he failed to meet his burden of proving his affirmative defense of material breach by Matthew.

In regards to the breach of fiduciary duty claim, the court ruled that Matthew met the prima facie requirements for his breach of fiduciary duty claims, citing evidence that Laudamiel shared confidential information to manipulate the separation negotiating process. The court noted that Laudamiel breached his fiduciary duties "if he acted for a purpose other than to promote the best interests of [the Company]." The court briefly mentioned that if Laudamiel had chosen to retain an attorney, these claims might have been dismissed. The court awarded Matthew $491,839.79, reasoning that was the value of his 35% share of the Company.

b. *Utilisave, LLC v. Khenin*, C.A. No. 7796-ML (Del. Ch. Aug. 18, 2015)

Plaintiff Utilisave, LLC ("Utilisave") was a Delaware limited liability company that audited utility bills to help customers find savings. Plaintiff MHS Venture Management Corp ("MHS") was a corporation wholly-owned and managed by Michael Steifman, who founded Utilisave and promoted defendant Mikhail Khenin to CEO in 2003. MHS had a 50 percent membership interest in Utilisave, Khenin a 40 percent interest, and Utilisave President Donna Miele a 10 percent interest. Steifman and Khenin entered into an Amended and Restated LLC Agreement of Utilisave (the "Operating Agreement") and separate employment agreements in 2006. Under the Operating Agreement, they were the co-managing members of Utilisave, which meant that Khenin could not take certain actions without approval from MHS. The Operating Agreement also provided that all distributions were to be made at the discretion of the majority of the members, and because MHS controlled a 50 percent interest in Utilisave, Khenin and Miele could not achieve the majority vote required to take these actions without approval from MHS.

The relationship between Steifman and Khenin soured in 2007, when Khenin began to exclude Steifman from the business. Khenin purported to fire Steifman and to unilaterally extend his employment agreement when it expired in January 2009. After he assumed sole control of Utilisave, Khenin unilaterally declared six distributions to Utilisave's members and continued to serve as de facto CEO of Utilisave until August 2011, when he was removed from this position by court order.

In a separate action in New York against Utilisave and Khenin, MHS and Steifman brought claims to recover unpaid distributions and to obtain a declaratory judgment that Khenin's unilateral extension of his Employment Agreement was unauthorized. In June 2011, the New York court entered a declaratory judgment that the extension was unauthorized and that Khenin wrongfully withheld portions of MHS's distributions to fund Utilisave's defense of the New York action.

There were multiple prior actions in the Delaware Court of Chancery as well. First, MHS filed a petition for dissolution of Utilisave in March 2009. In August 2011, the court appointed a liquidating trustee and appointed Steifman as interim CEO of Utilisave. After rejecting multiple requests for a distribution from Khenin, the trustee moved forward with a plan to sell Utilisave or its assets. MHS was the only bidder, and the trustee recommended the sale of Utilisave as a going concern to MHS, which would purchase all the assets and liabilities of Utilisave in exchange for waiving its priority claim to all proceeds from the sale of the company and any legal claims it or Steifman had against Utilisave. Khenin objected to the sale, arguing that only the dissolution of Utilisave was permitted. The Chancellor rejected this objection, explaining that the purpose of dissolution proceedings was to create an economically productive resolution and that the form is not critical. The transaction closed on July 9, 2012 and MHS became the sole owner of Utilisave.

Plaintiffs then filed this action against Khenin in the Court of Chancery, alleging nine counts, including breach of the fiduciary duty of loyalty and various breach of contract claims that included allegations of breach of the Operating Agreement. The dispute was referred by the court to a Master in Chancery (the "Master"), whose report on plaintiffs' motions and post-trial report are summarized here. Khenin counterclaimed that Steifman breached the Operating Agreement by failing to make a distribution after Steifman was appointed CEO. Then-Chancellor Strine dismissed the counterclaim as a matter of law, finding it to be an unreasonable reading of the Operating Agreement, and Khenin re-pled two counterclaims after being granted leave to do so. Before the court was plaintiffs' motion for partial summary judgment on six of the nine counts.

Plaintiffs' first count alleged Khenin breached his fiduciary duty of loyalty to Utilisave by incorporating a new business called Benchmarking Solution Services, Inc. ("Benchmarking") under his own name, issuing all authorized shares in Benchmarking to himself, and arranging for Benchmarking's bank statements to be mailed to Khenin's home address. Khenin admitted he opened Benchmarking for himself, and plaintiffs claim that by doing so he usurped a corporate opportunity of Utilisave. The Master denied plaintiffs' motion on this count, since plaintiffs did not suggest Utilisave lost any business to Benchmarking and the trustee recovered the approximately $30,000 that was in Benchmarking's bank account.

In a separate count, plaintiffs alleged Khenin breached the Operating Agreement by unilaterally making distributions during 2010 and 2011 without authorization from a majority of the members. Section 3.3 of the Operating Agreement provided in part as follows: "All distributions will be made at the discretion of the majority of the Members. It will be presumed that cash in excess of required working capital will be distributed unless there is a compelling reason to accumulate additional cash reserves." Khenin argued that the first sentence should be read to apply only to "discretionary" distributions, while the second sentence should be interpreted to apply only to "mandatory" distributions. Thus, he argued, when a majority vote could be obtained, the distribution of all excess cash was required, and as CEO he had the authority to unilaterally make that decision.

The Master rejected this interpretation. First, she noted that the earlier decisions by the New York Court and the Court of Chancery mandated a conclusion that no distributions could be issued without MHS's approval. However, even if these decisions did not collaterally estop Khenin from making this argument, the Master found under her own independent reading that the challenged distributions were unauthorized because the unambiguous language of the Operating Agreement provided that all distributions were discretionary. The second sentence merely explained a "presumption" that the parties agreed would apply in determining the amount of the discretionary distributions. Thus, the Master concluded that Khenin made several unauthorized distributions, but recommended that the Court of Chancery award only nominal damages of $1 since plaintiffs did not show that Utilisave was harmed by the distributions.

The Master then addressed Khenin's counterclaims. His first counterclaim had two parts. First, he argued that Utilisave was required to make a distribution during the pendency of the dissolution action under Section 3.03 of the Operating Agreement. He claimed that, by the time Steifman was appointed as acting CEO, Utilisave had accumulated cash in excess of required working capital, and that the cash should have been distributed to the members. However, when Khenin requested that the trustee issue a distribution in February 2012, the trustee declined to do so, reasoning that Utilisave could require funds in excess of the agreed amount of working capital to cover liquidated-related expenses and possible litigation. The Master dismissed this prong of the counterclaim, finding that plaintiffs' arguments were collaterally estopped by the New York's court's interpretation of Section 3.03 of the Operating Agreement and by then-Chancellor Strine's interpretation of this section. Khenin also argued that Miele had no right to a final distribution of approximately $15,000 she received from Utilisave in December 2012, since her interest in Utilisave was cancelled five months prior pursuant to the sale to MHS. Steifman characterized that payment as an employment bonus. Although the Master found the timing of the payout curious, because MHS fully owned Utilisave, the Master found it was free to pay distributions or bonuses to its employees at its discretion.

The Master also rejected the second part of Khenin's first counterclaim, in which he argued that Utilisave breached Section 6.04 of the Operating Agreement, which provided that "[u]pon dissolution of the Company a proper accounting shall be made by the company's accountants of the Company's assets, liabilities and operations." Because Utilisave was sold to MHS and remained a going concern, no accounting was required.

In his second counterclaim, Khenin argued that Utilisave breached Section 6.05 of the Operating Agreement by failing to distribute the company's remaining assets – approximately $800,000 in cash and $2.9 million in accounts receivable, as determined by the trustee's final accounting – to the members after the sale. He claimed that in order to realize its priority claim, MHS had to actually pay cash consideration for the assets, but the court rejected this argument because it would elevate form over substance. Khenin then argued that the sale of Utilisave to MHS did not extinguish his claim under Section 6.05 of the Operating Agreement because the court order approving the sale specifically stated that it was without prejudice to Khenin's claims against Utilisave, including his claims for distributions. As such, Khenin claimed that Utilisave's remaining assets were available for distribution after the sale to MHS and, because Steifman waived his priority claim in connection with the sale, the priority claim did not reduce the assets available for distribution. The Master rejected this argument, finding that once Utilisave's assets were sold, there were no assets left to distribute under Section 6.5. Although the court in approving the sale did so without prejudice to the claims, it made no finding as to the merit of those claims.

c. *CMS Inv. Holdings, LLC v. Castle*, C.A. No. 9468-VCP (Del. Ch. June 23, 2015)

This case involved a dispute between plaintiff, an investor in a Delaware LLC, RP Holdings Group, LLC ("RPH"), and several defendants that managed RPH together with law firms run by such defendants and their holding companies. RPH was in the business of providing non-legal services to law firms, including law firms run by defendants. RPH was managed by a board of managers (the "Board of Managers"). Plaintiff, who owned most of the Class A units in RPH, had the right to appoint three members to the Board of Managers, and two defendants served as appointees of the Class B unitholders. These two defendants together with other defendants provided services to and consulted for RPH as members of an "Operating Board," which allowed them to work as independent contractors while exercising control over the day-to-day operations of RPH.

Plaintiff alleged that although RPH's business was performing remarkably well during the 2008 recession, defendants failed to pay RPH for the services it provided to law firms run by defendants. Plaintiff further alleged that defendants diverted those fees away from RPH and instead paid themselves directly. Although RPH accrued substantial accounts receivable balances, plaintiff and its appointees to the Board of Managers relied on defendants' reassurances that they would make good on the fees owed to RPH. In 2011, plaintiff's suspicions were corroborated by an accounting firm that they hired to investigate RPH's operational efficiency issues—particularly in regards to its accounts receivable collections processes—which found that defendants were indeed retaining all or part of the payments owed to RPH. The accounting firm also found that defendants had intentionally concealed RPH's true financial condition from plaintiff and its appointees on the Board of Managers.

In 2012, RPH defaulted on a credit agreement it entered into with Freeport Financial, which allowed Freeport Financial to foreclose on RPH's collateral. Plaintiff claimed that defendants secretly engaged in a self-dealing scheme with Freeport Financial to orchestrate the sale of the still-valuable services businesses to defendants while leaving RPH, and by extension plaintiff, empty-handed.

Plaintiff filed suit against defendants in March 2014, charging them with a myriad of claims, including: breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duties, aiding and abetting, civil conspiracy, and fraudulent transfer. Defendants moved to dismiss plaintiff's complaint as it related to them.

As an initial inquiry, the court found defendants' arguments that plaintiff's claims were derivative—rather than direct—to be unpersuasive. In applying the Tooley analysis, the court found that plaintiff's claims were more direct than derivative in nature, and at least dually direct and derivative. The court reasoned that if plaintiff's fiduciary duty and breach of contract claims are proven, then the Class A unitholders—including plaintiff—would recover individually rather than on a pro rata basis. In this regard, these claims were largely based on distributions that should have been made to plaintiff as a Class A unitholder but were improperly distributed to certain defendants. The court found that the predominant harm thus fell upon the Class A unitholders, despite defendants' argument that RPH itself was harmed.

The court then addressed defendants' arguments for dismissal of plaintiff's claims for breach of contract, breach of implied covenants and unjust enrichment. With regard to the breach of contract claims, a defendant on the Board of Managers argued that although his holding company, LEC Holdings, LLC ("LEC"), was bound as a member of RPH by being a signatory to the LLC agreement of RPH, he was personally not bound by the LLC agreement because he was not a party to it, and therefore could not be liable for any alleged breaches thereof. Citing Section 18-101(7) of the Delaware LLC Act, the court reasoned that his role as a member of the Board of Managers bound him to the LLC agreement. Certain other defendants conceded that they were bound but argued that the breach of contract claims against them must be dismissed because the relevant sections of the LLC agreement bound the Board of Managers and not such defendants as members. However, these defendants did have positions on the Operating Board and the court found that their positions of influence in the operational structure of RPH could lead to a plausible inference that they caused improper distributions in contravention of the provisions of the LLC agreement. As to another defendant, Caren Castle ("Castle"), despite her role as a member of the Operating Board and a high-level executive of RPH, the court found nothing in the record to support a reasonable inference that she intended to be bound by the LLC agreement of RPH as she was not directly a member or on the Board of Managers.

In regards to the breach of implied covenants claims against defendants, the court noted that the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain. For this claim, the court looked to an opinion (the "Opinion") that was received in connection with the formation of RPH that outlined the structure of the intent of RPH. In this regard, the court found that compliance with the Opinion was an implied term of the LLC agreement and that defendants breached the implied covenant by receiving fees directly instead of properly channeling them through RPH. In this regard, the court found that defendants frustrated the overarching purpose of the LLC agreement as evidenced by the Opinion by taking advantage of their positions to control implementation of the LLC agreement's terms. However, the court did dismiss the claim against Castle, as it reasoned that one cannot breach an implied covenant of an LLC agreement if that defendant is not bound by the express terms of the agreement.

The court next turned to fiduciary duty claims brought by plaintiff. It found that the LLC agreement did not alter the traditional standards of care underlying the fiduciary duties of care and loyalty. Relying on that finding, the court then found that defendants on the Board of Managers were fiduciaries given their role as members of the Board of Managers. The court also found that certain other defendants, including Castle, were fiduciaries through their roles as high-level officers of RPH. In addition, the court found that one defendant acted as a fiduciary through his role as CEO of a particular region because he was "vested with discretionary power to manage the business of the LLC." However, the court noted that a more fully developed record could contradict this finding at a later procedural stage. Finally, the court dismissed plaintiff's breach of fiduciary duty claims against the holding company defendants, reasoning that neither entity was a managing member of RPH, nor were they in a position to exercise control over the business and affairs of the LLC.

Concerning defendants' alleged breaches of fiduciary duty, the court found that, assuming plaintiff's factual pleadings were true, certain defendants could have plausibly breached their fiduciary duties by purposefully taking action to force RPH into insolvency and colluding with Freeport Financial to purchase its business assets at a favorable price out of receivership. The court similarly reasoned that a defendant member of the Board of Managers could have breached his fiduciary duties by failing to do more than simply resign from his position as a Board member if he was privy to the other defendant's machinations.

Reasoning that one cannot have both direct and secondary liability for a breach of fiduciary duty, the court dismissed the aiding and abetting claims against defendants who were found by the court to be fiduciaries. However, the court held that if the record later reflected that Castle and another defendant were not fiduciaries to RPH, they could very well be secondarily liable under the aiding and abetting theory. In regard to the individual defendants' various affiliated entities, such as the various law firms and holding companies, the court noted that secondary liability could exist where an entity acts as "'middleman for and beneficiary of improper disbursements by' the allegedly faithless fiduciaries with which they are affiliated." Thus, the court denied those entity-defendants' motions to dismiss plaintiff's aiding and abetting claim.

d. *CanCan Dev., LLC v. Manno,* C.A. No. 6429-VCL (Del. Ch. May 27, 2015)

This decision after a trial involved an LLC formed to pursue a casino venture (the "Project") by Sandra Manno, who managed the LLC during most relevant times and was a defendant in this case ("Manno"), and a father ("Senior") and son ("Junior" and together with Senior, the "Investors") who invested in the LLC and were plaintiffs in the case together with the LLC itself. Among other facts that the court found were proven by a preponderance of the evidence at trial, the court found that Manno hired relatives and friends at generous salaries to manage the Project (including her sister who did not produce any work product, a friend who was paid by the LLC but worked solely on writing a screenplay of Manno's life, and a convicted felon), that she improperly hired a full-time driver for herself, that she periodically increased her salary without justification, that she improperly billed all of her living expenses, including meals and entertainment, to the LLC and that she on more than one occasion asked the Investors to contribute more capital to the LLC because it kept running out of money due to her mismanagement. The Investors ultimately had Manno removed as manager of the LLC and a judgment confirming such removal was entered by the Delaware Court of Chancery prior to this decision.

The court first addressed claims by the Investors and the LLC that Manno breached her fiduciary duties to the LLC, although the court noted that these claims belonged to the LLC and not the Investors. The court found that Manno owed fiduciary duties as manager of the LLC. In citing to prior cases, the court noted that the essence of a duty of loyalty claim is the assertion that a corporate officer or director has misused power over company property to benefit herself rather than to advance a corporate purpose and that a fiduciary must always act in a good faith effort to advance the interests of her beneficiary. The court further indicated that the duty of loyalty prohibits a fiduciary from misappropriating assets under her management. With respect to this standard, the court stated that self-interested compensation decisions and decisions by interested fiduciaries to reimburse their own expenses or provide themselves with company benefits are subject to entire fairness review. In this regard, the court stated that if fiduciaries divert company assets to themselves for non-corporate purposes, they are liable for the amounts diverted. Based on the lack of justification for Manno's compensation and reimbursed expenses in this case, including many expenses that lacked a documented business purpose, the court found that Manno was liable for a large part, although not all, of her compensation and expense reimbursements. Although Manno argued that another employee approved her increases in compensation, the court found that Manno's relationship with such employee was sufficiently close so that he could not be regarded as independent and that he simply rubber stamped the compensation without exercising any business judgment. As a result, the court found that such approval did not insulate Manno's unilateral decision from entire fairness review. The court then turned to the compensation Manno paid the employees that were her relatives and also applied entire fairness to their compensation, noting that family ties raise doubts about a fiduciary's independence. Based on the facts in this case, the court found that Manno was also liable for a portion of this compensation.

The court next discussed the Investors' claim that Manno used funds of the LLC to pursue projects that did not benefit the LLC, including an online gaming business and other casino ventures, a food and wine festival, a screenplay for a movie about her life and a personal move back to New Jersey. With respect to all of these expenses, the court found in favor of the Investors. However, the Investors also argued that Manno excessively spent LLC funds on limousines, hotels, meals and flights. The court observed that these expenses would ordinarily be subject to the business judgment rule, but in this case, many of the expenses related to the interested transactions identified above. As a result, the court found that Manno bore the burden at trial to "establish the purpose, amount, and propriety of the disbursements." The court found that Manno was liable for these expenses to the extent she could not demonstrate a documented business purpose.

The court then addressed the Investors' claim that certain expenses constituted waste, which consisted of expenditures on a luxury box that she used with friends that she hired as employees but rarely to entertain business guests, compensation to such friends and expenditures for liquor and cigars. The court noted that waste was one means of establishing a breach of the duty of loyalty's subsidiary element of good faith. In applying the business judgment rule, the court mentioned that it would infer bad faith and a breach of duty when a decision lacks any rationally conceivable basis and that the waste test is one of establishing irrational, bad faith conduct. In citing to case law, the court found that to establish waste, a plaintiff must prove that a decision was so out of whack that no business person of ordinary, sound judgment would have made it. Because the court determined that Manno lied about how she used the luxury box and never used it for business guests, the court found that she was liable for waste for the costs of the luxury box. The court also found Manno liable for waste for the compensation paid to her friend, who was a convicted felon, and indicated that no rational person would hire a convicted felon to work in a highly regulated casino industry. However, the court found that Manno was protected by the business judgment rule for hiring a friend that had relevant experience and for expenses on cigars and liquor as it appeared that she sent them to potential investors, customers and suppliers and plaintiffs could not prove that she incurred these expenses for her personal benefit.

Plaintiffs also sought to hold Manno Enterprises, an entity owned by Manno, liable in what the court characterized as a reverse veil-piercing claim because they argued that Manno Enterprises, an entity, was liable for acts of an individual. The court noted that reverse pierce claims implicate different policies and require a different analytical framework from a more conventional veil-piercing claim and because the claim was not properly presented, the court found that the claim failed.

Lastly, the court turned to Manno's counterclaims. She first claimed that she was promised a lucrative consulting agreement and that she was unfairly diluted, in both cases, prior to entering into the LLC agreement of the LLC. The court held that the LLC agreement was a fully integrated agreement and that it stated that any consulting agreement would need to be in writing and approved by a supermajority of the members and that it also stated the ownership interests of the members of the LLC. For these reasons, the court found that the LLC agreement controlled and rejected Manno's claims. Manno then claimed that she was diluted from capital calls after the effectiveness of the LLC agreement. The court found that the capital calls complied with the LLC agreement. However, the court indicated that when Junior gained control over the LLC, he owed fiduciary duties to the entity and that the capital calls which resulted in increasing his interest constituted self-dealing transactions subject to entire fairness review notwithstanding the facts that the capital calls were made pro rata and pursuant to the terms of the LLC agreement. After finding that the capital calls were necessary for the LLC to avoid immediate failure, made at times when financing on comparable terms was not available, and that the capital calls were priced appropriately, the court found that the capital calls satisfied the fair dealing/fair price requirements of entire fairness review. Manno then claimed that Junior usurped an LLC opportunity by having an entity he owned purchase property that the LLC had previously considered purchasing. The court held that a fiduciary violates his duty of loyalty by usurping a company opportunity when (i) the entity is financially able to undertake the opportunity, (ii) the opportunity falls within the line of the company's business, (iii) the entity has an interest or a reasonable expectancy in the opportunity and (iv) the fiduciary's interests conflict with those of the entity. The court found that the LLC lacked the resources to purchase the property and thus Junior could not have usurped this opportunity.

Finally, Manno claimed that Junior breached his fiduciary duties by dissolving the LLC and selling its assets to an entity he controlled. The court cited to prior case law in noting that a fiduciary can satisfy the entire fairness standard in a transaction where an interest holder receives nothing if the fiduciary proves that there was no future for the business and no better alternative for the interest holder. Based on the facts in this case, including that Junior shopped around for investors and that Manno's interest had no value because it was subordinate to the return of the Investors' capital and therefore effectively "under water," the court found that Junior did not breach his fiduciary duties.

e. *2009 Caiola Family Trust v. PWA, LLC*, C.A. No. 8028-VCP (Del. Ch. Dec. 18, 2014)

Nominal defendant Dunes Point West, LLC ("Dunes Point"), a Delaware limited liability company, was appointed by defendant PWA, LLC ("PWA"), a Kansas limited liability company, to serve as property manager of an apartment complex. Plaintiffs, non-managing members of Dunes Point, accused defendants PWA and Ward Katz, its managing member, of various breaches of Dunes Point's operating agreement (the "Agreement"). These included improper payment of asset management fees, provision of misleading financial reports, failure to improve and maintain the property, waste and other fiduciary duty breaches, and violation of the Agreement's "key person" provision. Both defendants moved to dismiss for failure to state a claim or, alternatively, on grounds of forum non conveniens. Katz also sought dismissal on grounds that he lacked sufficient minimum contacts with the State of Delaware for the court to exercise personal jurisdiction over him. Plaintiffs cross-moved for summary judgment, arguing that defendants' alleged actions justified removal of PWA from its position as managing member.

The court first addressed its jurisdiction over Katz, which was a two-part analysis. First, the court found that plaintiffs had authority to serve process on Katz under Delaware's long-arm statute, which gives the state jurisdiction over persons transacting business in the state. Several facts showed that Katz controlled and managed PWA, which managed Dunes Point, including that Katz executed multiple documents relating to Dunes Point, was listed as its principal manager, had sole authority to draw checks on its bank account, mailed its Delaware partnership returns, signed checks for its Delaware franchise tax payments, and signed and filed its tax returns. The court indicated that the fact that neither Katz nor PWA filed the documents related to Dunes Point's formation did not exempt them from the court's jurisdiction. Second, the court found that exercising jurisdiction over Katz comported with due process. Since he expected a significant monetary return from his management of Dunes Point, it was reasonable to require him to answer for alleging wrongdoing relating thereto in the court. The court rejected Katz's argument that expected benefits below a certain dollar amount would allow non-residents to avoid Delaware jurisdiction.

The court went on to deny defendant's motion to dismiss with respect to four of plaintiffs' claims, finding the complaint plead sufficient facts from which it could be inferred defendants (i) breached the Agreement by allegedly paying management fees in violation of the Agreement, by providing misleading financial reports to plaintiffs and by mismanaging Dunes Point, and (ii) breached their fiduciary duties by, for example, engaging in self-dealing by causing Dunes Point to pay management fees to an entity that was owned by Katz. Although the defendants argued the fiduciary duties claims should be dismissed because they were essentially in the nature of contract claims, the court found that the fiduciary duty claims were broader in scope than the contract claims. In so finding, the court highlighted that Katz was not a party to the Agreement and thus the claims against him could not constitute breach of contract claims. The court also found that the duty of loyalty could be implicated by the claimed self-dealing with respect to the alleged improper payment of management fees. The court dismissed the waste claim, however, since the standard for such a claim is extremely high and was not satisfied by plaintiffs' allegation that defendants charged somewhat lower rent than the alleged market rate for comparable apartments.

Finally, the court denied plaintiffs' cross-motion, finding there were genuine issues of material fact as to whether defendants improperly commingled tenant security deposits or whether Katz violated the "key person" provision by failing to remain actively involved in the management of the apartment complex.

f. *Ross Holding and Mgmt. Co. v. Advance Realty Grp. LLC*, C.A. No. 4113-VCN (Del. Ch. Sept. 4, 2014)

In this post-trial opinion, the court considered plaintiffs' claims of breach of fiduciary duty and the implied covenant of good faith and fair dealing, aiding and abetting breaches of fiduciary duty and request for the appoint of a receiver, among others, in connection with a reorganization of Advance Realty Group ("ARG"). In the reorganization, ARG's revenue-generating, developed assets were sold and its capital-intensive, undeveloped properties were split off into another entity ("ACP"). Plaintiffs, who were minority unitholders of ARG and former managers terminated shortly before the reorganization, were given the option of cashing out their holdings at a discounted price or converting them into equity in the newly-split off company, which would be run by the CEO who had recently terminated defendants. However, ARG's board, in negotiating the transaction, appeared to act in a self-interested manner without considering the interests of the minority unitholders. The parties disagreed as to what fiduciary duties ARG's board owed to ARG's members, whether entire fairness review applied and the merits of the entire fairness analysis.

The court first addressed what, if any, fiduciary duties ARG's board owed to ARG's members. ARG's board was comprised of members appointed by ARG's CEO and one of ARG's majority unitholders, referred to herein as "FARS." Defendants relied heavily on (i) Section 7.01 of the ARG operating agreement, which provided for management by the board and stated, "It is understood that the [board] shall act reasonably and in good faith in its management of [ARG]," (ii) the fact that the operating agreement required that the board be composed of designees of ARG's CEO and FARS and (iii) Section 7.05 of the ARG operating agreement, which provided a safe harbor for certain acts that might otherwise violate the traditional duty of loyalty, to contend that (A) the board's only fiduciary duties were to act in an objectively reasonable manner and with subjective good faith and (B) ARG was free to engage in transactions with members of the board or the interests they represent. The court rejected defendants' arguments that traditional fiduciary duties had been modified or eliminated, noting that drafters must clearly, plainly and unambiguously evidence a modification or elimination of fiduciary duties. The court stated that using the phrase "it is understood" did not clearly evidence a disclaimer of traditional fiduciary duties. The court also noted that the structure of the board (being comprised of representatives of the parties interested in the transaction) did not evidence a clear intent to eliminate the duty of loyalty, as Delaware law provides for conflicted board to use independent parties to negotiate interested transactions. Finally, the court found that the Section 7.05 safe harbor, which did not apply to the transaction at hand, did not implicitly authorize the transaction, noting that a "failure to mention a duty or to contemplate a given conflicted transaction is not an adequate disclaimer of it."

Having found that the ARG operating agreement did not disclaim or modify traditional fiduciary duties, the court turned its attention to what standard of review applied and who bore the burden of proof. The court noted that a plaintiff can rebuff the business judgment rule presumption by providing evidence that a defendant breached its duty of loyalty or care. If a plaintiff provides such evidence, the burden shifts to the defendant to provide the entire fairness of the transaction. The court found that plaintiffs provided the requisite evidence by demonstrating that the majority of board members, representatives of ACP and FARS, were interested in the reorganization. This board majority did not view themselves as representatives of all of ARG's unitholders, including the minority, and ACP and FARS received the opportunity to convert their equity into debt, an option not granted to the minority unitholders. Additionally, no committee of independent directors was organized and no informed minority vote ratified the reorganization. Therefore, the court found that defendants bore the burden of proving that the reorganization was entirely fair.

Having determined that the entire fairness standard applied, the court analyzed whether the reorganization was fair by looking at whether the board dealt fairly with the minority and whether the board offered the minority a fair price. The court found that the reorganization was procedurally unfair because defendants controlled the timing and structure, made little to no effort to consider the minority unitholders' interests, kept plaintiffs uninformed about the reorganization and structured the reorganization to give benefits to ACP and FARS that were not provided to the minority unitholders (i.e., valuing their units at a price that was unsupported in the market and giving them priority over the other equity holders). However, after sifting through the evidence and credibility of three expert witnesses, the court found that the reorganization provided the minority unitholders with a fair price—because of the extreme reduction in the number of outstanding units that occurred as a result of the reorganization, the value of plaintiffs' units actually increased through the reorganization and, after taking into account the layering of debt on top of plaintiffs' equity, the court stated that the value plaintiffs received was a "close approximation" of the value they had before the reorganization.

The court then focused on the "unitary" inquiry of whether the reorganization was entirely fair. The court found that the process employed by the ARG board was so deficient that the court could not find that the reorganization was entirely fair, even though plaintiffs appeared to have nominally benefitted from the transaction. Because plaintiffs realized a nominal benefit, the court stated that damages were an inappropriate remedy; however, the court noted that an appropriate remedy would be to unwind the portion of the reorganization that provided FARS and ACP with preferential treatment for their units and requested that the parties brief this issue for the court's consideration as well as the issue of who was responsible for attorneys' fees.

Finally, the court found that plaintiffs did not succeed on their claims of violation of an implied duty of good faith and fair dealing, aiding and abetting breaches of fiduciary duties, appointment of a receiver or violation of the corporate opportunity doctrine.

g. *AM Gen. Holdings LLC v. The Renco Grp., Inc.*, C.A. No. 7639-VCN (Del. Ch. Oct. 31, 2013)

In its fourth decision in this series of related cases, the court addressed motions for summary judgment from both plaintiff and defendants.

The court first addressed plaintiff's motion for partial summary judgment on its claim that ILR Capital LLC ("ILR"), the managing member of Ilshar Capital LLC ("Ilshar"), breached its obligations under Ilshar's limited liability company agreement (the "Ilshar LLC Agreement") by making "Prohibited Investments." The court found that the Ilshar LLC Agreement unambiguously prohibited Ilshar from acquiring or holding an interest in any entity in which either The Renco Group, Inc. ("Renco") or a Renco affiliate had an interest. The court then considered evidence that defendants' admitted a "possible violation" of the Prohibited Investments by providing certain compliance certificates. However, plaintiff submitted no further evidence of a violation. The court viewed the evidence submitted in the light most favorable to defendants, as non-moving parties, and denied plaintiff's motion for summary judgment.

The court then addressed defendants' motion to dismiss various claims made by plaintiff. The court dismissed plaintiff's claims that defendants' breached certain fiduciary duties. The court noted that, where a dispute arises from obligations addressed by a contract, fiduciary claims that arise from the same facts are foreclosed unless the fiduciary duty claims depend on additional facts, are broader in scope and involve different considerations in terms of a potential remedy. Because plaintiff's claims that defendants breached their duties of loyalty and care arose out of obligations defendants owed under the Ilshar LLC Agreement and a contribution agreement, and plaintiff failed to allege distinct harms outside of the scope of those contractual agreements, the court dismissed plaintiff's breach of fiduciary duty claims and the related aiding and abetting claims. The court also dismissed plaintiff's claims of tortious interference, unjust enrichment and conversion and for indemnification.

The court did not dismiss, however, plaintiff's claim that it was entitled to certain distributions, noting that the claim was not moot as suggested by defendants because the preliminary injunction granted previously on the issue did not provide plaintiff permanent relief.

h. *Stewart v. BF Bolthouse Holdco, LLC*, C.A. No. 8119-VCP (Del. Ch. Aug. 30, 2013)

Plaintiffs, former employees of the defendant LLC (the "Company"), brought claims against the Company and its board of managers (the "Board") for breach of contract, breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing in connection the Company's repurchase of plaintiffs' membership units in the Company (the "Units"). Plaintiffs acquired their Units by executing the LLC agreement of the Company (the "LLC Agreement") and a purchase agreement (the "Purchase Agreement"). Upon plaintiffs' voluntary termination of their employment with the Company, the Company exercised its right under the Purchase Agreement to repurchase plaintiffs' vested and unvested Units. The Board determined the Fair Market Value (as defined in the Purchase Agreement) of plaintiffs' Units under the Purchase Agreement was $0.00 and cancelled the Units without paying any consideration.

The court granted defendants' motion to dismiss plaintiffs' claims of breach of fiduciary duties and breach of the implied covenant of good faith and fair dealing, and denied in part and granted in part the motion with respect to the breach of contract claim. In light of an e-mail from the president and CEO of the Company valuing the Units at $200 each three weeks after the Board determined the Fair Market Value was $0.00, the court held that it was reasonably conceivable that the Fair Market Value of the Units was greater than $0.00 and that the Board acted in bad faith in determining the value in breach of the Purchase Agreement. The court also noted that defendants did not argue that any material event occurred during those three weeks that affected the valuation. The court further held that plaintiffs sufficiently pled facts that defendants' valuation of $0.00 was determined in bad faith because of facts indicating a value of the Units greater than $0.00 in surrounding years, and because the valuation was done at a time when defendants were no longer obligated to provide plaintiffs with relevant financial information of the Company. Moreover, plaintiffs pled a plausible motivation—to increase the majority owner's interest in the Company or, alternatively, as retribution for plaintiffs' unexpected departure from the Company at a time when plaintiffs were important to the future success of the Company. The court noted that although a claim of wrongful inducement, trickery or deception may be sufficient to establish bad faith, those elements are not necessary under Delaware law. The court therefore denied defendants' motion to dismiss plaintiffs' breach of contract claim that the Board determined the Fair Market Value of the Units in bad faith.

The court held that the LLC Agreement's fiduciary duty provision—which provided that the managers owed the same fiduciary duties as a director of a corporation—applied to the Board's determination of the value of the Units because execution of the LLC Agreement by plaintiffs was a condition precedent to receipt of their Units under the Purchase Agreement, and the duties to act carefully and loyally were not inconsistent with or contradictory to the Purchase Agreement's requirement that the Board determine the Fair Market Value of the Units in good faith. However, because plaintiffs made no allegations regarding the Board's valuation process, the court held that plaintiffs failed to state a claim for breach of the contractual duty of care. Plaintiffs also failed to state a claim of breach of the duty of loyalty on the basis that the repurchase was an interested transaction because plaintiffs did not allege that defendants stood on both sides of the repurchase transaction, nor did they allege that defendants were in a position to benefit from an unfairly low repurchase in a manner not shared equally with all owners of the Company. However, for the same reasons the contractual bad faith claim under the Purchase Agreement survived, the court held that plaintiffs sufficiently alleged that defendants acted in bad faith in determining the Fair Market Value in breach of the contractual duty of loyalty under the LLC Agreement. The court therefore denied defendants' motion to dismiss this claim.

The court dismissed plaintiffs' claim that defendants breached the LLC Agreement's requirement that the Company deliver to the members annual financial statements because the LLC Agreement only required the Company to provide the financial statements to a person with a present ownership interest in the Company, and plaintiffs no longer had a present ownership interest in the Company at the time the annual financial statements were required to be provided. The court also dismissed plaintiffs' claim that defendants breached the Purchase Agreement by "cancelling" the Units rather than "repurchasing" them as provided in the Purchase Agreement, holding that the only issue was whether the Company properly exercised the repurchase right, and so that claim was duplicative of plaintiffs' breach of contract claim.

The court similarly dismissed plaintiffs' breach of fiduciary duty claim because it was duplicative of and foreclosed by the breach of contract claim. Under Delaware law, a fiduciary duty claim that depends on the same nucleus of operative facts as a breach of contract claim only survives where it may be maintained independently of the breach of contract claim. Plaintiffs' fiduciary duty claim—that defendants acted contrary to their fiduciary duties to plaintiffs when they purported to declare the Units held no value and cancelled them—arose from the dispute relating to the contractual repurchase right under the Purchase Agreement. The breach of fiduciary duty claim was not broader in scope, nor did it implicate potentially different remedies. Finally, the court dismissed plaintiffs' claim that defendants violated the implied covenant of good faith and fair dealing by failing to act in good faith when valuing the Units. Plaintiffs did not allege a specific implied contractual obligation that was breached, and the issue was covered by an express term in the Purchase Agreement requiring the Board to value the Units in good faith. Therefore, the court also held the claim was duplicative.

i. *Ross Holding and Mgmt. Co. v. Advance Realty Grp. LLC*, C.A. No. 4113-VCN (Del. Ch. Mar. 7, 2013)

In this case, the court considered plaintiffs' challenge to Advance Realty Group's ("ARG") failure to repurchase plaintiffs' units when they were terminated and to ARG's adoption of a Conversion and Exchange Agreement ("Conversion Agreement") that involved a capital restructuring of ARG that allegedly adversely affected the value of plaintiffs' ARG holdings because defendants diverted ARG's assets for their benefit. Defendants moved for summary judgment.

The court granted defendants' motion for summary judgment as to the two issues to which the court applied Delaware law—breach of fiduciary duty claims against Rayevich, a member of the ARG managing board, and against Sheridan, ARG's Chief Financial Officer ("CFO"), in connection with their alleged involvement with ARG's failure to repurchase plaintiffs' units and ARG's adoption of the Conversion Agreement.

Rayevich was bound by the ARG Operating Agreement to manage ARG reasonably and in good faith; the Operating Agreement exculpated him from liability absent willful misconduct or bad faith. The court noted that Rayevich, although a member of ARG's managing board, had no discretion in how to vote because he was required to vote as directed. Notwithstanding Rayevich's lack of discretionary voting power, the court stated that fiduciary duties extended beyond voting and could involve studying the proposed transaction, determining its appropriateness, expressing dissenting views to fellow board members and, under proper circumstances, informing unit holders about potential adverse effects. However, because plaintiffs failed to provide any facts that demonstrated Rayevich's lack of good faith in connection with the Conversion Agreement, the court granted defendants motion for summary judgment.

Sheridan did not dispute that she, as ARG's CFO, owed fiduciary duties to plaintiffs, ARG unit holders. The court noted that fiduciary duty liability exists within the management framework of an LLC, its managing board and its unit holders. Furthermore, it stated that when a fiduciary makes misleading disclosures but no unit holder action is sought, a plaintiff must prove that the fiduciary knowingly disseminated materially false information and must prove the elements of reasonably reliance, causation and damages. Here, the court found that plaintiffs failed to demonstrate that Sheridan's alleged misstatements, omissions and misrepresentations in ARG's financial statements caused them any damage or that they relied on any of her alleged misrepresentations regarding the Conversion Agreement. The court granted defendants motion for summary judgment.

The court also addressed claims of breach of the Unit Holders Agreement and civil conspiracy under New Jersey law; the court granted summary judgment regarding breach of the Unit Holders Agreement but refused to grant summary judgment as to certain fiduciary claims against Sheridan because participation in a civil conspiracy against ARG unit holders precluded dismissing those claims.

j. *Feeley v. NHAOCG, LLC*, C.A. No. 7304-VCL (Del. Ch. Mar. 20, 2012), (Del. Ch. Oct. 12, 2012) and (Del. Ch. Nov. 28, 2012)

The Court of Chancery released three opinions in the *Feeley v. NHAOCG, LLC* matter. In the first two *Feeley* decisions, the court determined that: (1) it had jurisdiction over defendant NHA OCG, LLC ("NHA") based on LLC Act Sections 18-110(a) and 18-109(a), and (2) it would largely grant plaintiffs' motion for judgment on the pleadings based on defendants' failure to abide by the terms of the operating agreement of Oculus LLC (the "Oculus Operating Agreement").

The court found that plaintiff Feeley had entered into a business relationship with defendants A. Akel, G. Akel, Newman, Hughes, and NHA. The parties had formed two LLCs: Ak-Feel LLC ("Ak-Feel"), formed by Feeley and A. Akel, and Oculus LLC ("Oculus"), formed by Ak-Feel and NHA. Ak-Feel's Operating Agreement designated Feeley as its Managing Member; the Oculus Operating Agreement in turn designated Ak-Feel as its Managing Member. As Managing Members of the two entities, Feeley and Ak-Feel had full and exclusive authority to manage, control, administer and operate Ak-Feel and Oculus, respectively. Additionally, the Oculus Operating Agreement enumerated the only permissible ways to remove Ak-Feel as its Managing Member: unanimous member consent, termination of Feeley or Akel, or default without cure by Ak-Feel under the Oculus Operating Agreement. Feeley also entered into an employment agreement with Oculus to serve as its President and CEO.

When the business relationship between Feeley and defendants soured, defendant NHA attempted to give Feeley notice that his employment contract with Oculus would not be renewed but he would remain an Oculus officer. Later, NHA also attempted to remove Feeley as an Oculus officer. However, NHA was not Oculus's Managing Member—Ak-Feel was—and the Managing Member had exclusive authority to act on behalf of Oculus. NHA also gave notice to Ak-Feel that it was exercising its right to remove Ak-Feel as Oculus's Managing Member, replacing Ak-Feel with NHA.

Plaintiffs filed suit to determine the validity of NHA's removal of Ak-Feel as Oculus's Managing Member and Feeley as its President and CEO. Defendants moved to dismiss the complaint for lack of personal jurisdiction. Plaintiffs then moved for judgment on the pleadings.

In its first decision, the court held that Section 18-110(a) granted it *in rem* jurisdiction to determine who validly holds office as a manager of a Delaware LLC. Notice of the claims to each defendant was proper; therefore, the court found that it had constitutional authority to determine who the Managing Member of Oculus was: Ak-Feel or NHA. The court also found that, pursuant to Section 18-109(a), it could exercise personal jurisdiction over those serving as managers of an LLC for the purpose of adjudicating breach of duty claims. The court viewed NHA as a manager because NHA participated materially in Oculus's management not only by removing Ak-Feel as Managing Member, but also by purporting to remove Feeley as an employee, and later as an officer—an action that only the Managing Member of Oculus could take, pursuant to the Oculus Operating Agreement. Finally, the court stated that, since NHA was subject to personal jurisdiction under § 18-109(a), the court had jurisdiction over the other counts of the complaint, which arose out of a common nucleus of operative fact. The court deferred ruling on the individual defendants' lack of personal jurisdiction claims pending further discovery and briefing.

After determining the jurisdictional issues, the court, in its second decision, largely granted plaintiffs' motion for judgment on the pleadings and entered the following four judgments: (1) that letters sent by NHA purporting to replace AK-Feel as Oculus' Managing Member were invalid and void because the Oculus Operating Agreement stated the only grounds under which AK-Feel could be removed and none of those grounds applied; (2) that the termination letter sent by NHA attempting to terminate Feeley as President and CEO of Oculus was invalid because it was not sent by the Managing Member, AK-Feel, as required by the Oculus Operating Agreement; (3) that the attempted termination of both Feeley's employment and his position as President and CEO of Oculus was unlawful and void because the termination was not affected by Oculus' Managing Member, AK-Feel; and (4) that defendants' representations to third parties stating that AK-Feel and Feeley had been removed were incorrect.

In the court's third decision, it analyzed the five counterclaims of Oculus's non-managing member, NHA, against Oculus's managing member, Ak-Feel and Ak-Feel's managing member, Feeley.

NHA's counterclaims were largely based on Ak-Feel and Feeley's allegedly failed attempts at managing Oculus. NHA contended that Feeley did not identify a sufficient number of real estate projects for Oculus, that the projects that he did bring to Oculus "ended in disaster due to Feeley's gross negligence" and that Feeley negotiated certain real estate deals for himself rather than presenting the deals to NHA.

Count I alleged, *inter alia*, that Ak-Feel breached the Oculus Operating Agreement by engaging in self-dealing because Ak-Feel usurped opportunities that belonged to Oculus. The court rejected this allegation because Ak-Feel had no contractual obligation under the Oculus Operating Agreement to present opportunities to Oculus. Count I also alleged that Ak-Feel breached the Oculus Operating Agreement by taking action that amounted to gross negligence and willful misconduct; because Ak-Feel answered this portion of Count I, the court did not address the allegation in defendants' motion to dismiss.

Count II alleged that Feeley aided and abetted Ak-Feel's breaches of the Oculus Operating Agreement as discussed in Count I. The court denied plaintiffs' motion to dismiss these allegations, holding that Count II pled "a *Gotham Partners* claim against Feeley for aiding and abetting a breach of contract (odd as that sounds) to the same extent that a claim was pled in Count I." The court based this decision on the fact that Feeley, as the managing member of Ak-Feel, ultimately made Ak-Feel's decisions and carried out those decisions; therefore, Feeley knowingly participated in the contractual breaches of duty alleged in Count I.

Count III alleged that Ak-Feel and Feeley breached default fiduciary duties. The court determined that Ak-Feel, as Oculus's managing member, owed default fiduciaries to Oculus and that the Oculus Operating Agreement did not limit or eliminate those default fiduciary duties; therefore, the court denied plaintiffs' motion to dismiss Count III as to Ak-Feel. The court discussed the Delaware Supreme Court's decision in *Gatz* (which stated that the Court of Chancery's determination that the manager of an LLC owed default fiduciary duties was "dictum without any precedential value"), stating that "[t]he high court did not rule on whether the managers of an LLC owe default fiduciary duties." The court in this case stated that the Court of Chancery cases holding that default fiduciary duties apply to LLC managers were "appropriately viewed as *stare decisis* by this Court" and that a plain reading of LLC Act Section 18-1101(c) and its drafting history supported the existence of default fiduciary duties because "otherwise there would be nothing for the operating company agreement to expand, restrict, or eliminate." The court noted that the Supreme Court has the power to hold that no such default fiduciary duties exist, but that the Supreme Court had not yet made that determination. Then, the court looked to the Oculus Operating Agreement and found that it provided limited exculpation from monetary liability as permitted by Section 18-1101(e) but that it did not eliminate fiduciary duties under Section 18-1101(c). The court interpreted the language of the Oculus Operating Agreement, limiting liability for Oculus's members, as an assumption in the Oculus Operating Agreement that fiduciary duties existed and could give rise to liability unless the exculpation right was triggered.

The court also determined that Count III properly alleged claims that Ak-Feel breached its duty of care and that Feeley engaged in willful misconduct because Feeley allegedly negotiated deals for himself and, as the managing member of Ak-Feel, Feeley controlled Ak-Feel, meaning that he could not "mentally segregate his decision-making" so as to properly negotiate deals for himself while somehow not acting in his capacity as the managing member of Ak-Feel.

The court held that Count IV properly stated a claim for breach of the duty of care against Ak-Feel, but not against Feeley because, in Count IV, defendants named Feeley in his capacity as the party in control of Ak-Feel, which in turn was the managing member of Oculus, and not in his capacity as actual manager of Oculus.

Finally, in Count V, defendants sought a declaratory judgment stating that NHA had the unilateral right under the Oculus Operating Agreement to force Oculus to cease its business operations; the court granted plaintiffs' motion to dismiss Count V because the Oculus Operating Agreement did not give NHA such a right.

k. *Auriga Capital Corp. v. Gatz Prop., LLC*, C.A. 4390-CS (Del. Ch. Jan. 27, 2012); *Gatz Prop., LLC v. Auriga Capital Corp*., C.A. No. 4390-CS (Del. Nov. 7, 2012)

Plaintiffs were minority members of Peconic Bay, LLC, a Delaware LLC (the "Company"), who brought this action against defendant Gatz Properties, LLC, the manager of the Company (the "Manager"). The Manager was managed and controlled by defendant William Gatz, an individual ("Gatz"). At all relevant times, Gatz and his family members owned a majority of the voting interests in the Company. The Company held a leasehold interest in golf course property that was owned by Gatz and his family members, which was subleased (the "Sublease") by the Company to a third-party golf course operator (the "Operator"). Plaintiffs alleged that the Manager breached its contractual duties under the LLC agreement of the Company and its fiduciary duties to the Company and its minority members by taking actions designed to oust the minority members so that the Manager and Gatz family members could use the assets of the Company to their own benefit. In its post-trial opinion, the Delaware Court of Chancery held in favor of the plaintiffs.

The Manager first argued that its actions were not subject to a fiduciary duty analysis because the LLC agreement of the Company displaced common law equitable principles. In finding that traditional fiduciary duties did apply in the context of an LLC, the court noted that Section 18-1104 of the LLC Act provides a statutory mandate that equitable principles apply to an LLC. The court also looked to Section 18-1101(c) of the LLC Act, which permits fiduciary duties to be modified or eliminated, and found that this statutory provision implies that fiduciary duties must have existed in the first place. The court then addressed whether a manager of an LLC qualified as a "fiduciary" and, citing to Delaware precedent, indicated that a "fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person to protect the interests of another." The court found that because a manager of an LLC has more than an arms-length, contractual relationship with the members of the LLC it manages and is vested with discretionary power to manage the business of the LLC, it is a fiduciary. Turning to the terms of the LLC agreement of the Company, the court noted that the LLC agreement of the Company did not contain any general provision stating that the only duties owed by the Manager were set forth in the LLC agreement. In relevant part, the LLC agreement provided that the Manager could not cause the Company to enter into an agreement with an affiliate that was less favorable to the Company than the terms of similar agreements that could be entered into with "arms-length third parties" without the consent of a majority of the non-affiliated members. The court referred to prior cases in noting that this arms-length language for self-dealing transactions implicated the fiduciary duty of loyalty and imposed the equivalent of the substantive aspects of "entire fairness" review, which is the "fair price" prong. However, the court indicated that the entire fairness procedural inquiry into "fair dealing" may also apply in some respects because the extent to which the process leading to alleged self-dealing deviates from the behavior one would expect in an arms-length deal is important to price determination. In this regard, where there was no real market test, and where the self-interested party's conduct may have compromised the value of the asset in question, this could all bear on whether a fair price was paid.

With respect to the facts in this case, the court found that, as the plaintiffs alleged, the Manager knew in 2005 that the Operator intended to terminate the Sublease in 2010 pursuant to an early termination right that it had under the Sublease, but the Manager failed to take any action to address this expected loss, such as seeking a replacement operator for the golf course property. Instead, the court noted that the Manager sat back and waited for the Sublease to terminate and retained the cash surplus of the Company pursuant to a provision in the LLC agreement of the Company that permitted the Manager to retain funds that it reasonably determined were "necessary to meet the Company's present or future obligations," which in this case were future debt obligations of the Company after the Sublease terminated. The court found that the Manager took these actions because it desired to (i) let the Sublease terminate and to then use the property for residential properties, which it believed would be the best use and result in the highest value of the property and (ii) oust the minority members because it did not like having them interfere with what Gatz viewed as a Gatz family venture and that Gatz thought that if the Company were in a position of economic weakness, he could exploit that for the exclusive financial benefit of himself and his family. The court held that because the Manager was charged under the LLC agreement of the Company with the obligation to manage the operations of the Company, it had a fiduciary duty to manage the business loyally for the benefit of the members, which included the duty to address in good faith known, material risks that threatened the viability of the business of the Company. For these reasons, the court found that the Manager breached its fiduciary duties of loyalty and care by its bad faith and grossly negligent refusal to explore strategic options for the Company after knowing that the Operator would terminate the Sublease.

The court next turned to the Manager's dealings with a third-party that was interested in purchasing the Company or the lease owned by the Company. According to the court, the third-party asked to review the lease, the Sublease and other financial information, but the Manager refused to provide this information. Nevertheless, this offeror submitted an offer that unbeknownst to it, was below the Company's outstanding debt. However, rather than informing the offeror of this, the Manager put the offer to a membership vote knowing that it would be rejected and without informing the members that the offer was made without any due diligence by the offeror. The offeror then indicated that it was willing to negotiate an offer that could be north of $6 million, but the Manager never responded to this invitation to negotiate and the Manager never communicated this to the minority members. Although the Manager sought authorization from the minority members to approve a counteroffer of $6 million and the minority members approved it, the Manager, in its capacity as a member, and the Gatz family members, voted against it. The court held that the Manager violated its fiduciary duty of loyalty by its bad faith refusal to consider the third-party's offer to buy the Company or the lease owned by the Company and that it had also engaged in bad faith conduct when it presented to the minority members misleading information about the third-party's offer. Gatz submitted its own offer to purchase the Company for $6 million, which was rejected by the minority members, and then submitted a subsequent offer significantly lower than his initial offer based on an appraisal he obtained without giving the appraiser all relevant information. Gatz indicated at trial that this was his attempt to play "hardball" with the minority members. The court found that playing "hardball" is how one would deal with competitors not teammates and that the Manager violated its fiduciary duty of loyalty in its own conduct in its buyout offers.

The Manager then put the Company up for sale by an auction, which the court considered a "sham." The court noted that the Manager hired an auctioneer that had no experience with this type of transaction, that the auction was held within 90 days despite information available to the Manager from an appraiser that indicated that it would take six to nine months to market the property, that advertising commenced only two months prior to the auction date, with some of the advertisements being the size of postage stamps in newspapers of general circulation, that "as is" sale materials were offered to potential bidders that downplayed the value of the property, and that under the terms of the sale, the Manager was permitted to cancel the auction at any time before bidding began. Gatz was the only bidder at the auction and purchased the property for $50,000 in excess of the Company's debt, which resulted in approximately $20,000 to the minority members. Based on these facts, the court held that no rational person acting in good faith could perceive the auction as adequate, and, thus, the Manager acted in bad faith and was grossly negligent in running the auction process. The court noted that the Manager sought to protect itself from liability by claiming that it relied on the auctioneer's expert advice under Section 18-406 of the LLC Act, but held that a fiduciary cannot select an unqualified advisor instead of a qualified one and then claim he was guided by an expert, and, further, Gatz's claim of "reliance" was undercut by his involvement in the development and approval of the marketing plan and the terms of sale.

The Manager also argued that based on their voting power as members, it and the Gatz family members could veto any option for the Company, so they could properly use a chokehold over the Company to pursue their own interests, and the minority would have to live with the consequences of their freedom of action. The court found that the Manager was indeed free to vote its membership interest however it desired in connection with a sale of the Company, but that it was not free to create a situation of distress by failing to cause the Company to explore its market alternatives and then to buy the Company for a nominal price. The court observed that the purpose of the duty of loyalty was to prevent the exploitation by a fiduciary of its position to the disadvantage of a minority.

Finally, the Manager argued that even if it breached its fiduciary duties, there was no economic harm because the Company was insolvent. The court found that Gatz is the one that put the Company in a position of relative economic weakness by not taking action and letting the Sublease lapse and then running a sham auction. The court, therefore, awarded the minority members their full capital contribution plus $72,500, the equivalent of a sale of the company at $6.5 million, which factored in the $6 million offer plus the cash the Company had on hand. The court also awarded one-half of plaintiff's attorneys' fees and costs based on Gatz's conduct before and during the litigation and the breaches of the duty of loyalty.

Subsequent to the Court of Chancery's decision, Gatz filed an appeal, and Gatz Properties filed a voluntary Chapter 11 petition. When the Bankruptcy Court granted a motion for relief from the automatic stay, the Delaware Supreme Court was able to proceed with Gatz's appeal. Specifically, the Supreme Court held that Gatz did violate his contracted-for fiduciary duty to abide by the equitable standard of entire fairness in a conflict of interest transaction between himself and the Company by refusing to negotiate with a third-party bidder and by causing the Company to be sold to himself at an auction engineered by himself and sold to himself at an unfair price. The Supreme Court affirmed the Court of Chancery's award of damages and attorneys' fees.

The Supreme Court first analyzed whether the Court of Chancery correctly determined that Gatz owed contractually-agreed-to fiduciary duties to the other members of the Company. The Supreme Court held that Section 15 of the LLC Agreement, which prohibited related-party transactions that were "on terms and conditions which are less favorable to the Company than the terms and conditions of similar agreements which could then be entered into with arms-length third parties, without the consent of a majority of the non-affiliated Members[,]" was "the contractual equivalent of the entire fairness equitable standard of conduct and judicial review." The Supreme Court found that Section 15 of the LLC Agreement contractually adopted the fiduciary duty standard of entire fairness and the fair price obligation inherent in that standard. Thus, entire fairness (fair dealing and fair price) was the controlling fiduciary duty standard and, because no majority-of-the-minority vote occurred to approve the transaction as required by Section 15, Gatz had the burden to establish the transaction's fairness. The Supreme Court found adequate facts in the record to support the Court of Chancery's determination that Gatz did not establish the transaction's fairness and breached the fiduciary duty he owed to the minority members of the Company to engage in fair dealing and to obtain a fair price. Specifically, the record showed that the Company was worth more than Gatz paid, Gatz refused to properly deal with an interested third-party bidder, and the auction process was a "sham" based on the unprofessionalism of the marketing effort and the decision to auction off the Company as a distressed property as opposed to selling the Company in an orderly way. Therefore, the Supreme Court held that Court of Chancery properly determined that Gatz did not carry his burden of proving that he abided by his contracted-for fiduciary duty of entire fairness.

Second, the Supreme Court looked to whether the LLC Agreement exculpated Gatz. Section 16 of the Agreement permitted exculpation and indemnification of the Company's manager in certain instances. However, the Supreme Court found ample evidence in the record to support the Court of Chancery's determination that Gatz "acted in bad faith and made willful misrepresentations in the course of breaching his contracted-for fiduciary duty." Specifically, the court noted that Gatz knew that the Sublease likely would be terminated early, did not engage in any serious effort to look for a replacement golf course operator, refused to provide due diligence to a credible buyer, and decided to pursue a distressed sale auction when the Company's cash reserves would have permitted it to continue to pay its bills for three years while searching for a buyer. Because Gatz engaged in acts of bad faith and willful misconduct, the LLC Agreement offered him no exculpation.

Third, the Supreme Court considered the Court of Chancery's analysis regarding whether the Delaware LLC Act imposed default fiduciary duties. The Supreme Court found that the LLC Agreement explicitly and specifically addressed the "fiduciary duty issue" which controlled the dispute and that no litigant had asked the court to determine whether default fiduciary duties existed as a matter of statutory law. The Supreme Court also stated that the issue of whether the Delaware Limited Liability Company Act "does—or does not—impose default fiduciary duties is one about which reasonable minds could differ." Therefore, the Supreme Court held that the Court of Chancery's pronouncements about default statutory duties under the LLC Act "must be regarded as dictum without any precedential value."

Finally, the Supreme Court upheld the award of equitable damages because the record supported the Supreme Court's finding that Gatz breached a contracted-for fiduciary duty arising from equity and the award "was based on conscience and reason." Furthermore, the Supreme Court held that the award of attorneys' fees was warranted given the Court of Chancery's supported findings that Gatz engaged in bad faith litigation conduct.

l. *Paron Capital Mgmt., LLC v. Crombie*, C.A. No. 6380-VCP (Del. Ch. May 22, 2012)

Plaintiffs, two individuals with expertise in the investment field, sued defendant Crombie for acts arising out of a fraud related to a quantitatively-based trading program allegedly developed by Crombie. After performing extensive due diligence on Crombie and his software program—based in part on false information provided by Crombie about his financial situation, employment history, and investment track record—plaintiffs entered into business with Crombie. The parties formed Paron Capital Management, LLC (Paron) in June 2010—Crombie was the Initial Manager and a member of Paron and plaintiffs were also members of Paron.

Paron received an audit request in 2011 from its regulator. As part of the audit, Crombie provided certain account statements, which had been utilized previously to confirm Crombie's investment track record. In reality, Crombie had fabricated the account statements. After suspecting that the account statements were fabricated, plaintiffs halted all Paron trading activities, confronted Crombie, contacted Paron's regulator, and informed Paron investors that trading had stopped and that the situation was under investigation.

After confirming that the statements were fabricated, plaintiffs removed Crombie as member and Initial Manager of Paron. Then, plaintiffs filed an action against Crombie alleging breach of fiduciary duty and fraud.

The court held that Crombie, in his capacity as manager of Paron, owed general fiduciary duties of loyalty and care to plaintiffs, members of Paron, and that Crombie had breached his duty of loyalty. Crombie owed a general duty of loyalty to plaintiffs because the parties had not abrogated the application of traditional fiduciary duties in the Paron LLC Agreement. Furthermore, Crombie did not contest plaintiffs' interpretation of the LLC Agreement that Crombie owed plaintiffs fiduciary duties of loyalty and care. The court held that Crombie breached the duty of loyalty that he owed plaintiffs by preparing fraudulent marketing materials for Paron (based on information he provided that was forged or fabricated) and by continuing to conceal material information about his investment track record, his past employment, and his personal financial situation while Paron was operational. Because Crombie continued to conceal these misrepresentations and took affirmative steps to continue his fraudulent activity by providing false account statements, the court found that Crombie, in his capacity as Paron's manager, breached the duty of loyalty owed to plaintiffs in their capacity as members of Paron.

The court also found that plaintiffs satisfied the elements of fraud: Crombie had made numerous false representations of fact to plaintiffs before forming Paron with them, Crombie intended for plaintiffs to rely on those misrepresentations in deciding whether to go into business with him, plaintiffs justifiably relied on Crombie after performing sufficient due diligence, and plaintiffs suffered damage as a result of the fraud perpetrated by Crombie.

The court awarded reliance damages for loans and costs advanced to Crombie and Paron, mitigation costs for having to participate in litigation that was a direct result of Crombie's fraudulent conduct, and lost earnings for both plaintiffs based on their historical earnings, as well as attorneys' fees and expenses.

m. *Lola Cars Int'l. Ltd. v. Krohn Racing, LLC,* C. A. No. 4479-VCN; *Lola Cars Int'l. Ltd. v. Krohn Racing, LLC,* C.A. No. 4886-VCN (Del. Ch. Aug. 2, 2010)

This post-trial decision "dealt with a business relationship gone awry." The case involved a joint venture named Proto-Auto, LLC, a Delaware LLC (the "Company"), which was formed by an English company ("Lola") and a Delaware LLC ("Krohn"). Lola held 51% of the interest in the company and Krohn held 49%, but the parties agreed to equal representation on the Company's board, with each party appointing one director. Krohn appointed Hazell as director of the Company and agreed to contribute Hazell's services as the Company's CEO. Hazell was also named as a defendant in this case.

Lola claimed that Hazell mismanaged the Company, thereby breaching his fiduciary duties of care and loyalty. As noted by the court, a manager of a Delaware LLC owes the LLC and its members the traditional fiduciary duties of care and loyalty; however, these duties may be contractually limited by agreement among the members. Because the members did not agree in the Company's operating agreement or otherwise to limit Hazell's fiduciary duties as the manager of the Company, the court found that Hazell was bound by the traditional duties of care and loyalty. Lola argued that Hazell's effort to challenge a recently amended design regulation constituted a violation of his duty of care. The court stated that to prove a claim for breach of duty of care, Lola needed to demonstrate that Hazell acted with gross negligence, which has been defined as "reckless indifference" or conduct beyond the "bounds of reason." The court determined that Lola failed to meet its burden. While Hazell had been advised that efforts to lobby for an exemption from the regulation were likely to fail, there were legitimate reasons for doing so. Lola also argued that Hazell's failure to sell any Company vehicles was motivated by his loyalty to Krohn. Not only did the court find that Hazell's lack of independence and potential conflicts were known from the outset, it also held that there was insufficient evidence to conclude that Hazell deliberately, or even recklessly, stunted the Company's sales efforts as a means of furthering Krohn's interests.

The court also addressed Lola's request for judicial dissolution. Under Section 18-802 of the LLC Act, upon "application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." The court stated that even if the high standard of "not reasonably practicable" is met, the decision to enter a decree of dissolution rests with the discretion of the court. The court stated that the exercise of its discretion in judicial dissolution cases has been guided, among other things, by: (1) whether there is deadlock between the members at the board level, (2) whether the operating agreement gives a means of navigating around the deadlock, and (3) whether, due to the company's financial position, there is still a business to operate." The court found that there was no deadlock among the members. While representation on the Company's board was split evenly between the members, management of the Company's daily business affairs was vested in Hazell, who could not be unilaterally removed. The court determined that the most significant fact, however, was the fact that the operating agreement contained a provision whereby the parties could resolve any deadlock. Under the deadlock procedure, if a dispute between the members remained unresolved for approximately one month, one member (the "Terminator") had the right to offer a buyout price to the other member (the "Recipient"). The Recipient then had fifteen days in which to either accept the requirement to sell all of its interest to the Terminator or serve written notice upon the Terminator to require it to sell all of its interest to the Recipient at the same buyout price. According to the court, while it may have not been an ideal remedy for Lola's discontent with Hazell and Krohn, the deadlock procedure provided a method by which Lola could exit the business if it so chose. The court's determination that the deadlock procedure was a reasonable alternative for carrying on the business of the LLC stands in contrast to its holdings in both *Fisk Ventures, LLC v. Segal*, C.A. No. 2017-CC (Del. Ch. Jan. 13, 2009), and *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004). In *Fisk*, the court found it inequitable to force the petitioner to use its put right to exit its investment if it did not deem it to be in its best interest. Similarly, in *Haley*, the court found the exit mechanism to be an unreasonable alternative to carrying on the business of the LLC both because neither party wanted to leave the LLC and because the exit mechanism would not have provided for the removal of Haley as a personal guarantor of a mortgage on property owned by the LLC even though he would no longer have had any interest in the LLC.

The court in *Lola* concluded by emphasizing that a party to an operating agreement may not seek judicial dissolution as a means of freeing itself from what it considers to be a bad deal. As stated by the court, such a rule would unfairly permit one party to defeat the reasonable expectations of the other.

n. *Vila v. BVWebties LLC*, C.A. No. 4308-VCS (Del. Ch. Oct. 1, 2010)

Bob Vila, the well-known home improvement expert ("Vila"), and his friend, George Hill ("Hill"), entered into a joint venture called BVWebties LLC ("Webties") for the purpose of promoting Vila's website, BobVila.com. Webties' LLC Agreement provided that Vila and Hill were the managers, each owning 49% of Webties with the remaining 2% owned by a trust. The LLC Agreement required the consent of a majority of the managers for all decisions or actions to be made or taken. In order to promote BobVila.com, Webties entered into a licensing agreement with Vila that allowed Webties to use certain intellectual property owned by Vila. Either party could unilaterally terminate the licensing agreement at any time for any or no reason. In late 2007, after losing Webties' biggest advertiser and with the housing bubble about to burst, Vila and Hill began to disagree on the direction of Webties. The disagreement culminated in (a) a stalemate between Vila and Hill as to the strategic direction of Webties, (b) Vila's termination of the licensing agreement and a related suit by Hill in Massachusetts, and (c) Vila's initiation of the this action in the Court of Chancery seeking judicial dissolution of Webties under Section 18-802 of the LLC Act.

The court began by stating that in a judicial dissolution action, "the party seeking dissolution must prove by a preponderance of the evidence that he is (i) a member or manager, and (ii) that it is 'not reasonably practicable to carry on the business in conformity with a limited liability company agreement.'" Since it was clear that Vila was both a manager and a member of Webties, the court focused on whether it was no longer reasonably practicable to carry on the business of Webties in accordance with its LLC agreement. Vila advanced two arguments in support of judicial dissolution. First, he argued that since the purpose of Webties was to operate BobVila.com and Vila had terminated the licensing agreement with Webties, it was impossible for Webties to continue to perform its purpose. Second, he argued that the LLC agreement required both Vila and Hill, as managers of Webties, to consent to Webties' decisions and actions, and given that Vila and Hill could not agree on how to operate the business, no actions could be taken in accordance with Webties' LLC agreement.

The court stated that "[w]hen two coequal owners and managers whose mutual agreement is required for any company action are deadlocked as to the future direction and management of the enterprise and the LLC agreement provides no mechanism by which to break the deadlock, it is not reasonably practicable for the LLC to operate consistently with its operating agreement and a judicial dissolution will be ordered." The court analogized this situation to cases brought under DGCL Section 273, which sets forth the following three prerequisites for a judicial dissolution: (i) the corporation must have two 50% stockholders, (ii) those stockholders must be engaged in a joint venture, and (iii) those stockholders must be unable to agree upon whether to discontinue the business or how to dispose of its assets. The court found that Vila and Hill were deadlocked over serious managerial issues, including the strategic vision for and current operation of Webties and that the LLC agreement did not provide any alternative basis for resolving the deadlock. The court also found that Webties could not continue to operate in conformity the LLC agreement after Vila's termination of the licensing agreement. The court noted that this was not a case in which Vila in bad faith manufactured a phony deadlock, terminated the licensing agreement on short notice and sought dissolution so that he could take profits for himself that otherwise would have come to Webties. The court stated that "a business is not being operated in accordance with its governing instrument when one fiduciary acts as sole manager in a situation where the agreement of others is required." For these reasons, the court granted Vila's request for judicial dissolution of Webties.

Hill brought counterclaims alleging that Vila breached Webties' LLC agreement, breached the implied covenant of good faith and fair dealing and breached his fiduciary duties. The court found no basis for Hill's claims that Vila breached the LLC agreement. The court also denied Hill's claims that Vila breached the implied covenant of good faith and fair dealing. Hill argued that Vila breached the implied covenant by bringing the judicial dissolution action and refusing to accept supposed offers to purchase Webties. The court's denial was based on the fact that judicial dissolution is a remedy expressly contemplated by the LLC agreement and that Vila, as an equity owner, was under no contractual duty to consider selling his interest in Webties at a price that he viewed as suboptimal. Finally, the court dismissed Hill's fiduciary duty claims, finding them to have arisen out of the same facts that formed the basis for Hill's breach of contract claims and thus *to fail because they were superfluous.*

o. *Cline v. Grelock,* C.A. No. 4046-VCN (Del. Ch. Mar. 2, 2010)

This case involved a failed recovery and towing service; American Asset Recovery ("AAR"). AAR was organized as a Delaware LLC by two friends—the plaintiff ("Cline") and the defendant ("Grelock"). AAR operated mostly at a loss for about six months and was then dissolved unilaterally by Grelock. Grelock then started another similar company called Hound Dog Recovery ("Hound Dog") with his wife ("Crystal") and without Cline. Grelock then used the assets of AAR for the benefit of Hound Dog. Cline sued for damages and an ownership interest in Hound Dog.

There was a dispute over the parties' respective ownership percentages. The tax records for AAR reflected that the company was supposed to be owned equally between Cline and Grelock, 50/50. However, Grelock claimed that Cline had never made the required $25,000 capital contribution. Cline did not dispute the fact that he never made his capital contribution, but he claimed that he never signed the Operating Agreement that required it. In fact, the only contribution that Cline made was as a co-guarantor on the truck that AAR purchased with a loan from Sovereign Bank. The court found that it was unreasonable for Cline to claim he was a 50% owner when he did not make a capital contribution.

Grelock unilaterally dissolved AAR and established Hound Dog, which the court found to be a breach of his fiduciary duty because Cline had been treated as a member of AAR. However, Cline was unable to prove any damages from the dissolution of AAR and did not demonstrate a reasonable basis for assessing damages, if there were any. In the alternative, Cline argued that as a wrongfully excluded co-owner of AAR, he was entitled to an ownership interest in Hound Dog. After agreeing that a former partner (or member of an LLC) may be held accountable for profits earned using partnership assets, the court determined that Cline failed to show what his interest should be or how the court should calculate it. Moreover, the court was not persuaded that a person who failed to make a capital contribution should be allowed to claim an interest in a successor company. Therefore, even though Grelock's unilateral dissolution was a breach of fiduciary duty, the court did not afford Cline relief on his claims because he did not prove that he was harmed in any way.

Next, Grelock asserted a counter-claim asking the court to compel Cline to make his capital contribution for the benefit of AAR. The court assumed the benefit would actually go to Grelock and refused, citing Grelock's breach of fiduciary duty in dissolving AAR. Since Grelock excluded Cline and deprived him of whatever benefit he might have received from the continuation of AAR, the court would not compel Cline to pay.

Finally, the court took up the issue of the outstanding loan on the truck that was purchased by AAR, guaranteed by Cline and Grelock, and used for the benefit of Hound Dog. The court ordered Grelock and Crystal to exercise all good faith efforts to obtain Cline's release from the guaranty. Furthermore, the court said that if they were unable to secure Cline's release, Grelock and Crystal had to individually indemnify and hold Cline harmless from any claim arising out of the guaranty. Lastly, the court assessed the costs of the action against Grelock because of his breach of fiduciary duty.

p. *Kelly v. Blum*, C.A. No. 4516-VCP (Del. Ch. Feb. 24, 2010)

Plaintiff was a member, manager and the president of Marconi Broadcasting Company, LLC, a Delaware limited liability company (the "Company"). The Company was initially funded by Plaintiff, who received Class B common membership units in consideration of his investment, and MBC Investment, L.P. ("MBC Investment"), which provided a loan to the Company plus an equity investment in Class A preferred units. MBC Investment was a wholly-owned subsidiary of ELB Capital Management, LLC ("ELB"). The Company began to experience cash flow problems and entered into an additional loan agreement with another wholly-owned subsidiary of ELB. In connection with this loan, the Company entered into an amended limited liability company agreement of the Company (the "LLC Agreement"), pursuant to which MBC Lender received Class C common membership units in the Company. The LLC Agreement required that all actions of the Company be approved by managers holding a majority of the voting power. The LLC Agreement also provided that the Company could not enter into any merger without the prior written approval of the Class A member or managers and the Class C member or managers. At all relevant times, Class A managers held 24%, Class B managers held 25% and Class C managers held 51% of the voting power. At a March 18, 2009 board meeting for the Company, a Class A manager of the Company, proposed a transaction by which a wholly-owned subsidiary of ELB would merge into the Company with "New Marconi" being the surviving entity (the "Merger"). The purchase price included a cash component, an assumption of the MBC Investment debt, and preferred units in New Marconi to be issued to MBC Investment. Further, all of the Class A, B and C common units in the Company would convert pursuant to the Merger into the right to receive $1 per class. Several weeks after the March 18, 2009 board meeting, MBC Investment and MBC Lender signed a written consent approving the Merger without plaintiff's consent. On April 8, 2009, MBC Investment and MBC Lender sent a copy of such written consent to plaintiff by fax and email, the confirmation of which was sent by FedEx on April 9, 2009. The Certificate of Merger was filed on April 17, 2009 to consummate the Merger. Plaintiff filed his complaint and all amendments thereto after the Merger was consummated.

The Delaware Court of Chancery first addressed plaintiff's motion for partial summary judgment on his claim for a declaratory judgment that the Merger was void either (1) because plaintiff did not receive adequate notice of its approval by written action as required by the LLC Agreement or (2) because the Merger closed before the notice period required by the LLC Agreement elapsed. The court noted that notwithstanding Section 18-209(b) of the LLC Act which provides that a merger of a Delaware limited liability company generally must be approved by members who own more than 50% of the then current percentage or other interest in the profits of such company, parties may contract to impose additional requirements as was the case in the LLC Agreement. As noted above, the LLC Agreement required prior written approval of the Class A member or Class A managers and the Class C member or Class C managers. The LLC Agreement further provided that any written consent that is not executed by any member "must be delivered to such Member no less than five (5) business days prior to the effective date of such consent." The LLC Agreement also provided that in the event notice was given by fax, a confirmation copy must be sent on the same day of the fax "by first class mail." Plaintiff asserted that the Defendants that approved the Merger technically violated this notice provision because the confirmation copy was sent the day after the fax. The court held that if the notice provision applied to a written consent (the Court acknowledged that it may not apply as these provisions could be construed as ambiguous), the notice was in "substantial compliance." The Court cited to corporate case law by analogy in indicating that substantial compliance "is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met."

The court then turned to Defendants' motion to dismiss each of plaintiff's other claims (each as explained below) for lack of standing. In this regard, Defendants claimed that plaintiff could not maintain standing subsequent to the Merger because plaintiff's claims were derivative in nature, Plaintiff was no longer a member of the Company as a result of the Merger, and only members of the Company could assert derivative claims. The court agreed that under Section 18-1002 of the LLC Act, a plaintiff must be a "member or an assignee of a limited liability company interest" at the time of bringing a derivative action, and thus, plaintiff could only assert direct claims. The court noted two exceptions to this general rule under corporate case law precedent whereby a former shareholder could bring a derivative suit following a merger that terminates its interest (1) if the merger itself is subject to a claim of fraud being perpetrated merely to deprive shareholders of standing to bring a derivative action and (2) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise. Plaintiff did not allege these situations and thus they did not apply to this case. The court then applied the standing analysis set forth in the corporate case of *Tooley* to determine whether plaintiff's claims were direct or derivative.

The court first addressed plaintiff's claim that the Defendants that were members and managers of the Company violated their fiduciary duties of loyalty and care, which each owed to plaintiff as the minority equity holder, in approving a self-interested transaction (i.e., the Merger) on terms unfair to plaintiff. The court noted that Delaware cases interpreting Section 18-1101(c) of the LLC Act have concluded that despite the contractual freedom to restrict or eliminate duties owed by members and managers of a limited liability company, in the absence of a contrary provision in a limited liability company agreement, traditional fiduciary duties of loyalty (including good faith) and care apply. The LLC Agreement provided in a section entitled "Duties" that the board of managers "shall manage the Company in a prudent and businesslike manner . . . ." The LLC Agreement also contained an exculpatory provision which provided that managers of the Company would not be liable for money damages "for breach of fiduciary duty to the Company nor to any Member for their good faith actions . . . but only for their own willful or fraudulent misconduct or willful breach of their contractual or fiduciary duties under [the LLC Agreement]." The court found that these clauses did not explicitly disclaim or limit the applicability of default fiduciary duties. Further, the court held that if the Defendant managers of the Company entered into the Merger, as plaintiff alleged, to profit from squeezing out plaintiff and obtaining control of property held by the Company, this stated a direct duty of loyalty claim sufficient to survive a motion to dismiss. With respect to the exculpatory provision, the court noted that members could limit or eliminate a manager's or member's liability for breach of contract and fiduciary duties under Section 18-1101(e) of the LLC Act except for liability arising from a bad faith violation of the implied contractual covenant of good faith and fair dealing. The court interpreted the exculpatory language set forth in the LLC Agreement to require plaintiff to allege a "willful" breach of the Defendant managers' contractual or fiduciary duties to have a valid claim. The court did not determine whether "willful" required "evil intent to harm" or "acting recklessly and outside the bounds of reason" as the defendant managers asserted, but found that plaintiff had satisfied this standard by alleging facts sufficient to suggest that the Defendant managers "actually and specifically intended to extinguish [plaintiff's] membership interest in [the Company], knowing that such action would harm plaintiff." Accordingly, the court denied the motion to dismiss.

The court next addressed whether MBC Investment and MBC Lender owed fiduciary duties to plaintiff as controlling members of the Company. The court noted that, like managers of a limited liability company, in the absence of provisions to the contrary in a limited liability company agreement, controlling members in a manager-managed limited liability company owe minority members "the traditional fiduciary duties" that controlling shareholders owe to minority shareholders. Citing to corporate precedent, the court stated that these fiduciary duties include the duty "not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders." In respect of the Company, MBC Investment and MBC Lender were controlling members as they had the authority to appoint managers with 24% and 51% of the voting power, respectively, and further, they had the collective power to cause the Company to enter into merger agreements, among other things. The court found that plaintiff sufficiently alleged facts that, if true, showed that MBC Investment and MBC Lender, with the aid of their respective managers of the Company, effected the Merger to benefit themselves at the expense of plaintiff, and accordingly, the court denied the motion to dismiss.

With respect to plaintiff's claim that MBC Investment and MBC Lender breached their implied contractual covenant of good faith and fair dealing under the LLC Agreement by approving the Merger, not seeking alternative strategies for the Company and allowing the Company to enter into a self-interested transaction, the court noted that to have a valid claim, plaintiff must have alleged a "specific implied contractual obligation and allege how the violation of that obligation denied [plaintiff] the fruits of its contract." The court found that plaintiff did not sufficiently allege any specific implied contractual obligation, how it was breached, or how he was damaged by such breach. In this regard, the court observed that the LLC Agreement expressly addressed self-interested transactions. Therefore, the court granted the motion to dismiss this claim.

The court then addressed plaintiff's claim that ELB aided and abetted the alleged breaches of fiduciary duties explained above. The court stated that under Delaware law, to state such a claim, plaintiff must show "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) the defendant, who is not a fiduciary, knowingly participated in the breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that plaintiff had sufficiently alleged that ELB knowingly participated in the breaches of fiduciary duty by the other Defendants through the acts of ELB's officers and its two wholly-owned subsidiaries (MBC Investment and MBC Lender) that directly harmed plaintiff for the same reasons as discussed above. Accordingly, the motion to dismiss was denied.

Finally, plaintiff also sought a declaratory judgment to invalidate the loan agreement between the Company and MBC Lender. The court specifically noted that plaintiff consented to such loan and pledged his membership interest in the Company to obtain the loan. On that basis, the court dismissed this claim.

q. *Bakerman v. Sidney Frank Importing Co., Inc.*, C.A. No. 1844-N (Del. Ch. Oct. 10, 2006)

Plaintiff was chief legal counsel to Sidney Frank Importing Co., Inc. ("SFIC") and individually owned a membership interest in a subsidiary of SFIC, Grey Goose LLC (the "LLC"). SFIC and the LLC conducted the Grey Goose vodka business. Despite plaintiff's position as chief legal counsel, management of SFIC and the LLC negotiated a sale of the vodka business without the knowledge of plaintiff. Shortly before the scheduled public announcement of the sale, management of the LLC advised plaintiff of the sale and requested plaintiff's consent to the sale in his capacity as a member of the LLC, which was required under the LLC's operating agreement. Of the $2.25 billion dollar cash purchase price, less than 0.49% was proposed to be allocated to the LLC, and on this basis plaintiff initially refused to give his consent. After management threatened to sue plaintiff and terminate his employment, plaintiff consented to the sale. Plaintiff then brought this action, which alleged several derivative and direct claims. In this decision, the court addressed defendants' motion to dismiss.

The court first addressed defendants' motion to dismiss plaintiff's derivative claims for failure to make a proper demand. The court stated that the standard for alleging demand futility in Delaware (as established in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) requires the pleading of particularized facts raising a reasonable doubt that (i) management is disinterested and independent or (ii) the contested transaction was otherwise the result of a valid exercise of business judgment. As to the first element of the first prong, the court stated that "disinterested" means that a manager is not on both sides of the transaction and is not due to receive a benefit from the transaction that is not shared by the company or other interest holders. In this case, the court determined that the substantial benefit that the managers of the LLC received in their capacity as shareholders of SFIC, at the expense of the LLC, satisfied this element of demand-futility. As to the second element of the first prong, the court stated that the independence of a manager is sufficiently compromised for the purposes of demand-futility when the manager is beholden to a controlling person or so under the influence of a controlling person that the manager's discretion is effectively sterilized. In this case, the control that SFIC and Sidney Frank, who was the founder, chairman, chief executive officer and majority shareholder of SFIC, exerted with respect to the LLC and the sale transaction created a reasonable doubt as to the independence of the managers of the LLC. Despite concluding that demand was excused under the first prong, the court went on to analyze the second prong of the demand-futility test. The court stated that managers of an LLC are presumed to have acted on an informed basis and in the honest belief that their decisions were in furtherance of the LLC and its members. The court stated that, in determining whether such a presumption is overcome by the facts, which typically requires a showing tantamount to corporate waste, both the substance of the transaction and the process by which it was adopted are reviewed. As to the substance of the transaction, the court found that under the facts presented it could not be reasonably concluded that the allocation of the purchase price between SFIC and the LLC was appropriate. As to process, plaintiff alleged that defendants failed to utilize mechanisms typically employed to produce a fair process, such as obtaining an independent appraisal of the assets or appointing a special committee to assess the fairness of the transaction. The court thus held that plaintiff had met his burden of demonstrating demand futility.

Defendants also alleged that plaintiff was an inadequate derivative representative of the LLC because (i) at the time of the sale he was SFIC's chief legal counsel, (ii) he allegedly violated New York's attorney disciplinary rules by accepting an interest in the LLC while serving as SFIC's legal counsel and (iii) the lawsuit was not supported by other members of the LLC. The court found that plaintiff's position as legal counsel to SFIC did not preclude him from bringing a derivative suit because, as defendants excluded him from the negotiations regarding the sale, he never served as legal advisor on the transaction, and thus his representation of SFIC did not involve issues that were "substantially related" to the derivative claims. In addition, the court found that the derivative claims may be maintained without the support of the other members of the LLC, stating that a derivative representative is assessed by his ability to advance the interest of similarly situated interest holders (even if there is only one interest holder with such interest), regardless of the support of other interest holders.

Turning to the substance of plaintiff's derivative claims, the court first addressed plaintiff's claim of breach of fiduciary duty based on the alleged coercion that led plaintiff to consent to the sale. The court disagreed with plaintiff's assertion that the inequitable coercion doctrine, which is the doctrine Delaware courts have applied in the context of proxy voting by diffuse shareholders of public corporations, was applicable in this case. The court found that this doctrine was not applicable to a member of a closely held LLC, which, unlike diffuse shareholders, is not hampered by the difficulties of collective action. Instead, the court applied the standards relating to coercion and duress in bilateral contract negotiations, stating that a party alleging coercion or duress must plead (i) a wrongful act, (ii) which overcomes the will of the aggrieved part and (iii) that he has no adequate legal remedy to protect himself. The court determined that the application of these standards in this context by the fact that the managers of the LLC, in their position as fiduciaries, had a duty to disclose to plaintiff any information that carried a substantial likelihood that a reasonable interest holder would view as significantly changing the total mix of information bearing on the decision. The court concluded that the threats of litigation and loss of employment, combined with the brief time period in which plaintiff was forced to make a decision without the assistance of counsel, coerced his consent, and thus the court refused to dismiss these claims.

The court then examined defendants' allegations that plaintiff's direct claims were in fact derivative in nature. The court stated that the classification of a claim as derivative or direct turns on (i) who suffered the harm (the company or the suing interest holder individually) and (ii) who would receive the benefit of the remedy (the company or the interest holder individually). Based on this test, plaintiff's breach of contract and breach of good faith and fair dealing claims were judged to be direct because plaintiff suffered the unique harm of the deprivation of his voting rights under the LLC's operating agreement through the defendants' economic coercion and the remedy for such harm would be due solely to plaintiff. The court thus concluded that these claims were direct claims and determined that plaintiff's pleadings with respect to these claims were sufficient to survive defendants' motion to dismiss.

r. *Blackmore Partners, L.P. v. Link Energy LLC*, C.A. No. 454-N (Del. Ch. Oct. 14, 2005)

Following the court's denial of the defendants' motion to dismiss referred to below, the defendants moved for summary judgment at the conclusion of discovery and this opinion was the court's decision with respect to such motion.

The plaintiff first alleged that the court should apply enhanced scrutiny to the challenged transaction in which the proceeds of the sale of substantially all of the LLC's assets were used to repay the debt of the LLC and to pay holders of unsecured notes a payment for covenant waiver thus rendering the LLC's units worthless. The plaintiff claimed the board of directors of the LLC deprived the unit holders of consideration that they would have received if the board had not agreed to the demands of the note holders. The court rejected the plaintiff's reliance on the court's decision in *Orban v. Field* which held that "when a board approves a transaction that favors one corporate constituency over another, they lose, at least as an initial matter, the cloak of business judgment protection," and the board must demonstrate that it acted reasonably and in good faith. The court in the instant case distinguished *Orban* by finding that the "defendants did not act 'solely or primarily for the express purpose of depriving a shareholder of effective enjoyment of a right conferred by law.'" Importantly, the LLC's operating agreement empowered the board of directors to authorize a sale of all or substantially all of the LLC's assets without a vote of the unit holders thus precluding any need for measures by the board to prevent the unit holder's approval or vote. The court also found that even if *Orban* applied to the instant case, the defendants met the enhanced scrutiny standard since the company was insolvent and no better transaction was available.

The court next addressed the plaintiff's claim that the defendants breached their fiduciary duties to the unit holders by focusing on the creditors' interests over the interests of the unit holders. The plaintiff conceded that the company was insolvent at the time of the disputed transaction, and the court stated that "the board of directors of an insolvent company may take into account the interests of creditors at the apparent expense of stockholders if, in doing so, the board meets its fiduciary duties to all relevant constituencies."

The court then analyzed whether the directors met their fiduciary duties with respect to the unit holders. The plaintiff claimed that the board's decisions regarding the transaction were tainted by the involvement of J. Robert Chambers ("Chambers"), a director who was a managing director of Lehman Brothers, a holder of an equal percentage of notes and units of the LLC. The court referred to its decision in *Cooke v. Oolie* which involved defendants who were both shareholders and creditors of a corporation considering an acquisition proposal. The *Cooke* court held that "plaintiffs bore the burden of showing that an actual conflict existed, and that the deal chosen by the defendants offered superior terms for creditors and inferior terms for the plaintiff shareholders compared to other proposals available to the defendant corporation." Unlike the defendants in *Cooke*, the defendants in the instant case owed fiduciary duties to creditors because the company was insolvent. Even if Chambers' membership on the board created a potential conflict, there were no better alternatives for the unit holders other than the transaction approved by the board. The court also noted that even if Chambers were conflicted, the board would still receive the protections of the business judgment rule because such protections only require that a majority of the directors approving the transaction remain disinterested, and the plaintiff made no claims that other directors were interested.

The court also rejected the plaintiff's argument that the Special Committee of independent directors formed by the board to consider potential transactions was tainted by the presence of the CEO of the LLC and Chambers at the meetings of the Special Committee. Since the plaintiff failed to present evidence that the CEO or Chambers influenced the Special Committee or acted "as anything more than necessary sources of information," the court found the Special Committee operated with "sufficient independence to merit the cloak of business judgment protection."

Next, the plaintiff argued that the defendants breached their duty of care by approving the transaction without sufficient expert information and by failing to use the leverage from a potential bankruptcy filing against the note holders to negotiate a better settlement for the unit holders. The court found that the plaintiff's claims based on breach of the duty of care were precluded by the LLC's operating agreement exculpating directors for all awards of damages for violations of the duty of due care. Nonetheless, the court addressed the plaintiff's claims regarding the duty of due care finding that the directors did not violate such duty. The court stated that the defendants did not act with gross negligence since the record showed that the Special Committee met "repeatedly over months to address the issue of the company's impending insolvency and to consider alternatives." Additionally, the note holders had the ability to veto any proposed transaction thus limiting any leverage power the company had against the note holders. Moreover, the court noted that "the choices made in formulating a negotiating strategy are within the core of what is protected by the business judgment rule," and the evidence failed to support the plaintiff's claimed violation of due care.

Finally, the court rejected the plaintiff's claim that the defendants acted in bad faith in approving the transaction finding that "the fact that unit holders were left with nothing at the end, given a context in which the chief alternative substantiated by evidence was an equally barren bankruptcy proceeding, does not suffice to rebut the presumption that the directors were acting in the good faith exercise of their fiduciary duties, or to establish a claim of waste." The court granted the defendants' motion for summary judgment.

s. *Blackmore Partners, L.P. v. Link Energy LLC,* C.A. No. 454-N (Del. Ch. Nov. 10, 2004)

This case arose from the approval by the board of directors of a Delaware LLC of the sale of substantially all of the LLC's assets for $290 million. Under the terms of the LLC's operating agreement, the board of directors had the power to effectuate the transaction without a vote of the LLC's unitholders, and no vote of the unitholders was sought. Out of the $290 million, $265 million was to be used to repay debt of the LLC, including certain unsecured notes, and the remaining $25 million was to be paid to the holders of the unsecured notes in return for their agreement to waive covenants in the notes that required any purchaser of the LLC to assume the notes. No proceeds from the sale were to be distributed to the LLC's unitholders, and the sale rendered the LLC's units worthless.

Plaintiff, a unitholder of the LLC, brought a class action against the LLC and its directors for breach of fiduciary duty, alleging that the board favored the noteholders, to whom they did not owe a fiduciary duty, at the expense of the unitholders, to whom they did owe a fiduciary duty, and also that the board failed to maximize unitholder value in a sale of control transaction and, thus, violated its duty of loyalty under the principles of the corporate *Revlon* doctrine. Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted, and this opinion was the court's decision with respect to such motion.

The court stated that under the *Revlon* doctrine, "once a board of directors determines to sell the corporation in a change of control transaction, its responsibility is to endeavor to secure the highest value reasonably attainable for the stockholders." The court then applied the principles of the *Revlon* doctrine in this case involving an LLC. The court noted that the LLC's operating agreement contained a clause that exculpated the directors from liability for breach of the duty of care and stated that under *Revlon* precedent in order to survive the motion to dismiss in such a case, the complaint must allege particularized facts that support an inference of disloyalty or a lack of good faith. Defendants argued that the complaint must be dismissed because it did not allege self-interest or lack of independence by the directors. The court acknowledged that the absence of allegations of self-interest or lack of independence is often a fatal defect in a complaint for breach of the duty of loyalty, but did not find that to be true in this case. Under these circumstances, where the allegations supported an inference that the LLC's units had significant value prior to the announcement of the sale and that the LLC was neither insolvent nor on the verge of bankruptcy at such time, the court held that plaintiff's allegations raised a reasonable inference of disloyalty or intentional misconduct by the board of directors. The court went on to state that while a more complete record may show that defendants were justified in acting as they did, at this stage it was reasonable to infer that a properly motivated board would not have agreed to a transaction that wiped out the value of the LLC's units and surrendered all of that value to the LLC's creditors. The court thus denied defendants' motion to dismiss.

t. *Metro Commc'n Corp. BVI v. Advanced MobileComm Techs. Inc.*, C.A. No. 20099 (Del. Ch. May 3, 2004)

Plaintiff, a former member of a Delaware LLC, brought an action against other former members and the managers of the LLC alleging, *inter alia*, breach of fiduciary duty and breach of contract. Plaintiff's investments in the LLC were made through contractually required capital calls during and after a period in which one of the defendants, and the employees of another of the defendants, were implicated in a bribery scandal. As a result of the bribery scandal, the LLC self-referred itself to the Department of Justice for activities that may have involved violations of federal law. These facts were not described in the management reports received by plaintiff during the course of its investment. In addition, the LLC Agreement specifically required the LLC to disclose to the members any event reasonably likely to result in a material adverse effect (an "MAE Notice"). The LLC was dissolved in 2000 in connection with a reorganization.

On a motion to dismiss filed by the defendants, the court held that the self-referral to the Department of Justice demonstrated knowledge of the bribery on the part of the managers and that defendants breached their fiduciary duty to the members in failing to give an MAE Notice as a result of the bribery. Two defendants had argued that the requirement to give the MAE Notice applied only to the LLC, not the managers, but the court stated that a manager of an LLC who knowingly permits the LLC to violate a contractual duty owed to a member breaches its fiduciary duties and found that the failure to provide an MAE Notice to the members supported a claim for breach of fiduciary duty.

With respect to fiduciary duties relating to disclosure obligations, the court ruled that the requirement of plaintiff to respond to capital calls did not trigger a duty on the part of the LLC's managers to disclose all material facts each time a capital call was made. Rather, plaintiff was required to show that defendants acted with scienter, and that plaintiff reasonably relied on defendant's misstatements. The court ruled that plaintiff's allegations that one of the defendants, who had participated in the bribery and sent a misleading e-mail to plaintiff, were sufficient allegations that such defendant knowingly misled defendant, and therefore acted with scienter. With respect to the remaining defendants, the issue was the date from which such defendants could have breached their fiduciary duty of disclosure, when it was not alleged that such defendants knew of the bribery scheme prior to the LLC self-referring itself to the Department of Justice. The court found that once a fiduciary comes into knowledge of the misleading nature of a prior communication, it has a duty to correct such misleading communication. Therefore, the court ruled that plaintiff alleged a viable fiduciary duty claim based on the remaining defendants' failure to correct the previous misleading communications once the self-referral to the Department of Justice occurred and they were aware of the bribery scheme.

u. *Gonzalez v. Ward*, C.A. No. 19224 (Del. Jan. 15, 2004)

This action challenged the compensation of the managers of a Delaware LLC during the winding up of the business of the LLC. Plaintiff resigned his position as manager at the time of the decision to dissolve the LLC but continued to hold a one-third interest in the LLC, along with the two other members, each of whom continued to serve as a manager following the dissolution. Under the LLC's operating agreement, managers were compensated according to a formula pursuant to which the managers would be paid $500 per day, capped at $180,000 per year. Prior to the dissolution of the LLC, each of plaintiff and the other two managers received $60,000 per year under this formula. Upon the dissolution, plaintiff, who was responsible for sales, abandoned his position as manager while the other two managers, who were responsible for financial and legal services, continued working to wind up the LLC. The remaining managers spent approximately two years winding up the LLC and, under the formula set forth in the operating agreement, each earned $90,000 during the first year of the wind up and $41,000 for part of the second year.

Plaintiff filed suit in the Court of Chancery challenging the compensation paid to the remaining managers for their work to wind up the LLC. The Court of Chancery denied the challenge based on its findings that (i) the level of work performed by the managers justified the increased compensation, (ii) the LLC would have incurred greater costs had it employed others to wind up the company, (iii) the compensation formula was set before plaintiff's resignation as a manager and (iv) the compensation formula was applied correctly by the remaining managers for their work in winding up the LLC. Plaintiff appealed these findings and argued that the Court of Chancery should have applied the entire fairness standard in assessing the compensation the managers paid to themselves. The Supreme Court held that plaintiff's claims that the remaining managers arbitrarily awarded themselves compensation were unsupported by the facts, as the managers had to deal with a substantial increase in their workload, and that Delaware case law applying a stricter standard when executives fix their own salaries was inapplicable, given that the managers applied a specific compensation formula that had been agreed upon beforehand by all members and managers of the LLC. The Supreme Court also upheld the Court of Chancery's determination that, regardless of whether the entire fairness standard applied, the remaining managers acted fairly and reasonably with respect to their compensation decisions.

v. *Solar Cells, Inc. v. True North Partners, LLC*, C.A. No. 19477 (Del. Ch. Apr. 25, 2002)

Plaintiff member filed a motion for a preliminary injunction seeking to enjoin the proposed merger of a Delaware limited liability company with and into the wholly owned subsidiary of the LLC's other member. Plaintiff alleged that the individual managers of the LLC, acting at the direction of the other member, acted in bad faith in approving the proposed merger and would be unable to prove the entire fairness of the merger. In response, defendants argued that all of the actions taken with respect to the merger were authorized by the operating agreement of the LLC and, further, that the operating agreement contained a provision that limited the fiduciary duties owed by the defendant managers. The court acknowledged that the operating agreement did include a provision limiting liability stemming from a conflict of interest but held that such a waiver did not mean that there was a waiver of all fiduciary duties. Moreover, the court observed that the limitation on liability had no bearing on the issue at hand because plaintiff sought to enjoin the proposed merger rather than impose liability on individual defendants. In this case, the defendant managers elected by the defendant member approved the proposed merger by written consent the day after a meeting of the full board of managers during which defendants did not discuss the merger; nor was notice of the merger given to plaintiff or its board representatives until the day following its approval, which was only a week before the proposed date of consummation of the merger. Based on these facts, the court found that defendants likely would be required to show the entire fairness of the proposed merger and noted that taking action in technical compliance with the law was not an unassailable defense of such action if it otherwise breached a duty.

The court then found there was a reasonable likelihood that defendants would not be able to establish that the proposed merger was the result of fair dealing or at a fair price. With respect to fair dealing, the court noted several factors including the dilution of plaintiff's interest from a 50% stake in the LLC to only 5% ownership interest in the surviving entity and that the merger's proposed market-reset provision that would raise plaintiff's initial equity interest in the surviving entity in the event that such entity secured third-party financing in 2002 was illusory because defendants would have control of the surviving entity and it would be within their power to delay consummation of any third-party investment until after 2002. With respect to fair price, the court based its ruling on the difference between the valuation used as the basis for the proposed merger and valuations that had been done only a few months prior to the approval of the merger which were materially higher.

Finally, the court held that plaintiff would suffer irreparable harm if the injunction were denied based on the dilution of its equity position and voting power and the loss of its bargained-for participation in company management. The court also considered the difficulties that would be presented by the need to consider the interests of third-party investors brought into the surviving entity in formulating relief for plaintiff if it ultimately prevailed.

w. *VGS, Inc. v. Castiel*, C.A. No. 17995 (Del. Ch. Aug. 31, 2000), *aff'd*, 781 A.2d 696 (Del. 2001)

This case involved a Delaware limited liability company formed to build and operate a satellite system. Two of the members of the LLC, which, in the aggregate, owned a 75% equity interest in the LLC, were controlled by David Castiel ("Castiel"). The third member of the LLC was controlled by Peter Sahagen ("Sahagen") and had a 25% equity interest in the LLC. The LLC was governed by a three member Board of Managers. The members holding the 75% interest had the right to appoint, remove and replace two of the three members of the Board of Managers while the other member had the right to appoint, remove and replace the third member of the Board. The members holding the 75% interest appointed Castiel and Tom Quinn ("Quinn") as managers while the 25% interest member appointed Sahagen as the third manager. The Board of Managers subsequently appointed Castiel as the CEO of the LLC.

Not long after the formation of the LLC, Sahagen became dissatisfied with Castiel's management of the LLC and offered, unsuccessfully, to buy control of the LLC from Castiel. After failing to acquire control of the LLC, Sahagen convinced Quinn that Castiel must be ousted from leadership for the LLC to prosper. Sahagen and Quinn, as managers of the LLC, then acted by written consent, without notice to Castiel, to merge the LLC under Delaware law into a Delaware corporation. The surviving corporation's board of directors consisted of Sahagen, Quinn and a third individual. Castiel was not named a director. In addition, Sahagen purchased additional shares of the surviving corporation, which resulted in Sahagen and the former member of the LLC he controlled owning a 62.5% ownership interest in the corporation. This left Castiel, through the former members of the LLC he controlled, with a 37.5% ownership interest in the corporation.

Following the merger, Castiel brought suit alleging that (i) the Board of Managers of the LLC did not have the authority to act by majority vote in approving the merger and (ii) by failing to give him notice of their proposed action, Sahagen and Quinn failed to discharge their duty of loyalty to him in good faith. Although the LLC Agreement of the LLC did not expressly state that the Board of Managers could act by majority vote, the court found that requiring a unanimous vote of the managers would render various provisions of the LLC Agreement superfluous and that a unanimous vote requirement was inconsistent with the intent of the parties reflected in the terms of the LLC Agreement. Consequently, the court held that the Board of Managers did have the authority to approve the merger by a majority vote. With respect to Castiel's breach of duty of loyalty claim, the court first noted that Section 18-404(d) of the LLC Act does expressly permit managers of an LLC to act by written consent without prior notice. The court went on to find, however, that the reason Sahagen and Quinn did not provide notice of their proposed action to Castiel was because they knew that if Castiel had notice, he would have attempted to remove Quinn and block the proposed merger. Applying the classic maxim of equity that "equity looks to the intent rather than to the form," the court stated that

> the [General Assembly's] purpose of permitting action by written consent without notice is to enable LLC managers to take quick, efficient action in situations where a minority of managers could not block or adversely affect the course set by the majority even if they were notified of the proposed action and objected to it. The General Assembly never intended . . . to enable two managers to deprive, clandestinely and surreptitiously, a third manager representing the majority interest in the LLC of an opportunity to protect that interest by taking an action that the third manager's member would surely have opposed if he had knowledge of it.

The court thus held that Sahagen and Quinn breached their duty of loyalty to Castiel, as a manager, and to the members of the LLC he controlled by failing to provide Castiel with prior notice of their actions. Because Sahagen and Quinn knew Castiel's protection against actions adverse to his majority interest was the right to appoint, remove and replace two of the three managers, they had a duty to give him prior notice, even if they believed that he would have interfered with a plan they conscientiously believed to be in the best interest of the LLC. Based on the court's finding of a breach of their duty of loyalty, the court rejected Sahagen and Quinn's assertion that their actions were entitled to the protection of the business judgment rule. The court did state in dicta that had Sahagen and Quinn given Castiel notice and then filed suit to block Castiel's anticipated action to replace Quinn, who was allegedly serving as a disinterested and independent member of the Board, the court's analysis might have been different.

2. Fiduciary Duties of Non-Managing Members and Others

a. *2009 Caiola Family Trust v. PWA, LLC,* C.A. No. 8028-VCP (Del. Ch. Oct. 14, 2015)

Plaintiff, 2009 Caiola Family Trust, a Florida trust ("CFT"), owned 90% of the membership interests of Dunes Point West Associates, LLC, a Delaware limited liability company and the owner of an apartment complex in Kansas (the "Company"). Defendant, PWA, LLC, a Kansas limited liability company ("PWA"), owned 10% of the membership interests of the Company and was its managing member. PWA itself was managed by additional defendant Ward Katz ("Katz"), who owned 10% of the membership interests of PWA and was the CEO of the Company's property manager, Dunes Residential Services, Inc. ("DRS").

Plaintiffs, CFT and its trustee, suspected PWA had caused the Company to make distributions to members that were returns of member capital rather than returns on investment, misstated the Company's finances, paid asset management fees in violation of the limited liability company agreement of the Company and caused the Company to incur unreasonable expenses. Plaintiffs contended that in addition to the foregoing, defendants failed to participate in capital calls and committed other acts which, under the limited liability company agreement, permitted the removal of PWA as managing member and the recovery of damages. Defendants disputed these allegations and claimed that plaintiffs' claims were barred by laches. Based on these claims, plaintiffs asked the court to rule on the following: (1) whether plaintiffs could remove PWA as the managing member under the limited liability company agreement; (2) whether the alleged breaches of the limited liability company agreement by PWA established a basis to award money damages to the Company; (3) whether those same facts showed a breach of Katz's fiduciary duties owed to the Company; and (4) whether either party was entitled to attorney's fees from the other party. After trial, the court made the following ruling.

First, the court agreed that PWA could be removed as managing member because Katz ceased to be actively involved with the property manager's business when the Company replaced DRS with a new property manager, which was a violation of a provision in the limited liability company agreement of the Company that required Katz to remain actively involved with the property management and granted the removal of PWA as managing member.

Second, with respect to PWA's alleged breaches of the limited liability company agreement of the Company, the court held that plaintiffs proved that PWA materially breached the provisions that only permitted payment of asset management fees when the Company had sufficient net cash flow. The other claims either were not material or were barred by laches because the financial statements provided to plaintiffs put them on inquiry notice that the Company may not have had sufficient net cash flow to warrant payment of asset management fees at the time they were made.

Third, the court held that plaintiffs failed to meet their burden to prove that Katz breached his fiduciary duty to the Company or plaintiffs as a result of the asset management fees paid by the Company to the asset manager. The court concluded that under the *In re USACafes, L.P.* line of cases, Katz, as the managing member of PWA, would owe a duty of loyalty to the Company; however, plaintiffs' allegation that Katz caused the Company to pay the asset management fees in order to benefit his relationship with the asset manager was not supported by the facts. Plaintiffs failed to prove Katz's relationship to the asset manager was material to Katz and the asset management fees would have accrued regardless of whether they were paid out at the time they were.

Finally, the court decided to award plaintiffs only 50% of their attorneys' fees because they prevailed on their principal issue, removing the managing member, but only recovered a fraction of the money damages they sought due to laches.

b. *Corwin v. KKR Fin. Holdings LLC*, No. 629, 2014 (Del. Oct. 2, 2015)

Plaintiffs below appealed the Court of Chancery's dismissal of plaintiffs' complaint, which challenged the stock-for-stock acquisition of KKR Financial Holdings LLC ("Financial Holdings") by defendant KKR & Co. L.P. ("KKR"). Stockholder plaintiffs argued below that the acquisition was presumptively subject to the entire fairness standard of review because KKR was a controlling stockholder of Financial Holdings. In its opinion, the Court of Chancery granted defendants' motion to dismiss, finding that plaintiffs failed to plead facts supporting an inference that KKR was Financial Holdings' controlling stockholder. The Court of Chancery failed to find a combination of potent voting power and management control such that KKR could be deemed to have effective control of the board without actually owning a majority of stock. The Court of Chancery reasoned that plaintiffs were, at bottom, asking the Court of Chancery to impose fiduciary obligations on KKR, which owned less than 1% of Financial Holding's stock, because a preexisting contractual management agreement between a KKR affiliate and Financial Holdings constrained Financial Holdings' business and strategic options. Declining to create such a rule, the Court of Chancery held that KKR was not a controlling stockholder, and thus the business judgment rule standard of review applied to the acquisition.

On appeal, plaintiffs reiterated their controlling stockholder argument and also argued that even if KKR was not a controlling stockholder and the entire fairness standard of review was inapplicable, *Revlon* applied. Defendants argued that plaintiffs failed to fairly present their *Revlon* argument below, and, regardless, the transaction was approved by a fully informed, uncoerced stockholder vote, thus subjecting it to the business judgment rule standard of review. As to the controlling stockholder argument, the Delaware Supreme Court held that the Court of Chancery correctly applied the law and declined to repeat the Court of Chancery's analysis in its opinion. As to plaintiffs' *Revlon* argument, the Delaware Supreme Court agreed with defendants that the effect of the fully informed, uncoerced stockholder vote was outcome-determinative, even if *Revlon* applied. The court first reasoned that *Unocal* and *Revlon* were designed for pre-closing injunctive relief, rather than post-closing money damages claims as was the case here. Second, the court noted that the business judgment rule applied in these circumstances only when there was a fully informed, uncoerced stockholder vote, as opposed to a situation where "troubling facts regarding director behavior" were not disclosed to the stockholders. Finally, the court cited Delaware's long-standing policy of avoiding the "uncertainties and costs of judicial second-guessing" in circumstances where there is a fully informed, uncoerced stockholder vote.

The court also noted that although the parties "[had] acted as if this case was no different from one between two corporations whose internal affairs are governed by the [DGCL] and related case law. . . [and that the court] respected the parties' approach," but the court recognized that the case involved alternative entities and that in such cases, "distinctive arguments often arise due to the greater contractual flexibility given to those entities under our statutory law."

c. *Touch of Italy Salumeria & Pasticceria, LLC v. Bascio*, C.A. No. 8602-VCG (Del. Ch. Jan. 13, 2014)

Three individuals formed an LLC, the business of which was to operate an Italian grocery in Rehoboth, Delaware. The business was successful. However, one of the defendants decided to withdraw as a member of the LLC and gave notice pursuant to the LLC agreement, which provided that any member could withdraw after giving written notice to the other members. The withdrawing member allegedly told the remaining members that he intended to move to Pennsylvania and possibly start a new business there. However, ten weeks after he withdrew from the LLC, he opened a competing Italian grocery on the same block as the original Italian store. Plaintiffs sued and defendants filed a motion to dismiss, the subject of this opinion.

The court first addressed plaintiffs' breach of contract claim, looking to the LLC agreement itself to determine if defendant had breached the agreement. The court determined that the LLC agreement provided a mechanism for voluntary withdrawal and did not contain a non-compete provision. Further the court found that plaintiffs did not refer to any specific provision of the LLC agreement in support of their allegation of breach of the agreement. Therefore, the court dismissed this claim.

The court also dismissed plaintiffs' claims of fraud and misrepresentation because plaintiffs did not adequately plead any reliance on defendant's representations to their detriment in the complaint.

The court analyzed plaintiffs' allegation that defendant breached the implied covenant of good faith and fair dealing, which prevents a party from denying his or her contractual partners the benefit of their bargain based on circumstances that the parties did not anticipate. However, the court found that member withdrawal was specifically anticipated by the parties in the LLC agreement, which provided for voluntary member withdrawal. Further, the parties omitted a covenant not to compete in their LLC agreement, a "staple of employee contracts," which "omission the [p]laintiffs obviously now regret." The court refused to use the implied covenant to shoehorn a covenant not to compete into the parties' contract and dismissed this claim.

The court also dismissed plaintiffs' allegation that defendant breached his fiduciary duty to the LLC by making arrangements to open a competing business while he was still employed by the LLC. The court found that plaintiffs did not include any inferences supporting the conclusory allegation of breach of fiduciary duty in their complaint. Further, defendant would have owed no duties to the LLC in the ten weeks after he left the LLC until he opened his competing business.

Finally, the court dismissed plaintiffs' conversion claim because they failed to identify any specific property that defendant allegedly converted.

d. *Ross Holding and Mgmt. Co. v. Advance Realty Grp. LLC*, C.A. No. 4113-VCN (Del. Ch. Mar. 7, 2013)

In this case, the court considered plaintiffs' challenge to Advance Realty Group's ("ARG") failure to repurchase plaintiffs' units when they were terminated and to ARG's adoption of a Conversion and Exchange Agreement ("Conversion Agreement") that involved a capital restructuring of ARG that allegedly adversely affected the value of plaintiffs' ARG holdings because defendants diverted ARG's assets for their benefit. Defendants moved for summary judgment.

The court granted defendants' motion for summary judgment as to the two issues to which the court applied Delaware law—breach of fiduciary duty claims against Rayevich, a member of the ARG managing board, and against Sheridan, ARG's Chief Financial Officer ("CFO"), in connection with their alleged involvement with ARG's failure to repurchase plaintiffs' units and ARG's adoption of the Conversion Agreement.

Rayevich was bound by the ARG Operating Agreement to manage ARG reasonably and in good faith; the Operating Agreement exculpated him from liability absent willful misconduct or bad faith. The court noted that Rayevich, although a member of ARG's managing board, had no discretion in how to vote because he was required to vote as directed. Notwithstanding Rayevich's lack of discretionary voting power, the court stated that fiduciary duties extended beyond voting and could involve studying the proposed transaction, determining its appropriateness, expressing dissenting views to fellow board members and, under proper circumstances, informing unit holders about potential adverse effects. However, because plaintiffs failed to provide any facts that demonstrated Rayevich's lack of good faith in connection with the Conversion Agreement, the court granted defendants motion for summary judgment.

Sheridan did not dispute that she, as ARG's CFO, owed fiduciary duties to plaintiffs, ARG unit holders. The court noted that fiduciary duty liability exists within the management framework of an LLC, its managing board and its unit holders. Furthermore, it stated that when a fiduciary makes misleading disclosures but no unit holder action is sought, a plaintiff must prove that the fiduciary knowingly disseminated materially false information and must prove the elements of reasonably reliance, causation and damages. Here, the court found that plaintiffs failed to demonstrate that Sheridan's alleged misstatements, omissions and misrepresentations in ARG's financial statements caused them any damage or that they relied on any of her alleged misrepresentations regarding the Conversion Agreement. The court granted defendants motion for summary judgment.

The court also addressed claims of breach of the Unit Holders Agreement and civil conspiracy under New Jersey law; the court granted summary judgment regarding breach of the Unit Holders Agreement but refused to grant summary judgment as to certain fiduciary claims against Sheridan because participation in a civil conspiracy against ARG unit holders precluded dismissing those claims.

e. *Phillips v. Hove*, C.A. No. 3644-VCL (Del. Ch. Sept. 22, 2011)

The dispute arose out of a start-up business conducted through a Delaware LLC. In an earlier decision in which the court denied a motion to dismiss (*see Phillips v. Schifino*, C.A. No. 3644-VCL (Del. Ch. Dec. 18, 2009)), the court found that the transaction agreements involved were so ambiguous that it was unclear whether the central document, a four-page term sheet, was sufficient to constitute a limited liability company agreement. In this post-trial opinion, the court determined, among other issues, the identity of the voting members of the LLC. Noting that it had previously deemed the ownership provision in the term sheet to be ambiguous in denying a motion for summary judgment, the court now determined that the term sheet provided for an LLC composed of two members. One of the issues faced by the court was whether one of the members owned its membership interest in his individual capacity or through an investment entity. The term sheet referred both to the investment entity and to the individual as a member of the LLC and was executed by the individual in his individual capacity. Other agreements drafted in connection with the formation of the LLC, however, referred to the investment entity as a member of the LLC. The court noted that discussions between the parties indicated that the other member, who clearly owned his membership interest in his individual capacity, was aware that the investment entity, not the individual with whom the other member had negotiated, was intended to own the membership interest at issue. Based on the totality of the evidence, the court concluded that the membership interest was owned by the investment entity rather than the individual.

The court next considered whether it could exercise personal jurisdiction over an individual who was neither a member nor a manager of the LLC, but ran the day-to-day operations of the business and had filed a bankruptcy petition on behalf of the LLC. Noting that Section 18-109(a) of the LLC Act extends not only to formally designated managers but also to persons who "participate materially in the management" of an LLC, the court concluded that it could exercise jurisdiction in this case because an individual who manages the day-to-day operations of a business and files a bankruptcy petition on behalf of a business participates materially in the management of an LLC.

With the jurisdiction issue resolved, the court turned to a claim that the same individual breached his fiduciary duties. According to the court, an individual who asserts control over the operations of an LLC owes fiduciary duties to the LLC and its members even though such individual is not a member or manager. In making this determination, the court relied on past Delaware cases stating that one who controls property of another owes fiduciary duties when exerting such control over such property. The individual at issue had sold the LLC's inventory through a competing retailer, and the court concluded that this action constituted a breach of the duty of loyalty.

Finally, the court addressed an application for judicial dissolution of the LLC pursuant to LLC Act Section 18-802. Based on the history of animosity between the parties, the court concluded a deadlock existed. The court stated that the fact that the LLC had continued to operate marginally was irrelevant to whether a deadlock existed because the LLC never operated in conformity with the members' agreement. Although the term sheet provided for a mechanism to resolve disputes between the members, the court concluded judicial dissolution was appropriate because it was a more reasonable and equitable alternative than the contractual mechanism. Specifically, the term sheet called for resolution of member disputes by a five-member board. Each board member's appointment, however, had to be approved by both members of the LLC, which the court found to be unlikely given the state of relations between the members. In light of the members' history of disputes, the court also found it unlikely that the LLC would be wound down in an orderly and timely manner and therefore appointed a liquidating trustee pursuant to LLC Act Section 18-303(a).

f. *In re Atlas Energy Res., LLC, Unitholder Litig.*, C.A. No. 4589-VCN (Del. Ch. Oct. 28, 2010)

This case involved a publicly-traded limited liability company, Atlas Energy Resources, LLC (the "Company"), which negotiated a merger with its controlling unitholder, Atlas America, Inc. ("America"). The plaintiffs were public unitholders of the Company. The plaintiffs argued that America, as controlling unitholder, breached its fiduciary and other common law duties to the minority unitholders by negotiating the merger through an unfair process that resulted in terms that were unfair to the minority unitholders. The plaintiffs further argued that certain directors of the Company breached their fiduciary duties by agreeing to the merger. The defendants filed a motion to dismiss these claims.

First, the court held that under Delaware law, in the absence of provisions explicitly disclaiming the applicability of fiduciary duties, controlling members in a manager-managed LLC owe minority members the traditional fiduciary duties that controlling shareholders owe minority shareholders. The court also highlighted that it was particularly wary of eliminating such duties in the context of a publicly traded LLC and required either an explicit disclaimer or language mandating a contractual resolution. With respect to whether America had effectively modified its default fiduciary duties, the court found that the relevant provision of the LLC agreement of the Company (the "Operating Agreement") provided that "[w]henever a potential conflict of interest exists or arises between any Affiliate of the Company, on the one hand, and the Company or any Group Member, on the other, any resolution or course of action by the Board of Directors in respect of such conflict of interest shall be permitted and deemed approved by all Members, and shall not constitute a breach of this Agreement . . . or of any duty existing at law, in equity or otherwise, including any fiduciary duty, if the resolution or course of action in respect of such conflict of interest is (i) approved by Special Approval . . . ." In reviewing this provision, the court found that it only governed conflicts of interest between the Company and its "Affiliates," such as America, but not conflicts of interest between America and the Company's minority unitholders. Thus, the Operating Agreement did not eliminate America's fiduciary duties as the controlling unitholder of the Company to the minority unitholders. Applying the corporate precedent of *Kahn v. Lynch*, the court held that a merger between an LLC and its controlling unitholder must be evaluated under entire fairness notwithstanding any protective devices, such as independent committee review or approval by a majority of the minority unitholders, that may have been employed because, regardless of the protections employed, such a merger is characterized by "inherent coercion."

In discussing whether the merger satisfied the entire fairness standard, the court addressed the issues of fair price and fair dealing. With respect to fair price, the court found that plaintiffs sufficiently alleged facts suggesting the units were worth more than the consideration received under the merger agreement. The court also found that plaintiffs sufficiently alleged facts suggesting the process approving the merger may not have been fair, including that America withheld material information, that America manipulated the alternatives to the merger to make it appear that the merger of the Company with America was the only choice and that it exerted influence over the consultants to the special committee that approved the merger. Accordingly, the court denied America's motion to dismiss.

With respect to the plaintiffs' claims against the defendant directors of the Company, the court focused on a provision in the Operating Agreement that provided that except as otherwise set forth therein, "none of the Directors, nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Company or any Member." The court found that this language unambiguously eliminated the traditional fiduciary duties of the Company's directors and officers and that they were replaced by a duty of good faith on the directors and officers, where "good faith" was defined as an action believed to be in the best interest of the Company. The court noted that good faith under the Operating

Agreement required a subjective analysis in contrast to the object standard under the common law. The plaintiffs argued that such a provision was unenforceable because it eliminated the implied covenant of good faith and fair dealing. The court rejected this position, however, holding that the Operating Agreement clearly imposed a subjective good faith standard on the directors and the court would not invoke an implied covenant to override these provisions. The court noted that although the plaintiffs may have stated a colorable claim for breach of the traditional fiduciary duties of care and loyalty, they did not allege the type of subjective bad faith required to state a claim under the standard set forth in the Operating Agreement and, therefore, the claims against the defendant directors were dismissed.

g. *Kuroda v. SPJS Holdings, L.L.C.*, C.A. No. 4030-CC (Del. Ch. Mar. 16, 2010)

Following the court's dismissal in an earlier decision of the bulk of plaintiff's claims (see *Kuroda v. SPJS Holdings, L.L.C.*, C.A. No. 4030-CC (Del. Ch. Apr. 15, 2009), defendants filed counterclaims against plaintiff for: (a) breach of fiduciary duty, (b) breach of contract and (c) breach of implied covenant of good faith and fair dealing. Defendants had formed two investment funds: the Feeder Fund and the Master Fund (collectively, the "Funds"). The Master Fund served as the principal investment vehicle for making investments in strategically targeted Japanese companies and the Feeder Fund was structured to serve as a vehicle for U.S. investors to invest in the Master Fund. Plaintiff was a member of defendant SPJS Holdings, L.L.C., a Delaware limited liability company ("SPJS"), which was created to serve as the Funds' general partner. Steel Partners Japan Asset Management ("SPJAM") served as the Funds' investment manager, while Steel Partners Japan, K.K. ("SPJ-KK"), a corporation in which plaintiff was a 50% shareholder, consulted with SPJAM in connection with its role as investment manager. Plaintiff had no experience managing investments or operating an investment fund, but had spent time evaluating Japanese companies and developing acquisition strategies for senior Japanese executives. As such, he worked as a trusted consultant to the Funds' investment manager. Because of disagreements with his fellow members, plaintiff decided to withdraw from SPJS. Upon his departure, plaintiff launched a fund that competed directly with the Funds. Defendants alleged, among other things, that plaintiff misappropriated confidential investor lists, unlawfully used confidential trade secret information and hired away employees.

In the breach of fiduciary duty claim, defendants asserted that plaintiff violated fiduciary duties that arose both from the terms of a consulting agreement between SPJAM and SPJ-KK and from his role at SPJS and in the overall structure of the investment endeavor. The court found that the argument that plaintiff had assumed the role of a fiduciary by virtue of his "central role" in the LLC agreement was entirely baseless, as he was a non-managing member who had no control, power or authority over a single investor's assets or any actions taken by SPJS. Plaintiff's only duties were contractual, not fiduciary. As such, the court granted plaintiff's motion to dismiss the claim for breach of fiduciary duty.

In the breach of contract claim, defendants asserted that plaintiff violated provisions of the Funds' operating agreements that prohibited the disclosure of trade secrets and other proprietary information relating to the Funds. Plaintiff argued that because he was not a party to either operating agreement he could not be bound by any of their provisions, including the confidentiality provisions. Defendants, however, sought an exception to the rule that a non-signatory to an agreement will not be bound by it, arguing that plaintiff had implicitly adopted the contract when he accepted the benefits of the operating agreements. The court rejected defendants' implied-adoption argument, stating that a non-managing member of SPJS could not be bound to an agreement signed by SPJS, and dismissed the claim for breach of contract.

As to the breach of the implied covenant of good faith and fair dealing, defendants argued that plaintiff impliedly promised (1) not to misappropriate trade secrets, (2) not to cause SPJ-KK to commit a material breach of the consulting agreement's confidentiality provisions, (3) not to commit a material breach of the Fund's operating agreements' confidentiality provisions, (4) not to cause SPJS to commit a material breach of the Fund's operating agreements' confidentiality provisions, and (5) not to engage in conduct destructive to the business of SPJS and the Funds. The court refused to apply the implied covenant of good faith and fair dealing to impose upon plaintiff a duty of confidentiality under the SPJS operating agreement. Relying on *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434 (Del. 2005), the court explained that the implied covenant of good faith and fair dealing requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain. To successfully invoke the implied covenant, one must allege a specific implied contractual obligation and allege how the violation of that obligation denied him the fruits of the contract. In this case, the SPJS operating agreement specifically excluded any duties relating to confidentiality, while other agreements, including the consulting agreement, did not. As such, there was no specific implied contractual obligation of confidentiality that plaintiff could have breached. The court, therefore, dismissed the claim for breach of the implied covenant of good faith and fair dealing.

h. *Kelly v. Blum,* C.A. No. 4516-VCP (Del. Ch. Feb. 24, 2010)

Plaintiff was a member, manager and the president of Marconi Broadcasting Company, LLC, a Delaware limited liability company (the "Company"). The Company was initially funded by Plaintiff, who received Class B common membership units in consideration of his investment, and MBC Investment, L.P. ("MBC Investment"), which provided a loan to the Company plus an equity investment in Class A preferred units. MBC Investment was a wholly-owned subsidiary of ELB Capital Management, LLC ("ELB"). The Company began to experience cash flow problems and entered into an additional loan agreement with another wholly-owned subsidiary of ELB. In connection with this loan, the Company entered into an amended limited liability company agreement of the Company (the "LLC Agreement"), pursuant to which MBC Lender received Class C common membership units in the Company. The LLC Agreement required that all actions of the Company be approved by managers holding a majority of the voting power. The LLC Agreement also provided that the Company could not enter into any merger without the prior written approval of the Class A member or managers and the Class C member or managers. At all relevant times, Class A managers held 24%, Class B managers held 25% and Class C managers held 51% of the voting power. At a March 18, 2009 board meeting for the Company, a Class A manager of the Company, proposed a transaction by which a wholly-owned subsidiary of ELB would merge into the Company with "New Marconi" being the surviving entity (the "Merger"). The purchase price included a cash component, an assumption of the MBC Investment debt, and preferred units in New Marconi to be issued to MBC Investment. Further, all of the Class A, B and C common units in the Company would convert pursuant to the Merger into the right to receive $1 per class. Several weeks after the March 18, 2009 board meeting, MBC Investment and MBC Lender signed a written consent approving the Merger without plaintiff's consent. On April 8, 2009, MBC Investment and MBC Lender sent a copy of such written consent to plaintiff by fax and email, the confirmation of which was sent by FedEx on April 9, 2009. The Certificate of Merger was filed on April 17, 2009 to consummate the Merger. Plaintiff filed his complaint and all amendments thereto after the Merger was consummated.

The Delaware Court of Chancery first addressed plaintiff's motion for partial summary judgment on his claim for a declaratory judgment that the Merger was void either (1) because plaintiff did not receive adequate notice of its approval by written action as required by the LLC Agreement or (2) because the Merger closed before the notice period required by the LLC Agreement elapsed. The court noted that notwithstanding Section 18-209(b) of the LLC Act which provides that a merger of a Delaware limited liability company generally must be approved by members who own more than 50% of the then current percentage or other interest in the profits of such company, parties may contract to impose additional requirements as was the case in the LLC Agreement. As noted above, the LLC Agreement required prior written approval of the Class A member or Class A managers and the Class C member or Class C managers. The LLC Agreement further provided that any written consent that is not executed by any member "must be delivered to such Member no less than five (5) business days prior to the effective date of such consent." The LLC Agreement also provided that in the event notice was given by fax, a confirmation copy must be sent on the same day of the fax "by first class mail." Plaintiff asserted that the Defendants that approved the Merger technically violated this notice provision because the confirmation copy was sent the day after the fax. The court held that if the notice provision applied to a written consent (the court acknowledged that it may not apply as these provisions could be construed as ambiguous), the notice was in "substantial compliance." The court cited to corporate case law by analogy in indicating that substantial compliance "is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met."

The court then turned to Defendants' motion to dismiss each of plaintiff's other claims (each as explained below) for lack of standing. In this regard, Defendants claimed that plaintiff could not maintain standing subsequent to the Merger because plaintiff's claims were derivative in nature, Plaintiff was no longer a member of the Company as a result of the Merger, and only members of the Company could assert derivative claims. The court agreed that under Section 18-1002 of the LLC Act, a plaintiff must be a "member or an assignee of a limited liability company interest" at the time of bringing a derivative action, and thus, plaintiff could only assert direct claims. The court noted two exceptions to this general rule under corporate case law precedent whereby a former shareholder could bring a derivative suit following a merger that terminates its interest (1) if the merger itself is subject to a claim of fraud being perpetrated merely to deprive shareholders of standing to bring a derivative action and (2) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise. Plaintiff did not allege these situations and thus they did not apply to this case. The court then applied the standing analysis set forth in the corporate case of *Tooley* to determine whether plaintiff's claims were direct or derivative.

The court first addressed plaintiff's claim that the Defendants that were members and managers of the Company violated their fiduciary duties of loyalty and care, which each owed to plaintiff as the minority equity holder, in approving a self-interested transaction (i.e., the Merger) on terms unfair to plaintiff. The court noted that Delaware cases interpreting Section 18-1101(c) of the LLC Act have concluded that despite the contractual freedom to restrict or eliminate duties owed by members and managers of a limited liability company, in the absence of a contrary provision in a limited liability company agreement, traditional fiduciary duties of loyalty (including good faith) and care apply. The LLC Agreement provided in a section entitled "Duties" that the board of managers "shall manage the Company in a prudent and businesslike manner . . . ." The LLC Agreement also contained an exculpatory provision which provided that managers of the Company would not be liable for money damages "for breach of fiduciary duty to the Company nor to any Member for their good faith actions . . . but only for their own willful or fraudulent misconduct or willful breach of their contractual or fiduciary duties under [the LLC Agreement]." The court found that these clauses did not explicitly disclaim or limit the applicability of default fiduciary duties. Further, the court held that if the Defendant managers of the Company entered into the Merger, as plaintiff alleged, to profit from squeezing out plaintiff and obtaining control of property held by the Company, this stated a direct duty of loyalty claim sufficient to survive a motion to dismiss. With respect to the exculpatory provision, the court noted that members could limit or eliminate a manager's or member's liability for breach of contract and fiduciary duties under Section 18-1101(e) of the LLC Act except for liability arising from a bad faith violation of the implied contractual covenant of good faith and fair dealing. The court interpreted the exculpatory language set forth in the LLC Agreement to require plaintiff to allege a "willful" breach of the Defendant managers' contractual or fiduciary duties to have a valid claim. The court did not determine whether "willful" required "evil intent to harm" or "acting recklessly and outside the bounds of reason" as the defendant managers asserted, but found that plaintiff had satisfied this standard by alleging facts sufficient to suggest that the Defendant managers "actually and specifically intended to extinguish [plaintiff's] membership interest in [the Company], knowing that such action would harm plaintiff." Accordingly, the court denied the motion to dismiss.

The court next addressed whether MBC Investment and MBC Lender owed fiduciary duties to plaintiff as controlling members of the Company. The court noted that, like managers of a limited liability company, in the absence of provisions to the contrary in a limited liability company agreement, controlling members in a manager-managed limited liability company owe minority members "the traditional fiduciary duties" that controlling shareholders owe to minority shareholders. Citing to corporate precedent, the court stated that these fiduciary duties include the duty "not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders." In respect of the Company, MBC Investment and MBC Lender were controlling members as they had the authority to appoint managers with 24% and 51% of the voting power, respectively, and further, they had the collective power to cause the Company to enter into merger agreements, among other things. The court found that plaintiff sufficiently alleged facts that, if true, showed that MBC Investment and MBC Lender, with the aid of their respective managers of the Company, effected the Merger to benefit themselves at the expense of plaintiff, and accordingly, the court denied the motion to dismiss.

With respect to plaintiff's claim that MBC Investment and MBC Lender breached their implied contractual covenant of good faith and fair dealing under the LLC Agreement by approving the Merger, not seeking alternative strategies for the Company and allowing the Company to enter into a self-interested transaction, the court noted that to have a valid claim, plaintiff must have alleged a "specific implied contractual obligation and allege how the violation of that obligation denied [plaintiff] the fruits of its contract." The court found that plaintiff did not sufficiently allege any specific implied contractual obligation, how it was breached, or how he was damaged by such breach. In this regard, the court observed that the LLC Agreement expressly addressed self-interested transactions. Therefore, the court granted the motion to dismiss this claim.

The court then addressed plaintiff's claim that ELB aided and abetted the alleged breaches of fiduciary duties explained above. The court stated that under Delaware law, to state such a claim, plaintiff must show "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) the defendant, who is not a fiduciary, knowingly participated in the breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that plaintiff had sufficiently alleged that ELB knowingly participated in the breaches of fiduciary duty by the other Defendants through the acts of ELB's officers and its two wholly-owned subsidiaries (MBC Investment and MBC Lender) that directly harmed plaintiff for the same reasons as discussed above. Accordingly, the motion to dismiss was denied.

Finally, plaintiff also sought a declaratory judgment to invalidate the loan agreement between the Company and MBC Lender. The court specifically noted that plaintiff consented to such loan and pledged his membership interest in the Company to obtain the loan. On that basis, the court dismissed this claim.

i. *ZRII, LLC v. Wellness Acquisition Grp., Inc.*, C.A. No. 4374-VCP (Del. Ch. Sept. 21, 2009)

Plaintiff ZRII, LLC, a Delaware LLC (the "Company"), brought an action against several former officers, employees and contractors of the Company alleging that they had conspired to overtake or destroy the Company by improper means. In this decision, the Court of Chancery considered the Company's motion for a preliminary injunction based, among other things, on a claim that certain former officers of the Company (the "Defendant Officers") had breached their fiduciary duties to the Company.

As part of its argument for the injunction, the Company alleged that the Defendant Officers breached their fiduciary duties to the Company by conspiring to either wrest control of the Company from its current ownership or dismantle the Company's distribution system and start a competitive venture. The court stated that under Delaware law, a breach of fiduciary duty claim requires proof of two elements: (1) that a fiduciary duty existed, and (2) that the defendant breached that duty. Citing to corporate precedent, the court stated that the first prong of the test was satisfied because each of the Defendant Officers owed fiduciary duties to the Company as officers, which fiduciary duties the court stated were identical to those typically owed by a company's directors. In fact, the Defendant Officers admitted that they owed fiduciary duties to the Company. In support of its argument that the Defendant Officers breached their fiduciary duties to the Company, the Company alleged that the Defendant Officers organized an effort to take over or dismantle the Company, took confidential information that they used in their competitive venture and encouraged the Company's employees to stage a lockout. The court agreed with the Company and held that the Defendant Officers had breached their fiduciary duties to the Company.

j. *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, C.A. No. 3658-VCS (Del. Ch. Apr. 20, 2009)

This action arose out of a failed development project between plaintiff Bay Center Apartments Owner, LLC ("Bay Center") and defendant Emery Bay PKI, LLC ("PKI"). PKI was owned and operated by defendant Alfred E. Nevis ("Nevis"). To effectuate the development project, Bay Center and PKI formed defendant Emery Bay Member, LLC, a Delaware LLC ("Emery Bay"), and designated PKI as its managing member. Emery Bay's LLC Agreement provided for PKI to manage the project, but the details of its management duties were defined in a separate Development Management Agreement, which was an exhibit to the LLC Agreement. Under the LLC Agreement, PKI was required to cause one of its subsidiaries to enter into the Development Management Agreement with the Development Manager, which was defined as PKI or one of its affiliates. PKI designated another Nevis-owned affiliate, defendant Emery Bay ETI, LLC ("ETI"), as the Development Manager. Thus, the entity with primary responsibility for the success of the development project, the Development Manager, was not in contractual privity with Bay Center. Under the LLC Agreement, however, PKI had the power and authority to cause the Development Manager to perform its obligations under the Development Management Agreement.

Soon after the project began, Emery Bay defaulted on a construction loan that Nevis had guaranteed. Bay Center alleged that defendants secretly renegotiated the loan on several occasions, which both diverted cash flow from the development project and allowed Nevis to avoid triggering his personal guarantee. After a series of other problems allegedly resulting from mismanagement by PKI's affiliates, the development project failed and was put into receivership. In this case, Bay Center pursued a breach of contract claim against PKI, the only defendant that was party to the LLC Agreement, and sought to expand its remedial options by filing suit for breach of the contractually implied covenant of good faith and fair dealing, breach of fiduciary duty, common law fraud, and aiding and abetting a breach of fiduciary duty. This decision addressed defendants' motion to dismiss all of Bay Center's claims except for those based on breach of contract.

With respect to Bay Center's breach of fiduciary duty claims, the court first looked to the provisions of the LLC Agreement regarding the fiduciary obligations of the members. One section of the LLC Agreement provided that members owed each other the default fiduciary duties that exist between members of an LLC except where the LLC Agreement provided otherwise but the very next section of the LLC Agreement provided that no member owed the other member any duty of any kind that was not imposed by the LLC Agreement itself. The court found these seemingly contradictory provisions to create an ambiguity and, for purposes of the motion to dismiss, resolved the ambiguity in favor of an interpretation that the LLC Agreement required members to act in accordance with traditional fiduciary duties. The court thus denied defendants' motion to dismiss Bay Center's fiduciary duty claims against PKI.

Bay Center also alleged that Nevis, despite being neither a member nor an officer of Emery Bay, breached his fiduciary duty to Bay Center. The court stated that Nevis would be beyond the normal scope of those who owe fiduciary duties in the corporate context, but could be subject to fiduciary duties under the line of cases in the alternative entity context starting with *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991). The court held that to apply the USA Cafes doctrine to hold an affiliate liable for breach of fiduciary duty to an entity, the affiliate must exert control over the assets of that entity and, if such control is established, the affiliate only has "the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." The court, in attempting to resolve uncertainty regarding the scope of the duties under the *USACafes* doctrine, stated that limiting the application of *USACafes* to this duty provides a rational and disciplined way of protecting investors in alternative entities with managing members who are themselves entities, while not subjecting all the individuals who work for managing members to wide-ranging causes of action. The court found that Bay Center sufficiently pled that Nevis (a) exerted direct control over Emery Bay's property and (b) used such control to stave off personal liability. As such, the motion to dismiss this fiduciary duty claim against Nevis was denied.

The court next turned to Bay Center's aiding and abetting claims and stated that to allege a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that Bay Center had pled sufficient facts in this regard and thus denied defendants' motion to dismiss the aiding and abetting claims.

With respect to Bay Center's common law fraud allegations, the court stated that there are three ways to demonstrate common law fraud: (1) overt misrepresentation; (2) silence in the face of a duty to speak; or (3) deliberate concealment of material facts. In its claim, Bay Center argued that PKI and Nevis had a duty to speak and failed to do so. The court stated that to commit common law fraud through silence, a defendant must have a duty to speak that arises by operation of law, not purely by contract. For purposes of this motion, the court considered PKI subject to traditional fiduciary duties and held that fiduciaries of an LLC have a duty to disclose fully and fairly all material information within their control when they seek members' consent. Because the LLC Agreement required Bay Center's consent for any refinancing or restructuring of loans and the facts alleged showed that PKI failed to notify Bay Center of six of seven loan modifications, the court held that Bay Center successfully pled its fraud claim against PKI. The court stated that under Delaware law, "[a] corporate officer can be held personally liable for the torts he commits and cannot shield himself behind a corporation when he is a participant," which includes situations where a corporate agent participates in corporate fraud. On this basis, the court found that Bay Center had a proper claim against Nevis for his individual participation in PKI's fraud.

k. *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC (Del. Ch. May 7, 2008) and (Del. Ch. July 3, 2008)

Genitrix, LLC (the "Company") was formed to develop and market biomedical technology. The equity in the Company was divided into three classes, a Class A membership interest primarily owned by Dr. Andrew Segal ("Segal"), a Class B membership interest primarily owned by Dr. H. Fisk Johnson ("Johnson"), Fisk Ventures, LLC ("Fisk") and affiliates of Fisk and Class C membership interests owned by passive investors. The Company's LLC Agreement required the cooperation of the Class A and Class B members for the effective operation of the Company. However, the Class A and Class B members consistently disagreed on matters related to research and financing. The failure of the Class A and Class B members to agree left the Company virtually frozen and at the time of litigation the Company had only one employee, no office, no capital funds, no grant funds and it generated no revenue. The Class B members initiated a suit to dissolve the Company under Sections 18-801 and 18-802 of the LLC Act. In response, Segal counterclaimed against Fisk, Johnson and Stephen Rose and William Freund (who were representatives of Fisk on the board of representatives of the Company) alleging that the counterclaim/third party defendants breached the Company's LLC Agreement, breached the implied covenant of good faith and fair dealing implicit in the LLC Agreement, breached their fiduciary duties to the Company and tortiously interfered with Segal's employment agreement with the Company. Johnson moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction and the other counterclaim/third party defendants moved to dismiss the claims under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The court's opinion addressed the motions to dismiss made by the counterclaim/third party defendants.

Segal argued that the counterclaim defendants violated their fiduciary duties to Segal. In support of his breach of fiduciary duty claim, he pointed to the same provisions of the Company's LLC Agreement that he cited for his breach of contract claims. The court found that these claims should be dismissed for two reasons. First, the Company's LLC Agreement, as permitted by the LLC Act, had restricted or even eliminated fiduciary duties. Second, even assuming that there remained a fiduciary duty to not act in bad faith or with gross negligence, Segal failed to allege facts sufficient to support a claim that such duty had been breached. The court also dismissed Segal's claim that Rose and Freund tortiously interfered with his employment contract because the court concluded that Segal failed to plead facts indicating that there was ever a breach of his employment contract.

Following the court's decision, Segal filed a motion for reargument pursuant to Rule 59(f). In his motion, Segal sought reargument on two issues: (i) the sufficiency of his claim that Rose and Freund breached their fiduciary duties; and (ii) the claim of tortious interference with Segal's employment contract by Rose and Freund. With respect to Segal's claims that Rose and Freund breached their fiduciary duties, Segal argued that the court's dismissal was based on a misunderstanding of the fiduciary duties owed by Rose and Freund as representatives of the Company. Segal argued that the court based its dismissal on its conclusion that members of the Company owed no duties to each other but Segal argued that the representatives owed duties different than those owed by members of the Company. The court stated that it did not misunderstand the Company's LLC Agreement and in fact, it specifically concluded that "because the agreement does not expressly articulate fiduciary obligations, they are eliminated." Further, the court noted that its previous opinion addressed the potential liability for breaches of fiduciary duties by the representatives throughout the opinion. The court stated, "even if Segal were correct that in the LLC Agreement there remained a fiduciary duty not to act in bad faith or with gross negligence, Segal has manifestly failed to allege facts sufficient to support a claim that anyone had breached such a hypothetical duty." Thus, because the court concluded that Segal had failed to demonstrate that the court's decision was predicated upon a misunderstanding of a material fact or a misapplication of law, his motion for reargument on the fiduciary duty claim was denied. Similarly, the court denied Segal's motion for reargument on the claim of tortious interference finding that, first, its initial holding did not misapply the law and, second, that even if it did, the outcome of the decision would not be affected because the doctrine of tortious interference requires that the defendants be strangers to the contract in question and the defendants were not and further that Segal failed to plead facts showing that the defendants had exceeded the scope of their authority which would be necessary to support his contention that the stranger doctrine did not apply.

3. Contractual Modification of Fiduciary Duties

a. *The Renco Grp., Inc. v. MacAndrews AMG Holdings LLC*, C.A. No 7668-VCN (Del. Ch. Jan. 29, 2015) and (Del. Ch. Apr. 20, 2015)

Plaintiff, a member of AM General LLC (the "LLC"), filed an action directly and derivatively against the LLC's managing member ("MacAndrews AMG") and controllers. Defendants moved to dismiss. At issue were three relevant classes of claims—breach of contract claims, implied covenant of good faith and fair dealing claims and fiduciary duty claims—stemming from plaintiff's and defendants' dispute over whether the defendants had given plaintiff the benefit of certain protections afforded plaintiff in the LLC's limited liability company agreement (the "LLC Agreement").

The breach of contract claims centered on the meaning of certain terms in the LLC Agreement. Because ambiguity existed around the meaning of the terms and the terms were reasonably susceptible to different interpretations, the court denied defendants' motion to dismiss the breach of contract claims. The court likewise denied defendants' motion to dismiss plaintiff's implied covenant claims because the court could not foreclose plaintiff's "reasonably conceivable claims" that MacAndrews AMG's conduct went to issues so fundamental that plaintiff's reasonable expectations were frustrated. However, the court granted defendants' motion to dismiss plaintiff's fiduciary duty claims because the LLC Agreement explicitly addressed the parties' rights on the matters plaintiff asserted in its fiduciary duty claims and the LLC Agreement provisions superseded fiduciary duties that might otherwise apply.

In its subsequent decision, the court addressed plaintiff's request for a certification of an interlocutory appeal of the court's earlier decision to dismiss plaintiff's fiduciary duty claims against defendants. While the court held that plaintiff met the substantial issue and legal right requirements of a certification of interlocutory appeal, plaintiff did not satisfy one of the factors enumerated in Supreme Court Rule 42(b). Plaintiff argued that even if plaintiff's fiduciary duty claims against defendant were properly dismissed, the court still must decide plaintiff's aiding and abetting claims against third-party defendants based on those fiduciary duties. The court denied plaintiff's interlocutory appeal, reasoning that interlocutory appeals are disfavored when they are not case dispositive.

b. *Ross Holding and Mgmt. Co. v. Advance Realty Grp. LLC*, C.A. No. 4113-VCN (Del. Ch. Sept. 4, 2014)

In this post-trial opinion, the court considered plaintiffs' claims of breach of fiduciary duty and the implied covenant of good faith and fair dealing, aiding and abetting breaches of fiduciary duty and request for the appoint of a receiver, among others, in connection with a reorganization of Advance Realty Group ("ARG"). In the reorganization, ARG's revenue-generating, developed assets were sold and its capital-intensive, undeveloped properties were split off into another entity ("ACP"). Plaintiffs, who were minority unitholders of ARG and former managers terminated shortly before the reorganization, were given the option of cashing out their holdings at a discounted price or converting them into equity in the newly-split off company, which would be run by the CEO who had recently terminated defendants. However, ARG's board, in negotiating the transaction, appeared to act in a self-interested manner without considering the interests of the minority unitholders. The parties disagreed as to what fiduciary duties ARG's board owed to ARG's members, whether entire fairness review applied and the merits of the entire fairness analysis.

The court first addressed what, if any, fiduciary duties ARG's board owed to ARG's members. ARG's board was comprised of members appointed by ARG's CEO and one of ARG's majority unitholders, referred to herein as "FARS." Defendants relied heavily on (i) Section 7.01 of the ARG operating agreement, which provided for management by the board and stated, "It is understood that the [board] shall act reasonably and in good faith in its management of [ARG]," (ii) the fact that the operating agreement required that the board be composed of designees of ARG's CEO and FARS and (iii) Section 7.05 of the ARG operating agreement, which provided a safe harbor for certain acts that might otherwise violate the traditional duty of loyalty, to contend that (A) the board's only fiduciary duties were to act in an objectively reasonable manner and with subjective good faith and (B) ARG was free to engage in transactions with members of the board or the interests they represent. The court rejected defendants' arguments that traditional fiduciary duties had been modified or eliminated, noting that drafters must clearly, plainly and unambiguously evidence a modification or elimination of fiduciary duties. The court stated that using the phrase "it is understood" did not clearly evidence a disclaimer of traditional fiduciary duties. The court also noted that the structure of the board (being comprised of representatives of the parties interested in the transaction) did not evidence a clear intent to eliminate the duty of loyalty, as Delaware law provides for conflicted board to use independent parties to negotiate interested transactions. Finally, the court found that the Section 7.05 safe harbor, which did not apply to the transaction at hand, did not implicitly authorize the transaction, noting that a "failure to mention a duty or to contemplate a given conflicted transaction is not an adequate disclaimer of it."

Having found that the ARG operating agreement did not disclaim or modify traditional fiduciary duties, the court turned its attention to what standard of review applied and who bore the burden of proof. The court noted that a plaintiff can rebuff the business judgment rule presumption by providing evidence that a defendant breached its duty of loyalty or care. If a plaintiff provides such evidence, the burden shifts to the defendant to provide the entire fairness of the transaction. The court found that plaintiffs provided the requisite evidence by demonstrating that the majority of board members, representatives of ACP and FARS, were interested in the reorganization. This board majority did not view themselves as representatives of all of ARG's unitholders, including the minority, and ACP and FARS received the opportunity to convert their equity into debt, an option not granted to the minority unitholders. Additionally, no committee of independent directors was organized and no informed minority vote ratified the reorganization. Therefore, the court found that defendants bore the burden of proving that the reorganization was entirely fair.

Having determined that the entire fairness standard applied, the court analyzed whether the reorganization was fair by looking at whether the board dealt fairly with the minority and whether the board offered the minority a fair price. The court found that the reorganization was procedurally unfair because defendants controlled the timing and structure, made little to no effort to consider the minority unitholders' interests, kept plaintiffs uninformed about the reorganization and structured the reorganization to give benefits to ACP and FARS that were not provided to the minority unitholders (i.e., valuing their units at a price that was unsupported in the market and giving them priority over the other equity holders).

However, after sifting through the evidence and credibility of three expert witnesses, the court found that the reorganization provided the minority unitholders with a fair price—because of the extreme reduction in the number of outstanding units that occurred as a result of the reorganization, the value of plaintiffs' units actually increased through the reorganization and, after taking into account the layering of debt on top of plaintiffs' equity, the court stated that the value plaintiffs received was a "close approximation" of the value they had before the reorganization.

The court then focused on the "unitary" inquiry of whether the reorganization was entirely fair. The court found that the process employed by the ARG board was so deficient that the court could not find that the reorganization was entirely fair, even though plaintiffs appeared to have nominally benefitted from the transaction. Because plaintiffs realized a nominal benefit, the court stated that damages were an inappropriate remedy; however, the court noted that an appropriate remedy would be to unwind the portion of the reorganization that provided FARS and ACP with preferential treatment for their units and requested that the parties brief this issue for the court's consideration as well as the issue of who was responsible for attorneys' fees.

Finally, the court found that plaintiffs did not succeed on their claims of violation of an implied duty of good faith and fair dealing, aiding and abetting breaches of fiduciary duties, appointment of a receiver or violation of the corporate opportunity doctrine.

c. *Wiggs v. Summit Midstream Partners, LLC,* C.A. No. 7801-VCN (Del. Ch. Mar. 28, 2013)

Plaintiffs were former employees of defendant LLCs and were terminated without cause. In exchange for plaintiffs' management services, they received Class B membership interests in defendant DFW Midstream Management, LLC ("Management"), which was a member of defendant DFW Midstream Services, LLC ("Services"), thus providing plaintiffs with an indirect right to share in the profits of Services under certain circumstances. Plaintiffs had no management or business decision-making authority. Services was governed by a board of managers composed of four managers, three appointed by defendant Summit Midstream Partners, LLC ("Summit") and one appointed by Texas Competitive Electric Holdings Company, LLC ("TCEH"). Summit also served as the sole managing member of Management.

In 2011, Summit purchased all of TCEH's membership interest in Services. Defendants entered into a Second Amended and Restated Limited Liability Company Agreement of Services (the "2011 Amendment"), and Summit transferred its membership in Services to a newly created entity, Summit Midstream Holdings, LLC ("Summit Holdings"). Plaintiffs brought several claims in connection with the 2011 Amendment. The court granted defendant's motion to dismiss pursuant to Court of Chancery Rule 12(b)(6) with respect to each of plaintiffs' claims.

The court first rejected defendant's argument that plaintiffs lacked standing because they were not members of Services, and addressed each claim on its merits. Plaintiffs sought a declaratory judgment that the 2011 Amendment was invalid and a breach of the original Services LLC agreement (the "Original Services Agreement"), and that the 2011 Amendment was a breach of the implied covenant of good faith and fair dealing. The court found that plaintiffs proffered a reasonable inference that they have a "claim of right or other legal interest," as required by the Declaratory Judgment Act, because the Award Agreements setting forth the compensation structure for plaintiffs' services were listed as "Operative Agreements" incorporated by reference under Management's LLC agreement, and Management's LLC agreement was listed as an "Operative Agreement" incorporated by reference under the Original Services Agreement.

Plaintiffs' first challenge, that defendants breached the Original Services Agreement by amending such agreement in a way that materially affected plaintiffs' interests without their consent, failed. The Original Services Agreement provided that no amendment, modification or supplement thereto could adversely affect the interest of a member without such member's consent. Because plaintiffs were never members of Services, the court held that plaintiffs did plead a reasonably conceivable claim of breach of contract.

Plaintiffs similarly did not sufficiently plead rights under an implied covenant of good faith and fair dealing. Although the elimination of language regarding the duty of good faith and fair dealing from the Original Services Agreement has no legal effect because Delaware law prohibits LLCs from eliminating such duty, a plaintiff must allege a specific implied contractual obligation and how the violation of that obligation denied the plaintiff of the benefits of the contract. The court rejected plaintiffs' argument that defendants needed plaintiffs' consent in order to amend the Original Services Agreement in a way that essentially eliminated future payment for plaintiffs because the Original Services Agreement expressly set forth an amendment process and, therefore, an implied covenant was not appropriate. Plaintiffs' alternative formulation of the implied covenant—that the purpose of the parties' bargain was that plaintiffs, in exchange for their continued services, would receive a share of the profits after defendants received their return of capital—also failed. Summit provided the vast majority of the capital and, by taking only an indirect interest in profits, plaintiffs implicitly acknowledged that they did not acquire any corporate governance authority over Services. The court held that plaintiffs did not sufficiently allege any rights under an implied covenant of good faith and fair dealing.

The court rejected plaintiffs' claim that Summit and Summit Holdings breached their fiduciary duties under the Original Services Agreement because plaintiffs were not members of Services and therefore were not owed any fiduciary duties under the agreement, and because the agreement unambiguously eliminated fiduciary duties of the managers. Plaintiffs' claim for breach of fiduciary duties under Management's LLC agreement similarly failed because the agreement specifically eliminated any fiduciary duties of Summit. The court held that plaintiffs did not plead a reasonably conceivable claim that they were owed fiduciary duties.

Plaintiffs' claim that defendants committed fraud by failing to inform plaintiffs of the 2011 Amendment, and of the full scope and character of credit facilities and the resulting encumbrances on Services, failed. Plaintiffs based their fraud allegation on the theory that defendants either had a "duty to speak" or actively concealed information. Because plaintiffs were not members of Services and their consent to the 2011 Amendment was not required, defendants did not have a duty to disclose the existence of the 2011 Amendment or the credit facilities to plaintiffs. Although one plaintiff sought a copy of the 2011 Amendment but was denied on the grounds that the 2011 Amendment prevented its disclosure, and another plaintiff asked whether there had been any amendments to the Original Services Agreement or Management's LLC agreement and was not answered, plaintiffs' lack of knowledge of the 2011 Amendment could not have been relied upon to their detriment because they could not challenge the adoption of such amendment. The court held that plaintiffs did not plead a reasonably conceivable claim of fraud.

Finally, plaintiffs sought an order dissolving Services and Management under Section 18-802 or Section 18-803 of the LLC Act. Because plaintiffs were not members or managers of Services, they could not apply for dissolution of Services under either provision. Looking to the analogous limited partnership dissolution statute, the court noted that the court orders dissolution in two situations: (1) where there is a "deadlock" that prevents the entity from operation and (2) where the defined purpose of the entity is fulfilled or impossible to carry out. With respect to Management, plaintiffs alleged the latter because plaintiffs disagreed with a credit facility entered into by defendants and the initial public offering of Summit Holdings. Because of Management's broad purpose clause allowing Management to engage in any lawful act or activity for which limited liability companies may be organized under the LLC Act, the court held that plaintiffs did not plead a reasonably conceivable claim for judicial dissolution.

d. *Zimmerman v. Crothall,* C.A. No. 6001-VCP (Del. Ch. Mar. 5, 2012 and Jan. 31, 2013)

Plaintiff claimed that certain issuances of preferred units and convertible debt were self-interested transactions in Adhezion Biomedical LLC, a Delaware limited liability company ("Adhezion"), benefitted certain of the current directors and the VC Investors (as defined below) and unfairly diluted the common members. Plaintiff argued that the directors' actions violated the duty of care and the duty of loyalty and breached the LLC Agreement by authorizing additional units of existing series of units and creating a new series of units without the approval of a majority of the common members. The defendants included directors of Adhezion and certain venture capital investors in Adhezion (the "VC Investors"). This case was before the court on the defendant's motion for summary judgment.

The court granted the defendants' motion for summary judgment on the plaintiff's breach of the duty of care claim. The defendants argued that the LLC Agreement limited the directors' liability to only breaches of the duty of loyalty. However, the court found that the use of the word "recklessness" in the list of behavioral descriptors that were grounds for damages was equivalent to "gross negligence," and therefore the LLC Agreement implicated the duty of care. Nevertheless, the court found that the defendants' conduct did not amount to gross negligence because the board's actions were properly viewed through the business judgment rule. In order to overcome the applicability of the business judgment rule, the plaintiff needed to prove that the board's decision making process showed a "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." The court noted that this is an onerous standard and determined that the plaintiff was unable to show that the board's process was reckless. To the contrary, Adhezion needed capital and the board contacted over 40 potential investors, entering into serious discussions with a few. Although the board ultimately decided to raise capital from current investors, the defendants showed that the board received updates on the financial condition of Adhezion and discussed different financing options.

With respect to the plaintiff's breach of the duty of loyalty claim, the plaintiff alleged that the directors approved self-dealing transactions in bad faith, that they were standing on both sides of the transactions, and therefore, the entire fairness analysis should be applied. In order to prove a claim of bad faith, the court said that the plaintiff needed to show that the "board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." Also, the court noted that an intentional dereliction of a known duty is higher than a standard of recklessness. The court granted the defendant's motion for summary judgment on the plaintiff's bad faith claim for the same reasons it granted the motion on the breach of duty of care claims.

With respect to his claim of self-dealing, the plaintiff argued that the transactions entered into by Adhezion were self-dealing because a majority of the directors that approved the transactions were "standing on both sides" of the transactions and also because the VC Investors constituted a control group which also stood on both sides of the transactions. The court denied the motion for summary judgment on the claim that the VC Investors were a control group. A shareholder is "controlling" if it owns a majority interest or it exercises actual control over the board (actual control can be shown if the shareholder (or group) holds such power that it is similarly situated as if it had a majority interest). On the one hand, the court noted that it is very difficult to show that a shareholder is a "controlling shareholder." On the other hand, the VC Investors together held 66% of the voting shares and at least two of the five directors' seats. Furthermore, both were early stage investors and there were communications of the defendants that tended to show the VC Investors had considerable pull in the actions the board decided to pursue. Turning to the plaintiff's claim that a majority of the board was interested, the court determined that out of the five directors, two participated in the transactions individually and another was the managing partner of one of the VC Investors. Therefore, it was possible that the plaintiff could show a majority of the board was interested.

In addition to showing that the majority of the board was interested or that the VC Investors were a control group, the plaintiff also needed to show that those on both sides of the transaction received a benefit exclusive to them. The transaction that took place in 2009 was not open to all current unitholders of Adhezion. The defendants argued that it did not matter because the offering price was consistent with the price in other recent transactions. However, the plaintiff's claim was that the issuance took place at a price that was improperly low and, therefore, the overall value of Adhezion was diluted. In light of the plaintiff's claim, the court determined that the fact that the price was similar to other recent prices at the time did not warrant granting summary judgment. The court denied the defendants' request for summary judgment on the plaintiff's self-dealing claim with respect to the 2009 transaction because it was possible that it was subject to the entire fairness standard, and whether it passed such scrutiny could not be determined without expert valuations. The other transactions complained of did not treat all unitholders equally in that the defendants were given the opportunity to subscribe for the new interests first, with the leftovers (if any) available to be purchased by the common members. Based on this structure, the court determined that the transactions that took place in 2010 and 2011 conferred an exclusive benefit on the defendants because they were given the opportunity to participate first and fully in the additional offerings. Although the court noted that there is no inherent right against dilution in Delaware law, the structure of the transactions conferred an exclusive benefit on the defendants. The court denied summary judgment and in fact determined that the 2010 and 2011 transactions were self-dealing and subject to entire fairness review.

Two of the five directors on the board of Adhezion were allegedly independent and disinterested. The LLC Agreement included a safe harbor provision that the court found might have overridden the entire fairness review in the situation. The safe harbor provision closely tracked 8 Del. C. § 144 and the defendants argued that it entitled them to have the transactions at issue reviewed under the business judgment rule. However, the plaintiff argued that the safe harbor provision did not address monetary damages and only rendered a transaction itself not void or voidable solely because it was an interested transaction. The court sided with the plaintiff on this issue. The plaintiff also argued that the defendants had not satisfied the safe harbor provision anyway, citing reasons such as the VC Investors being a control group and the transactions being taken in bad faith. The court dismissed the defendants' motion for summary judgment in accordance with its earlier discussion regarding the VC Investors being a control group and granted it on the plaintiff's bad faith arguments.

Turning to the plaintiff's aiding and abetting claim, the court noted that in order to prevail on such a claim, the plaintiff needed to show the underlying breach of fiduciary duty. Therefore the court granted the defendants' motion for summary judgment with respect to the aiding and abetting claims regarding a breach of the duty of care. The court denied the motion with respect to the aiding and abetting claims based on the alleged breach of the duty of loyalty. Furthermore, the court granted the motion for summary judgment of the aiding and abetting claims based on a breach of contract, noting that there is no cause of action for aiding and abetting a breach of contract under Delaware law.

Finally, the plaintiff claimed that the defendants breached the amendment provisions of the LLC Agreement by creating a new preferred series of units without the consent of a majority of the common members. The LLC Agreement provided that amendments required the vote of a majority in interest of the common members. The only exception was "as otherwise provided in Section 3.8…with respect to the issuance of additional Units." Section 3.8 of the LLC Agreement provided that the board could "issue additional units…or create additional classes or series of units…." The defendants claimed that Section 3.8 gave the board a "blank check" to create, authorize and issue new units. Conversely, the plaintiff argued that "create" in Section 3.8 should be construed more narrowly, and, more importantly in the court's view, that the exception to the majority in interest of common members rule only spoke to issuance of additional units (and not the creation of a new series of units). The court determined that the language of the LLC Agreement in this situation was ambiguous, and therefore denied the defendants' motion for summary judgment on the breach of contract claim.

In its subsequent post-trial opinion, the court addressed the plaintiff's claims alleging breach of the LLC Agreement, breach of the duty of loyalty by the directors and the VC Investors and aiding and abetting of the directors' breach of the duty of loyalty as well as the plaintiff's requests for reformation and repayment of attorney's fees advanced by Adhezion to the defendants.

The court first turned to the breach of contract claim, which centered on whether the LLC Agreement required the approval of common unitholders (1) to increase the number of units Adhezion was authorized to issue and (2) to create additional classes or series of units. The court noted that the LLC Agreement used three terms with commonly-understood meanings in the corporate context: "create," "authorize" and "issue."

With respect to the approval required to authorize additional units, the defendants argued that the power to increase the number of authorized units was merely incidental to the Board's ability to create and issue units under the LLC Agreement and to unilaterally amend the LLC Agreement in connection therewith. The court disagreed with this argument. Relying on testimony of the attorney that drafted the LLC Agreement and noting that the LLC Agreement gave certain unitholders veto rights in connection with the authorization of units while providing the board with the power only to create and issue units, the court concluded that the use of "authorize" in the LLC Agreement was deliberate and additional units must therefore be authorized. Regarding the procedures necessary to authorize additional units, the court found that because the LLC Agreement was silent on the steps necessary to authorize additional units, the most reasonable interpretation was that the parties intended the LLC Agreement to be amended to accomplish the authorization of units. The court next considered what was required to amend the LLC Agreement. The LLC Agreement required unitholder approval, including common unitholder approval, of all amendments except with respect to the "issuance" of additional units pursuant to provisions of the LLC Agreement that authorized the board to "create" and "issue" additional units. The parties disputed the scope of the amendment exception and whether authorization of additional units fell within the exception. The court, reading the LLC Agreement as a whole, held that regardless of whether the board could unilaterally create or issue additional units, it clearly could not authorize additional units without obtaining the unitholder consent required by the LLC Agreement's amendment provision.

Next, the plaintiff contended that the LLC Agreement required common unitholder approval to create additional series or classes of units because the exception to the LLC Agreement's amendment provision referred only to "issuance" of units pursuant to provisions of the LLC Agreement that authorized the board both to "create" and "issue" additional units. The court concluded the LLC Agreement to be ambiguous on this point and therefore turned to extrinsic evidence. The court noted that at all relevant times, the amendment exception referred only to "issuance" of units, even when the section of the LLC Agreement cross-referenced in the exception gave the board the power only to "create" additional series or classes of units. The LLC Agreement was later amended to authorize the board to "create and "issue" additional series or classes of units. The court therefore declined to interpret the language of the amendment exception as limiting and instead found that the exception broadly referred to the subject matter of the cross-referenced section-namely, the "creation" and "issuance" of additional series or classes of units.

Having concluded that common unitholder approval was required to increase the number of authorized units but not to create additional series or classes of units, the court turned to whether the directors breached the LLC Agreement in connection with the challenged issuances. The court held that the directors breached the LLC Agreement because the directors had purported (1) to increase the number of authorized shares without obtaining the requisite unitholder consent and (2) to issue units that, although created in accordance with the provisions of the LLC Agreement, had not been properly authorized.

In reaching its conclusion on the breach of the LLC Agreement, the court noted that it is incumbent upon parties to an LLC Agreement to manifest their intent to deviate from the meaning that a reasonable investor would attribute to a term. The court therefore rejected the strained meaning of the familiar corporate law term "authorize" that the defendants advocated. The court also found the facts of this case supported application of the rule of *contra proferentum,* which requires that ambiguous contract terms be construed against the drafter. Specifically, the court concluded that the plaintiff reasonably understood the use of the term "authorize" in the LLC Agreement to place a limit on the level of dilution he faced subject to his consent, in his capacity as a common unitholder, to increase such dilution.

The court next addressed the plaintiff's claim of breach of the duty of loyalty. The plaintiff alleged breach of the duty of loyalty by the directors and by two unitholders that allegedly controlled Adhezion. The court first turned to plaintiff's claim against the unitholders. Because neither unitholder alone possessed the voting power to control Adhezion, the plaintiff needed to show that the unitholders acted together to exert control over the company. The court concluded that the plaintiff failed to allege facts demonstrating a concerted effort by the unitholders to control Adhezion.

In connection with its analysis of breach of the duty of loyalty by the directors, the court reviewed the LLC Agreement to determine what provisions, if any, addressed fiduciary duties. The court concluded that the LLC Agreement defined the scope of director fiduciary duties in two ways: first, by setting a general standard for fiduciary conduct and, second, by giving the directors the right to engage in conflicted transactions subject to certain requirements.

Having determined the scope of the duties owed by the directors, the court noted that it must determine the applicable standard of review and the party that bears the burden of proof. The provisions of the LLC Agreement pertaining to conflicted transactions gave directors the right to engage in a conflicted transaction provided that the payments made by Adhezion were "comparable to the payments or fees that would be paid to unrelated third parties providing the same property, goods, or services" to Adhezion. In addition, the LLC Agreement provided that a conflicted transaction would not be deemed void or voidable if the transaction was "fair" to Adhezion at the time it was authorized. The court noted that Delaware courts have interpreted similar provisions as effectively calling for review under the entire fairness standard, which requires a showing of a fair process and a fair price.

The court then addressed the question of which party must demonstrate that there was a fair process and a fair price. The court first noted that in the corporate context, or where default fiduciary duties are applicable in the LLC context, director-defendants bear the burden of proving that a transaction is entirely fair. The duties in this case, however, were set forth in the LLC Agreement and therefore contractual in nature. Focusing on the LLC Agreement provision requiring conflicted transactions to be on terms comparable to unrelated third party transactions—i.e., entirely fair—the court held that the plaintiff had the burden of proving a breach of the contractual requirement that the challenged transactions be entirely fair. The court recognized, however, that other provisions of the LLC Agreement pertaining to conflicted transactions rendered its conclusion not free from doubt. These other provisions deemed conflicted transactions not to be void or voidable if certain requirements were met. The court noted that it was unclear whether qualifying under one of these safe harbor provisions would trigger review under the business judgment rule or shift the burden to the party challenging the transaction. The court concluded that its approach of allocating to the plaintiff the burden to prove entire fairness harmonized all provisions of the LLC Agreement pertaining to conflicted transactions. According to the court, if the directors had the burden to prove entire fairness then one of the safe harbors, which deemed a transaction not to be void or voidable if it was fair to the company at the time it was authorized, would be redundant.

In connection with its discussion of the burden of proof, the court distinguished the conflicted transaction LLC Agreement provision at issue here with a similar provision interpreted by the Delaware Supreme Court in the recent Auriga case. The relevant LLC agreement provision in Auriga provided that members or managers could not, without the required consent, cause the company to enter into a conflicted transaction on terms less favorable than terms obtainable in an arm's length transaction. The Supreme Court concluded that under this provision the defendants had the burden to prove the entire fairness of the challenged transaction. In contrast, the court noted that Adhezion's LLC Agreement gave directors the affirmative right to enter into a conflicted transaction so long as the terms of such transaction were comparable to terms of unrelated third party transactions. The court also noted that dicta in the Supreme Court's Auriga decision indicated that compliance with one of the LLC Agreement's safe harbor provisions may trigger application of the business judgment rule. Specifically, in Auriga, the Supreme Court stated that if the transaction at issue had been conditioned on approval by an informed majority of nonaffiliated members as required by the LLC agreement, it would not have been reviewed under the contractual entire fairness standard and the Supreme Court contrasted such a result with the usual outcome of shifting the burden to prove entire fairness in the corporate law context.

The court concluded that the directors complied with one of the safe harbors: good faith approval of the challenged transaction by disinterested directors with knowledge of the material facts. According to the court, at least two of the directors were disinterested and both approved the challenged transactions. As a result, the court found that the directors should arguably receive the benefit of the business judgment rule or, at a minimum, the burden to demonstrate entire fairness should shift to the plaintiff, assuming the plaintiff did not already bear such burden.

Having addressed what standard of review applied and which party had the burden of proof, the court turned to the issue of whether the challenged transactions were entirely fair. The court noted that although its analysis assumed that the plaintiff had the burden to prove entire fairness, the facts of this case were sufficiently strong regardless of which party had the burden. Turning to the factual evidence, the court noted that at the time of each of the challenged transactions, Adhezion needed money to continue its business. Adhezion was a risky investment because of threatened patent litigation, lack of a strategic partner and a market dominated by a single competitor. Adhezion had solicited further outside investment without success and had considered offers to purchase that included a limited amount of cash up front. The court also found the defendants' expert witness' testimony regarding fairness of the transactions and the value of Adhezion to be more credible. As a result, the court concluded that, regardless of which party had the burden to prove the entire fairness of the challenged transactions, the transactions were entirely fair and the directors therefore had not breached the duty of loyalty. The court further noted that because there had been no breach of fiduciary duty the plaintiff's aiding and abetting claim could not succeed.

The court next turned to the issue of the remedy for the directors' breach of the LLC Agreement. The plaintiff requested reformation of the terms of the challenged transactions. Specifically, the plaintiff asked the court to cancel all warrants and certain options that were issued and to deem promissory notes to have been issued instead of units. The court refused to grant the plaintiff's request. The court noted that Adhezion needed cash at the time of the challenged transactions and received cash on fair terms. Moreover, the relief requested would create a windfall for the plaintiff. As a result, the court declined to award damages beyond nominal damages of one dollar.

Finally, the court turned to the plaintiff's request to require the defendants to reimburse Adhezion for legal fees advanced to the defendants. The court found that the directors were entitled to indemnification under the terms of the LLC Agreement and that the non-director defendants were entitled to indemnification under the terms of a purchase agreement entered into in connection with one of the challenged transactions. As a result, the court concluded, whether the defendants were also entitled to advancement was largely moot at this advanced stage of the proceeding. Moreover, the court noted that although the LLC Agreement did not expressly address advancement, it gave the directors broad authority to make decisions and take actions not otherwise provided for in the LLC Agreement. The court concluded that the directors therefore had authority to approve advancement of the defendants' legal fees.

e. *Auriga Capital Corp. v. Gatz Prop., LLC*, C.A. 4390-CS (Del. Ch. Jan. 27, 2012); *Gatz Prop., LLC v. Auriga Capital Corp*., C.A. No. 4390-CS (Del. Nov. 7, 2012)

Plaintiffs were minority members of Peconic Bay, LLC, a Delaware LLC (the "Company"), who brought this action against defendant Gatz Properties, LLC, the manager of the Company (the "Manager"). The Manager was managed and controlled by defendant William Gatz, an individual ("Gatz"). At all relevant times, Gatz and his family members owned a majority of the voting interests in the Company. The Company held a leasehold interest in golf course property that was owned by Gatz and his family members, which was subleased (the "Sublease") by the Company to a third-party golf course operator (the "Operator"). Plaintiffs alleged that the Manager breached its contractual duties under the LLC agreement of the Company and its fiduciary duties to the Company and its minority members by taking actions designed to oust the minority members so that the Manager and Gatz family members could use the assets of the Company to their own benefit. In its post-trial opinion, the Delaware Court of Chancery held in favor of the plaintiffs.

The Manager first argued that its actions were not subject to a fiduciary duty analysis because the LLC agreement of the Company displaced common law equitable principles. In finding that traditional fiduciary duties did apply in the context of an LLC, the court noted that Section 18-1104 of the LLC Act provides a statutory mandate that equitable principles apply to an LLC. The court also looked to Section 18-1101(c) of the LLC Act, which permits fiduciary duties to be modified or eliminated, and found that this statutory provision implies that fiduciary duties must have existed in the first place. The court then addressed whether a manager of an LLC qualified as a "fiduciary" and, citing to Delaware precedent, indicated that a "fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person to protect the interests of another." The court found that because a manager of an LLC has more than an arms-length, contractual relationship with the members of the LLC it manages and is vested with discretionary power to manage the business of the LLC, it is a fiduciary. Turning to the terms of the LLC agreement of the Company, the court noted that the LLC agreement of the Company did not contain any general provision stating that the only duties owed by the Manager were set forth in the LLC agreement. In relevant part, the LLC agreement provided that the Manager could not cause the Company to enter into an agreement with an affiliate that was less favorable to the Company than the terms of similar agreements that could be entered into with "arms-length third parties" without the consent of a majority of the non-affiliated members. The court referred to prior cases in noting that this arms-length language for self-dealing transactions implicated the fiduciary duty of loyalty and imposed the equivalent of the substantive aspects of "entire fairness" review, which is the "fair price" prong. However, the court indicated that the entire fairness procedural inquiry into "fair dealing" may also apply in some respects because the extent to which the process leading to alleged self-dealing deviates from the behavior one would expect in an arms-length deal is important to price determination. In this regard, where there was no real market test, and where the self-interested party's conduct may have compromised the value of the asset in question, this could all bear on whether a fair price was paid.

With respect to the facts in this case, the court found that, as the plaintiffs alleged, the Manager knew in 2005 that the Operator intended to terminate the Sublease in 2010 pursuant to an early termination right that it had under the Sublease, but the Manager failed to take any action to address this expected loss, such as seeking a replacement operator for the golf course property. Instead, the court noted that the Manager sat back and waited for the Sublease to terminate and retained the cash surplus of the Company pursuant to a provision in the LLC agreement of the Company that permitted the Manager to retain funds that it reasonably determined were "necessary to meet the Company's present or future obligations," which in this case were future debt obligations of the Company after the Sublease terminated. The court found that the Manager took these actions because it desired to (i) let the Sublease terminate and to then use the property for residential properties, which it believed would be the best use and result in the highest value of the property and (ii) oust the minority members because it did not like having them interfere with what Gatz viewed as a Gatz family venture and that Gatz thought that if the Company were in a position of economic weakness, he could exploit that for the exclusive financial benefit of himself and his family. The court held that because the Manager was charged under the LLC agreement of the Company with the obligation to manage the operations of the Company, it had a fiduciary duty to manage the business loyally for the benefit of the members, which included the duty to address in good faith known, material risks that threatened the viability of the business of the Company. For these reasons, the court found that the Manager breached its fiduciary duties of loyalty and care by its bad faith and grossly negligent refusal to explore strategic options for the Company after knowing that the Operator would terminate the Sublease.

The court next turned to the Manager's dealings with a third-party that was interested in purchasing the Company or the lease owned by the Company. According to the court, the third-party asked to review the lease, the Sublease and other financial information, but the Manager refused to provide this information. Nevertheless, this offeror submitted an offer that unbeknownst to it, was below the Company's outstanding debt. However, rather than informing the offeror of this, the Manager put the offer to a membership vote knowing that it would be rejected and without informing the members that the offer was made without any due diligence by the offeror. The offeror then indicated that it was willing to negotiate an offer that could be north of $6 million, but the Manager never responded to this invitation to negotiate and the Manager never communicated this to the minority members. Although the Manager sought authorization from the minority members to approve a counteroffer of $6 million and the minority members approved it, the Manager, in its capacity as a member, and the Gatz family members, voted against it. The court held that the Manager violated its fiduciary duty of loyalty by its bad faith refusal to consider the third-party's offer to buy the Company or the lease owned by the Company and that it had also engaged in bad faith conduct when it presented to the minority members misleading information about the third-party's offer. Gatz submitted its own offer to purchase the Company for $6 million, which was rejected by the minority members, and then submitted a subsequent offer significantly lower than his initial offer based on an appraisal he obtained without giving the appraiser all relevant information. Gatz indicated at trial that this was his attempt to play "hardball" with the minority members. The court found that playing "hardball" is how one would deal with competitors not teammates and that the Manager violated its fiduciary duty of loyalty in its own conduct in its buyout offers.

The Manager then put the Company up for sale by an auction, which the court considered a "sham." The court noted that the Manager hired an auctioneer that had no experience with this type of transaction, that the auction was held within 90 days despite information available to the Manager from an appraiser that indicated that it would take six to nine months to market the property, that advertising commenced only two months prior to the auction date, with some of the advertisements being the size of postage stamps in newspapers of general circulation, that "as is" sale materials were offered to potential bidders that downplayed the value of the property, and that under the terms of the sale, the Manager was permitted to cancel the auction at any time before bidding began. Gatz was the only bidder at the auction and purchased the property for $50,000 in excess of the Company's debt, which resulted in approximately $20,000 to the minority members. Based on these facts, the court held that no rational person acting in good faith could perceive the auction as adequate, and, thus, the Manager acted in bad faith and was grossly negligent in running the auction process. The court noted that the Manager sought to protect itself from liability by claiming that it relied on the auctioneer's expert advice under Section 18-406 of the LLC Act, but held that a fiduciary cannot select an unqualified advisor instead of a qualified one and then claim he was guided by an expert, and, further, Gatz's claim of "reliance" was undercut by his involvement in the development and approval of the marketing plan and the terms of sale.

The Manager also argued that based on their voting power as members, it and the Gatz family members could veto any option for the Company, so they could properly use a chokehold over the Company to pursue their own interests, and the minority would have to live with the consequences of their freedom of action. The court found that the Manager was indeed free to vote its membership interest however it desired in connection with a sale of the Company, but that it was not free to create a situation of distress by failing to cause the Company to explore its market alternatives and then to buy the Company for a nominal price. The court observed that the purpose of the duty of loyalty was to prevent the exploitation by a fiduciary of its position to the disadvantage of a minority.

Finally, the Manager argued that even if it breached its fiduciary duties, there was no economic harm because the Company was insolvent. The court found that Gatz is the one that put the Company in a position of relative economic weakness by not taking action and letting the Sublease lapse and then running a sham auction. The court, therefore, awarded the minority members their full capital contribution plus $72,500, the equivalent of a sale of the company at $6.5 million, which factored in the $6 million offer plus the cash the Company had on hand. The court also awarded one-half of plaintiff's attorneys' fees and costs based on Gatz's conduct before and during the litigation and the breaches of the duty of loyalty.

Subsequent to the Court of Chancery's decision, Gatz filed an appeal, and Gatz Properties filed a voluntary Chapter 11 petition. When the Bankruptcy Court granted a motion for relief from the automatic stay, the Delaware Supreme Court was able to proceed with Gatz's appeal. Specifically, the Supreme Court held that Gatz did violate his contracted-for fiduciary duty to abide by the equitable standard of entire fairness in a conflict of interest transaction between himself and the Company by refusing to negotiate with a third-party bidder and by causing the Company to be sold to himself at an auction engineered by himself and sold to himself at an unfair price. The Supreme Court affirmed the Court of Chancery's award of damages and attorneys' fees.

The Supreme Court first analyzed whether the Court of Chancery correctly determined that Gatz owed contractually-agreed-to fiduciary duties to the other members of the Company. The Supreme Court held that Section 15 of the LLC Agreement, which prohibited related-party transactions that were "on terms and conditions which are less favorable to the Company than the terms and conditions of similar agreements which could then be entered into with arms-length third parties, without the consent of a majority of the non-affiliated Members[,]" was "the contractual equivalent of the entire fairness equitable standard of conduct and judicial review." The Supreme Court found that Section 15 of the LLC Agreement contractually adopted the fiduciary duty standard of entire fairness and the fair price obligation inherent in that standard. Thus, entire fairness (fair dealing and fair price) was the controlling fiduciary duty standard and, because no majority-of-the-minority vote occurred to approve the transaction as required by Section 15, Gatz had the burden to establish the transaction's fairness. The Supreme Court found adequate facts in the record to support the Court of Chancery's determination that Gatz did not establish the transaction's fairness and breached the fiduciary duty he owed to the minority members of the Company to engage in fair dealing and to obtain a fair price. Specifically, the record showed that the Company was worth more than Gatz paid, Gatz refused to properly deal with an interested third-party bidder, and the auction process was a "sham" based on the unprofessionalism of the marketing effort and the decision to auction off the Company as a distressed property as opposed to selling the Company in an orderly way. Therefore, the Supreme Court held that Court of Chancery properly determined that Gatz did not carry his burden of proving that he abided by his contracted-for fiduciary duty of entire fairness.

Second, the Supreme Court looked to whether the LLC Agreement exculpated Gatz. Section 16 of the Agreement permitted exculpation and indemnification of the Company's manager in certain instances. However, the Supreme Court found ample evidence in the record to support the Court of Chancery's determination that Gatz "acted in bad faith and made willful misrepresentations in the course of breaching his contracted-for fiduciary duty." Specifically, the court noted that Gatz knew that the Sublease likely would be terminated early, did not engage in any serious effort to look for a replacement golf course operator, refused to provide due diligence to a credible buyer, and decided to pursue a distressed sale auction when the Company's cash reserves would have permitted it to continue to pay its bills for three years while searching for a buyer. Because Gatz engaged in acts of bad faith and willful misconduct, the LLC Agreement offered him no exculpation.

Third, the Supreme Court considered the Court of Chancery's analysis regarding whether the Delaware LLC Act imposed default fiduciary duties. The Supreme Court found that the LLC Agreement explicitly and specifically addressed the "fiduciary duty issue" which controlled the dispute and that no litigant had asked the court to determine whether default fiduciary duties existed as a matter of statutory law. The Supreme Court also stated that the issue of whether the Delaware Limited Liability Company Act "does—or does not—impose default fiduciary duties is one about which reasonable minds could differ." Therefore, the Supreme Court held that the Court of Chancery's pronouncements about default statutory duties under the LLC Act "must be regarded as dictum without any precedential value."

Finally, the Supreme Court upheld the award of equitable damages because the record supported the Supreme Court's finding that Gatz breached a contracted-for fiduciary duty arising from equity and the award "was based on conscience and reason." Furthermore, the Supreme Court held that the award of attorneys' fees was warranted given the Court of Chancery's supported findings that Gatz engaged in bad faith litigation conduct.

f. *CNL-AB LLC v. Eastern Prop. Fund I SPE (MS REF) LLC,* C.A. No. 6137-VCP (Del. Ch. Jan. 28, 2011)

This case came before the court on a motion for a preliminary injunction by the counterclaimant/third-party plaintiff ("counterclaimant"). The counterclaimant was a unitholder in an LLC that was the indirect owner of several resort properties. The plaintiff made mezzanine loans to several of the entities in the structure. When the various entities defaulted on their loans, the plaintiff brought foreclosure proceedings against certain resort properties that were indirectly held by the LLC. The counterclaimant petitioned the court for a preliminary injunction to enjoin the foreclosure, claiming that the managing member of the LLC breached its fiduciary duties to the counterclaimant by entering into an agreement with the plaintiff which allowed the foreclosure in exchange for releases from guarantees of the loans and other consideration.

The Vice Chancellor denied the counterclaimant's request for a preliminary injunction based on the doctrine of laches, but also found that counterclaimant had failed to demonstrate a probability of success on its breach of fiduciary duty claim. The LLC's operating agreement restricted the fiduciary duties of the managing member in accordance with 6 *Del. C.* § 18-1101 of the LLC Act. The operating agreement gave the managing member the sole and absolute discretion to execute, deliver and perform any agreement authorized by the operating agreement. It further stated that the managing member need not consider any other obligation or duty, fiduciary or otherwise, of the LLC or the members, and that such execution, delivery or performance would not constitute a breach of any duty the managing member might have owed to the LLC or any other person under the operating agreement, or any duty stated or implied by law or equity. Also, the operating agreement absolved the managing member from liability for monetary and other damages, unless the managing member acted in bad faith and the act/omission was material to the matter giving rise to loss, liability or benefit not derived. The court found that these provisions put the burden on the counterclaimant to prove the managing member acted in bad faith, a burden the counterclaimant could not carry.

Furthermore, the court found that even if the counterclaimant were able to prove that the managing member acted in bad faith, it would not be able to prove that the managing member's actions were material to its loss as the court found that plaintiff was able to foreclose on the resort properties without the agreement of the managing member.

Finally, the court found that there was no breach of fiduciary duty because the managing member could not cause the counterclaimant to lose any asset of value. The counterclaimant's equity interest was junior to all of the debt, including the plaintiff's loans. The LLC defaulted on all of the loans, so, regardless of the agreement between the managing member and the plaintiff, foreclosure would have left the counterclaimant with nothing.

g. *In re Atlas Energy Res., LLC, Unitholder Litig.*, C.A. No. 4589-VCN (Del. Ch. Oct. 28, 2010)

This case involved a publicly-traded limited liability company, Atlas Energy Resources, LLC (the "Company"), which negotiated a merger with its controlling unitholder, Atlas America, Inc. ("America"). The plaintiffs were public unitholders of the Company. The plaintiffs argued that America, as controlling unitholder, breached its fiduciary and other common law duties to the minority unitholders by negotiating the merger through an unfair process that resulted in terms that were unfair to the minority unitholders. The plaintiffs further argued that certain directors of the Company breached their fiduciary duties by agreeing to the merger. The defendants filed a motion to dismiss these claims.

First, the court held that under Delaware law, in the absence of provisions explicitly disclaiming the applicability of fiduciary duties, controlling members in a manager-managed LLC owe minority members the traditional fiduciary duties that controlling shareholders owe minority shareholders. The court also highlighted that it was particularly wary of eliminating such duties in the context of a publicly traded LLC and required either an explicit disclaimer or language mandating a contractual resolution. With respect to whether America had effectively modified its default fiduciary duties, the court found that the relevant provision of the LLC agreement of the Company (the "Operating Agreement") provided that "[w]henever a potential conflict of interest exists or arises between any Affiliate of the Company, on the one hand, and the Company or any Group Member, on the other, any resolution or course of action by the Board of Directors in respect of such conflict of interest shall be permitted and deemed approved by all Members, and shall not constitute a breach of this Agreement . . . or of any duty existing at law, in equity or otherwise, including any fiduciary duty, if the resolution or course of action in respect of such conflict of interest is (i) approved by Special Approval . . . ." In reviewing this provision, the court found that it only governed conflicts of interest between the Company and its "Affiliates," such as America, but not conflicts of interest between America and the Company's minority unitholders. Thus, the Operating Agreement did not eliminate America's fiduciary duties as the controlling unitholder of the Company to the minority unitholders. Applying the corporate precedent of *Kahn v. Lynch*, the court held that a merger between an LLC and its controlling unitholder must be evaluated under entire fairness notwithstanding any protective devices, such as independent committee review or approval by a majority of the minority unitholders, that may have been employed because, regardless of the protections employed, such a merger is characterized by "inherent coercion."

In discussing whether the merger satisfied the entire fairness standard, the court addressed the issues of fair price and fair dealing. With respect to fair price, the court found that plaintiffs sufficiently alleged facts suggesting the units were worth more than the consideration received under the merger agreement. The court also found that plaintiffs sufficiently alleged facts suggesting the process approving the merger may not have been fair, including that America withheld material information, that America manipulated the alternatives to the merger to make it appear that the merger of the Company with America was the only choice and that it exerted influence over the consultants to the special committee that approved the merger. Accordingly, the court denied America's motion to dismiss.

With respect to the plaintiffs' claims against the defendant directors of the Company, the court focused on a provision in the Operating Agreement that provided that except as otherwise set forth therein, "none of the Directors, nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Company or any Member." The court found that this language unambiguously eliminated the traditional fiduciary duties of the Company's directors and officers and that they were replaced by a duty of good faith on the directors and officers, where "good faith" was defined as an action believed to be in the best interest of the Company. The court noted that good faith under the Operating Agreement required a subjective analysis in contrast to the object standard under the common law. The plaintiffs argued that such a provision was unenforceable because it eliminated the implied covenant of good faith and fair dealing. The court rejected this position, however, holding that the Operating Agreement clearly imposed a subjective good faith standard on the directors and the court would not invoke an implied covenant to override these provisions. The court noted that although the plaintiffs may have stated a colorable claim for breach of the traditional fiduciary duties of care and loyalty, they did not allege the type of subjective bad faith required to state a claim under the standard set forth in the Operating Agreement and, therefore, the claims against the defendant directors were dismissed.

h. *Related Westpac LLC v. JER Snowmass LLC*, C.A. No. 5001-VCS (Del. Ch. July 23, 2010)

This case involves a suit between members of two LLCs formed to pursue a land development project in Snowmass, Colorado. When the funding needs of the project exceeded the agreed upon budget, plaintiff, the operating member of the LLCs, issued a capital call which defendant refused to meet. Defendant also refused to give its consent to a variety of major decisions. Under the operating agreements, defendant could not unreasonably withhold its consent to certain decisions. However, defendant argued that as to additional capital calls and the other matters at issue, it had contractually bargained to withhold its consent for any reason. Plaintiff sought to have the court (a) impose a reasonableness condition as part of the operating agreements' implied covenant of good faith and fair dealing and (b) find that defendant breached its fiduciary duty as a joint venturer by refusing unreasonably to fund capital calls and unreasonably withholding its consent to necessary transactions.

The court agreed with the defendant that under the LLC Agreements, it could withhold its consent for any reason as to the matters in dispute, and citing to *Nemec v. Shrader*, 991 A.2d1120, 1125-26 (Del. 2010), which provided that the implied covenant could not be used to "rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal," the court rejected plaintiff's request to imply a reasonableness requirement, as "[t]he express bargain of the parties covere[d] this subject and implying such an obligation would override their express bargain."

The court similarly rejected plaintiff's breach of fiduciary duty claim. According to the court, the parties to an operating agreement have the contractual freedom to structure the entity as they see fit. When the parties "cover a particular subject in an express manner, their contractual choice governs and cannot be supplanted by the application of inconsistent fiduciary duties that might otherwise apply as a default." To imply a fiduciary duty of reasonableness in these circumstances would nullify the parties' express bargain. The court cannot do that: "When a fiduciary duty claim is plainly inconsistent with the contractual bargain struck by parties to an LLC or other alternative entity agreement, the fiduciary duty claim must fall, otherwise 'the primacy of contract law over fiduciary law in matters involving contractual rights and obligations [would be undermined].'" (footnote omitted). Significantly, the court held that under the operating agreements, defendant had the contractual right to give or withhold its consent for a variety of major decisions as it chose, in its own commercial interest, and suggested that such a provision would allow defendant to secure a personal advantage as consideration for giving its consent.

i. *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, C.A. No. 3658-VCS (Del. Ch. Apr. 20, 2009)

This action arose out of a failed development project between plaintiff Bay Center Apartments Owner, LLC ("Bay Center") and defendant Emery Bay PKI, LLC ("PKI"). PKI was owned and operated by defendant Alfred E. Nevis ("Nevis"). To effectuate the development project, Bay Center and PKI formed defendant Emery Bay Member, LLC, a Delaware LLC ("Emery Bay"), and designated PKI as its managing member. Emery Bay's LLC Agreement provided for PKI to manage the project, but the details of its management duties were defined in a separate Development Management Agreement, which was an exhibit to the LLC Agreement. Under the LLC Agreement, PKI was required to cause one of its subsidiaries to enter into the Development Management Agreement with the Development Manager, which was defined as PKI or one of its affiliates. PKI designated another Nevis-owned affiliate, defendant Emery Bay ETI, LLC ("ETI"), as the Development Manager. Thus, the entity with primary responsibility for the success of the development project, the Development Manager, was not in contractual privity with Bay Center. Under the LLC Agreement, however, PKI had the power and authority to cause the Development Manager to perform its obligations under the Development Management Agreement.

Soon after the project began, Emery Bay defaulted on a construction loan that Nevis had guaranteed. Bay Center alleged that defendants secretly renegotiated the loan on several occasions, which both diverted cash flow from the development project and allowed Nevis to avoid triggering his personal guarantee. After a series of other problems allegedly resulting from mismanagement by PKI's affiliates, the development project failed and was put into receivership. In this case, Bay Center pursued a breach of contract claim against PKI, the only defendant that was party to the LLC Agreement, and sought to expand its remedial options by filing suit for breach of the contractually implied covenant of good faith and fair dealing, breach of fiduciary duty, common law fraud, and aiding and abetting a breach of fiduciary duty. This decision addressed defendants' motion to dismiss all of Bay Center's claims except for those based on breach of contract.

With respect to Bay Center's breach of fiduciary duty claims, the court first looked to the provisions of the LLC Agreement regarding the fiduciary obligations of the members. One section of the LLC Agreement provided that members owed each other the default fiduciary duties that exist between members of an LLC except where the LLC Agreement provided otherwise but the very next section of the LLC Agreement provided that no member owed the other member any duty of any kind that was not imposed by the LLC Agreement itself. The court found these seemingly contradictory provisions to create an ambiguity and, for purposes of the motion to dismiss, resolved the ambiguity in favor of an interpretation that the LLC Agreement required members to act in accordance with traditional fiduciary duties. The court thus denied defendants' motion to dismiss Bay Center's fiduciary duty claims against PKI.

Bay Center also alleged that Nevis, despite being neither a member nor an officer of Emery Bay, breached his fiduciary duty to Bay Center. The court stated that Nevis would be beyond the normal scope of those who owe fiduciary duties in the corporate context, but could be subject to fiduciary duties under the line of cases in the alternative entity context starting with *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991). The court held that to apply the USA Cafes doctrine to hold an affiliate liable for breach of fiduciary duty to an entity, the affiliate must exert control over the assets of that entity and, if such control is established, the affiliate only has "the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." The court, in attempting to resolve uncertainty regarding the scope of the duties under the *USACafes* doctrine, stated that limiting the application of *USACafes* to this duty provides a rational and disciplined way of protecting investors in alternative entities with managing members who are themselves entities, while not subjecting all the individuals who work for managing members to wide-ranging causes of action. The court found that Bay Center sufficiently pled that Nevis (a) exerted direct control over Emery Bay's property and (b) used such control to stave off personal liability. As such, the motion to dismiss this fiduciary duty claim against Nevis was denied.

The court next turned to Bay Center's aiding and abetting claims and stated that to allege a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that Bay Center had pled sufficient facts in this regard and thus denied defendants' motion to dismiss the aiding and abetting claims.

With respect to Bay Center's common law fraud allegations, the court stated that there are three ways to demonstrate common law fraud: (1) overt misrepresentation; (2) silence in the face of a duty to speak; or (3) deliberate concealment of material facts. In its claim, Bay Center argued that PKI and Nevis had a duty to speak and failed to do so. The court stated that to commit common law fraud through silence, a defendant must have a duty to speak that arises by operation of law, not purely by contract. For purposes of this motion, the court considered PKI subject to traditional fiduciary duties and held that fiduciaries of an LLC have a duty to disclose fully and fairly all material information within their control when they seek members' consent. Because the LLC Agreement required Bay Center's consent for any refinancing or restructuring of loans and the facts alleged showed that PKI failed to notify Bay Center of six of seven loan modifications, the court held that Bay Center successfully pled its fraud claim against PKI. The court stated that under Delaware law, "[a] corporate officer can be held personally liable for the torts he commits and cannot shield himself behind a corporation when he is a participant," which includes situations where a corporate agent participates in corporate fraud. On this basis, the court found that Bay Center had a proper claim against Nevis for his individual participation in PKI's fraud.

j. *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC (Del. Ch. May 7, 2008) and (Del. Ch. July 3, 2008)

Genitrix, LLC (the "Company") was formed to develop and market biomedical technology. The equity in the Company was divided into three classes, a Class A membership interest primarily owned by Dr. Andrew Segal ("Segal"), a Class B membership interest primarily owned by Dr. H. Fisk Johnson ("Johnson"), Fisk Ventures, LLC ("Fisk") and affiliates of Fisk and Class C membership interests owned by passive investors. The Company's LLC Agreement required the cooperation of the Class A and Class B members for the effective operation of the Company. However, the Class A and Class B members consistently disagreed on matters related to research and financing. The failure of the Class A and Class B members to agree left the Company virtually frozen and at the time of litigation the Company had only one employee, no office, no capital funds, no grant funds and it generated no revenue. The Class B members initiated a suit to dissolve the Company under Sections 18-801 and 18-802 of the LLC Act. In response, Segal counterclaimed against Fisk, Johnson and Stephen Rose and William Freund (who were representatives of Fisk on the board of representatives of the Company) alleging that the counterclaim/third party defendants breached the Company's LLC Agreement, breached the implied covenant of good faith and fair dealing implicit in the LLC Agreement, breached their fiduciary duties to the Company and tortiously interfered with Segal's employment agreement with the Company. Johnson moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction and the other counterclaim/third party defendants moved to dismiss the claims under Rule

12(b)(6) for failure to state a claim upon which relief could be granted. The court's opinion addressed the motions to dismiss made by the counterclaim/third party defendants.

Segal argued that the counterclaim defendants violated their fiduciary duties to Segal. In support of his breach of fiduciary duty claim, he pointed to the same provisions of the Company's LLC Agreement that he cited for his breach of contract claims. The court found that these claims should be dismissed for two reasons. First, the Company's LLC Agreement, as permitted by the LLC Act, had restricted or even eliminated fiduciary duties. Second, even assuming that there remained a fiduciary duty to not act in bad faith or with gross negligence, Segal failed to allege facts sufficient to support a claim that such duty had been breached. The court also dismissed Segal's claim that Rose and Freund tortiously interfered with his employment contract because the court concluded that Segal failed to plead facts indicating that there was ever a breach of his employment contract.

Following the court's decision, Segal filed a motion for reargument pursuant to Rule 59(f). In his motion, Segal sought reargument on two issues: (i) the sufficiency of his claim that Rose and Freund breached their fiduciary duties; and (ii) the claim of tortious interference with Segal's employment contract by Rose and Freund. With respect to Segal's claims that Rose and Freund breached their fiduciary duties, Segal argued that the court's dismissal was based on a misunderstanding of the fiduciary duties owed by Rose and Freund as representatives of the Company. Segal argued that the court based its dismissal on its conclusion that members of the Company owed no duties to each other but Segal argued that the representatives owed duties different than those owed by members of the Company. The court stated that it did not misunderstand the Company's LLC Agreement and in fact, it specifically concluded that "because the agreement does not expressly articulate fiduciary obligations, they are eliminated." Further, the court noted that its previous opinion addressed the potential liability for breaches of fiduciary duties by the representatives throughout the opinion. The court stated, "even if Segal were correct that in the LLC Agreement there remained a fiduciary duty not to act in bad faith or with gross negligence, Segal has manifestly failed to allege facts sufficient to support a claim that anyone had breached such a hypothetical duty." Thus, because the court concluded that Segal had failed to demonstrate that the court's decision was predicated upon a misunderstanding of a material fact or a misapplication of law, his motion for reargument on the fiduciary duty claim was denied. Similarly, the court denied Segal's motion for reargument on the claim of tortious interference finding that, first, its initial holding did not misapply the law and, second, that even if it did, the outcome of the decision would not be affected because the doctrine of tortious interference requires that the defendants be strangers to the contract in question and the defendants were not and further that Segal failed to plead facts showing that the defendants had exceeded the scope of their authority which would be necessary to support his contention that the stranger doctrine did not apply.

4. Aiding and Abetting

a. *Matthew v. Laudamiel*, C.A. No. 5957-VCN (Del. Ch. Nov. 12, 2014)

Defendant Fläkt Woods Group SA ("Fläkt Woods") moved for summary judgment on plaintiff Stewart Matthew's claims of aiding and abetting breach of fiduciary duties, tortious interference with contractual relations, unjust enrichment and civil conspiracy. Subsequent to Fläkt Woods' motion, plaintiff amended his complaint to add Fläkt Woods Limited ("FWL") as a defendant. Plaintiff's claims were premised upon Fläkt Woods' and FWL's role in the efforts of defendants Christophe Laudamiel and Roberto Capua to rid Aeosphere LLC, a Delaware limited liability company (the "Company"), of plaintiff. The claims against Fläkt Woods and FWL were substantially the same, so all of the court's references to Fläkt Woods were to FWL, as well.

Plaintiff's allegations centered on the actions of Neil Yule, who represented Fläkt Woods in its dealings with the Company. The court noted that Yule's (and thus Fläkt Woods') desire for the Company to resolve its internal disputes and its wish to do business with Laudamiel were unobjectionable. However, although it found scant evidence of wrongful conduct by Yule, the record suggested he engaged in behavior that could support an inference that he developed and implemented the strategy to force plaintiff out of the Company.

For instance, Yule allegedly created scheduling conflicts to keep Matthew from attending potentially important meetings; joined meetings between Laudamiel and Capua to discuss how to exclude Matthew from the Company; made statements to the effect that any contact he had with Matthew was for the sole purpose of helping Laudamiel and Capua; offered to threaten that Fläkt Woods would discontinue its relationship with the Company, with the potential effect of causing Matthew to leave the Company; and took the position that DreamAir, the new entity Laudamiel formed after the Company was dissolved, would inherit the terms of the agreement in place between the Company and Fläkt Woods. Although these facts were not dispositive, the court stated they were considerable obstacles to granting Fläkt Woods' motion.

Against this general background, the court proceeded to discuss the specific claims against Fläkt Woods. It first addressed the fiduciary duty claim. Fläkt Woods argued these claims should be dismissed because they were based on plaintiff's breach of contract claims related to the dissolution or unwinding of the Company and were therefore duplicative. The court agreed that fiduciary duty claims cannot proceed in parallel with contract claims based on the same conduct, since this would undermine the primacy of contract law over fiduciary duty law in matters involving contractual rights and obligations and waste resources. However, although plaintiff's harm primarily arose from the dissolution and winding up of the Company and the Company's operating agreement addressed those topics, the court found plaintiff presented facts that could support claims independent of the contract. For example, plaintiff's allegation that Fläkt Woods was carrying on the Company's business with DreamAir raised material issues of fact about the scope of Fläkt Woods' violations and the resulting harm, since he contended that Laudamiel and Capua engaged in a scheme with Fläkt Woods to exploit the Company's assets, of which the dissolution of the Company was only a part. Therefore, the court denied Fläkt Woods summary judgment on the aiding and abetting of fiduciary duty claim. For largely the same reason, it also denied Fläkt Woods' motion for summary judgment on the civil conspiracy claim.

The court then turned to plaintiff's tortious interference claims, which were based on the Company's LLC agreement and plaintiff's employment agreement with the Company. To prevail, plaintiff had to demonstrate there was a contract about which Fläkt Woods knew, that it engaged in an intentional act which was a significant factor in causing a breach of the contract, that the act was without justification, and that it caused injury. First, the court rejected Fläkt Woods' argument that it was unaware of the employment agreement, since Yule had conversations with plaintiff about his "employment in the organization," from which he could have inferred the existence of the agreement. Next, the court found Yule's actions could be construed as a substantial cause in the process leading to the dissolution, since the record supported an inference he wanted to move forward without Matthew and encouraged Laudamiel and Capua to work toward this goal. As for Fläkt Woods' contention that its conduct was legally justified, although it had legitimate concerns about the effect of the Company's internal dissention on its joint venture, the court found there was an insufficient factual record to determine what role, if any, Yule played in causing this dissension. Thus, it denied Fläkt Woods' motion for summary judgment on the tortious interference claims.

Finally, the court granted Fläkt Woods' motion for summary judgment on the unjust enrichment claim, since it found Fläkt Woods gained no economic advantage from its conduct. Although plaintiff may have been able to show an "impoverishment," he did not show Fläkt Woods was enriched or that he lacked an adequate remedy at law for his harm.

b. *Zimmerman v. Crothall*, C.A. No. 6001-VCP (Del. Ch. Mar. 5, 2012 and Jan. 31, 2013)

Plaintiff claimed that certain issuances of preferred units and convertible debt were self-interested transactions in Adhezion Biomedical LLC, a Delaware limited liability company ("Adhezion"), benefitted certain of the current directors and the VC Investors (as defined below) and unfairly diluted the common members. Plaintiff argued that the directors' actions violated the duty of care and the duty of loyalty and breached the LLC Agreement by authorizing additional units of existing series of units and creating a new series of units without the approval of a majority of the common members. The defendants included directors of Adhezion and certain venture capital investors in Adhezion (the "VC

Investors"). This case was before the court on the defendant's motion for summary judgment.

The court granted the defendants' motion for summary judgment on the plaintiff's breach of the duty of care claim. The defendants argued that the LLC Agreement limited the directors' liability to only breaches of the duty of loyalty. However, the court found that the use of the word "recklessness" in the list of behavioral descriptors that were grounds for damages was equivalent to "gross negligence," and therefore the LLC Agreement implicated the duty of care. Nevertheless, the court found that the defendants' conduct did not amount to gross negligence because the board's actions were properly viewed through the business judgment rule. In order to overcome the applicability of the business judgment rule, the plaintiff needed to prove that the board's decision making process showed a "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." The court noted that this is an onerous standard and determined that the plaintiff was unable to show that the board's process was reckless. To the contrary, Adhezion needed capital and the board contacted over 40 potential investors, entering into serious discussions with a few. Although the board ultimately decided to raise capital from current investors, the defendants showed that the board received updates on the financial condition of Adhezion and discussed different financing options.

With respect to the plaintiff's breach of the duty of loyalty claim, the plaintiff alleged that the directors approved self-dealing transactions in bad faith, that they were standing on both sides of the transactions, and therefore, the entire fairness analysis should be applied. In order to prove a claim of bad faith, the court said that the plaintiff needed to show that the "board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." Also, the court noted that an intentional dereliction of a known duty is higher than a standard of recklessness. The court granted the defendant's motion for summary judgment on the plaintiff's bad faith claim for the same reasons it granted the motion on the breach of duty of care claims.

With respect to his claim of self-dealing, the plaintiff argued that the transactions entered into by Adhezion were self-dealing because a majority of the directors that approved the transactions were "standing on both sides" of the transactions and also because the VC Investors constituted a control group which also stood on both sides of the transactions. The court denied the motion for summary judgment on the claim that the VC Investors were a control group. A shareholder is "controlling" if it owns a majority interest or it exercises actual control over the board (actual control can be shown if the shareholder (or group) holds such power that it is similarly situated as if it had a majority interest). On the one hand, the court noted that it is very difficult to show that a shareholder is a "controlling shareholder." On the other hand, the VC Investors together held 66% of the voting shares and at least two of the five directors' seats. Furthermore, both were early stage investors and there were communications of the defendants that tended to show the VC Investors had considerable pull in the actions the board decided to pursue. Turning to the plaintiff's claim that a majority of the board was interested, the court determined that out of the five directors, two participated in the transactions individually and another was the managing partner of one of the VC Investors. Therefore, it was possible that the plaintiff could show a majority of the board was interested.

In addition to showing that the majority of the board was interested or that the VC Investors were a control group, the plaintiff also needed to show that those on both sides of the transaction received a benefit exclusive to them. The transaction that took place in 2009 was not open to all current unitholders of Adhezion. The defendants argued that it did not matter because the offering price was consistent with the price in other recent transactions. However, the plaintiff's claim was that the issuance took place at a price that was improperly low and, therefore, the overall value of Adhezion was diluted. In light of the plaintiff's claim, the court determined that the fact that the price was similar to other recent prices at the time did not warrant granting summary judgment. The court denied the defendants' request for summary judgment on the plaintiff's self-dealing claim with respect to the 2009 transaction because it was possible that it was subject to the entire fairness standard, and whether it passed such scrutiny could not be determined without expert valuations. The other transactions complained of did not treat all unitholders equally in that the defendants were given the opportunity to subscribe for the new interests first, with the leftovers (if any) available to be purchased by the common members. Based on this structure, the court determined that the transactions that took place in 2010 and 2011 conferred an exclusive benefit on the defendants because they were given the opportunity to participate first and fully in the additional offerings. Although the court noted that there is no inherent right against dilution in Delaware law, the structure of the transactions conferred an exclusive benefit on the defendants. The court denied summary judgment and in fact determined that the 2010 and 2011 transactions were self-dealing and subject to entire fairness review.

Two of the five directors on the board of Adhezion were allegedly independent and disinterested. The LLC Agreement included a safe harbor provision that the court found might have overridden the entire fairness review in the situation. The safe harbor provision closely tracked 8 Del. C. § 144 and the defendants argued that it entitled them to have the transactions at issue reviewed under the business judgment rule. However, the plaintiff argued that the safe harbor provision did not address monetary damages and only rendered a transaction itself not void or voidable solely because it was an interested transaction. The court sided with the plaintiff on this issue. The plaintiff also argued that the defendants had not satisfied the safe harbor provision anyway, citing reasons such as the VC Investors being a control group and the transactions being taken in bad faith. The court dismissed the defendants' motion for summary judgment in accordance with its earlier discussion regarding the VC Investors being a control group and granted it on the plaintiff's bad faith arguments.

Turning to the plaintiff's aiding and abetting claim, the court noted that in order to prevail on such a claim, the plaintiff needed to show the underlying breach of fiduciary duty. Therefore the court granted the defendants' motion for summary judgment with respect to the aiding and abetting claims regarding a breach of the duty of care. The court denied the motion with respect to the aiding and abetting claims based on the alleged breach of the duty of loyalty. Furthermore, the court granted the motion for summary judgment of the aiding and abetting claims based on a breach of contract, noting that there is no cause of action for aiding and abetting a breach of contract under Delaware law.

Finally, the plaintiff claimed that the defendants breached the amendment provisions of the LLC Agreement by creating a new preferred series of units without the consent of a majority of the common members. The LLC Agreement provided that amendments required the vote of a majority in interest of the common members. The only exception was "as otherwise provided in Section 3.8…with respect to the issuance of additional Units." Section 3.8 of the LLC Agreement provided that the board could "issue additional units…or create additional classes or series of units…." The defendants claimed that Section 3.8 gave the board a "blank check" to create, authorize and issue new units. Conversely, the plaintiff argued that "create" in Section 3.8 should be construed more narrowly, and, more importantly in the court's view, that the exception to the majority in interest of common members rule only spoke to issuance of additional units (and not the creation of a new series of units). The court determined that the language of the LLC Agreement in this situation was ambiguous, and therefore denied the defendants' motion for summary judgment on the breach of contract claim.

In its subsequent post-trial opinion, the court addressed the plaintiff's claims alleging breach of the LLC Agreement, breach of the duty of loyalty by the directors and the VC Investors and aiding and abetting of the directors' breach of the duty of loyalty as well as the plaintiff's requests for reformation and repayment of attorney's fees advanced by Adhezion to the defendants.

The court first turned to the breach of contract claim, which centered on whether the LLC Agreement required the approval of common unitholders (1) to increase the number of units Adhezion was authorized to issue and (2) to create additional classes or series of units. The court noted that the LLC Agreement used three terms with commonly-understood meanings in the corporate context: "create," "authorize" and "issue."

With respect to the approval required to authorize additional units, the defendants argued that the power to increase the number of authorized units was merely incidental to the

Board’s ability to create and issue units under the LLC Agreement and to unilaterally amend the LLC Agreement in connection therewith. The court disagreed with this argument. Relying on testimony of the attorney that drafted the LLC Agreement and noting that the LLC Agreement gave certain unitholders veto rights in connection with the authorization of units while providing the board with the power only to create and issue units, the court concluded that the use of “authorize” in the LLC Agreement was deliberate and additional units must therefore be authorized. Regarding the procedures necessary to authorize additional units, the court found that because the LLC Agreement was silent on the steps necessary to authorize additional units, the most reasonable interpretation was that the parties intended the LLC Agreement to be amended to accomplish the authorization of units. The court next considered what was required to amend the LLC Agreement. The LLC Agreement required unitholder approval, including common unitholder approval, of all amendments except with respect to the “issuance” of additional units pursuant to provisions of the LLC Agreement that authorized the board to “create” and “issue” additional units. The parties disputed the scope of the amendment exception and whether authorization of additional units fell within the exception. The court, reading the LLC Agreement as a whole, held that regardless of whether the board could unilaterally create or issue additional units, it clearly could not authorize additional units without obtaining the unitholder consent required by the LLC Agreement’s amendment provision.

Next, the plaintiff contended that the LLC Agreement required common unitholder approval to create additional series or classes of units because the exception to the LLC Agreement’s amendment provision referred only to “issuance” of units pursuant to provisions of the LLC Agreement that authorized the board both to “create” and “issue” additional units. The court concluded the LLC Agreement to be ambiguous on this point and therefore turned to extrinsic evidence. The court noted that at all relevant times, the amendment exception referred only to “issuance” of units, even when the section of the LLC Agreement cross-referenced in the exception gave the board the power only to “create” additional series or classes of units. The LLC Agreement was later amended to authorize the board to “create and “issue” additional series or classes of units. The court therefore declined to interpret the language of the amendment exception as limiting and instead found that the exception broadly referred to the subject matter of the cross-referenced section-namely, the “creation” and “issuance” of additional series or classes of units.

Having concluded that common unitholder approval was required to increase the number of authorized units but not to create additional series or classes of units, the court turned to whether the directors breached the LLC Agreement in connection with the challenged issuances. The court held that the directors breached the LLC Agreement because the directors had purported (1) to increase the number of authorized shares without obtaining the requisite unitholder consent and (2) to issue units that, although created in accordance with the provisions of the LLC Agreement, had not been properly authorized.

In reaching its conclusion on the breach of the LLC Agreement, the court noted that it is incumbent upon parties to an LLC Agreement to manifest their intent to deviate from the meaning that a reasonable investor would attribute to a term. The court therefore rejected the strained meaning of the familiar corporate law term “authorize” that the defendants advocated. The court also found the facts of this case supported application of the rule of *contra proferentum*, which requires that ambiguous contract terms be construed against the drafter. Specifically, the court concluded that the plaintiff reasonably understood the use of the term “authorize” in the LLC Agreement to place a limit on the level of dilution he faced subject to his consent, in his capacity as a common unitholder, to increase such dilution.

The court next addressed the plaintiff’s claim of breach of the duty of loyalty. The plaintiff alleged breach of the duty of loyalty by the directors and by two unitholders that allegedly controlled Adhezion. The court first turned to plaintiff’s claim against the unitholders. Because neither unitholder alone possessed the voting power to control Adhezion, the plaintiff needed to show that the unitholders acted together to exert control over the company. The court concluded that the plaintiff failed to allege facts demonstrating a concerted effort by the unitholders to control Adhezion.

In connection with its analysis of breach of the duty of loyalty by the directors, the court reviewed the LLC Agreement to determine what provisions, if any, addressed fiduciary duties. The court concluded that the LLC Agreement defined the scope of director fiduciary duties in two ways: first, by setting a general standard for fiduciary conduct and, second, by giving the directors the right to engage in conflicted transactions subject to certain requirements.

Having determined the scope of the duties owed by the directors, the court noted that it must determine the applicable standard of review and the party that bears the burden of proof. The provisions of the LLC Agreement pertaining to conflicted transactions gave directors the right to engage in a conflicted transaction provided that the payments made by Adhezion were "comparable to the payments or fees that would be paid to unrelated third parties providing the same property, goods, or services" to Adhezion. In addition, the LLC Agreement provided that a conflicted transaction would not be deemed void or voidable if the transaction was "fair" to Adhezion at the time it was authorized. The court noted that Delaware courts have interpreted similar provisions as effectively calling for review under the entire fairness standard, which requires a showing of a fair process and a fair price.

The court then addressed the question of which party must demonstrate that there was a fair process and a fair price. The court first noted that in the corporate context, or where default fiduciary duties are applicable in the LLC context, director-defendants bear the burden of proving that a transaction is entirely fair. The duties in this case, however, were set forth in the LLC Agreement and therefore contractual in nature. Focusing on the LLC Agreement provision requiring conflicted transactions to be on terms comparable to unrelated third party transactions—i.e., entirely fair—the court held that the plaintiff had the burden of proving a breach of the contractual requirement that the challenged transactions be entirely fair. The court recognized, however, that other provisions of the LLC Agreement pertaining to conflicted transactions rendered its conclusion not free from doubt. These other provisions deemed conflicted transactions not to be void or voidable if certain requirements were met. The court noted that it was unclear whether qualifying under one of these safe harbor provisions would trigger review under the business judgment rule or shift the burden to the party challenging the transaction. The court concluded that its approach of allocating to the plaintiff the burden to prove entire fairness harmonized all provisions of the LLC Agreement pertaining to conflicted transactions. According to the court, if the directors had the burden to prove entire fairness then one of the safe harbors, which deemed a transaction not to be void or voidable if it was fair to the company at the time it was authorized, would be redundant.

In connection with its discussion of the burden of proof, the court distinguished the conflicted transaction LLC Agreement provision at issue here with a similar provision interpreted by the Delaware Supreme Court in the recent Auriga case. The relevant LLC agreement provision in Auriga provided that members or managers could not, without the required consent, cause the company to enter into a conflicted transaction on terms less favorable than terms obtainable in an arm's length transaction. The Supreme Court concluded that under this provision the defendants had the burden to prove the entire fairness of the challenged transaction. In contrast, the court noted that Adhezion's LLC Agreement gave directors the affirmative right to enter into a conflicted transaction so long as the terms of such transaction were comparable to terms of unrelated third party transactions. The court also noted that dicta in the Supreme Court's Auriga decision indicated that compliance with one of the LLC Agreement's safe harbor provisions may trigger application of the business judgment rule. Specifically, in Auriga, the Supreme Court stated that if the transaction at issue had been conditioned on approval by an informed majority of nonaffiliated members as required by the LLC agreement, it would not have been reviewed under the contractual entire fairness standard and the Supreme Court contrasted such a result with the usual outcome of shifting the burden to prove entire fairness in the corporate law context.

The court concluded that the directors complied with one of the safe harbors: good faith approval of the challenged transaction by disinterested directors with knowledge of the material facts. According to the court, at least two of the directors were disinterested and both approved the challenged transactions. As a result, the court found that the directors should arguably receive the benefit of the business judgment rule or, at a minimum, the burden to demonstrate entire fairness should shift to the plaintiff, assuming the plaintiff did not already bear such burden.

Having addressed what standard of review applied and which party had the burden of proof, the court turned to the issue of whether the challenged transactions were entirely fair. The court noted that although its analysis assumed that the plaintiff had the burden to prove entire fairness, the facts of this case were sufficiently strong regardless of which party had the burden. Turning to the factual evidence, the court noted that at the time of each of the challenged transactions, Adhezion needed money to continue its business. Adhezion was a risky investment because of threatened patent litigation, lack of a strategic partner and a market dominated by a single competitor. Adhezion had solicited further outside investment without success and had considered offers to purchase that included a limited amount of cash up front. The court also found the defendants' expert witness' testimony regarding fairness of the transactions and the value of Adhezion to be more credible. As a result, the court concluded that, regardless of which party had the burden to prove the entire fairness of the challenged transactions, the transactions were entirely fair and the directors therefore had not breached the duty of loyalty. The court further noted that because there had been no breach of fiduciary duty the plaintiff's aiding and abetting claim could not succeed.

The court next turned to the issue of the remedy for the directors' breach of the LLC Agreement. The plaintiff requested reformation of the terms of the challenged transactions. Specifically, the plaintiff asked the court to cancel all warrants and certain options that were issued and to deem promissory notes to have been issued instead of units. The court refused to grant the plaintiff's request. The court noted that Adhezion needed cash at the time of the challenged transactions and received cash on fair terms. Moreover, the relief requested would create a windfall for the plaintiff. As a result, the court declined to award damages beyond nominal damages of one dollar.

Finally, the court turned to the plaintiff's request to require the defendants to reimburse Adhezion for legal fees advanced to the defendants. The court found that the directors were entitled to indemnification under the terms of the LLC Agreement and that the non-director defendants were entitled to indemnification under the terms of a purchase agreement entered into in connection with one of the challenged transactions. As a result, the court concluded, whether the defendants were also entitled to advancement was largely moot at this advanced stage of the proceeding. Moreover, the court noted that although the LLC Agreement did not expressly address advancement, it gave the directors broad authority to make decisions and take actions not otherwise provided for in the LLC Agreement. The court concluded that the directors therefore had authority to approve advancement of the defendants' legal fees.

c. *Feeley v. NHAOCG, LLC*, C.A. No. 7304-VCL (Del. Ch. Mar. 20, 2012), (Del. Ch. Oct. 12, 2012) and (Del. Ch. Nov. 28, 2012)

The Court of Chancery released three opinions in the *Feeley v. NHAOCG, LLC* matter. In the first two *Feeley* decisions, the court determined that: (1) it had jurisdiction over defendant NHA OCG, LLC ("NHA") based on LLC Act Sections 18-110(a) and 18-109(a), and (2) it would largely grant plaintiffs' motion for judgment on the pleadings based on defendants' failure to abide by the terms of the operating agreement of Oculus LLC (the "Oculus Operating Agreement").

The court found that plaintiff Feeley had entered into a business relationship with defendants A. Akel, G. Akel, Newman, Hughes, and NHA. The parties had formed two LLCs: Ak-Feel LLC (”Ak-Feel"), formed by Feeley and A. Akel, and Oculus LLC ("Oculus"), formed by Ak-Feel and NHA. Ak-Feel's Operating Agreement designated Feeley as its Managing Member; the Oculus Operating Agreement in turn designated Ak-Feel as its Managing Member. As Managing Members of the two entities, Feeley and Ak-Feel had full and exclusive authority to manage, control, administer and operate Ak-Feel and Oculus, respectively. Additionally, the Oculus Operating Agreement enumerated the only permissible ways to remove Ak-Feel as its Managing Member: unanimous member consent, termination of Feeley or Akel, or default without cure by Ak-Feel under the

Oculus Operating Agreement. Feeley also entered into an employment agreement with Oculus to serve as its President and CEO.

When the business relationship between Feeley and defendants soured, defendant NHA attempted to give Feeley notice that his employment contract with Oculus would not be renewed but he would remain an Oculus officer. Later, NHA also attempted to remove Feeley as an Oculus officer. However, NHA was not Oculus's Managing Member—Ak-Feel was—and the Managing Member had exclusive authority to act on behalf of Oculus. NHA also gave notice to Ak-Feel that it was exercising its right to remove Ak-Feel as Oculus's Managing Member, replacing Ak-Feel with NHA.

Plaintiffs filed suit to determine the validity of NHA's removal of Ak-Feel as Oculus's Managing Member and Feeley as its President and CEO. Defendants moved to dismiss the complaint for lack of personal jurisdiction. Plaintiffs then moved for judgment on the pleadings.

In its first decision, the court held that Section 18-110(a) granted it *in rem* jurisdiction to determine who validly holds office as a manager of a Delaware LLC. Notice of the claims to each defendant was proper; therefore, the court found that it had constitutional authority to determine who the Managing Member of Oculus was: Ak-Feel or NHA. The court also found that, pursuant to Section 18-109(a), it could exercise personal jurisdiction over those serving as managers of an LLC for the purpose of adjudicating breach of duty claims. The court viewed NHA as a manager because NHA participated materially in Oculus's management not only by removing Ak-Feel as Managing Member, but also by purporting to remove Feeley as an employee, and later as an officer—an action that only the Managing Member of Oculus could take, pursuant to the Oculus Operating Agreement. Finally, the court stated that, since NHA was subject to personal jurisdiction under § 18-109(a), the court had jurisdiction over the other counts of the complaint, which arose out of a common nucleus of operative fact. The court deferred ruling on the individual defendants' lack of personal jurisdiction claims pending further discovery and briefing.

After determining the jurisdictional issues, the court, in its second decision, largely granted plaintiffs' motion for judgment on the pleadings and entered the following four judgments: (1) that letters sent by NHA purporting to replace AK-Feel as Oculus' Managing Member were invalid and void because the Oculus Operating Agreement stated the only grounds under which AK-Feel could be removed and none of those grounds applied; (2) that the termination letter sent by NHA attempting to terminate Feeley as President and CEO of Oculus was invalid because it was not sent by the Managing Member, AK-Feel, as required by the Oculus Operating Agreement; (3) that the attempted termination of both Feeley's employment and his position as President and CEO of Oculus was unlawful and void because the termination was not affected by Oculus' Managing Member, AK-Feel; and (4) that defendants' representations to third parties stating that AK-Feel and Feeley had been removed were incorrect.

In the court's third decision, it analyzed the five counterclaims of Oculus's non-managing member, NHA, against Oculus's managing member, Ak-Feel and Ak-Feel's managing member, Feeley.

NHA's counterclaims were largely based on Ak-Feel and Feeley's allegedly failed attempts at managing Oculus. NHA contended that Feeley did not identify a sufficient number of real estate projects for Oculus, that the projects that he did bring to Oculus "ended in disaster due to Feeley's gross negligence" and that Feeley negotiated certain real estate deals for himself rather than presenting the deals to NHA.

Count I alleged, *inter alia*, that Ak-Feel breached the Oculus Operating Agreement by engaging in self-dealing because Ak-Feel usurped opportunities that belonged to Oculus. The court rejected this allegation because Ak-Feel had no contractual obligation under the Oculus Operating Agreement to present opportunities to Oculus. Count I also alleged that Ak-Feel breached the Oculus Operating Agreement by taking action that amounted to gross negligence and willful misconduct; because Ak-Feel answered this portion of Count I, the court did not address the allegation in defendants' motion to dismiss.

Count II alleged that Feeley aided and abetted Ak-Feel's breaches of the Oculus Operating Agreement as discussed in Count I. The court denied plaintiffs' motion to dismiss these allegations, holding that Count II pled "a *Gotham Partners* claim against Feeley for aiding and abetting a breach of contract (odd as that sounds) to the same extent that a claim was pled in Count I." The court based this decision on the fact that Feeley, as the managing member of Ak-Feel, ultimately made Ak-Feel's decisions and carried out those decisions; therefore, Feeley knowingly participated in the contractual breaches of duty alleged in Count I.

Count III alleged that Ak-Feel and Feeley breached default fiduciary duties. The court determined that Ak-Feel, as Oculus's managing member, owed default fiduciaries to Oculus and that the Oculus Operating Agreement did not limit or eliminate those default fiduciary duties; therefore, the court denied plaintiffs' motion to dismiss Count III as to Ak-Feel. The court discussed the Delaware Supreme Court's decision in *Gatz* (which stated that the Court of Chancery's determination that the manager of an LLC owed default fiduciary duties was "dictum without any precedential value"), stating that "[t]he high court did not rule on whether the managers of an LLC owe default fiduciary duties." The court in this case stated that the Court of Chancery cases holding that default fiduciary duties apply to LLC managers were "appropriately viewed as *stare decisis* by this Court" and that a plain reading of LLC Act Section 18-1101(c) and its drafting history supported the existence of default fiduciary duties because "otherwise there would be nothing for the operating company agreement to expand, restrict, or eliminate." The court noted that the Supreme Court has the power to hold that no such default fiduciary duties exist, but that the Supreme Court had not yet made that determination. Then, the court looked to the Oculus Operating Agreement and found that it provided limited exculpation from monetary liability as permitted by Section 18-1101(e) but that it did not eliminate fiduciary duties under Section 18-1101(c). The court interpreted the language of the Oculus Operating Agreement, limiting liability for Oculus's members, as an assumption in the Oculus Operating Agreement that fiduciary duties existed and could give rise to liability unless the exculpation right was triggered.

The court also determined that Count III properly alleged claims that Ak-Feel breached its duty of care and that Feeley engaged in willful misconduct because Feeley allegedly negotiated deals for himself and, as the managing member of Ak-Feel, Feeley controlled Ak-Feel, meaning that he could not "mentally segregate his decision-making" so as to properly negotiate deals for himself while somehow not acting in his capacity as the managing member of Ak-Feel.

The court held that Count IV properly stated a claim for breach of the duty of care against Ak-Feel, but not against Feeley because, in Count IV, defendants named Feeley in his capacity as the party in control of Ak-Feel, which in turn was the managing member of Oculus, and not in his capacity as actual manager of Oculus.

Finally, in Count V, defendants sought a declaratory judgment stating that NHA had the unilateral right under the Oculus Operating Agreement to force Oculus to cease its business operations; the court granted plaintiffs' motion to dismiss Count V because the Oculus Operating Agreement did not give NHA such a right.

d. *Kelly v. Blum*, C.A. No. 4516-VCP (Del. Ch. Feb. 24, 2010)

Plaintiff was a member, manager and the president of Marconi Broadcasting Company, LLC, a Delaware limited liability company (the "Company"). The Company was initially funded by Plaintiff, who received Class B common membership units in consideration of his investment, and MBC Investment, L.P. ("MBC Investment"), which provided a loan to the Company plus an equity investment in Class A preferred units. MBC Investment was a wholly-owned subsidiary of ELB Capital Management, LLC ("ELB"). The Company began to experience cash flow problems and entered into an additional loan agreement with another wholly-owned subsidiary of ELB. In connection with this loan, the Company entered into an amended limited liability company agreement of the Company (the "LLC Agreement"), pursuant to which MBC Lender received Class C common membership units in the Company. The LLC Agreement required that all actions of the Company be approved by managers holding a majority of the voting power. The LLC Agreement also provided that the Company could not enter into any merger without the prior written approval of the Class A member or managers and the Class C member or managers. At all relevant times, Class A managers held 24%, Class B managers held 25% and Class C managers held 51% of the voting power. At a March 18, 2009 board meeting for the Company, a Class A manager of the Company, proposed a transaction by which a wholly-owned subsidiary of ELB would merge into the Company with "New Marconi" being the surviving entity (the "Merger"). The purchase price included a cash component, an assumption of the MBC Investment debt, and preferred units in New Marconi to be issued to MBC Investment. Further, all of the Class A, B and C common units in the Company would convert pursuant to the Merger into the right to receive $1 per class. Several weeks after the March 18, 2009 board meeting, MBC Investment and MBC Lender signed a written consent approving the Merger without plaintiff's consent. On April 8, 2009, MBC Investment and MBC Lender sent a copy of such written consent to plaintiff by fax and email, the confirmation of which was sent by FedEx on April 9, 2009. The Certificate of Merger was filed on April 17, 2009 to consummate the Merger. Plaintiff filed his complaint and all amendments thereto after the Merger was consummated.

The Delaware Court of Chancery first addressed plaintiff's motion for partial summary judgment on his claim for a declaratory judgment that the Merger was void either (1) because plaintiff did not receive adequate notice of its approval by written action as required by the LLC Agreement or (2) because the Merger closed before the notice period required by the LLC Agreement elapsed. The court noted that notwithstanding Section 18-209(b) of the LLC Act which provides that a merger of a Delaware limited liability company generally must be approved by members who own more than 50% of the then current percentage or other interest in the profits of such company, parties may contract to impose additional requirements as was the case in the LLC Agreement. As noted above, the LLC Agreement required prior written approval of the Class A member or Class A managers and the Class C member or Class C managers. The LLC Agreement further provided that any written consent that is not executed by any member "must be delivered to such Member no less than five (5) business days prior to the effective date of such consent." The LLC Agreement also provided that in the event notice was given by fax, a confirmation copy must be sent on the same day of the fax "by first class mail." Plaintiff asserted that the Defendants that approved the Merger technically violated this notice provision because the confirmation copy was sent the day after the fax. The court held that if the notice provision applied to a written consent (the court acknowledged that it may not apply as these provisions could be construed as ambiguous), the notice was in "substantial compliance." The court cited to corporate case law by analogy in indicating that substantial compliance "is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met."

The court then turned to Defendants' motion to dismiss each of plaintiff's other claims (each as explained below) for lack of standing. In this regard, Defendants claimed that plaintiff could not maintain standing subsequent to the Merger because plaintiff's claims were derivative in nature, Plaintiff was no longer a member of the Company as a result of the Merger, and only members of the Company could assert derivative claims. The court agreed that under Section 18-1002 of the LLC Act, a plaintiff must be a "member or an assignee of a limited liability company interest" at the time of bringing a derivative action, and thus, plaintiff could only assert direct claims. The court noted two exceptions to this general rule under corporate case law precedent whereby a former shareholder could bring a derivative suit following a merger that terminates its interest (1) if the merger itself is subject to a claim of fraud being perpetrated merely to deprive shareholders of standing to bring a derivative action and (2) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise. Plaintiff did not allege these situations and thus they did not apply to this case. The court then applied the standing analysis set forth in the corporate case of *Tooley* to determine whether plaintiff's claims were direct or derivative.

The court first addressed plaintiff's claim that the Defendants that were members and managers of the Company violated their fiduciary duties of loyalty and care, which each owed to plaintiff as the minority equity holder, in approving a self-interested transaction (i.e., the Merger) on terms unfair to plaintiff. The court noted that Delaware cases interpreting Section 18-1101(c) of the LLC Act have concluded that despite the contractual freedom to restrict or eliminate duties owed by members and managers of a limited liability company, in the absence of a contrary provision in a limited liability company agreement, traditional fiduciary duties of loyalty (including good faith) and care apply. The LLC Agreement provided in a section entitled "Duties" that the board of managers "shall manage the Company in a prudent and businesslike manner . . . ." The LLC Agreement also contained an exculpatory provision which provided that managers of the Company would not be liable for money damages "for breach of fiduciary duty to the Company nor to any Member for their good faith actions . . . but only for their own willful or fraudulent misconduct or willful breach of their contractual or fiduciary duties under [the LLC Agreement]." The court found that these clauses did not explicitly disclaim or limit the applicability of default fiduciary duties. Further, the court held that if the Defendant managers of the Company entered into the Merger, as plaintiff alleged, to profit from squeezing out plaintiff and obtaining control of property held by the Company, this stated a direct duty of loyalty claim sufficient to survive a motion to dismiss. With respect to the exculpatory provision, the court noted that members could limit or eliminate a manager's or member's liability for breach of contract and fiduciary duties under Section 18-1101(e) of the LLC Act except for liability arising from a bad faith violation of the implied contractual covenant of good faith and fair dealing. The court interpreted the exculpatory language set forth in the LLC Agreement to require plaintiff to allege a "willful" breach of the Defendant managers' contractual or fiduciary duties to have a valid claim. The court did not determine whether "willful" required "evil intent to harm" or "acting recklessly and outside the bounds of reason" as the defendant managers asserted, but found that plaintiff had satisfied this standard by alleging facts sufficient to suggest that the Defendant managers "actually and specifically intended to extinguish [plaintiff's] membership interest in [the Company], knowing that such action would harm plaintiff." Accordingly, the court denied the motion to dismiss.

The court next addressed whether MBC Investment and MBC Lender owed fiduciary duties to plaintiff as controlling members of the Company. The court noted that, like managers of a limited liability company, in the absence of provisions to the contrary in a limited liability company agreement, controlling members in a manager-managed limited liability company owe minority members "the traditional fiduciary duties" that controlling shareholders owe to minority shareholders. Citing to corporate precedent, the court stated that these fiduciary duties include the duty "not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders." In respect of the Company, MBC Investment and MBC Lender were controlling members as they had the authority to appoint managers with 24% and 51% of the voting power, respectively, and further, they had the collective power to cause the Company to enter into merger agreements, among other things. The court found that plaintiff sufficiently alleged facts that, if true, showed that MBC Investment and MBC Lender, with the aid of their respective managers of the Company, effected the Merger to benefit themselves at the expense of plaintiff, and accordingly, the court denied the motion to dismiss.

With respect to plaintiff's claim that MBC Investment and MBC Lender breached their implied contractual covenant of good faith and fair dealing under the LLC Agreement by approving the Merger, not seeking alternative strategies for the Company and allowing the Company to enter into a self-interested transaction, the court noted that to have a valid claim, plaintiff must have alleged a "specific implied contractual obligation and allege how the violation of that obligation denied [plaintiff] the fruits of its contract." The court found that plaintiff did not sufficiently allege any specific implied contractual obligation, how it was breached, or how he was damaged by such breach. In this regard, the court observed that the LLC Agreement expressly addressed self-interested transactions. Therefore, the court granted the motion to dismiss this claim.

The court then addressed plaintiff's claim that ELB aided and abetted the alleged breaches of fiduciary duties explained above. The court stated that under Delaware law, to state such a claim, plaintiff must show "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) the defendant, who is not a fiduciary, knowingly participated in the breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that plaintiff had sufficiently alleged that ELB knowingly participated in the breaches of fiduciary duty by the other Defendants through the acts of ELB's officers and its two wholly-owned subsidiaries (MBC Investment and MBC Lender) that directly harmed plaintiff for the same reasons as discussed above. Accordingly, the motion to dismiss was denied.

Finally, plaintiff also sought a declaratory judgment to invalidate the loan agreement between the Company and MBC Lender. The court specifically noted that plaintiff consented to such loan and pledged his membership interest in the Company to obtain the loan. On that basis, the court dismissed this claim.

e. *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, C.A. No. 3658-VCS (Del. Ch. Apr. 20, 2009)

This action arose out of a failed development project between plaintiff Bay Center Apartments Owner, LLC ("Bay Center") and defendant Emery Bay PKI, LLC ("PKI"). PKI was owned and operated by defendant Alfred E. Nevis ("Nevis"). To effectuate the development project, Bay Center and PKI formed defendant Emery Bay Member, LLC, a Delaware LLC ("Emery Bay"), and designated PKI as its managing member. Emery Bay's LLC Agreement provided for PKI to manage the project, but the details of its management duties were defined in a separate Development Management Agreement, which was an exhibit to the LLC Agreement. Under the LLC Agreement, PKI was required to cause one of its subsidiaries to enter into the Development Management Agreement with the Development Manager, which was defined as PKI or one of its affiliates. PKI designated another Nevis-owned affiliate, defendant Emery Bay ETI, LLC ("ETI"), as the Development Manager. Thus, the entity with primary responsibility for the success of the development project, the Development Manager, was not in contractual privity with Bay Center. Under the LLC Agreement, however, PKI had the power and authority to cause the Development Manager to perform its obligations under the Development Management Agreement.

Soon after the project began, Emery Bay defaulted on a construction loan that Nevis had guaranteed. Bay Center alleged that defendants secretly renegotiated the loan on several occasions, which both diverted cash flow from the development project and allowed Nevis to avoid triggering his personal guarantee. After a series of other problems allegedly resulting from mismanagement by PKI's affiliates, the development project failed and was put into receivership. In this case, Bay Center pursued a breach of contract claim against PKI, the only defendant that was party to the LLC Agreement, and sought to expand its remedial options by filing suit for breach of the contractually implied covenant of good faith and fair dealing, breach of fiduciary duty, common law fraud, and aiding and abetting a breach of fiduciary duty. This decision addressed defendants' motion to dismiss all of Bay Center's claims except for those based on breach of contract.

With respect to Bay Center's breach of fiduciary duty claims, the court first looked to the provisions of the LLC Agreement regarding the fiduciary obligations of the members. One section of the LLC Agreement provided that members owed each other the default fiduciary duties that exist between members of an LLC except where the LLC Agreement provided otherwise but the very next section of the LLC Agreement provided that no member owed the other member any duty of any kind that was not imposed by the LLC Agreement itself. The court found these seemingly contradictory provisions to create an ambiguity and, for purposes of the motion to dismiss, resolved the ambiguity in favor of an interpretation that the LLC Agreement required members to act in accordance with traditional fiduciary duties. The court thus denied defendants' motion to dismiss Bay Center's fiduciary duty claims against PKI.

Bay Center also alleged that Nevis, despite being neither a member nor an officer of Emery Bay, breached his fiduciary duty to Bay Center. The court stated that Nevis would be beyond the normal scope of those who owe fiduciary duties in the corporate context, but could be subject to fiduciary duties under the line of cases in the alternative entity context starting with *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991). The court held that to apply the USA Cafes doctrine to hold an affiliate liable for breach of fiduciary duty to an entity, the affiliate must exert control over the assets of that entity and, if such control is established, the affiliate only has "the duty not to use control over the partnership's property to advantage the corporate director at the expense of the partnership." The court, in attempting to resolve uncertainty regarding the scope of the duties under the *USACafes* doctrine, stated that limiting the application of *USACafes* to this duty provides a rational and disciplined way of protecting investors in alternative entities with managing members who are themselves entities, while not subjecting all the individuals who work for managing members to wide-ranging causes of action. The court found that Bay Center sufficiently pled that Nevis (a) exerted direct control over Emery Bay's property and (b) used such control to stave off personal liability. As such, the motion to dismiss this fiduciary duty claim against Nevis was denied.

The court next turned to Bay Center's aiding and abetting claims and stated that to allege a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that Bay Center had pled sufficient facts in this regard and thus denied defendants' motion to dismiss the aiding and abetting claims.

With respect to Bay Center's common law fraud allegations, the court stated that there are three ways to demonstrate common law fraud: (1) overt misrepresentation; (2) silence in the face of a duty to speak; or (3) deliberate concealment of material facts. In its claim, Bay Center argued that PKI and Nevis had a duty to speak and failed to do so. The court stated that to commit common law fraud through silence, a defendant must have a duty to speak that arises by operation of law, not purely by contract. For purposes of this motion, the court considered PKI subject to traditional fiduciary duties and held that fiduciaries of an LLC have a duty to disclose fully and fairly all material information within their control when they seek members' consent. Because the LLC Agreement required Bay Center's consent for any refinancing or restructuring of loans and the facts alleged showed that PKI failed to notify Bay Center of six of seven loan modifications, the court held that Bay Center successfully pled its fraud claim against PKI. The court stated that under Delaware law, "[a] corporate officer can be held personally liable for the torts he commits and cannot shield himself behind a corporation when he is a participant," which includes situations where a corporate agent participates in corporate fraud. On this basis, the court found that Bay Center had a proper claim against Nevis for his individual participation in PKI's fraud.

5. Entire Fairness

a. *Corwin v. KKR Fin. Holdings LLC*, No. 629, 2014 (Del. Oct. 2, 2015)

Plaintiffs below appealed the Court of Chancery's dismissal of plaintiffs' complaint, which challenged the stock-for-stock acquisition of KKR Financial Holdings LLC ("Financial Holdings") by defendant KKR & Co. L.P. ("KKR"). Stockholder plaintiffs argued below that the acquisition was presumptively subject to the entire fairness standard of review because KKR was a controlling stockholder of Financial Holdings. In its opinion, the Court of Chancery granted defendants' motion to dismiss, finding that plaintiffs failed to plead facts supporting an inference that KKR was Financial Holdings' controlling stockholder. The Court of Chancery failed to find a combination of potent voting power and management control such that KKR could be deemed to have effective control of the board without actually owning a majority of stock. The Court of Chancery reasoned that plaintiffs were, at bottom, asking the Court of Chancery to impose fiduciary obligations on KKR, which owned less than 1% of Financial Holding's stock, because a preexisting contractual management agreement between a KKR affiliate and Financial Holdings constrained Financial Holdings' business and strategic options. Declining to create such a rule, the Court of Chancery held that KKR was not a controlling stockholder, and thus the business judgment rule standard of review applied to the acquisition.

On appeal, plaintiffs reiterated their controlling stockholder argument and also argued that even if KKR was not a controlling stockholder and the entire fairness standard of review was inapplicable, *Revlon* applied. Defendants argued that plaintiffs failed to fairly present their *Revlon* argument below, and, regardless, the transaction was approved by a fully informed, uncoerced stockholder vote, thus subjecting it to the business judgment rule standard of review. As to the controlling stockholder argument, the Delaware Supreme

Court held that the Court of Chancery correctly applied the law and declined to repeat the Court of Chancery's analysis in its opinion. As to plaintiffs' *Revlon* argument, the Delaware Supreme Court agreed with defendants that the effect of the fully informed, uncoerced stockholder vote was outcome-determinative, even if *Revlon* applied. The court first reasoned that *Unocal* and *Revlon* were designed for pre-closing injunctive relief, rather than post-closing money damages claims as was the case here. Second, the court noted that the business judgment rule applied in these circumstances only when there was a fully informed, uncoerced stockholder vote, as opposed to a situation where "troubling facts regarding director behavior" were not disclosed to the stockholders. Finally, the court cited Delaware's long-standing policy of avoiding the "uncertainties and costs of judicial second-guessing" in circumstances where there is a fully informed, uncoerced stockholder vote.

The court also noted that although the parties "[had] acted as if this case was no different from one between two corporations whose internal affairs are governed by the [DGCL] and related case law. . . [and that the court] respected the parties' approach," but the court recognized that the case involved alternative entities and that in such cases, "distinctive arguments often arise due to the greater contractual flexibility given to those entities under our statutory law."

b. *Ross Holding and Mgmt. Co. v. Advance Realty Grp. LLC*, C.A. No. 4113-VCN (Del. Ch. Sept. 4, 2014)

In this post-trial opinion, the court considered plaintiffs' claims of breach of fiduciary duty and the implied covenant of good faith and fair dealing, aiding and abetting breaches of fiduciary duty and request for the appoint of a receiver, among others, in connection with a reorganization of Advance Realty Group ("ARG"). In the reorganization, ARG's revenue-generating, developed assets were sold and its capital-intensive, undeveloped properties were split off into another entity ("ACP"). Plaintiffs, who were minority unitholders of ARG and former managers terminated shortly before the reorganization, were given the option of cashing out their holdings at a discounted price or converting them into equity in the newly-split off company, which would be run by the CEO who had recently terminated defendants. However, ARG's board, in negotiating the transaction, appeared to act in a self-interested manner without considering the interests of the minority unitholders. The parties disagreed as to what fiduciary duties ARG's board owed to ARG's members, whether entire fairness review applied and the merits of the entire fairness analysis.

The court first addressed what, if any, fiduciary duties ARG's board owed to ARG's members. ARG's board was comprised of members appointed by ARG's CEO and one of ARG's majority unitholders, referred to herein as "FARS." Defendants relied heavily on (i) Section 7.01 of the ARG operating agreement, which provided for management by the board and stated, "It is understood that the [board] shall act reasonably and in good faith in its management of [ARG]," (ii) the fact that the operating agreement required that the board be composed of designees of ARG's CEO and FARS and (iii) Section 7.05 of the ARG operating agreement, which provided a safe harbor for certain acts that might otherwise violate the traditional duty of loyalty, to contend that (A) the board's only fiduciary duties were to act in an objectively reasonable manner and with subjective good faith and (B) ARG was free to engage in transactions with members of the board or the interests they represent. The court rejected defendants' arguments that traditional fiduciary duties had been modified or eliminated, noting that drafters must clearly, plainly and unambiguously evidence a modification or elimination of fiduciary duties. The court stated that using the phrase "it is understood" did not clearly evidence a disclaimer of traditional fiduciary duties. The court also noted that the structure of the board (being comprised of representatives of the parties interested in the transaction) did not evidence a clear intent to eliminate the duty of loyalty, as Delaware law provides for conflicted board to use independent parties to negotiate interested transactions. Finally, the court found that the Section 7.05 safe harbor, which did not apply to the transaction at hand, did not implicitly authorize the transaction, noting that a "failure to mention a duty or to contemplate a given conflicted transaction is not an adequate disclaimer of it."

Having found that the ARG operating agreement did not disclaim or modify traditional fiduciary duties, the court turned its attention to what standard of review applied and who bore the burden of proof. The court noted that a plaintiff can rebuff the business judgment rule presumption by providing evidence that a defendant breached its duty of loyalty or care. If a plaintiff provides such evidence, the burden shifts to the defendant to provide the entire fairness of the transaction. The court found that plaintiffs provided the requisite evidence by demonstrating that the majority of board members, representatives of ACP and FARS, were interested in the reorganization. This board majority did not view themselves as representatives of all of ARG's unitholders, including the minority, and ACP and FARS received the opportunity to convert their equity into debt, an option not granted to the minority unitholders. Additionally, no committee of independent directors was organized and no informed minority vote ratified the reorganization. Therefore, the court found that defendants bore the burden of proving that the reorganization was entirely fair.

Having determined that the entire fairness standard applied, the court analyzed whether the reorganization was fair by looking at whether the board dealt fairly with the minority and whether the board offered the minority a fair price. The court found that the reorganization was procedurally unfair because defendants controlled the timing and structure, made little to no effort to consider the minority unitholders' interests, kept plaintiffs uninformed about the reorganization and structured the reorganization to give benefits to ACP and FARS that were not provided to the minority unitholders (i.e., valuing their units at a price that was unsupported in the market and giving them priority over the other equity holders). However, after sifting through the evidence and credibility of three expert witnesses, the court found that the reorganization provided the minority unitholders with a fair price—because of the extreme reduction in the number of outstanding units that occurred as a result of the reorganization, the value of plaintiffs' units actually increased through the reorganization and, after taking into account the layering of debt on top of plaintiffs' equity, the court stated that the value plaintiffs received was a "close approximation" of the value they had before the reorganization.

The court then focused on the "unitary" inquiry of whether the reorganization was entirely fair. The court found that the process employed by the ARG board was so deficient that the court could not find that the reorganization was entirely fair, even though plaintiffs appeared to have nominally benefitted from the transaction. Because plaintiffs realized a nominal benefit, the court stated that damages were an inappropriate remedy; however, the court noted that an appropriate remedy would be to unwind the portion of the reorganization that provided FARS and ACP with preferential treatment for their units and requested that the parties brief this issue for the court's consideration as well as the issue of who was responsible for attorneys' fees.

Finally, the court found that plaintiffs did not succeed on their claims of violation of an implied duty of good faith and fair dealing, aiding and abetting breaches of fiduciary duties, appointment of a receiver or violation of the corporate opportunity doctrine.

c. *Zimmerman v. Crothall*, C.A. No. 6001-VCP (Del. Ch. Mar. 5, 2012 and Jan. 31, 2013)

Plaintiff claimed that certain issuances of preferred units and convertible debt were self-interested transactions in Adhezion Biomedical LLC, a Delaware limited liability company ("Adhezion"), benefitted certain of the current directors and the VC Investors (as defined below) and unfairly diluted the common members. Plaintiff argued that the directors' actions violated the duty of care and the duty of loyalty and breached the LLC Agreement by authorizing additional units of existing series of units and creating a new series of units without the approval of a majority of the common members. The defendants included directors of Adhezion and certain venture capital investors in Adhezion (the "VC Investors"). This case was before the court on the defendant's motion for summary judgment.

The court granted the defendants' motion for summary judgment on the plaintiff's breach of the duty of care claim. The defendants argued that the LLC Agreement limited the directors' liability to only breaches of the duty of loyalty. However, the court found that the use of the word "recklessness" in the list of behavioral descriptors that were grounds for damages was equivalent to "gross negligence," and therefore the LLC Agreement implicated the duty of care. Nevertheless, the court found that the defendants' conduct did not amount to gross negligence because the board's actions were properly viewed through the business judgment rule. In order to overcome the applicability of the business judgment rule, the plaintiff needed to prove that the board's decision making process showed a "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." The court noted that this is an onerous standard and determined that the plaintiff was unable to show that the board's process was reckless. To the contrary, Adhezion needed capital and the board contacted over 40 potential investors, entering into serious discussions with a few. Although the board ultimately decided to raise capital from current investors, the defendants showed that the board received updates on the financial condition of Adhezion and discussed different financing options.

With respect to the plaintiff's breach of the duty of loyalty claim, the plaintiff alleged that the directors approved self-dealing transactions in bad faith, that they were standing on both sides of the transactions, and therefore, the entire fairness analysis should be applied. In order to prove a claim of bad faith, the court said that the plaintiff needed to show that the "board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." Also, the court noted that an intentional dereliction of a known duty is higher than a standard of recklessness. The court granted the defendant's motion for summary judgment on the plaintiff's bad faith claim for the same reasons it granted the motion on the breach of duty of care claims.

With respect to his claim of self-dealing, the plaintiff argued that the transactions entered into by Adhezion were self-dealing because a majority of the directors that approved the transactions were "standing on both sides" of the transactions and also because the VC Investors constituted a control group which also stood on both sides of the transactions. The court denied the motion for summary judgment on the claim that the VC Investors were a control group. A shareholder is "controlling" if it owns a majority interest or it exercises actual control over the board (actual control can be shown if the shareholder (or group) holds such power that it is similarly situated as if it had a majority interest). On the one hand, the court noted that it is very difficult to show that a shareholder is a "controlling shareholder." On the other hand, the VC Investors together held 66% of the voting shares and at least two of the five directors' seats. Furthermore, both were early stage investors and there were communications of the defendants that tended to show the VC Investors had considerable pull in the actions the board decided to pursue. Turning to the plaintiff's claim that a majority of the board was interested, the court determined that out of the five directors, two participated in the transactions individually and another was the managing partner of one of the VC Investors. Therefore, it was possible that the plaintiff could show a majority of the board was interested.

In addition to showing that the majority of the board was interested or that the VC Investors were a control group, the plaintiff also needed to show that those on both sides of the transaction received a benefit exclusive to them. The transaction that took place in 2009 was not open to all current unitholders of Adhezion. The defendants argued that it did not matter because the offering price was consistent with the price in other recent transactions. However, the plaintiff's claim was that the issuance took place at a price that was improperly low and, therefore, the overall value of Adhezion was diluted. In light of the plaintiff's claim, the court determined that the fact that the price was similar to other recent prices at the time did not warrant granting summary judgment. The court denied the defendants' request for summary judgment on the plaintiff's self-dealing claim with respect to the 2009 transaction because it was possible that it was subject to the entire fairness standard, and whether it passed such scrutiny could not be determined without expert valuations. The other transactions complained of did not treat all unitholders equally in that the defendants were given the opportunity to subscribe for the new interests first, with the leftovers (if any) available to be purchased by the common members. Based on this structure, the court determined that the transactions that took place in 2010 and 2011 conferred an exclusive benefit on the defendants because they were given the opportunity to participate first and fully in the additional offerings. Although the court noted that there is no inherent right against dilution in Delaware law, the structure of the transactions conferred an exclusive benefit on the defendants. The court denied summary judgment and in fact determined that the 2010 and 2011 transactions were self-dealing and subject to entire fairness review.

Two of the five directors on the board of Adhezion were allegedly independent and disinterested. The LLC Agreement included a safe harbor provision that the court found might have overridden the entire fairness review in the situation. The safe harbor provision closely tracked 8 Del. C. § 144 and the defendants argued that it entitled them to have the transactions at issue reviewed under the business judgment rule. However, the plaintiff argued that the safe harbor provision did not address monetary damages and only rendered a transaction itself not void or voidable solely because it was an interested transaction. The court sided with the plaintiff on this issue. The plaintiff also argued that the defendants had not satisfied the safe harbor provision anyway, citing reasons such as the VC Investors being a control group and the transactions being taken in bad faith. The court dismissed the defendants' motion for summary judgment in accordance with its earlier discussion regarding the VC Investors being a control group and granted it on the plaintiff's bad faith arguments.

Turning to the plaintiff's aiding and abetting claim, the court noted that in order to prevail on such a claim, the plaintiff needed to show the underlying breach of fiduciary duty. Therefore the court granted the defendants' motion for summary judgment with respect to the aiding and abetting claims regarding a breach of the duty of care. The court denied the motion with respect to the aiding and abetting claims based on the alleged breach of the duty of loyalty. Furthermore, the court granted the motion for summary judgment of the aiding and abetting claims based on a breach of contract, noting that there is no cause of action for aiding and abetting a breach of contract under Delaware law.

Finally, the plaintiff claimed that the defendants breached the amendment provisions of the LLC Agreement by creating a new preferred series of units without the consent of a majority of the common members. The LLC Agreement provided that amendments required the vote of a majority in interest of the common members. The only exception was "as otherwise provided in Section 3.8…with respect to the issuance of additional Units." Section 3.8 of the LLC Agreement provided that the board could "issue additional units…or create additional classes or series of units…." The defendants claimed that Section 3.8 gave the board a "blank check" to create, authorize and issue new units. Conversely, the plaintiff argued that "create" in Section 3.8 should be construed more narrowly, and, more importantly in the court's view, that the exception to the majority in interest of common members rule only spoke to issuance of additional units (and not the creation of a new series of units). The court determined that the language of the LLC Agreement in this situation was ambiguous, and therefore denied the defendants' motion for summary judgment on the breach of contract claim.

In its subsequent post-trial opinion, the court addressed the plaintiff's claims alleging breach of the LLC Agreement, breach of the duty of loyalty by the directors and the VC Investors and aiding and abetting of the directors' breach of the duty of loyalty as well as the plaintiff's requests for reformation and repayment of attorney's fees advanced by Adhezion to the defendants.

The court first turned to the breach of contract claim, which centered on whether the LLC Agreement required the approval of common unitholders (1) to increase the number of units Adhezion was authorized to issue and (2) to create additional classes or series of units. The court noted that the LLC Agreement used three terms with commonly-understood meanings in the corporate context: "create," "authorize" and "issue."

With respect to the approval required to authorize additional units, the defendants argued that the power to increase the number of authorized units was merely incidental to the Board's ability to create and issue units under the LLC Agreement and to unilaterally amend the LLC Agreement in connection therewith. The court disagreed with this argument. Relying on testimony of the attorney that drafted the LLC Agreement and noting that the LLC Agreement gave certain unitholders veto rights in connection with the authorization of units while providing the board with the power only to create and issue units, the court concluded that the use of "authorize" in the LLC Agreement was deliberate and additional units must therefore be authorized. Regarding the procedures necessary to authorize additional units, the court found that because the LLC Agreement was silent on the steps necessary to authorize additional units, the most reasonable interpretation was that the parties intended the LLC Agreement to be amended to accomplish the authorization of units. The court next considered what was required to amend the LLC Agreement. The LLC Agreement required unitholder approval, including common unitholder approval, of all amendments except with respect to the "issuance" of additional units pursuant to provisions of the LLC Agreement that authorized the board to "create" and "issue" additional units. The parties disputed the scope of the amendment exception and whether authorization of additional units fell within the exception. The court, reading the LLC Agreement as a whole, held that regardless of whether the board could unilaterally create or issue additional units, it clearly could not authorize additional units without obtaining the unitholder consent required by the LLC Agreement's amendment provision.

Next, the plaintiff contended that the LLC Agreement required common unitholder approval to create additional series or classes of units because the exception to the LLC Agreement's amendment provision referred only to "issuance" of units pursuant to provisions of the LLC Agreement that authorized the board both to "create" and "issue" additional units. The court concluded the LLC Agreement to be ambiguous on this point and therefore turned to extrinsic evidence. The court noted that at all relevant times, the amendment exception referred only to "issuance" of units, even when the section of the LLC Agreement cross-referenced in the exception gave the board the power only to "create" additional series or classes of units. The LLC Agreement was later amended to authorize the board to "create and "issue" additional series or classes of units. The court therefore declined to interpret the language of the amendment exception as limiting and instead found that the exception broadly referred to the subject matter of the cross-referenced section-namely, the "creation" and "issuance" of additional series or classes of units.

Having concluded that common unitholder approval was required to increase the number of authorized units but not to create additional series or classes of units, the court turned to whether the directors breached the LLC Agreement in connection with the challenged issuances. The court held that the directors breached the LLC Agreement because the directors had purported (1) to increase the number of authorized shares without obtaining the requisite unitholder consent and (2) to issue units that, although created in accordance with the provisions of the LLC Agreement, had not been properly authorized.

In reaching its conclusion on the breach of the LLC Agreement, the court noted that it is incumbent upon parties to an LLC Agreement to manifest their intent to deviate from the meaning that a reasonable investor would attribute to a term. The court therefore rejected the strained meaning of the familiar corporate law term "authorize" that the defendants advocated. The court also found the facts of this case supported application of the rule of *contra proferentum*, which requires that ambiguous contract terms be construed against the drafter. Specifically, the court concluded that the plaintiff reasonably understood the use of the term "authorize" in the LLC Agreement to place a limit on the level of dilution he faced subject to his consent, in his capacity as a common unitholder, to increase such dilution.

The court next addressed the plaintiff's claim of breach of the duty of loyalty. The plaintiff alleged breach of the duty of loyalty by the directors and by two unitholders that allegedly controlled Adhezion. The court first turned to plaintiff's claim against the unitholders. Because neither unitholder alone possessed the voting power to control Adhezion, the plaintiff needed to show that the unitholders acted together to exert control over the company. The court concluded that the plaintiff failed to allege facts demonstrating a concerted effort by the unitholders to control Adhezion.

In connection with its analysis of breach of the duty of loyalty by the directors, the court reviewed the LLC Agreement to determine what provisions, if any, addressed fiduciary duties. The court concluded that the LLC Agreement defined the scope of director fiduciary duties in two ways: first, by setting a general standard for fiduciary conduct and, second, by giving the directors the right to engage in conflicted transactions subject to certain requirements.

Having determined the scope of the duties owed by the directors, the court noted that it must determine the applicable standard of review and the party that bears the burden of proof. The provisions of the LLC Agreement pertaining to conflicted transactions gave directors the right to engage in a conflicted transaction provided that the payments made by

Adhezion were "comparable to the payments or fees that would be paid to unrelated third parties providing the same property, goods, or services" to Adhezion. In addition, the LLC Agreement provided that a conflicted transaction would not be deemed void or voidable if the transaction was "fair" to Adhezion at the time it was authorized. The court noted that Delaware courts have interpreted similar provisions as effectively calling for review under the entire fairness standard, which requires a showing of a fair process and a fair price.

The court then addressed the question of which party must demonstrate that there was a fair process and a fair price. The court first noted that in the corporate context, or where default fiduciary duties are applicable in the LLC context, director-defendants bear the burden of proving that a transaction is entirely fair. The duties in this case, however, were set forth in the LLC Agreement and therefore contractual in nature. Focusing on the LLC Agreement provision requiring conflicted transactions to be on terms comparable to unrelated third party transactions—i.e., entirely fair—the court held that the plaintiff had the burden of proving a breach of the contractual requirement that the challenged transactions be entirely fair. The court recognized, however, that other provisions of the LLC Agreement pertaining to conflicted transactions rendered its conclusion not free from doubt. These other provisions deemed conflicted transactions not to be void or voidable if certain requirements were met. The court noted that it was unclear whether qualifying under one of these safe harbor provisions would trigger review under the business judgment rule or shift the burden to the party challenging the transaction. The court concluded that its approach of allocating to the plaintiff the burden to prove entire fairness harmonized all provisions of the LLC Agreement pertaining to conflicted transactions. According to the court, if the directors had the burden to prove entire fairness then one of the safe harbors, which deemed a transaction not to be void or voidable if it was fair to the company at the time it was authorized, would be redundant.

In connection with its discussion of the burden of proof, the court distinguished the conflicted transaction LLC Agreement provision at issue here with a similar provision interpreted by the Delaware Supreme Court in the recent Auriga case. The relevant LLC agreement provision in Auriga provided that members or managers could not, without the required consent, cause the company to enter into a conflicted transaction on terms less favorable than terms obtainable in an arm's length transaction. The Supreme Court concluded that under this provision the defendants had the burden to prove the entire fairness of the challenged transaction. In contrast, the court noted that Adhezion's LLC Agreement gave directors the affirmative right to enter into a conflicted transaction so long as the terms of such transaction were comparable to terms of unrelated third party transactions. The court also noted that dicta in the Supreme Court's Auriga decision indicated that compliance with one of the LLC Agreement's safe harbor provisions may trigger application of the business judgment rule. Specifically, in Auriga, the Supreme Court stated that if the transaction at issue had been conditioned on approval by an informed majority of nonaffiliated members as required by the LLC agreement, it would not have been reviewed under the contractual entire fairness standard and the Supreme Court contrasted such a result with the usual outcome of shifting the burden to prove entire fairness in the corporate law context.

The court concluded that the directors complied with one of the safe harbors: good faith approval of the challenged transaction by disinterested directors with knowledge of the material facts. According to the court, at least two of the directors were disinterested and both approved the challenged transactions. As a result, the court found that the directors should arguably receive the benefit of the business judgment rule or, at a minimum, the burden to demonstrate entire fairness should shift to the plaintiff, assuming the plaintiff did not already bear such burden.

Having addressed what standard of review applied and which party had the burden of proof, the court turned to the issue of whether the challenged transactions were entirely fair. The court noted that although its analysis assumed that the plaintiff had the burden to prove entire fairness, the facts of this case were sufficiently strong regardless of which party had the burden. Turning to the factual evidence, the court noted that at the time of each of the challenged transactions, Adhezion needed money to continue its business. Adhezion was a risky investment because of threatened patent litigation, lack of a strategic partner and a market dominated by a single competitor. Adhezion had solicited further outside investment without success and had considered offers to purchase that included a limited amount of cash up front. The court also found the defendants' expert witness' testimony regarding fairness of the transactions and the value of Adhezion to be more credible. As a result, the court concluded that, regardless of which party had the burden to prove the entire fairness of the challenged transactions, the transactions were entirely fair and the directors therefore had not breached the duty of loyalty. The court further noted that because there had been no breach of fiduciary duty the plaintiff's aiding and abetting claim could not succeed.

The court next turned to the issue of the remedy for the directors' breach of the LLC Agreement. The plaintiff requested reformation of the terms of the challenged transactions. Specifically, the plaintiff asked the court to cancel all warrants and certain options that were issued and to deem promissory notes to have been issued instead of units. The court refused to grant the plaintiff's request. The court noted that Adhezion needed cash at the time of the challenged transactions and received cash on fair terms. Moreover, the relief requested would create a windfall for the plaintiff. As a result, the court declined to award damages beyond nominal damages of one dollar.

Finally, the court turned to the plaintiff's request to require the defendants to reimburse Adhezion for legal fees advanced to the defendants. The court found that the directors were entitled to indemnification under the terms of the LLC Agreement and that the non-director defendants were entitled to indemnification under the terms of a purchase agreement entered into in connection with one of the challenged transactions. As a result, the court concluded, whether the defendants were also entitled to advancement was largely moot at this advanced stage of the proceeding. Moreover, the court noted that although the LLC Agreement did not expressly address advancement, it gave the directors broad authority to make decisions and take actions not otherwise provided for in the LLC Agreement. The court concluded that the directors therefore had authority to approve advancement of the defendants' legal fees.

d. *Auriga Capital Corp. v. Gatz Prop., LLC*, C.A. 4390-CS (Del. Ch. Jan. 27, 2012); *Gatz Prop., LLC v. Auriga Capital Corp*., C.A. No. 4390-CS (Del. Nov. 7, 2012)

Plaintiffs were minority members of Peconic Bay, LLC, a Delaware LLC (the "Company"), who brought this action against defendant Gatz Properties, LLC, the manager of the Company (the "Manager"). The Manager was managed and controlled by defendant William Gatz, an individual ("Gatz"). At all relevant times, Gatz and his family members owned a majority of the voting interests in the Company. The Company held a leasehold interest in golf course property that was owned by Gatz and his family members, which was subleased (the "Sublease") by the Company to a third-party golf course operator (the "Operator"). Plaintiffs alleged that the Manager breached its contractual duties under the LLC agreement of the Company and its fiduciary duties to the Company and its minority members by taking actions designed to oust the minority members so that the Manager and Gatz family members could use the assets of the Company to their own benefit. In its post-trial opinion, the Delaware Court of Chancery held in favor of the plaintiffs.

The Manager first argued that its actions were not subject to a fiduciary duty analysis because the LLC agreement of the Company displaced common law equitable principles. In finding that traditional fiduciary duties did apply in the context of an LLC, the court noted that Section 18-1104 of the LLC Act provides a statutory mandate that equitable principles apply to an LLC. The court also looked to Section 18-1101(c) of the LLC Act, which permits fiduciary duties to be modified or eliminated, and found that this statutory provision implies that fiduciary duties must have existed in the first place. The court then addressed whether a manager of an LLC qualified as a "fiduciary" and, citing to Delaware precedent, indicated that a "fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person to protect the interests of another." The court found that because a manager of an LLC has more than an arms-length, contractual relationship with the members of the LLC it manages and is vested with discretionary power to manage the business of the LLC, it is a fiduciary. Turning to the terms of the LLC agreement of the Company, the court noted that the LLC agreement of the Company did not contain any general provision stating that the only duties owed by the Manager were set forth in the

LLC agreement. In relevant part, the LLC agreement provided that the Manager could not cause the Company to enter into an agreement with an affiliate that was less favorable to the Company than the terms of similar agreements that could be entered into with "arms-length third parties" without the consent of a majority of the non-affiliated members. The court referred to prior cases in noting that this arms-length language for self-dealing transactions implicated the fiduciary duty of loyalty and imposed the equivalent of the substantive aspects of "entire fairness" review, which is the "fair price" prong. However, the court indicated that the entire fairness procedural inquiry into "fair dealing" may also apply in some respects because the extent to which the process leading to alleged self-dealing deviates from the behavior one would expect in an arms-length deal is important to price determination. In this regard, where there was no real market test, and where the self-interested party's conduct may have compromised the value of the asset in question, this could all bear on whether a fair price was paid.

With respect to the facts in this case, the court found that, as the plaintiffs alleged, the Manager knew in 2005 that the Operator intended to terminate the Sublease in 2010 pursuant to an early termination right that it had under the Sublease, but the Manager failed to take any action to address this expected loss, such as seeking a replacement operator for the golf course property. Instead, the court noted that the Manager sat back and waited for the Sublease to terminate and retained the cash surplus of the Company pursuant to a provision in the LLC agreement of the Company that permitted the Manager to retain funds that it reasonably determined were "necessary to meet the Company's present or future obligations," which in this case were future debt obligations of the Company after the Sublease terminated. The court found that the Manager took these actions because it desired to (i) let the Sublease terminate and to then use the property for residential properties, which it believed would be the best use and result in the highest value of the property and (ii) oust the minority members because it did not like having them interfere with what Gatz viewed as a Gatz family venture and that Gatz thought that if the Company were in a position of economic weakness, he could exploit that for the exclusive financial benefit of himself and his family. The court held that because the Manager was charged under the LLC agreement of the Company with the obligation to manage the operations of the Company, it had a fiduciary duty to manage the business loyally for the benefit of the members, which included the duty to address in good faith known, material risks that threatened the viability of the business of the Company. For these reasons, the court found that the Manager breached its fiduciary duties of loyalty and care by its bad faith and grossly negligent refusal to explore strategic options for the Company after knowing that the Operator would terminate the Sublease.

The court next turned to the Manager's dealings with a third-party that was interested in purchasing the Company or the lease owned by the Company. According to the court, the third-party asked to review the lease, the Sublease and other financial information, but the Manager refused to provide this information. Nevertheless, this offeror submitted an offer that unbeknownst to it, was below the Company's outstanding debt. However, rather than informing the offeror of this, the Manager put the offer to a membership vote knowing that it would be rejected and without informing the members that the offer was made without any due diligence by the offeror. The offeror then indicated that it was willing to negotiate an offer that could be north of $6 million, but the Manager never responded to this invitation to negotiate and the Manager never communicated this to the minority members. Although the Manager sought authorization from the minority members to approve a counteroffer of $6 million and the minority members approved it, the Manager, in its capacity as a member, and the Gatz family members, voted against it. The court held that the Manager violated its fiduciary duty of loyalty by its bad faith refusal to consider the third-party's offer to buy the Company or the lease owned by the Company and that it had also engaged in bad faith conduct when it presented to the minority members misleading information about the third-party's offer. Gatz submitted its own offer to purchase the Company for $6 million, which was rejected by the minority members, and then submitted a subsequent offer significantly lower than his initial offer based on an appraisal he obtained without giving the appraiser all relevant information. Gatz indicated at trial that this was his attempt to play "hardball" with the minority members. The court found that playing "hardball" is how one would deal with competitors not teammates and that the Manager violated its fiduciary duty of loyalty in its own conduct in its buyout offers.

The Manager then put the Company up for sale by an auction, which the court considered a "sham." The court noted that the Manager hired an auctioneer that had no experience with this type of transaction, that the auction was held within 90 days despite information available to the Manager from an appraiser that indicated that it would take six to nine months to market the property, that advertising commenced only two months prior to the auction date, with some of the advertisements being the size of postage stamps in newspapers of general circulation, that "as is" sale materials were offered to potential bidders that downplayed the value of the property, and that under the terms of the sale, the Manager was permitted to cancel the auction at any time before bidding began. Gatz was the only bidder at the auction and purchased the property for $50,000 in excess of the Company's debt, which resulted in approximately $20,000 to the minority members. Based on these facts, the court held that no rational person acting in good faith could perceive the auction as adequate, and, thus, the Manager acted in bad faith and was grossly negligent in running the auction process. The court noted that the Manager sought to protect itself from liability by claiming that it relied on the auctioneer's expert advice under Section 18-406 of the LLC Act, but held that a fiduciary cannot select an unqualified advisor instead of a qualified one and then claim he was guided by an expert, and, further, Gatz's claim of "reliance" was undercut by his involvement in the development and approval of the marketing plan and the terms of sale.

The Manager also argued that based on their voting power as members, it and the Gatz family members could veto any option for the Company, so they could properly use a chokehold over the Company to pursue their own interests, and the minority would have to live with the consequences of their freedom of action. The court found that the Manager was indeed free to vote its membership interest however it desired in connection with a sale of the Company, but that it was not free to create a situation of distress by failing to cause the Company to explore its market alternatives and then to buy the Company for a nominal price. The court observed that the purpose of the duty of loyalty was to prevent the exploitation by a fiduciary of its position to the disadvantage of a minority.

Finally, the Manager argued that even if it breached its fiduciary duties, there was no economic harm because the Company was insolvent. The court found that Gatz is the one that put the Company in a position of relative economic weakness by not taking action and letting the Sublease lapse and then running a sham auction. The court, therefore, awarded the minority members their full capital contribution plus $72,500, the equivalent of a sale of the company at $6.5 million, which factored in the $6 million offer plus the cash the Company had on hand. The court also awarded one-half of plaintiff's attorneys' fees and costs based on Gatz's conduct before and during the litigation and the breaches of the duty of loyalty.

Subsequent to the Court of Chancery's decision, Gatz filed an appeal, and Gatz Properties filed a voluntary Chapter 11 petition. When the Bankruptcy Court granted a motion for relief from the automatic stay, the Delaware Supreme Court was able to proceed with Gatz's appeal. Specifically, the Supreme Court held that Gatz did violate his contracted-for fiduciary duty to abide by the equitable standard of entire fairness in a conflict of interest transaction between himself and the Company by refusing to negotiate with a third-party bidder and by causing the Company to be sold to himself at an auction engineered by himself and sold to himself at an unfair price. The Supreme Court affirmed the Court of Chancery's award of damages and attorneys' fees.

The Supreme Court first analyzed whether the Court of Chancery correctly determined that Gatz owed contractually-agreed-to fiduciary duties to the other members of the Company. The Supreme Court held that Section 15 of the LLC Agreement, which prohibited related-party transactions that were "on terms and conditions which are less favorable to the Company than the terms and conditions of similar agreements which could then be entered into with arms-length third parties, without the consent of a majority of the non-affiliated Members[,]" was "the contractual equivalent of the entire fairness equitable standard of conduct and judicial review." The Supreme Court found that Section 15 of the LLC Agreement contractually adopted the fiduciary duty standard of entire fairness and the fair price obligation inherent in that standard. Thus, entire fairness (fair dealing and fair price) was the controlling fiduciary duty standard and, because no majority-of-the-minority vote occurred to approve the transaction as required by Section 15, Gatz had the burden to establish the transaction's fairness. The Supreme Court found adequate facts in the record to support the Court of Chancery's determination that Gatz did not establish the transaction's fairness and breached the fiduciary duty he owed to the minority members of the Company to engage in fair dealing and to obtain a fair price. Specifically, the record showed that the Company was worth more than Gatz paid, Gatz refused to properly deal with an interested third-party bidder, and the auction process was a "sham" based on the unprofessionalism of the marketing effort and the decision to auction off the Company as a distressed property as opposed to selling the Company in an orderly way. Therefore, the Supreme Court held that Court of Chancery properly determined that Gatz did not carry his burden of proving that he abided by his contracted-for fiduciary duty of entire fairness.

Second, the Supreme Court looked to whether the LLC Agreement exculpated Gatz. Section 16 of the Agreement permitted exculpation and indemnification of the Company's manager in certain instances. However, the Supreme Court found ample evidence in the record to support the Court of Chancery's determination that Gatz "acted in bad faith and made willful misrepresentations in the course of breaching his contracted-for fiduciary duty." Specifically, the court noted that Gatz knew that the Sublease likely would be terminated early, did not engage in any serious effort to look for a replacement golf course operator, refused to provide due diligence to a credible buyer, and decided to pursue a distressed sale auction when the Company's cash reserves would have permitted it to continue to pay its bills for three years while searching for a buyer. Because Gatz engaged in acts of bad faith and willful misconduct, the LLC Agreement offered him no exculpation.

Third, the Supreme Court considered the Court of Chancery's analysis regarding whether the Delaware LLC Act imposed default fiduciary duties. The Supreme Court found that the LLC Agreement explicitly and specifically addressed the "fiduciary duty issue" which controlled the dispute and that no litigant had asked the court to determine whether default fiduciary duties existed as a matter of statutory law. The Supreme Court also stated that the issue of whether the Delaware Limited Liability Company Act "does—or does not—impose default fiduciary duties is one about which reasonable minds could differ." Therefore, the Supreme Court held that the Court of Chancery's pronouncements about default statutory duties under the LLC Act "must be regarded as dictum without any precedential value."

Finally, the Supreme Court upheld the award of equitable damages because the record supported the Supreme Court's finding that Gatz breached a contracted-for fiduciary duty arising from equity and the award "was based on conscience and reason." Furthermore, the Supreme Court held that the award of attorneys' fees was warranted given the Court of Chancery's supported findings that Gatz engaged in bad faith litigation conduct.

e. *Saliba v. William Penn P'ship*, C.A. No. 111 (Del. Feb. 9, 2011)

Plaintiffs were members of a Delaware LLC that owned a motel as its sole asset, and defendants were members and the managers of the LLC. Defendants surreptitiously arranged for the sale of the motel to another company controlled by defendants using a deceptive and manipulative sale process. Plaintiffs brought an action in the Chancery Court for breach of fiduciary duty alleging that defendants' breached their duty of loyalty, and the Chancery Court agreed with plaintiffs. In assessing the damages that should be awarded to plaintiffs, the Chancery Court determined that the sale price of the motel paid by defendants was greater than its appraised price. Since there were no compensatory damages available to plaintiffs, the Chancery Court exercised its discretionary powers to award plaintiffs their attorneys fees and costs, stating that it would be unfair and inequitable for plaintiffs to bear the costs of litigation arising from a successful breach of fiduciary duty claim against defendants.

In this decision, the Delaware Supreme Court addressed an appeal by defendants of the Chancery Court's decision. The Supreme Court began by stating that, because the LLC agreement did not modify or eliminate fiduciary duties, defendants owed the traditional fiduciary duties of loyalty and care to the other members of the LLC. The court then found that by standing on both sides of the sale transaction, the managers were required to demonstrate the entire fairness of the transaction in order to show they had complied with their duty of loyalty. In order to demonstrate the entire fairness of the transaction, the court required that defendants show both fair dealing and fair price. The court described fair dealing as involving an analysis of the structure, timing, disclosures and approvals for the transaction and fair price as involving the economic and financial considerations of the transaction. The court stated that "a party does not meet the entire fairness standard simply by showing that the price fell within a reasonable range that would be considered fair." The court found that defendants had manipulated the sale transaction through multiple misrepresentations and material omissions. Defendants argued that the deal was ultimately fair, however, because the sale price was higher than the appraised price. The court rejected defendants' argument and found that defendant's manipulation of the sale process denied plaintiffs the benefit of knowing the price a fair bidding process might have brought. The Supreme Court thus affirmed the Chancery Court's determination that defendants' had breached their fiduciary duties.

f. *In re Atlas Energy Res., LLC, Unitholder Litig.*, C.A. No. 4589-VCN (Del. Ch. Oct. 28, 2010)

This case involved a publicly-traded limited liability company, Atlas Energy Resources, LLC (the "Company"), which negotiated a merger with its controlling unitholder, Atlas America, Inc. ("America"). The plaintiffs were public unitholders of the Company. The plaintiffs argued that America, as controlling unitholder, breached its fiduciary and other common law duties to the minority unitholders by negotiating the merger through an unfair process that resulted in terms that were unfair to the minority unitholders. The plaintiffs further argued that certain directors of the Company breached their fiduciary duties by agreeing to the merger. The defendants filed a motion to dismiss these claims.

First, the court held that under Delaware law, in the absence of provisions explicitly disclaiming the applicability of fiduciary duties, controlling members in a manager-managed LLC owe minority members the traditional fiduciary duties that controlling shareholders owe minority shareholders. The court also highlighted that it was particularly wary of eliminating such duties in the context of a publicly traded LLC and required either an explicit disclaimer or language mandating a contractual resolution. With respect to whether America had effectively modified its default fiduciary duties, the court found that the relevant provision of the LLC agreement of the Company (the "Operating Agreement") provided that "[w]henever a potential conflict of interest exists or arises between any Affiliate of the Company, on the one hand, and the Company or any Group Member, on the other, any resolution or course of action by the Board of Directors in respect of such conflict of interest shall be permitted and deemed approved by all Members, and shall not constitute a breach of this Agreement . . . or of any duty existing at law, in equity or otherwise, including any fiduciary duty, if the resolution or course of action in respect of such conflict of interest is (i) approved by Special Approval . . . ." In reviewing this provision, the court found that it only governed conflicts of interest between the Company and its "Affiliates," such as America, but not conflicts of interest between America and the Company's minority unitholders. Thus, the Operating Agreement did not eliminate America's fiduciary duties as the controlling unitholder of the Company to the minority unitholders. Applying the corporate precedent of *Kahn v. Lynch*, the court held that a merger between an LLC and its controlling unitholder must be evaluated under entire fairness notwithstanding any protective devices, such as independent committee review or approval by a majority of the minority unitholders, that may have been employed because, regardless of the protections employed, such a merger is characterized by "inherent coercion."

In discussing whether the merger satisfied the entire fairness standard, the court addressed the issues of fair price and fair dealing. With respect to fair price, the court found that plaintiffs sufficiently alleged facts suggesting the units were worth more than the consideration received under the merger agreement. The court also found that plaintiffs sufficiently alleged facts suggesting the process approving the merger may not have been fair, including that America withheld material information, that America manipulated the alternatives to the merger to make it appear that the merger of the Company with America was the only choice and that it exerted influence over the consultants to the special committee that approved the merger. Accordingly, the court denied America's motion to dismiss.

With respect to the plaintiffs' claims against the defendant directors of the Company, the court focused on a provision in the Operating Agreement that provided that except as otherwise set forth therein, "none of the Directors, nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Company or any Member." The court found that this language unambiguously eliminated the traditional fiduciary duties of the Company's directors and officers and that they were replaced by a duty of good faith on the directors and officers, where "good faith" was defined as an action believed to be in the best interest of the Company. The court noted that good faith under the Operating Agreement required a subjective analysis in contrast to the object standard under the common law. The plaintiffs argued that such a provision was unenforceable because it eliminated the implied covenant of good faith and fair dealing. The court rejected this position, however, holding that the Operating Agreement clearly imposed a subjective good faith standard on the directors and the court would not invoke an implied covenant to override these provisions. The court noted that although the plaintiffs may have stated a colorable claim for breach of the traditional fiduciary duties of care and loyalty, they did not allege the type of subjective bad faith required to state a claim under the standard set forth in the Operating Agreement and, therefore, the claims against the defendant directors were dismissed.

g. *Solar Cells, Inc. v. True North Partners, LLC*, C.A. No. 19477 (Del. Ch. Apr. 25, 2002)

Plaintiff member filed a motion for a preliminary injunction seeking to enjoin the proposed merger of a Delaware limited liability company with and into the wholly owned subsidiary of the LLC's other member. Plaintiff alleged that the individual managers of the LLC, acting at the direction of the other member, acted in bad faith in approving the proposed merger and would be unable to prove the entire fairness of the merger. In response, defendants argued that all of the actions taken with respect to the merger were authorized by the operating agreement of the LLC and, further, that the operating agreement contained a provision that limited the fiduciary duties owed by the defendant managers. The court acknowledged that the operating agreement did include a provision limiting liability stemming from a conflict of interest but held that such a waiver did not mean that there was a waiver of all fiduciary duties. Moreover, the court observed that the limitation on liability had no bearing on the issue at hand because plaintiff sought to enjoin the proposed merger rather than impose liability on individual defendants. In this case, the defendant managers elected by the defendant member approved the proposed merger by written consent the day after a meeting of the full board of managers during which defendants did not discuss the merger; nor was notice of the merger given to plaintiff or its board representatives until the day following its approval, which was only a week before the proposed date of consummation of the merger. Based on these facts, the court found that defendants likely would be required to show the entire fairness of the proposed merger and noted that taking action in technical compliance with the law was not an unassailable defense of such action if it otherwise breached a duty.

The court then found there was a reasonable likelihood that defendants would not be able to establish that the proposed merger was the result of fair dealing or at a fair price. With respect to fair dealing, the court noted several factors including the dilution of plaintiff's interest from a 50% stake in the LLC to only 5% ownership interest in the surviving entity and that the merger's proposed market-reset provision that would raise plaintiff's initial equity interest in the surviving entity in the event that such entity secured third-party financing in 2002 was illusory because defendants would have control of the surviving entity and it would be within their power to delay consummation of any third-party investment until after 2002. With respect to fair price, the court based its ruling on the difference between the valuation used as the basis for the proposed merger and valuations that had been done only a few months prior to the approval of the merger which were materially higher.

Finally, the court held that plaintiff would suffer irreparable harm if the injunction were denied based on the dilution of its equity position and voting power and the loss of its bargained-for participation in company management. The court also considered the difficulties that would be presented by the need to consider the interests of third-party investors brought into the surviving entity in formulating relief for plaintiff if it ultimately prevailed.

6. Special Approval

a. *Blackmore Partners, L.P. v. Link Energy LLC*, C.A. No. 454-N (Del. Ch. Oct. 14, 2005)

Following the court's denial of the defendants' motion to dismiss referred to below, the defendants moved for summary judgment at the conclusion of discovery and this opinion was the court's decision with respect to such motion.

The plaintiff first alleged that the court should apply enhanced scrutiny to the challenged transaction in which the proceeds of the sale of substantially all of the LLC's assets were used to repay the debt of the LLC and to pay holders of unsecured notes a payment for covenant waiver thus rendering the LLC's units worthless. The plaintiff claimed the board of directors of the LLC deprived the unit holders of consideration that they would have received if the board had not agreed to the demands of the note holders. The court rejected the plaintiff's reliance on the court's decision in *Orban v. Field* which held that "when a board approves a transaction that favors one corporate constituency over another, they lose, at least as an initial matter, the cloak of business judgment protection," and the board must demonstrate that it acted reasonably and in good faith. The court in the instant case distinguished *Orban* by finding that the "defendants did not act 'solely or primarily for the express purpose of depriving a shareholder of effective enjoyment of a right conferred by law.'" Importantly, the LLC's operating agreement empowered the board of directors to authorize a sale of all or substantially all of the LLC's assets without a vote of the unit holders thus precluding any need for measures by the board to prevent the unit holder's approval or vote. The court also found that even if *Orban* applied to the instant case, the defendants met the enhanced scrutiny standard since the company was insolvent and no better transaction was available.

The court next addressed the plaintiff's claim that the defendants breached their fiduciary duties to the unit holders by focusing on the creditors' interests over the interests of the unit holders. The plaintiff conceded that the company was insolvent at the time of the disputed transaction, and the court stated that "the board of directors of an insolvent company may take into account the interests of creditors at the apparent expense of stockholders if, in doing so, the board meets its fiduciary duties to all relevant constituencies."

The court then analyzed whether the directors met their fiduciary duties with respect to the unit holders. The plaintiff claimed that the board's decisions regarding the transaction were tainted by the involvement of J. Robert Chambers ("Chambers"), a director who was a managing director of Lehman Brothers, a holder of an equal percentage of notes and units of the LLC. The court referred to its decision in *Cooke v. Oolie* which involved defendants who were both shareholders and creditors of a corporation considering an acquisition proposal. The *Cooke* court held that "plaintiffs bore the burden of showing that an actual conflict existed, and that the deal chosen by the defendants offered superior terms for creditors and inferior terms for the plaintiff shareholders compared to other proposals available to the defendant corporation." Unlike the defendants in *Cooke*, the defendants in the instant case owed fiduciary duties to creditors because the company was insolvent. Even if Chambers' membership on the board created a potential conflict, there were no better alternatives for the unit holders other than the transaction approved by the board. The court also noted that even if Chambers were conflicted, the board would still receive the protections of the business judgment rule because such protections only require that a majority of the directors approving the transaction remain disinterested, and the plaintiff made no claims that other directors were interested.

The court also rejected the plaintiff's argument that the Special Committee of independent directors formed by the board to consider potential transactions was tainted by the presence of the CEO of the LLC and Chambers at the meetings of the Special Committee. Since the plaintiff failed to present evidence that the CEO or Chambers influenced the Special Committee or acted "as anything more than necessary sources of information," the court found the Special Committee operated with "sufficient independence to merit the cloak of business judgment protection."

Next, the plaintiff argued that the defendants breached their duty of care by approving the transaction without sufficient expert information and by failing to use the leverage from a potential bankruptcy filing against the note holders to negotiate a better settlement for the unit holders. The court found that the plaintiff's claims based on breach of the duty of care were precluded by the LLC's operating agreement exculpating directors for all awards of damages for violations of the duty of due care. Nonetheless, the court addressed the plaintiff's claims regarding the duty of due care finding that the directors did not violate such duty. The court stated that the defendants did not act with gross negligence since the record showed that the Special Committee met "repeatedly over months to address the issue of the company's impending insolvency and to consider alternatives." Additionally, the note holders had the ability to veto any proposed transaction thus limiting any leverage power the company had against the note holders. Moreover, the court noted that "the choices made in formulating a negotiating strategy are within the core of what is protected by the business judgment rule," and the evidence failed to support the plaintiff's claimed violation of due care.

Finally, the court rejected the plaintiff's claim that the defendants acted in bad faith in approving the transaction finding that "the fact that unit holders were left with nothing at the end, given a context in which the chief alternative substantiated by evidence was an equally barren bankruptcy proceeding, does not suffice to rebut the presumption that the directors were acting in the good faith exercise of their fiduciary duties, or to establish a claim of waste." The court granted the defendants' motion for summary judgment.

b. *U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls, L.L.C.*, 864 A.2d 930 (Del. Ch. 2004), vacated, C.A. No. 112 (Del. June 6, 2005)

Plaintiff, an indenture trustee, acting on behalf of unsecured noteholders of a Delaware LLC, alleged, among other claims, breach of fiduciary duty by the directors of the LLC to the noteholders in connection with certain transactions between the LLC and a related third party. Defendants moved to dismiss the fiduciary duty claim on the grounds that the complaint failed adequately to allege that defendants owed fiduciary duties to the noteholders and on the grounds that the LLC's operating agreement deemed the transactions at issue not to constitute a breach of any duty.

The court first addressed defendants' argument that the complaint did not establish that defendants owed fiduciary duties to the noteholders. Defendants admitted that under Delaware law when a debtor enterprise is insolvent, the fiduciary duties of those managing the debtor enterprise extend to the interests of creditors. While fiduciary duties to creditors have been recognized by Delaware courts in the context of insolvent Delaware corporations and limited partnerships, this is the first decision by a Delaware court in which such a fiduciary duty was recognized in the LLC context. Defendants contended that the complaint did not allege sufficient facts from which the court could infer that the LLC was insolvent. The court stated that to meet its burden to plead a breach of fiduciary duty to creditors, plaintiff must plead facts sufficient to support a finding that the LLC was insolvent. According to the court, insolvency is defined in two ways in Delaware. First, a company is insolvent if it is unable to pay its debts as they fall due in the usual course of business. Second, a company may be insolvent if it has liabilities in excess of a reasonable market value of its assets. The court noted that fiduciary duties to creditors may arise when the company is in the zone of insolvency. The court did not find sufficient evidence in the complaint that the LLC was not able to pay its debts as they fell due but did find that, given the LLC's status as a mature company as opposed to a start-up, the significant amount by which its liabilities exceeded its assets raised an issue of material fact as to whether the LLC was insolvent or in the zone of insolvency that was sufficient to survive a motion to dismiss.

The court then addressed defendants' argument that the fiduciary duty claim must be dismissed because the LLC's operating agreement deemed the transactions in question not to constitute a breach of any duty. The operating agreement contained a typical procedure for authorizing interested transactions through the approval of a conflicts committee. Upon such approval, the operating agreement provided that any such transactions would be deemed to be "fair and reasonable" and not a "breach of any duty." The defendants contended that the trustee's fiduciary duty claim was derivative in nature and must therefore be brought on behalf of the LLC, which pursuant to LLC Act Section 18-101(7) is bound by the provisions of the operating agreement including the provisions deeming the interested transaction not to constitute a breach of any duty. The court, however, found that defendants had not shown that the conflicts committee actually met and authorized the transactions at issue and, on that basis, denied the defendants' motion to dismiss the fiduciary duty claim.

In a subsequent decision in this case, the Delaware Supreme Court vacated the order issued by the Court of Chancery following the decision discussed above and remanded the case to the Court of Chancery for a trial that would include the issues determined by the Court of Chancery in such order. While the vacation of the order precludes citation of the Court of Chancery's opinion as precedent, the opinion is included because the Supreme Court did not reject its reasoning and it indicates how the Court of Chancery may address similar issues in the future.

7. Limited Liability Company Opportunity Doctrine

a. *Grove v. Brown*, C.A. No. 6793-VCG (Del. Ch. Aug. 8, 2013)

This post-trial opinion involved a dispute between two members of one family (the "Plaintiffs") and two members of another family (the "Defendants") who formed a Delaware LLC ("Heartfelt") to engage in a home health care business. As the relationship between the Plaintiffs and the Defendants soured, the Defendants attempted to merge Heartfelt with an entity owned by them to freeze out the Plaintiffs, claiming that they had authority to do so because they owned a majority of the membership interests in Heartfelt. In that regard, the Defendants argued that the Heartfelt LLC agreement required each member to contribute $10,000 as an initial capital contribution and that the Plaintiffs failed to make their capital contribution in full and, based on the contributions provided to date, the Defendants owned a majority of the membership interests of Heartfelt. In addressing this issue, the court focused on the provisions in the Heartfelt LLC agreement essentially providing that each member was required to contribute $10,000 and indicating that each member had a 25% membership interest in Heartfelt as well as the provisions providing that the profits and losses should be divided among the members "in proportion to each Member [sic] relative capital interest in [Heartfelt]." The court found that these provisions unambiguously provided that each member was a 25% equal owner and that nothing in the Heartfelt LLC agreement indicated that ownership was contingent on the obligation to provide the capital contribution. The court further noted that even if it were to consider extrinsic evidence, there were membership certificates reflecting a 25% membership interest of each member and certain conduct of the parties (e.g., representations to a potential lender of equal ownership) that were consistent with the court's interpretation of the Heartfelt LLC agreement. Although the Defendants argued that the membership certificates were invalid for failure to provide a date or the company seal, the court mentioned that it did not consider the certificates to be contracts but it did consider them to be overt statements demonstrating the understanding of the members of Heartfelt. The court held that the purported merger was a legal nullity as the Heartfelt LLC agreement did not address mergers and the Defendants did not have the authority to effectuate a merger because they did not own more than 50% of the then current percentage in the profits of Heartfelt as required under the LLC Act.

The court then turned to the Defendants' counterclaims that the Plaintiffs, as managing members of Heartfelt along with the Defendants, violated their fiduciary duties by taking corporate opportunities from Heartfelt. The Plaintiffs had formed a Maryland LLC which operated fewer than ten miles from the offices of Heartfelt and then formed a Delaware LLC with an office in the same building as Heartfelt, each engaged in the same business as Heartfelt. The court cited to *Feeley v. NHAOCG, LLC* for the principle that default fiduciary duties apply to managing members of an LLC. The court then referred to corporate case law by analogy, noting that the corporate opportunity doctrine is a consequence of a fiduciary's duty of loyalty and it exists to prevent officers or directors (or a managing member of an LLC) from personally benefiting from opportunities belonging to the corporation (or an LLC). The court further noted that under the doctrine a corporate officer or director (or managing member of an LLC) may not take a business opportunity as his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation; but, a director or officer may take personal advantage of a corporate opportunity if: (1) the opportunity is presented to the director or officer in his individual and not corporate capacity; (2) the opportunity is not essential to the corporation; (3) the corporation holds no interest or expectancy in the opportunity; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity. The court highlighted that this is essentially a factual question and the burden is on the fiduciary to show that he or she did not seize a corporate opportunity. Based on the facts presented at trial, the court found that the Plaintiffs breached their duty of loyalty by usurping business opportunities of Heartfelt in forming two competing entities. The court focused on the evidence relating to whether or not the Defendants disclaimed their right to pursue the corporate opportunity and found that the evidence demonstrated that, although the Defendants knew the Plaintiffs were interested in expanding, the Defendants had not clearly disclaimed their right to pursue expansion and in fact had plans to eventually cause Heartfelt to expand even if not as quickly as the Plaintiffs desired. The court also found that notwithstanding the fact that the Plaintiffs presented the opportunity to join the Defendants as members of the competing entities, presenting an opportunity to other members was not the same as presenting it to Heartfelt. The court determined that the appropriate remedy was for each party to account to Heartfelt for profits that they wrongfully kept for themselves as the Defendants attempted a merger that was not valid but presumably made profits thereafter and the Plaintiffs usurped corporate opportunities by forming the competing entities that also presumably made profits. The court also noted that although it would not effectuate a judicial dissolution sua sponte, it hoped that the parties would present a petition for dissolution because given the bitterness and acrimony between the parties, it was not reasonably practicable to carry on the business of Heartfelt in conformity with the Heartfelt LLC agreement.

Lastly, the court rejected counterclaims against certain of the Plaintiffs' relatives who worked for the competing entities for aiding and abetting because the Defendants failed to present evidence that the counterclaim defendants knowingly participated in breaches of fiduciary duty.

b. *In re Mobilactive Media LLC*, C.A. No. 5725-VCP (Del. Ch. Jan 25, 2013)

In this case, two members of a joint venture formed as a Delaware LLC disputed the scope of a clause in the LLC agreement stating that interactive video and advertising activities in North America by either member or their affiliates must take place exclusively through the joint venture. The joint venture, Mobilactive Media LLC ("Mobilactive"), was formed by plaintiff Terry Bienstock ("Bienstock") and defendant Silverback Media, PLC ("Silverback). Other defendants included Adenyo, Inc. ("Adenyo"), which was the Canadian parent of Silverback, and two Delaware corporations that were subsidiary entities of Adenyo.

Bienstock alleged that Silverback and its affiliates breached the Mobilactive LLC Agreement, and usurped corporate opportunities belonging to Mobilactive by, among other things, acquiring competing businesses through subsidiaries without offering Mobilactive or Bienstock an opportunity to invest in these acquisitions. Silverback argued that these acquisitions did not violate the LLC agreement under Silverback's interpretation, but the court found that Silverback's interpretation was incorrect and that its conduct breached the LLC agreement.

The court next addressed Bienstock's claims that Silverback breached its fiduciary duties by usurping corporate opportunities rightfully belonging to Mobilactive. The LLC agreement provided that the parties were to act in the best interest of Mobilactive and exercise utmost good faith and fair dealing, and the court stated that under Delaware common law parties to a joint venture are required to act with the utmost good faith, fairness and honesty with each other with respect to the enterprise. The court found that certain of the alleged opportunities were within Mobilactive's line of business and that Mobilactive had an interest or expectancy in those opportunities. Silverback alleged that Mobilactive did not have the financial ability to exploit the opportunities. The court disagreed, but also held that, based on corporate precedent, there is no need to consider the financial ability of Mobilactive to exploit the opportunities in a corporate opportunity analysis where there is a parallel contractual obligation to present corporate opportunities.

The court also found that, as a result of the alleged usurpation, Silverback stood in a position inimicable to its duties to Mobilactive. The court thus found that the elements of the corporate opportunity test were satisfied with respect to certain opportunities taken by Silverback and held that Silverback breached its fiduciary duties.

After Bienstock initially sued Silverback, Adenyo acquired all of the assets of Silverback in consideration solely for a deed of indemnity by Adenyo to pay all claims of Silverback's creditors in Silverback's liquidation. Bienstock alleged that such transfer constituted a fraudulent transfer because the transfer was made by Adenyo with actual intent to hinder Bienstock's ability to enforce his rights under the LLC agreement. In addition to other defenses, Adenyo argued that the court had no personal jurisdiction over it. The court found that it had personal jurisdiction over Adenyo under Delaware's long-arm statute because Adenyo "purposely availed" itself of the benefits and protections of Delaware by incorporating Delaware subsidiaries for the purpose of acquiring the entities that formed the basis of the Silverback's wrongful usurpation of Mobilactive's corporate opportunities. The court also found that Adenyo was subject to personal jurisdiction under LLC Act Section 18-109 (the LLC Act's implied consent statute) because Adenyo participated materially in the management of Mobilactive by causing a petition seeking judicial dissolution of Mobilactive be filed in the court. The court then held that the transfer by Silverback to Adenyo constituted a fraudulent transfer.

The court next addressed the petition for judicial dissolution of Mobilactive that had been filed by Adenyo on behalf of Silverback. The court noted that under existing Delaware case law even if the standard under LLC Act Section 18-802 for judicial dissolution is met, the court may decide in the exercise of its equitable powers not to grant the petition. In this case, the court found that it may not be reasonably practicable to carry on Mobilactive's business, but the court refused to order judicial dissolution. The court found that the breaches of contract and fiduciary duties by Silverback contributed materially to Mobilactive's inability to fulfill its business purpose and stated that Silverback should not be permitted to use its inequitable conduct to extricate itself from the joint venture. The court also found that a judicial dissolution might hinder Bienstock from recovering the damages he is due.

c. *Feeley v. NHAOCG, LLC,* C.A. No. 7304-VCL (Del. Ch. Mar. 20, 2012), (Del. Ch. Oct. 12, 2012) and (Del. Ch. Nov. 28, 2012)

The Court of Chancery released three opinions in the *Feeley v. NHAOCG, LLC* matter. In the first two *Feeley* decisions, the court determined that: (1) it had jurisdiction over defendant NHA OCG, LLC ("NHA") based on LLC Act Sections 18-110(a) and 18-109(a), and (2) it would largely grant plaintiffs' motion for judgment on the pleadings based on defendants' failure to abide by the terms of the operating agreement of Oculus LLC (the "Oculus Operating Agreement").

The court found that plaintiff Feeley had entered into a business relationship with defendants A. Akel, G. Akel, Newman, Hughes, and NHA. The parties had formed two LLCs: Ak-Feel LLC ("Ak-Feel"), formed by Feeley and A. Akel, and Oculus LLC ("Oculus"), formed by Ak-Feel and NHA. Ak-Feel's Operating Agreement designated Feeley as its Managing Member; the Oculus Operating Agreement in turn designated Ak-Feel as its Managing Member. As Managing Members of the two entities, Feeley and Ak-Feel had full and exclusive authority to manage, control, administer and operate Ak-Feel and Oculus, respectively. Additionally, the Oculus Operating Agreement enumerated the only permissible ways to remove Ak-Feel as its Managing Member: unanimous member consent, termination of Feeley or Akel, or default without cure by Ak-Feel under the Oculus Operating Agreement. Feeley also entered into an employment agreement with Oculus to serve as its President and CEO.

When the business relationship between Feeley and defendants soured, defendant NHA attempted to give Feeley notice that his employment contract with Oculus would not be renewed but he would remain an Oculus officer. Later, NHA also attempted to remove Feeley as an Oculus officer. However, NHA was not Oculus's Managing Member—Ak-Feel was—and the Managing Member had exclusive authority to act on behalf of Oculus.

NHA also gave notice to Ak-Feel that it was exercising its right to remove Ak-Feel as Oculus's Managing Member, replacing Ak-Feel with NHA.

Plaintiffs filed suit to determine the validity of NHA's removal of Ak-Feel as Oculus's Managing Member and Feeley as its President and CEO. Defendants moved to dismiss the complaint for lack of personal jurisdiction. Plaintiffs then moved for judgment on the pleadings.

In its first decision, the court held that Section 18-110(a) granted it *in rem* jurisdiction to determine who validly holds office as a manager of a Delaware LLC. Notice of the claims to each defendant was proper; therefore, the court found that it had constitutional authority to determine who the Managing Member of Oculus was: Ak-Feel or NHA. The court also found that, pursuant to Section 18-109(a), it could exercise personal jurisdiction over those serving as managers of an LLC for the purpose of adjudicating breach of duty claims. The court viewed NHA as a manager because NHA participated materially in Oculus's management not only by removing Ak-Feel as Managing Member, but also by purporting to remove Feeley as an employee, and later as an officer—an action that only the Managing Member of Oculus could take, pursuant to the Oculus Operating Agreement. Finally, the court stated that, since NHA was subject to personal jurisdiction under § 18-109(a), the court had jurisdiction over the other counts of the complaint, which arose out of a common nucleus of operative fact. The court deferred ruling on the individual defendants' lack of personal jurisdiction claims pending further discovery and briefing.

After determining the jurisdictional issues, the court, in its second decision, largely granted plaintiffs' motion for judgment on the pleadings and entered the following four judgments: (1) that letters sent by NHA purporting to replace AK-Feel as Oculus' Managing Member were invalid and void because the Oculus Operating Agreement stated the only grounds under which AK-Feel could be removed and none of those grounds applied; (2) that the termination letter sent by NHA attempting to terminate Feeley as President and CEO of Oculus was invalid because it was not sent by the Managing Member, AK-Feel, as required by the Oculus Operating Agreement; (3) that the attempted termination of both Feeley's employment and his position as President and CEO of Oculus was unlawful and void because the termination was not affected by Oculus' Managing Member, AK-Feel; and (4) that defendants' representations to third parties stating that AK-Feel and Feeley had been removed were incorrect.

In the court's third decision, it analyzed the five counterclaims of Oculus's non-managing member, NHA, against Oculus's managing member, Ak-Feel and Ak-Feel's managing member, Feeley.

NHA's counterclaims were largely based on Ak-Feel and Feeley's allegedly failed attempts at managing Oculus. NHA contended that Feeley did not identify a sufficient number of real estate projects for Oculus, that the projects that he did bring to Oculus "ended in disaster due to Feeley's gross negligence" and that Feeley negotiated certain real estate deals for himself rather than presenting the deals to NHA.

Count I alleged, *inter alia*, that Ak-Feel breached the Oculus Operating Agreement by engaging in self-dealing because Ak-Feel usurped opportunities that belonged to Oculus. The court rejected this allegation because Ak-Feel had no contractual obligation under the Oculus Operating Agreement to present opportunities to Oculus. Count I also alleged that Ak-Feel breached the Oculus Operating Agreement by taking action that amounted to gross negligence and willful misconduct; because Ak-Feel answered this portion of Count I, the court did not address the allegation in defendants' motion to dismiss.

Count II alleged that Feeley aided and abetted Ak-Feel's breaches of the Oculus Operating Agreement as discussed in Count I. The court denied plaintiffs' motion to dismiss these allegations, holding that Count II pled "a *Gotham Partners* claim against Feeley for aiding and abetting a breach of contract (odd as that sounds) to the same extent that a claim was pled in Count I." The court based this decision on the fact that Feeley, as the managing member of Ak-Feel, ultimately made Ak-Feel's decisions and carried out those decisions; therefore, Feeley knowingly participated in the contractual breaches of duty alleged in Count I.

Count III alleged that Ak-Feel and Feeley breached default fiduciary duties. The court determined that Ak-Feel, as Oculus's managing member, owed default fiduciaries to Oculus and that the Oculus Operating Agreement did not limit or eliminate those default fiduciary duties; therefore, the court denied plaintiffs' motion to dismiss Count III as to Ak-Feel. The court discussed the Delaware Supreme Court's decision in *Gatz* (which stated that the Court of Chancery's determination that the manager of an LLC owed default fiduciary duties was "dictum without any precedential value"), stating that "[t]he high court did not rule on whether the managers of an LLC owe default fiduciary duties." The court in this case stated that the Court of Chancery cases holding that default fiduciary duties apply to LLC managers were "appropriately viewed as *stare decisis* by this Court" and that a plain reading of LLC Act Section 18-1101(c) and its drafting history supported the existence of default fiduciary duties because "otherwise there would be nothing for the operating company agreement to expand, restrict, or eliminate." The court noted that the Supreme Court has the power to hold that no such default fiduciary duties exist, but that the Supreme Court had not yet made that determination. Then, the court looked to the Oculus Operating Agreement and found that it provided limited exculpation from monetary liability as permitted by Section 18-1101(e) but that it did not eliminate fiduciary duties under Section 18-1101(c). The court interpreted the language of the Oculus Operating Agreement, limiting liability for Oculus's members, as an assumption in the Oculus Operating Agreement that fiduciary duties existed and could give rise to liability unless the exculpation right was triggered.

The court also determined that Count III properly alleged claims that Ak-Feel breached its duty of care and that Feeley engaged in willful misconduct because Feeley allegedly negotiated deals for himself and, as the managing member of Ak-Feel, Feeley controlled Ak-Feel, meaning that he could not "mentally segregate his decision-making" so as to properly negotiate deals for himself while somehow not acting in his capacity as the managing member of Ak-Feel.

The court held that Count IV properly stated a claim for breach of the duty of care against Ak-Feel, but not against Feeley because, in Count IV, defendants named Feeley in his capacity as the party in control of Ak-Feel, which in turn was the managing member of Oculus, and not in his capacity as actual manager of Oculus.

Finally, in Count V, defendants sought a declaratory judgment stating that NHA had the unilateral right under the Oculus Operating Agreement to force Oculus to cease its business operations; the court granted plaintiffs' motion to dismiss Count V because the Oculus Operating Agreement did not give NHA such a right.

8. Fiduciary Duties to Creditors

a. *CML V, LLC v. JetDirect Aviation Holdings, LLC*, C.A. No. 5373-VCL (Del. Ch. Nov. 3, 2010), aff'd No. 735, 2010 (Del. Sept. 2, 2011)

In this case, the Court of Chancery held that creditors of a Delaware LLC do not have standing to bring a derivative suit against fiduciaries of the LLC for breach of fiduciary duties committed while the LLC was insolvent or in the zone of insolvency. The case involved a loan by CML V, LLC ("CML") to JetDirect Aviation Holdings, LLC ("JetDirect"), a Delaware LLC that was engaged in an aggressive strategy of acquiring small to mid-sized jet charter and service companies. Insufficient internal controls at JetDirect and poor financial reporting procedures, combined with ill-advised acquisitions resulted in several JetDirect subsidiaries filing for bankruptcy and ultimately the insolvency of JetDirect. After defaulting on CML's loan, JetDirect liquidated some of its assets, with some JetDirect assets sold to entities controlled by certain of JetDirect's managers. CML brought a derivative action alleging breach of fiduciary duty claims against JetDirect. Defendants moved to dismiss these claims based on Section 18-1002 of the LLC Act.

Section 18-1002 provides, in relevant part, that "in a derivative action, plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action . . . ." The court stated that Section 18-1002 "limits standing to bring a derivative claim to holders of membership interests in an [LLC] and their assignees. Section 18-1002 does not grant standing to creditors. Although this limitation might surprise wizened veterans of the debates over corporate creditor standing, JetDirect is not a corporation. JetDirect is an LLC, and the plain language of the LLC Act controls."

The court contrasted the provisions of Section 18-1002 with the provisions of Section 327 of the DGCL, which is the only Delaware corporate statute that addresses derivative actions. Section 327 provides that "in any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law." The court distinguished Section 327 from Section 18-1002 by finding that Section 327, which by its terms applies to any derivative suit instituted by a stockholder, does not limit creditors or any other person from bringing a derivative suit while Section 18-1002, which by its terms states that in a derivative action plaintiff must be a member or an assignee, creates an exclusive right for members and assignees to bring derivative suits involving an LLC. The court found that Section 327 of the DGCL is non-exclusive—i.e., it speaks only to the "subset of derivative suits" instituted by a stockholder of a corporation—while Section 18-1002 of the LLC Act, on the other hand, is exclusive—i.e., it provides that a plaintiff bringing a derivative claim in the LLC context must be a member or an assignee of a member interest. Thus, the court concluded, a literal reading of the plain language of the LLC Act precludes recognition of derivative standing to creditors of an insolvent LLC.

The court acknowledged that previous decisions of the Chancery Court and most of the commentary on this issue appear to have assumed that the precedent on a creditor's standing to bring a derivative suit against an insolvent corporation also applied to allow derivative suits by creditors in the context of insolvent alternative entities. However, the court determined that the literal terms of the LLC Act barred such a result. The court found support for its literal reading of Section 18-1002 in two earlier Chancery Court decisions, Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc., 1996 WL 652773 (Del. Ch. Nov. 4, 1996), and U-H Acq. Co. v. Barbo, 1994 WL 34688 (Del. Ch. Jan. 31, 1994), in which the derivative action statutes of the DRULPA and the LLC Act had been read strictly to bar suits by assignees of LP or LLC interests (as opposed to partners or members). The court noted that DRULPA and LLC Act were each amended in 1998 to authorize assignees of LP or LLC interests to sue derivatively.

The court recognized that it had the power to avoid a literal interpretation of Section 18-1002 "if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature." CML argued that a plain reading of Section 18-1002 would produce an absurd distinction between insolvent corporations, where creditors can sue derivatively, and insolvent LLC, where they cannot. The court disagreed, stating that "[a]s a threshold matter, there is nothing absurd about different legal principles applying to corporations and LLCs," and that limiting creditors to their bargained-for contractual rights and denying them the additional right to sue derivatively on behalf of an insolvent entity is consistent with the "contractarian environment created by the LLC Act." The court then cited to multiple provisions of the LLC Act that allow for the protection of the interests of creditors, including (a) Section 18-101(7), which permits an LLC agreement to provide rights to any person, including a person who is not a party to the LLC agreement, (b) Section 18-306, which provides that members may be subject to specified penalties or consequences for breaching the LLC agreement, and (c) Section18-502(b), which provides a creditor with the right to enforce a member's obligation to contribute capital to an LLC. The court thus dismissed CML's derivative claims for lack of standing.

In an appeal of this decision, the Delaware Supreme Court affirmed the Court of Chancery's judgment that the LLC Act denies derivative standing to creditors of insolvent LLCs. In so doing, the Supreme Court rejected CML's argument that Section 18-1002 of the LLC Act was unconstitutional because its limitation of derivative standing "strips the Court of Chancery of equitable jurisdiction to extend standing to sue derivatively in cases where derivative standing is necessary to prevent a complete failure of justice." Since the Delaware Constitution prohibits the legislature from limiting the Court of Chancery's equitable jurisdiction to less than the general equity jurisdiction of the High Court of Chancery of Great Britain existing at the time of Delaware's separation from England, CML argued that Section 18-1002 violates the constitution because courts of equity extended derivative standing to stockholders of corporations at common law.

The Supreme Court noted that although the doctrine of derivative standing has been extended to creditors of corporations, this was only done to prevent failures of justice and only in the corporate context. JetDirect was a limited liability company, not a corporation, and limited liability companies did not exist until 200 years after the separation with England. Courts look to the LLC Act to determine rights and remedies associated with LLCs because LLCs did not exist at common law. Common law only applies where the LLC Act is silent. On the issue of derivative standing, the LLC Act is not silent. In fact, Section 18-1002 unambiguously limits derivative standing to members and assignees. Moreover, the Supreme Court did not think that extending derivative standing to CML in this case was necessary to prevent a failure of justice. Rather, the Supreme Court noted that CML could have bargained for additional rights—perhaps even the right to become an assignee upon the insolvency of JetDirect.

b. *Vichi v. Koninklijke Philips Electronics N.V.*, C.A. No. 2578-VCP (Del. Ch. Dec. 1, 2009)

This case involved an individual ("Vichi") who loaned a substantial amount of money to a Delaware LLC ("Finance"), a subsidiary of a joint venture ("LPD") between a Netherlands holding company ("Philips") and South Korean Company ("LGE"). Philips, LGE, LPD, Kiam-Kong Ho ("Ho"), and Peter Warmerdam ("Warmerdam") were defendants. Ho was an employee of LPD and another LPD subsidiary ("International," which was the sole member and manager of Finance). Warmerdam was an employee of Philips. LPD and Finance went bankrupt and defaulted on the loan to Vichi. Vichi then sued the defendants, claiming that he entered the transaction with the belief that the loan was done on behalf of, and would be backed directly by, Philips.

Among other claims, Vichi had brought breach of fiduciary duty claims against Ho. Ho successfully moved to have the court dismiss the claims against him for lack of personal jurisdiction. However, the court stated that even if it had not dismissed the claims against Ho for lack of personal jurisdiction, it would have dismissed Vichi's breach of fiduciary duty claims against Ho for failure to state a claim because Vichi failed to demonstrate that his fiduciary claims were cognizable under Delaware law.

The court cited *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007), for the proposition that creditors of a Delaware corporation that is either insolvent or in the zone of insolvency may have standing to bring derivative claims but have no right to assert direct breach of fiduciary claims and relied on *VGS, Inc. v. Castiel*, 2003 WL 723285 (Del. Ch. Feb. 28, 2003), to apply the same rule to creditors of LLCs. The court then turned to *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), in order to determine whether Vichi's fiduciary claim was direct or derivative. The *Tooley* test directed the court to consider solely (1) who suffered the alleged harm, and (2) who would receive the benefit of recovery. The court found that, in his complaint, Vichi alleged that Ho breached his fiduciary duty to Vichi as a creditor and that Vichi had personally suffered damages. Moreover, Vichi's prayer for relief demanded that he personally receive recompense for the value of the notes, among other damages. The court therefore found that (1) under *Tooley*, Vichi's breach of fiduciary duty claims were direct, and (2) applying *Gheewalla*, Vichi, as a creditor of a Delaware LLC, could not bring a direct claim for breach of fiduciary duty. Thus, the court concluded that Vichi had failed to state a claim for which relief could be granted under Delaware law with respect to his fiduciary duty claims against Ho.

c. *Blackmore Partners, L.P. v. Link Energy LLC*, C.A. No. 454-N (Del. Ch. Oct. 14, 2005)

Following the court's denial of the defendants' motion to dismiss referred to below, the defendants moved for summary judgment at the conclusion of discovery and this opinion was the court's decision with respect to such motion.

The plaintiff first alleged that the court should apply enhanced scrutiny to the challenged transaction in which the proceeds of the sale of substantially all of the LLC's assets were used to repay the debt of the LLC and to pay holders of unsecured notes a payment for covenant waiver thus rendering the LLC's units worthless. The plaintiff claimed the board of directors of the LLC deprived the unit holders of consideration that they would have received if the board had not agreed to the demands of the note holders. The court rejected the plaintiff's reliance on the court's decision in *Orban v. Field* which held that "when a board approves a transaction that favors one corporate constituency over another, they lose, at least as an initial matter, the cloak of business judgment protection," and the board must demonstrate that it acted reasonably and in good faith. The court in the instant case distinguished *Orban* by finding that the "defendants did not act 'solely or primarily for the express purpose of depriving a shareholder of effective enjoyment of a right conferred by law.'" Importantly, the LLC's operating agreement empowered the board of directors to authorize a sale of all or substantially all of the LLC's assets without a vote of the unit holders thus precluding any need for measures by the board to prevent the unit holder's approval or vote. The court also found that even if *Orban* applied to the instant case, the defendants met the enhanced scrutiny standard since the company was insolvent and no better transaction was available.

The court next addressed the plaintiff's claim that the defendants breached their fiduciary duties to the unit holders by focusing on the creditors' interests over the interests of the unit holders. The plaintiff conceded that the company was insolvent at the time of the disputed transaction, and the court stated that "the board of directors of an insolvent company may take into account the interests of creditors at the apparent expense of stockholders if, in doing so, the board meets its fiduciary duties to all relevant constituencies."

The court then analyzed whether the directors met their fiduciary duties with respect to the unit holders. The plaintiff claimed that the board's decisions regarding the transaction were tainted by the involvement of J. Robert Chambers ("Chambers"), a director who was a managing director of Lehman Brothers, a holder of an equal percentage of notes and units of the LLC. The court referred to its decision in *Cooke v. Oolie* which involved defendants who were both shareholders and creditors of a corporation considering an acquisition proposal. The *Cooke* court held that "plaintiffs bore the burden of showing that an actual conflict existed, and that the deal chosen by the defendants offered superior terms for creditors and inferior terms for the plaintiff shareholders compared to other proposals available to the defendant corporation." Unlike the defendants in *Cooke*, the defendants in the instant case owed fiduciary duties to creditors because the company was insolvent. Even if Chambers' membership on the board created a potential conflict, there were no better alternatives for the unit holders other than the transaction approved by the board. The court also noted that even if Chambers were conflicted, the board would still receive the protections of the business judgment rule because such protections only require that a majority of the directors approving the transaction remain disinterested, and the plaintiff made no claims that other directors were interested.

The court also rejected the plaintiff's argument that the Special Committee of independent directors formed by the board to consider potential transactions was tainted by the presence of the CEO of the LLC and Chambers at the meetings of the Special Committee. Since the plaintiff failed to present evidence that the CEO or Chambers influenced the Special Committee or acted "as anything more than necessary sources of information," the court found the Special Committee operated with "sufficient independence to merit the cloak of business judgment protection."

Next, the plaintiff argued that the defendants breached their duty of care by approving the transaction without sufficient expert information and by failing to use the leverage from a potential bankruptcy filing against the note holders to negotiate a better settlement for the unit holders. The court found that the plaintiff's claims based on breach of the duty of care were precluded by the LLC's operating agreement exculpating directors for all awards of damages for violations of the duty of due care. Nonetheless, the court addressed the plaintiff's claims regarding the duty of due care finding that the directors did not violate such duty. The court stated that the defendants did not act with gross negligence since the record showed that the Special Committee met "repeatedly over months to address the issue of the company's impending insolvency and to consider alternatives." Additionally, the note holders had the ability to veto any proposed transaction thus limiting any leverage power the company had against the note holders. Moreover, the court noted that "the choices made in formulating a negotiating strategy are within the core of what is protected by the business judgment rule," and the evidence failed to support the plaintiff's claimed violation of due care.

Finally, the court rejected the plaintiff's claim that the defendants acted in bad faith in approving the transaction finding that "the fact that unit holders were left with nothing at the end, given a context in which the chief alternative substantiated by evidence was an equally barren bankruptcy proceeding, does not suffice to rebut the presumption that the directors were acting in the good faith exercise of their fiduciary duties, or to establish a claim of waste." The court granted the defendants' motion for summary judgment.

d. *U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls, L.L.C.*, 864 A.2d 930 (Del. Ch. 2004), vacated, C.A. No. 112 (Del. June 6, 2005)

Plaintiff, an indenture trustee, acting on behalf of unsecured noteholders of a Delaware LLC, alleged, among other claims, breach of fiduciary duty by the directors of the LLC to the noteholders in connection with certain transactions between the LLC and a related third party. Defendants moved to dismiss the fiduciary duty claim on the grounds that the complaint failed adequately to allege that defendants owed fiduciary duties to the noteholders and on the grounds that the LLC's operating agreement deemed the transactions at issue not to constitute a breach of any duty.

The court first addressed defendants' argument that the complaint did not establish that defendants owed fiduciary duties to the noteholders. Defendants admitted that under Delaware law when a debtor enterprise is insolvent, the fiduciary duties of those managing the debtor enterprise extend to the interests of creditors. While fiduciary duties to creditors have been recognized by Delaware courts in the context of insolvent Delaware corporations and limited partnerships, this is the first decision by a Delaware court in which such a fiduciary duty was recognized in the LLC context. Defendants contended that the complaint did not allege sufficient facts from which the court could infer that the LLC was insolvent. The court stated that to meet its burden to plead a breach of fiduciary duty to creditors, plaintiff must plead facts sufficient to support a finding that the LLC was insolvent. According to the court, insolvency is defined in two ways in Delaware. First, a company is insolvent if it is unable to pay its debts as they fall due in the usual course of business. Second, a company may be insolvent if it has liabilities in excess of a reasonable market value of its assets. The court noted that fiduciary duties to creditors may arise when the company is in the zone of insolvency. The court did not find sufficient evidence in the complaint that the LLC was not able to pay its debts as they fell due but did find that, given the LLC's status as a mature company as opposed to a start-up, the significant amount by which its liabilities exceeded its assets raised an issue of material fact as to whether the LLC was insolvent or in the zone of insolvency that was sufficient to survive a motion to dismiss.

The court then addressed defendants' argument that the fiduciary duty claim must be dismissed because the LLC's operating agreement deemed the transactions in question not to constitute a breach of any duty. The operating agreement contained a typical procedure for authorizing interested transactions through the approval of a conflicts committee. Upon such approval, the operating agreement provided that any such transactions would be deemed to be "fair and reasonable" and not a "breach of any duty." The defendants contended that the trustee's fiduciary duty claim was derivative in nature and must therefore be brought on behalf of the LLC, which pursuant to LLC Act Section 18-101(7) is bound by the provisions of the operating agreement including the provisions deeming the interested transaction not to constitute a breach of any duty. The court, however, found that defendants had not shown that the conflicts committee actually met and authorized the transactions at issue and, on that basis, denied the defendants' motion to dismiss the fiduciary duty claim.

In a subsequent decision in this case, the Delaware Supreme Court vacated the order issued by the Court of Chancery following the decision discussed above and remanded the case to the Court of Chancery for a trial that would include the issues determined by the Court of Chancery in such order. While the vacation of the order precludes citation of the Court of Chancery's opinion as precedent, the opinion is included because the Supreme Court did not reject its reasoning and it indicates how the Court of Chancery may address similar issues in the future.

B. Inspection of Limited Liability Company Books and Records

1. *RED Capital Inv. L.P. v. RED Parent LLC,* C.A. No. 11575-VCN (Del. Ch. Feb. 11, 2016)

Plaintiffs, RED Capital Investment L.P. ("RED Capital") and George Polk ("Polk"), claimed that RED Parent LLC ("RED Parent") violated their rights under the Amended and Restated Operating Agreement of RED Parent by denying plaintiffs' request for the books and records of its subsidiaries. RED Capital was a member of RED Parent, and Polk controlled RED Capital and was a manager of RED Parent.

The main issue in this case was whether Polk's book and records request "was made solely in his capacity as a representative of RED Capital (a member of RED Parent) or whether it was also made in his capacity as a [m]anager of RED Parent." Under Red Parent's Operating Agreement, a member's right to information was limited to the "books of account" of RED Parent. However, in Polk's capacity as a manager, Polk would be entitled to inspect RED Parent's books and records for all of the information encompassed by LLC Act Section 18-305(a) because a manager's access to information was not limited in the Operating Agreement. Section 18-305 provides that unless otherwise provided in an LLC agreement, a manager may receive certain enumerated categories of information for a purpose reasonably related to its position as manager.

The court examined Polk's books and records request to determine the capacity in which Polk made his request. In an email request to RED Parent's general counsel, Polk stated that he always acts as a member of RED Parent even while acting as a manager of RED Parent; he requested the information on behalf of RED Capital; and pursuant to his fiduciary obligations as an investor and manager of RED Parent, he made this request to "diligently reassure [himself] that all of the assets [of RED Parent] are solvent and stable." The court, while noting that the first two statements in the email request supported the proposition that he sent the request in his capacity as a representative of RED Capital, held that based Polk's third statement, the request as a whole was made both in his capacity as a representative of RED Capital and a manager of RED Parent. Thus, Polk's request was not limited by the language in the Operating Agreement restricting members' access to books and records to the "books of account" of RED Parent.

A secondary issue in this case was whether Polk was entitled to the books and records of RED Parent's subsidiaries. RED Parent was the sole member of RED Investment LLC, which in turn was a holding company for various energy companies. Red Parent argued that Polk was not entitled to subsidiary information because each subsidiary was "a legally distinct entity created for a host of legitimate business reasons." Polk argued that, under the reasoning of *DFG Wine Co. v. Eight Estates Wine Hldgs., LLC*, 2011 WL 4056371 (Del. Ch. Aug. 31, 2011), he was entitled to the books and records of RED Parent's subsidiaries. The court held that Polk was entitled to the books and records of RED Parent's subsidiaries for various reasons. First, the court stated that the facts in this case were similar to *DFG Wine Co.* because "RED Parent has no business other than those of its operating subsidiaries, RED Parent has no employees or daily operations of its own, and each entity shares the same computer system, email domain, accounting software, and director and officer insurance policy." Additionally, the court stated that the subsidiaries also were not distinct from RED Parent because "RED Parent's operations occur[ed] solely at the subsidiary entity level" and RED Parent and the subsidiaries shared the same CEO and controller. Finally, as a manager, Polk was entitled to all information falling within Section 18-305(a)(1)-(6) that was "reasonably related to the position of manager" to the extent that such information was within Red Parent's control or was in a subsidiary's possession and control and could be obtained through Red Parent's exercise of control over the subsidiary. Thus, the court held that it would not deny Polk's request to view the books and records of RED Parent's wholly-owned subsidiary operating entities because (i) that information was "reasonably related" to Polk's position as a manager and (ii) RED Parent and its wholly-owned subsidiary operating entities had sufficient unity of control and management to properly subject the subsidiaries to a request by RED Parent's manager in accordance with Section 18-305(b).

2. *AM Gen. Holdings LLC v. The Renco Grp., Inc.*, C.A. No. 7639-VCN; *The Renco Grp., Inc. v. MacAndrews AMG Holdings LLC*, C.A. No. 7668-VCN (Del. Ch. Dec. 29, 2015)

The Renco Group, Inc. and its affiliates ("Renco") and MacAndrews & Forbes Holdings Inc. and its affiliates ("M&F") were engaged in a dispute about their related investments in AM Gen. Holdings LLC ("Holdco") and Ilshar Capital LLC ("Ilshar"). Two motions were before the court: M&F's

motion to compel discovery and Renco's request for a preliminary injunction requiring M&F to provide Renco with certain operating information about Holdco.

M&F's motion to compel centered on Ilshar's statement of assets and liabilities, which M&F argued it was entitled to under the informational rights provisions of the Ilshar LLC Agreement, and its request for information related to how Renco was able to post a supersedeas bond. The court granted M&F's motion to compel with regard to the former information because the court considered the information a proper objective of discovery related to M&F's claims and not privileged. However, the court denied M&F's motion with regard to the latter information because the information was neither relevant nor likely to lead to the discovery of admissible evidence.

The court also addressed Renco's request for a preliminary injunction enjoining defendants from depriving Renco of its information rights under Holdco's LLC Agreement. Renco cited to Section 10.1(a) of Holdco's LLC Agreement, which provided members the right to inspect Holdco's books and records, and Section 15.14 of Holdco's LLC Agreement, which permitted the parties to the agreement to apply for injunctive relief. In an earlier decision in this series of disputes, the court looked to the Section 15.14 language to conclude that the irreparable injury prong of the preliminary injunction standard was satisfied. Therefore, Renco argued that its burden of showing irreparable harm was waived or otherwise satisfied for the purposes of the issue at hand. However, the court noted that the earlier decision did not establish that Section 15.14 by itself satisfied the element of irreparable harm, nor did an even earlier decision. The court pointed to language in its earlier opinions that supported a determination that "a contractual waiver provision does not necessarily satisfy the element of irreparable harm because each decision weighs it as one relevant, and sometimes significant, contributor informing whether the flexible preliminary injunction standard was met." Therefore, the court found that neither prior opinion established that the waiver provision conclusively satisfied the irreparable harm element. Because Renco did make a showing of irreparable harm because of its "informational shortage," the court denied Renco's motion for preliminary injunction.

3. *In re New Media Books and Records Action*, Consol. C.A. No. 9984-VCN (Del. Ch. Dec. 23, 2015)

Plaintiffs, members of defendant New Media Investors II-B, LLC ("New Media"), a Delaware limited liability company established to invest in Jenzabar, Inc. ("Jenzabar"), brought a books and records request under LLC Act Section 18-305 to seek valuation of their holdings in New Media and investigate possible misconduct by the managing member of New Media (who was also the CEO and Chairman of the Board of Directors of Jenzabar). The issue underlying plaintiffs' request involved the lapse of certain warrants received by New Media from Jenzabar without exercise.

The court noted that it could consolidate plaintiffs' seven different inspection requests into two categories—valuation and misconduct. The court found that plaintiffs had demonstrated that valuation was a proper purpose for seeking inspection of New Media's book and records, but found that plaintiff had not established by a preponderance of the evidence a credible basis to infer misconduct that would support misconduct as a proper purpose for inspection. The court stated that plaintiffs, in order to fulfill their valuation purpose, were only permitted to inspect New Media's books and records, as plaintiffs were members of New Media, and not Jenzabar's books and records. The court noted that "perhaps with evidence of wrongdoing, the inspection rights would extend to Jenzabar, but no such showing has been made. Merely sharing fiduciaries does not extend an inspection obligation from one entity to the next." The court also placed time period and record type restrictions on the books and records that plaintiffs were permitted to inspect to ensure that such books and records were "necessary, essential and sufficient" for valuation purposes.

4. *de Vries v. Diamanté del Mar, L.L.C.*, C.A. No. 9782-ML (Del. Ch. June 3, 2015)

An LLC's operating agreement required the managing member to prepare and provide quarterly and annual reports to the other members, an obligation that the managing member ignored for the past five years. During that time period, the managing member, in settling a breach of contract claim (the "Settlement"), caused the LLC to surrender its only asset to satisfy a debt that the managing member had personally guaranteed and that was worth only a fraction of the value of the asset. The asset transfer extinguished the personal guarantee. Unaware of the asset transfer, two members of the LLC (plaintiffs in this case) attempted to inspect the LLC's books and records to determine the value of the members' investment and to investigate possible mismanagement. The LLC permitted the members to inspect the LLC's books and records but withheld privileged documents that would have revealed information regarding the asset transfer. Plaintiffs moved to compel the privileged documents' production under the fiduciary exception to attorney-client privilege, and the master recommended that the Court of Chancery grant the motion in part.

In analyzing the application of the fiduciary exception to attorney-client privilege, which exception "attempts to strike a balance between the privilege's purpose of encouraging open communication between counsel and client, and the right of a stockholder to understand what advice was given to fiduciaries who are charged with breaching their duties," the master noted that the Delaware Supreme Court held that the "good cause" test adopted by the Fifth Circuit Court of Appeals in *Garner v. Wolfinbarger* may apply in books and records actions. The master stated that the court must first determine that the records at issue are "necessary and essential" to the stockholder's stated purpose for inspection. Then, if the court answers that inquiry affirmatively, it should undertake the *Garner* "good cause" analysis. The necessary and essential test is satisfied if the document "addresses the crux of the shareholder's purpose, and if the essential information the document contains is unavailable from any other source." The master found that the documents relating to the negotiation of the Settlement and the transfer of the LLC's only asset were necessary and essential to plaintiffs' stated purpose for inspection.

The master then turned to the application of the *Garner* "good cause" test, noting that the Court of Chancery generally viewed the following factors of the test as the most important: the nature of the claim, whether the claim was obviously colorable, the apparent necessity or desirability of the shareholder having the information, the availability of the information from other sources and the extent to which the information requested was identified as opposed to whether the shareholder was blindly fishing for information. The master held that the *Garner* factors were either irrelevant, neutral in their application or favored the application of the fiduciary exception for documents created after the Settlement. Therefore, she recommended that the Court of Chancery grant plaintiffs' motion to compel in part and order the LLC to allow plaintiffs to inspect documents on the privilege log created after the Settlement but not created in connection with this litigation.

5. *Prokupek v. Consumer Capital Partners LLC*, C.A. No. 9918-VCN (Del. Ch. Dec. 30, 2014)

Plaintiff, former Chairman and CEO of defendant Smashburger Master LLC ("Smashburger"), was granted a substantial amount of restricted equity of Smashburger as a term of employment, most of which would not vest unless Smashburger met certain "performance hurdles." After Smashburger terminated him and redeemed his vested units pursuant to its LLC Agreement (the "Agreement") at a price it determined to be fair market value, Plaintiff demanded certain of Smashburger's business records under Section 18-305(a) of the Delaware Limited Liability Company Act (the "LLC Act"), with the stated purpose of evaluating Smashburger's financial performance to determine whether it manipulated its financials to make it appear that it fell short of some of the performance hurdles. After Smashburger refused his demand, plaintiff petitioned the court for inspection, arguing that he retained equity in Smashburger and concomitant inspection rights because it did not call a substantial number of his units and also because it paid him too little for his units. Alternatively, he argued that he retained inspection rights by virtue of his status as a former member of Smashburger. Smashburger moved to dismiss plaintiff's claim, asserting that it had already redeemed his units, thus terminating his membership and precluding him from exercising inspection rights.

The court first addressed the issue of whether plaintiff was a member of Smashburger at the time of his demand. It noted that the unit redemption price and the number of units redeemed were undisputed facts fit for resolution on summary judgment. Addressing the plaintiff's first argument on this issue, the court found that under the redemption provision of the Agreement, Smashburger's manager was to determine the number of vested units by certifying whether Smashburger achieved the applicable performance hurdles. Since the manager decided Smashburger did not, Smashburger complied with the Agreement and plaintiff was no longer a member. Whether the EBITDA numbers the manager used to determine compliance with the performance hurdles were unreliable was a separate factual question that could support a breach of contract action, but did not affect plaintiff's membership status.

The court next addressed plaintiff's argument that he retained equity pursuant to a dispute mechanism in the Agreement. This mechanism allowed former employees to object to Smashburger's determination of fair market value within thirty days of receiving a call notice, with the parties having an additional fifteen days to agree on the fair market value and, if no agreement was reached, the option to retain an independent firm to give a valuation within thirty days. Plaintiff contended this mechanism required Smashburger to determine a fair price for his units prior to redeeming his units. The court rejected this argument based on the plain language of the redemption provision, which provided that all redemptions shall close within sixty days of the notice of termination and contained no exception for ongoing disputes covered by the dispute mechanism. In addition, the dispute mechanism contemplated a period of up to seventy-five days from the date of Smashburger's determination of fair market value to resolve disputes, whereas the redemption provision required closing to occur within sixty days. Thus, the only way to give effect to both provisions without altering the Agreement's express terms would be to recognize that valuation disputes may continue after a member's units have been validly called. Therefore, although the plaintiff may have had damages claims related to the redemption closings, the court found he was not entitled to the restoration of an equity interest.

Lastly, the court addressed plaintiff's argument that even if he was no longer a member, he retained inspection rights. The court looked to Section 18-305(a)'s corporate analogue, 8 Del. C. § 220, for guidance. Section 220 unambiguously limits inspection rights to current stockholders and is narrowly construed by the court. In addition, Section 18-305(a) confers inspection rights only on current members and plaintiff cited no Delaware authority holding that former members retain residual inspection rights. Since the LLC Act permits LLC agreements to grant members greater inspection rights than are provided by statute, the court found no reason to expand the LLC Act's plain language when the parties could have done so themselves. Having rejected all three of plaintiff's arguments, the court granted Smashburger's motion to dismiss.

6. *Capano v. Capano*, C.A. No. 8721-VCN (June 30, 2014)

This case involved a family owned LLC with the following members: Louis, Joseph, the AAMM Trust, Louis III and the CI Trust. Another family member, Gerry, was the sole beneficiary of the CI Trust, a Delaware statutory trust with a third-party serving as trustee (the "Trustee"). The CI Trust served as the tie-breaking vote in the event of a deadlock among the other members of the LLC. The court was presented with a motion to dismiss by defendants Louis and Louis III, among others, relating to claims made by Gerry and Joseph, which claims included (i) Gerry's claim that a purported transfer by him to Louis of his interest in the CI Trust was invalid and (ii) a challenge by Gerry and Joseph to a purported merger effected by Louis of the LLC with and into an entity owned by Louis, which cashed out Joseph's interest in the LLC (the "Merger").

With respect to the first claim, the defendants relied on signed documents, pursuant to which Gerry purported to replace the Trustee as trustee of the CI Trust and then Gerry purported to assign all of his right, title and interest therein, including his position as trustee, to Louis. Gerry argued that there were a number of defects with these documents including, without limitation, that Louis backdated them without his consent and that Gerry was inebriated when he signed them. The trust agreement of CI Trust contained a spendthrift provision requiring the written consent of the trustee for the beneficial owner (i.e. Gerry) to transfer his interest in the CI Trust. The court denied the defendants' motion to dismiss this issue because, in light of the alleged defects noted above, there was a question as to who the trustee was at the time the transfer documents were effective and thus there was a question as to whether consent was given by the trustee in accordance with the trust agreement of CI Trust.

Turning to the Merger, the defendants argued that Gerry lacked standing to challenge the Merger because he had no rights in the CI Trust. The court found that if Gerry successfully demonstrated that the assignment of his interest in the CI Trust to Louis was invalid, then his remaining interest in the CI Trust would permit him to assert rights in the LLC to challenge the fairness of the Merger. Accordingly, the court denied defendants' motion to dismiss this claim for lack of standing.

Defendants also argued that Joseph lacked standing to challenge the transfer documents relating to the CI Trust because he was not an intended beneficiary of those documents. Joseph asserted that because the CI Trust held an interest in the LLC and essentially functioned as a tie-breaking voter, he was therefore an intended beneficiary of such documents. The court found in favor of the defendants on this issue by looking at the text of the trust agreement of the CI Trust, to which Joseph was not a party and was not identified as a third-party beneficiary. However, the court noted that Joseph would obviously have standing to challenge a transfer of interest in the CI Trust to the extent it violated the operating agreement of the LLC.

The court then turned to defendants' argument that the purported transfer of the interest in the CI Trust to Louis and another transfer by Louis of his interest in the LLC to a limited partnership (the "Louis LP") he controlled were ratified because the defendant members owned a majority of the voting power of the LLC. The court found that the power to wield a majority voting interest capable of ratifying the transfers was dependent upon compliance with the operating agreement of the LLC and if the transfer of interest in the CI Trust was invalid, a properly-constituted majority would not have ratified such transfers. Similarly, the defendants argued that because they controlled a majority of the economic interest, they "could" have consented. The court found that the factual issue must be resolved as to whether they actually did consent as a necessary precondition to Louis exercising the transferred interests under the operating agreement of the LLC.

In addition, Joseph alleged that the defendants (other than Louis but consisting of entities owned and/or controlled by Louis) aided and abetted Louis's alleged breaches of fiduciary duties owed to him. The defendants argued that a corporation could not be deemed to have conspired with its wholly owned subsidiary or its officers or agents. The court found that there were exceptions to this rule and cited a case that held that it was "uncontroversial for parent corporations to be subjected to claims for aiding and abetting breaches of fiduciary duty committed by directors of their subsidiaries." Defendants also argued, in the alternative, that they were acting as agents while acting in their capacities as trustee of the CI Trust and general partner of the Louis LP, and that an agent could not aid and abet its principal. The court found that the defendants mischaracterized these relationships because they were not agents of the LLC. For these reasons, the court denied the defendants motion to dismiss this claim.

The defendants also sought to dismiss a books and records request by Joseph. The court found that Joseph did not have any rights to books and records of entities for which he was not a member, but that if Joseph were successful in unwinding the Merger, he could separately request the LLC's books and records at that time. Therefore, Joseph's books and records request was denied.

Lastly, the defendants argued that Gerry and Joseph were precluded from a remedy of rescission because the LLC had entered into numerous transactions with third parties that could not be undone. The court held that defendants' argument may be compelling after additional factual development, but that it was premature to conclude that plaintiffs had no possibility of recovery that could include such a remedy.

7. *Fla. R&D Fund Inv'rs, LLC v. Fla. BOCA/Deerfield R&D Inv'rs, LLC*, C.A. No. 8400-VCN (Del. Ch. Aug. 30, 2013)

Plaintiff, a member of a joint venture formed as a Delaware LLC (the "Joint Venture"), brought a books and records action under Section 18-305 of the LLC Act and the Joint Venture's LLC Agreement seeking certain information for the purposes of appointing a new asset manager and investigating possible mismanagement of the Joint Venture due to certain alleged improper payments to the Joint Venture's former asset manager (the "Asset Manager"). Plaintiff named the Joint Venture, the Asset Manager, the other members of the Joint Venture and certain other affiliated parties as defendants. Defendants, other than the Joint Venture, moved to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiff alleged the court had personal jurisdiction over the Asset Manager, an Indiana corporation with an Indiana address, pursuant to the Delaware long-arm statute or LLC Act Section 18-109. The court declined to exercise jurisdiction over the Asset Manager under the Delaware long-arm statute, noting that merely participating in the management of a Delaware entity – with no allegation of extensive and continuing contacts with Delaware – does not subject a party to the court's long-arm jurisdiction. The court stated that plaintiff failed to allege that the Asset Manager took any actions inside the State of Delaware with respect to the Joint Venture or that the Asset Manager was involved in the formation of the Joint Venture.

The court next addressed whether the Asset Manager was subject to the court's jurisdiction under Section 18-109, which provides that service as a manager of an LLC constitutes implied consent to the court's jurisdiction. For purpose of Section 18-109, the term "manager" refers "(i) to a person who is a manager as defined in [LLC Act Section 18-101(10)] and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in [LLC Act Section 18-101(10)], participates materially in the management of the limited liability company; provided however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in [LLC Act Section 18-101(10)] shall not, by itself, constitute participation in the management of the limited liability company." Because the Joint Venture's LLC Agreement explicitly provided that the Board of Directors of the Joint Venture was the manager of the Joint Venture for purposes of the LLC Act and the LLC Agreement did not name or designate the Asset Manager as a manager of the Joint Venture, the court held that the Asset Manager was not a manager of the Joint Venture for purposes of the first prong of Section 18-109.

The court then examined whether the Asset Manager had participated materially in the management of the Joint Venture so as to make it a manager of the Joint Venture for purposes of the second prong of Section 18-109. Under the Asset Manager's asset management agreement with the Joint Venture, the Asset Manager was identified as an independent contractor and was confined to acting as the asset manager and providing certain enumerated services in a manner consistent with the Joint Venture's business plan and budget. The court did not determine whether this level of authority was sufficient to constitute material participation in the manager of the Joint Venture because the court found that plaintiff had not alleged that the Asset Manager actually engaged in any of its contractually authorized conduct. The court stated that merely having the capacity to participate in management does not constitute material participation in management and thus dismissed plaintiff's claim against the Asset Manager for lack of personal jurisdiction.

The court then turned to plaintiff's claim against defendants other than the Joint Venture and the Asset Manager seeking a right to inspect records allegedly held by such defendants, which defendants were other members of the Joint Venture and affiliates of such members. The court granted defendants' motion to dismiss, holding that the complaint did not state a claim against those defendants because plaintiff failed to identify any contractual or statutory basis that would provide it with a right to inspect the books and records of members or parties affiliated with such members.

8. *Stewart v. BF Bolthouse Holdco, LLC*, C.A. No. 8119-VCP (Del. Ch. Aug. 30, 2013)

Plaintiffs, former employees of the defendant LLC (the "Company"), brought claims against the Company and its board of managers (the "Board") for breach of contract, breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing in connection the Company's repurchase of plaintiffs' membership units in the Company (the "Units"). Plaintiffs acquired their Units by executing the LLC agreement of the Company (the "LLC Agreement") and a purchase agreement (the "Purchase Agreement"). Upon plaintiffs' voluntary termination of their employment with the Company, the Company exercised its right under the Purchase Agreement to repurchase plaintiffs' vested and unvested Units. The Board determined the Fair Market Value (as defined in the Purchase Agreement) of plaintiffs' Units under the Purchase Agreement was $0.00 and cancelled the Units without paying any consideration.

The court granted defendants' motion to dismiss plaintiffs' claims of breach of fiduciary duties and breach of the implied covenant of good faith and fair dealing, and denied in part and granted in part the motion with respect to the breach of contract claim. In light of an e-mail from the president and CEO of the Company valuing the Units at $200 each three weeks after the Board determined the Fair Market Value was $0.00, the court held that it was reasonably conceivable that the Fair Market Value of the Units was greater than $0.00 and that the Board acted in bad faith in determining the value in breach of the Purchase Agreement. The court also noted that defendants did not argue that any material event occurred during those three weeks that affected the valuation. The court further held that plaintiffs sufficiently pled facts that defendants' valuation of $0.00 was determined in bad faith because of facts indicating a value of the Units greater than $0.00 in surrounding years, and because the valuation was done at a time when defendants were no longer obligated to provide plaintiffs with relevant financial information of the Company. Moreover, plaintiffs pled a plausible motivation—to increase the majority owner's interest in the Company or, alternatively, as retribution for plaintiffs' unexpected departure from the Company at a time when plaintiffs were important to the future success of the Company. The court noted that although a claim of wrongful inducement, trickery or deception may be sufficient to establish bad faith, those elements are not necessary under Delaware law. The court therefore denied defendants' motion to dismiss plaintiffs' breach of contract claim that the Board determined the Fair Market Value of the Units in bad faith.

The court held that the LLC Agreement's fiduciary duty provision—which provided that the managers owed the same fiduciary duties as a director of a corporation—applied to the Board's determination of the value of the Units because execution of the LLC Agreement by plaintiffs was a condition precedent to receipt of their Units under the Purchase Agreement, and the duties to act carefully and loyally were not inconsistent with or contradictory to the Purchase Agreement's requirement that the Board determine the Fair Market Value of the Units in good faith. However, because plaintiffs made no allegations regarding the Board's valuation process, the court held that plaintiffs failed to state a claim for breach of the contractual duty of care. Plaintiffs also failed to state a claim of breach of the duty of loyalty on the basis that the repurchase was an interested transaction because plaintiffs did not allege that defendants stood on both sides of the repurchase transaction, nor did they allege that defendants were in a position to benefit from an unfairly low repurchase in a manner not shared equally with all owners of the Company. However, for the same reasons the contractual bad faith claim under the Purchase Agreement survived, the court held that plaintiffs sufficiently alleged that defendants acted in bad faith in determining the Fair Market Value in breach of the contractual duty of loyalty under the LLC Agreement. The court therefore denied defendants' motion to dismiss this claim.

The court dismissed plaintiffs' claim that defendants breached the LLC Agreement's requirement that the Company deliver to the members annual financial statements because the LLC Agreement only required the Company to provide the financial statements to a person with a present ownership interest in the Company, and plaintiffs no longer had a present ownership interest in the Company at the time the annual financial statements were required to be provided. The court also dismissed plaintiffs' claim that defendants breached the Purchase Agreement by "cancelling" the Units rather than "repurchasing" them as provided in the Purchase Agreement, holding that the only issue was whether the Company properly exercised the repurchase right, and so that claim was duplicative of plaintiffs' breach of contract claim.

The court similarly dismissed plaintiffs' breach of fiduciary duty claim because it was duplicative of and foreclosed by the breach of contract claim. Under Delaware law, a fiduciary duty claim that depends on the same nucleus of operative facts as a breach of contract claim only survives where it may be maintained independently of the breach of contract claim. Plaintiffs' fiduciary duty claim—that defendants acted contrary to their fiduciary duties to plaintiffs when they purported to declare the Units held no value and cancelled them—arose from the dispute relating to the contractual repurchase right under the Purchase Agreement. The breach of fiduciary duty claim was not broader in scope, nor did it implicate potentially different remedies. Finally, the court dismissed plaintiffs' claim that defendants violated the implied covenant of good faith and fair dealing by failing to act in good faith when valuing the Units. Plaintiffs did not allege a specific implied contractual obligation that was breached, and the issue was covered by an express term in the Purchase Agreement requiring the Board to value the Units in good faith. Therefore, the court also held the claim was duplicative.

9. *DFG Wine Co., LLC v. Eight Estates Wine Holdings, LLC*, C.A. No. 6110-VCN (Del. Ch. Aug. 31, 2011)

Plaintiff, a member of Eight Estates Wine Holdings, LLC ("Eight Estates"), sought to inspect certain books and records of Eight Estates pursuant to LLC Act Section 18-305 and a contractual inspection right under Eight Estates' LLC agreement. Plaintiff's demanded access to sixteen categories of the records of Eight Estates, Ascentia Wine Estates, LLC ("Ascentia") and other entities for the purposes of (i) determining the value of plaintiff's investment in Eight Estates and (ii) determining whether plaintiff should exercise its right to appoint a representative to sit on Eight Estates' board of managers. Eight Estates' provided certain of the requested information but refused to provide other of such requested information for various reasons. Following such refusal, plaintiff brought this action.

The court first determined that the two purposes stated in plaintiff's demand constituted proper purposes for purposes of Section 18-305, although the court noted that the documents that plaintiff would need to accomplish the purpose of deciding whether to appoint someone to Eight Estates' board of managers would be of a very limited nature.

The court then turned to whether plaintiff had a contractual or statutory right to inspect the books and records of Ascentia, which was a wholly owned subsidiary of Eight Estates. The court held that the Eight Estates' LLC Agreement did not grant plaintiff a contractual right to such inspection. As to a statutory inspection right, the court acknowledged that Section 18-305 does not explicitly grant a right to inspect books and records of a subsidiary but the court stated that Delaware courts have recognized that Section 18-305 provides a right to inspect books and records of subsidiaries "where the facts at least suggested the absence, in reality, of separate entities," including, for example, where subsidiaries are "under the full control of the parent and the 'value' of the subsidiaries accrue[s] to the parent." The court noted that the right to inspect books and records of subsidiaries has been codified in Section 220 of the Delaware General Corporation Law. In this case, Ascentia was wholly owned by Eight Estates and was Eight Estates' sole asset. Eight Estates had no budget, business plan, projections or value apart from Ascentia's. Since a member of Eight Estates could not value its holdings without having access to the records of its only asset, the court held that plaintiff was entitled to inspect the books and records of Ascentia.

The court then addressed various defenses Eight Estates asserted to limit its obligation to provide information. Eight Estates argued that it was entitled under Section 18-305(c) to withhold details regarding Eight Estates' and Ascentia's relations with their creditors based on Eight Estates' belief that divulging such information would not be in the best interests of Eight Estates. According to testimony by a manager of Eight Estates, plaintiff had been attempting to damage Eight Estates by informing Eight Estates' and Ascentia's creditors of plaintiff's views regarding their tenuous financial condition. The court held that, for purposes of Section 18-305(c), Eight Estates' had established a good faith belief that it was not in Eight Estates' best interests to disclose such details. The court did not find that Eight Estates had a good faith belief that disclosing information regarding certain assets of Ascentia that Eight Estates believed plaintiff might want to purchase was not in the best interests of Eight Estates, particularly given that Eight Estates had demonstrated a willingness to sell those assets to others. Pursuant to Section 18-305(c), the court permitted Eight Estates to redact information that Eight Estates' managers reasonably believed to be in the nature of trade secrets.

The court then evaluated each specific request of plaintiff and made the following determinations: (i) access to internal records of Eight Estates' board of managers was not reasonably related to the purpose of valuing plaintiff's interest; (ii) access to employment agreements of Ascentia's key employees, subject to reasonable redaction of trade secrets, was reasonably related to the purpose of valuing plaintiff's interest; and (iii) an evaluation of certain key supplier contracts would be needed to value plaintiff's interest, but Eight Estates may provide a summary of the contracts, rather than the contracts themselves, because the contracts would contain far more information than was necessary to satisfy plaintiff's purposes and may include trade secrets.

10. *Sanders v. Ohmite Holding, LLC*, C.A. No. 5145-VCL (Del. Ch. Feb. 21, 2011)

Plaintiff acquired a membership interest in a Delaware LLC that he believed represented a 7.75% interest in the LLC. A year after the acquisition, the LLC claimed that a dilutive event had occurred prior to the time of plaintiff's acquisition that resulted in plaintiff's membership interest actually representing a .000775% interest in the LLC. Plaintiff requested to inspect the books and records of the LLC for the purpose of evaluating the value of his membership interest, the status of the business and financial condition of the LLC, the performance of management and the legitimacy of the dilution of his membership interest. The LLC denied plaintiff's request and this action followed.

In this decision, the Chancery Court addressed the parties' cross-motions for summary judgment. The court stated that to inspect books and records pursuant to LLC Act Section 18-305, a member of a Delaware LLC must establish by a preponderance of the evidence a proper purpose for the inspection. The LLC argued that plaintiff failed to demonstrate a proper purpose because he was not a member at the time of the events he sought to investigate. The court noted that, in the corporate context, the Delaware Supreme Court has rejected this argument, concluding that activities that are reasonably related to a stockholder's interest as a stockholder support access to books and records even if the activities occurred before the stockholder acquired its shares. The court found no reason not to apply the same rule in the LLC context and concluded that plaintiff's purposes—valuing his ownership interest and investigating potential wrongdoing—were proper. With respect to plaintiff's purpose of investigating potential misconduct, the court noted that plaintiff was not obligated to demonstrate that misconduct had occurred. Rather, he must establish a credible basis from which a court can infer mismanagement. The court found that plaintiff had established a credible basis and was therefore entitled to inspect the books and records of the LLC. Finally, the court stated that plaintiff had the burden of demonstrating that each category of books and records requested is essential and sufficient to his stated purpose. Noting that a requirement that books and records literally be both "essential and sufficient" could lead to problematic results, and further noting that the terms "essential," "necessary," and "sufficient" have been used interchangeably in the books and records context, the court stated that the core inquiry is whether the requested documents are reasonably required to satisfy the purpose of the demand. In this case, the court concluded each category of books and records was reasonably required to satisfy plaintiff's stated purposes.

11. *Lavi v. Wideawake Deathrow Entm't, LLC*, C.A. No. 5779-VCS (Del. Ch. Jan. 18, 2011)

In response to an action by a member to compel inspection of the books and records of the defendant LLC, defendant filed a motion to dismiss, which included multiple exhibits, ranging from pleadings in other cases to correspondence between the plaintiff and the defendant. The court determined that defendant's approach was procedurally improper because it was more like a motion for summary judgment than a motion to dismiss. The court noted that books and records actions are summary proceedings and cited to Section 18-305(f) of the LLC Act for support. The court explained that "summary proceedings" are to be promptly tried and that rarely is dispositive motion practice efficient when the case can be tried within two months of filing. Accordingly, the court denied defendant's motion to dismiss because it was procedurally defective and did not address the viability of plaintiff's pleading.

12. *Mickman v. Am. Int'l Processing, L.L.C.*, C.A. No. 3869-VCP (Del. Ch. Apr. 1, 2009) and (July 28, 2009)

In this case involving cross-motions for summary judgment, the court addressed the issue of what evidence would be admissible to prove standing for purposes of a books and records demand under Section 18-305 of the LLC Act. Defendant LFF, L.L.C. ("LFF") argued that plaintiff was not entitled to inspect LFF's records because, according to LFF's documents, she was neither a member nor a manager of LFF. While plaintiff conceded that she was not listed as a member in either the operating agreement or its amendments, she argued that contemporaneous documents signed by the initial two members of LFF, Richard Mickman (her ex-husband) and Howard Gleit, supported a reasonable inference that she was a member. One document, a 2001 tax return for LFF, which included a Schedule K-1 for each member, listed the members as Howard Gleit and Richard and Elaine Mickman. In a second document, signed prior to the couple's divorce, Richard Mickman signed under penalty of perjury an Offer in Compromise to the IRS in which he stated that his "only assets [were] his house . . . and stock in a number of closely held companies owned jointly by Taxpayer and his wife."

Section 18-305 of the LLC Act states that "[e]ach member of a limited liability company has the right . . . to obtain from the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the [LLC] . . . [various records of the LLC]." Relying on *Shaw v. Agri-Mark, Inc.*, 663 A.2d 464 (Del. 1995), LFF argued that the court should apply the same evidentiary standard for an LLC as it does for a corporation in considering a demand for books and records. For purposes of a request for books and records under Section 220 of the Delaware General Corporation Law, only those stockholders listed in the stock ledger are recognized as holders of record of stock. A party that supplies equity to a stock corporation, but is not a stockholder of record, has no right to inspect the corporation's books and records. As such, LFF argued that only those members listed in its operating agreement should be recognized as having a right to inspect its books and records. The court disagreed, however, stating that, due to the flexible and less formal nature of LLCs, it is reasonable for the court "to consider any evidence beyond the four corners of the operating agreement, where, as here, the plaintiff has presented admissible evidence that, notwithstanding the language of the operating agreement, suggests the parties to that agreement intended to make, and believed they had made, the plaintiff a member of the LLC."

Despite LFF's contentions that the representations in the aforementioned documents were simply mistakes, the court held that LFF's argument raised factual issues that could not be determined on a motion for summary judgment. Therefore, LFF's motion for summary judgment was denied.

In this decision, the court was presented with the question of whether or not plaintiff was entitled to photocopies of the general ledgers of LFF and another defendant, American International Processing, L.L.C. Plaintiff first claimed that defendants waived any objections to providing copies of the general ledgers because defendants had previously granted her counsel the opportunity to review and take notes on the general ledgers. The court cited Delaware case law in stating that a waiver is the "intentional relinquishment of a known right, either expressly or by conduct, which clearly indicates an intention to renounce a known privilege or power. It involves both knowledge and intent." The court found that, because defendants had taken affirmative steps to deny plaintiff's counsel from photocopying the general ledgers in connection with the prior inspection, this indicated defendants' intent to preserve, not relinquish, their objections to plaintiff obtaining photocopies. The court thus held that defendants had not waived their right to object to plaintiff obtaining photocopies.

The court then turned to plaintiff's alternative arguments—namely, that she had a legal right to photocopies of the general ledgers under defendants' operating agreements and under Section 18-305 of the LLC Act. The court observed that the respective operating agreements of defendants provided that the "Members and their designated representatives shall have access to all books and records of the Company at all reasonable times . . . ." The court further observed that such operating agreements did not define what "access to all books and records" means in terms of specific documents or rights. The court noted that "all books and records" generally denotes a grant of broad inspection rights, which would include general ledgers. Thus, whether or not plaintiff had the right to receive photocopies of the general ledgers depended on whether the right to "access" the general ledgers included the right to photocopy them. The court, noting that it often looks to Delaware corporate statutes and case law when interpreting similar provisions in an LLC agreement, stated that under Section 220(b) of the DGCL, if a shareholder is granted inspection rights, the shareholder has the right "to make copies and extracts" of the document. The court further stated that the right to make copies of documents that a shareholder is entitled to examine was recognized at common law for corporations long before Section 220(b) of the DGCL was enacted. In a similar corporate case, the court determined that a right to access and inspect included a right to make copies. Accordingly, the court thus construed the term "access" under the operating agreements as having its ordinary meaning under Delaware law, which includes the right to make photocopies. The court also denied defendants' arguments that plaintiff should not have the right to make photocopies of the general ledgers because she had not included general ledgers in her inspection demand and that she had not stated a purpose for her inspection request. The court held that the operating agreements did not include a demand requirement, only a requirement that members give at least one day written notice of a request to access documents, which plaintiff had complied with, and did not impose any proper purpose requirement. Because the court found that the operating agreements provide plaintiff with a contractual right to photocopies of the general ledgers, the count did not address her additional arguments for inspection rights under Section 18-305.

13. *Jakks Pacific, Inc. v. THQ/Jakks Pacific, LLC and THQ, Inc.*, C.A. No. 4295-VCL (Del. Ch. May 6, 2009)

Plaintiff, a member of a Delaware LLC (the "Company"), brought an action to inspect the Company's books and records pursuant to Section 18-305 of the LLC Act. The Company was a joint venture formed by the plaintiff and defendant THQ, Inc. ("THQ") to develop and sell wrestling-based video games pursuant to a license from World Wrestling Entertainment ("WWE"). The WWE license would expire on December 31, 2009; however, the Company had an option to extend the term of the license agreement for a five-year period if the Company were not in default under the license agreement. Pursuant to the Company's LLC agreement, THQ operated the Company on a day-to-day basis and plaintiff was entitled to a guaranteed preferred return based on an income stream related to the license agreement contributed by plaintiff to the Company. The preferred return was based upon historical sales data such that it would approximate 49% of the profits of the Company during the distribution period. Initially, the percentage agreed upon was 10% for the period from October 1999 to June 30, 2006. The current distribution period began July 1, 2006 and ended December 31, 2009. The parties had been unable to establish a preferred return rate for the current distribution period and therefore the issue was presented to an arbitrator as required under the Company's LLC Agreement.

Although extensive discovery was taken in connection with the arbitration, in March, 2008, plaintiff made a demand for financial documents, which the Company complied with. Subsequently, plaintiff made a second demand for a broad range of documents relating to the Company and THQ. THQ responded that plaintiff's request was overly broad but that THQ was willing to make a limited production, subject to plaintiff's agreement to certain conditions. Plaintiff refused the offer and commenced this action to enforce its rights under Section 18-305 of the LLC Act.

Plaintiff offered three purposes for which it needed the demanded documents: (1) to aid it in negotiating the preferred return for the next distribution period, (2) to value its interest in the Company, and (3) to investigate alleged mismanagement and wrongdoing by THQ in managing the affairs of the Company. The court ruled in favor of the Company, stating that plaintiff had failed to demonstrate a proper purpose for its demand. The court stated that, under Section 18-305 of the LLC Act, a member must first establish, by a preponderance of the evidence, the existence of a proper purpose for the inspection sought. Additionally, the court stated that "such a purpose cannot be proper in the abstract, but must be reasonably related to the specific interests of the member making the demand."

The court went on to analyze separately each purpose offered by plaintiff. With respect to the first purpose offered by plaintiff, that it needed the documents to aid it in negotiating the preferred return for the next distribution period, the court reasoned that due to the current relationship between plaintiff and WWE and the ongoing litigation between WWE and the Company, there was no certainty that the Company would be able to renew its license with WWE, thus any future distribution period was "highly speculative." The court reasoned that if the Company were later able to extend the license, a books and records demand might then be appropriate. Thus the court concluded "a demand in order to satisfy a purpose so disconnected from the likely course of events is not 'reasonably related' to [plaintiff's] interest in the LLC."

The second purpose offered by plaintiff was that it needed the documents to value its interest in the Company. According to the court, normally this would be a proper purpose for a demand, but here it was largely meaningless. The court reasoned that plaintiff only had an interest in the preferred return and had no residual equity interest. The value of plaintiff's interest in the Company was simply the present value of the preferred return for the current distribution period. Thus, once the arbitrator determined the preferred return rate, the calculation of the value of plaintiff's interest would be a matter of simple arithmetic, and there would be no need for further documents to determine what the value of that interest was. The court, therefore, concluded that the production of further documents could not reasonably serve the purpose of valuing plaintiff's interest in the Company.

The last purpose offered by plaintiff was that it needed the documents to investigate mismanagement by THQ. The court stated that to support an allegation of mismanagement under a Section 18-305 action, a member is required to offer a credible basis to suspect mismanagement or wrongdoing, and, in this case, the court found that plaintiff failed to do so. The court was not convinced by the two witnesses offered by plaintiff that there was a credible basis to infer that THQ breached any of its duties under the LLC Agreement. Thus, the court denied plaintiff's action to inspect the books and records of the Company under Section 18-305 of the LLC Act.

14. *Maitland v. Int'l Registries, LLC,* C.A. No. 3669-CC (Del. Ch. June 6, 2008)

In an action under Section 18-305 of the Delaware LLC Act for inspection of the books and records of two different limited liability companies, plaintiff filed two motions. Plaintiff's first motion sought to strike an answer filed by one of the defendant companies ("Vienna") and disqualify Vienna's counsel. The second motion was for a commission requesting documents and deposition testimony from the outside auditing firm of the second defendant company.

Plaintiff was one of two members and a fifty percent interest holder of Vienna and, as such, claimed that Vienna was not authorized to file an answer and hire counsel without plaintiff's consent. Section 7 of Vienna's LLC agreement provided that the decision of the members holding a majority interest shall be controlling. Section 7 went on to state that the members were "granted all rights, powers, authorities, and authorizations necessary, appropriate, and advisable and/or convenient to manage [Vienna] and to determine and carry out its affairs." The court held, however, that while this provision may allow for one member to act unilaterally where the other is silent, where the members disagree, the quoted language does not trump the language providing that decisions of the majority are controlling. Recognizing that the dispute between plaintiff and Vienna was essentially a dispute between plaintiff and the other member, the court went on to state that, although plaintiff's motion to strike the answer and disqualify counsel would be granted, the second member was expressly permitted to intervene as a party defendant with authority to defend on behalf of Vienna.

The court denied plaintiff's second motion for a commission, citing Chancery Court Rule 26, which restricts discovery to matters relevant to the subject matter involved. The court stated that to grant such a sweeping request would effectively grant plaintiff its final relief--the books and records ultimately at issue. Thus, because there was no showing that the requested commission was for materials relevant to the narrow issue at hand, the motion was denied.

15. *NAMA Holdings, LLC v. World Market Ctr. Venture, LLC*, C.A. No. 2756-VCL (Del. Ch. July 20, 2007)

Plaintiff brought an action to inspect the books and records of a Delaware limited liability company (the "Company") pursuant to a contractual right provided in the Company's limited liability company agreement. Prior to bringing the action, plaintiff had indicated that it would exercise its rights of inspection through a professional real estate advisory service, acting as its authorized representative, and that it would copy and retain, among other things, lease agreements, appraisals and all communications between the Company and its managers, attorneys and/or accountants. The Company responded that certain of the information and material sought by plaintiff was highly proprietary, confidential and entitled to trade secret protection, that it would strictly enforce the contractual provisions governing plaintiff's right to inspect its books and records, that plaintiff's right of access was contingent upon execution of a confidentiality agreement, that only a principal of plaintiff (and not a third party designee) would be allowed access to the Company's documents and that copying of any records would be limited. In addition, the Company claimed that its managing members were contractually entitled to impose other reasonable limitations on plaintiff's inspection rights. Focusing on the language of the LLC agreement giving plaintiff "reasonable access" to the Company's books and records, the court concluded that the parties intended some limitation to be placed on plaintiff's right of access and that it was the managing members of the Company that had the discretionary authority to determine exactly what limitations would constitute "reasonable access." The court bolstered this conclusion by noting that the managing members were generally vested with the power and obligation to manage the assets and affairs of the Company. Turning to the specific restrictions imposed by the Company, the court found that the managing members acted reasonably by limiting the scope of the inspection to only non-sensitive information, prohibiting photocopying and requiring a confidentiality agreement, particularly in light of the fact that affiliates of plaintiff had threatened to leak certain of the Company's records to a competitor. The only point on which the court agreed with plaintiff was with respect to who could conduct the inspection. On this issue, the court held that it was unreasonable for the managing member to require that a principal of plaintiff conduct the inspection rather than an agent or representative. Analogizing to the corporate context, the court noted that it had held that a stockholder who was granted a right of access to the books and records of a corporation pursuant to a stockholder's agreement may utilize duly constituted agents such as attorneys, accountants or clerks to conduct an inspection even though the agreement did not specifically provide for such delegation. In this regard, the court agreed with plaintiff's observation that if inspection rights were to have any substantive force, the party who benefited from them must be able to enlist the sophisticated assistance of attorneys, accountants and other experts to evaluate meaningfully complex financial information.

16. *Somerville S Trust v. USV Partners, LLC,* C.A. No. 19446-NC (Del. Ch. Aug. 2, 2002)

After an investigation of the manager of a Delaware LLC revealed potential mismanagement and wrongdoing, a member of the LLC brought an action against the LLC and the manager to inspect the LLC's books and records for the purposes of (a) investigating the allegations of wrongdoing and mismanagement and (b) valuing its membership interest in the LLC. The court stated that in order for a request to inspect books and records to be granted, the plaintiff must establish by a preponderance of the evidence the existence of a proper purpose for inspection, which purpose must be reasonably related to the plaintiff's interest as a member. The court also stated that in addition to showing a proper purpose, the plaintiff must show that the documents it seeks to inspect are essential and sufficient for that purpose. The defendants conceded that the plaintiff's stated purposes were of a type that is generally considered to be proper under Delaware law but challenged the inspection request on the grounds that the stated purposes were not reasonably related to the plaintiff's interest as a member of the LLC.

With respect to the purpose of investigating allegations of wrongdoing and mismanagement, the defendants argued that the plaintiff had not presented any credible evidence that the mismanagement adversely affected the plaintiff's interest as a member. The court stated that the plaintiff is required only to show that wrongdoing may have occurred in the LLC, not that the plaintiff's specific interest in the LLC was adversely affected by the wrongdoing. Finding that the plaintiff's evidence showed that the manager may have (i) fraudulently induced the plaintiff to invest in the LLC, (ii) caused the LLC to improperly incur indebtedness and pledge assets, (iii) caused the LLC to file a false Schedule 13D with the SEC, (iv) operated the LLC in violation of its LLC agreement, (v) engaged in a pattern of similar misconduct in other single-purpose entities controlled by the manager and (vi) disregarded legal formalities in operating and managing the LLC, the court held that the preponderance of the evidence supported the plaintiff's stated purpose of investigating possible mismanagement.

With respect to the plaintiff's stated purpose of valuing its interest in the LLC, the defendants argued that inspection of the LLC's books and records was not necessary for the plaintiff to value its LLC interest because the LLC's sole purpose was to hold its members' stock in a single corporation and, because the plaintiff knew the exact amount of stock of the corporation the LLC held for it, it must know the value of its LLC interest. However, based on the defendants' concession that they and the plaintiff disputed the number of shares of the corporation held by the LLC for the plaintiff, the court held that the plaintiff was entitled to inspect the LLC's books and records to value its interest in the LLC.

The court then reviewed the documents requested to be inspected by the plaintiff to determine if they were essential and sufficient for the purposes of the plaintiff's inspection and determined that the plaintiff had made the required showing with respect to most of the documents requested.

17. *Arbor Place, L.P. v. Encore Opportunity Fund, L.L.C.*, C. A. No. 18928 (Del. Ch. Jan. 29, 2002)

Plaintiff, a member in two Delaware LLCs, brought this action against the two LLCs and the managing member of the two LLCs to inspect certain books and records. Plaintiff requested copies of the federal tax returns of the LLCs, lists of the other members of the LLCs and certain books and records of two subsidiary investment companies of the LLCs (the "Funds"). Each request was based on Section 18-305 of the LLC Act and Section 9.2 of the LLC Agreements, which provided members with the right to inspect and copy "all books and records of the [LLCs]."

Regarding plaintiff's alleged right to inspect the federal tax returns and member lists of the LLCs, the court found that Section 9.2 of the LLC Agreements provided members with a contractual right to examine books and records of the LLCs and looked to Section 18-305 of the LLC Act as well as Section 220 of the Delaware General Corporation Law and Section 17-305 of the DRULPA to construe the term "books and records." Finding federal tax returns and member lists among the list of "records" set forth in Section 18-305 of the LLC Act, the court held that Section 9.2 of the LLC Agreements provides plaintiff with a contractual right to inspect and copy the LLCs' federal tax returns and member lists.

Defendants had argued that Section 13.1 of the LLC Agreements, which provided that the LLC Agreements, the transactions contemplated by the LLC Agreements and "all other matters related to the [LLCs]" be held confidential, required that member lists be kept confidential. However, the court rejected defendants' argument, finding that defendants' reading of Section 13.1 would render Section 9.2 of the LLC Agreements meaningless. Defendants' had also argued that the "Confidential Subscriber Questionnaires," which were given to all potential investors in the LLCs and provided that all information collected "will be kept strictly confidential," obligated defendants not to reveal the identity of the members. The court held that once the investors qualified and elected to invest in the LLCs, they were governed by the LLC Agreements and that any presumption of confidentiality created by the questionnaires during the application process was defeated by the express language of the LLC Agreements. The court also rejected defendants' argument that under Section 18-305(c) of the LLC Act they were not required to disclose the member lists because they had a good faith belief that disclosure of the member lists would harm the LLCs by violating the privacy notices distributed by the LLCs pursuant to the Gramm-Leach-Bliley Act of 1999 (the "GLBA"). The court determined, by reference to the *Bond Purchase* case decided in the limited partnership context, that Section 18-305(c) does not apply in the case of a contractual claim to inspect books and records and that under the "implied proper purpose" defense, production of books and records can only be denied if it "would in fact be adverse" to the entity. The court also noted that the GLBA would not preclude disclosure of the member lists due to an exception for the disclosure of nonpublic personal information "[t]o comply with federal, State, or local laws, rules and other applicable legal requirements" because the disclosure of the member lists in this case would be required under state law and other applicable legal requirements.

Finally, the court considered plaintiff's request for books and records of the Funds. On plaintiff's contract claim, the court found that Section 9.2 of the LLC Agreements provided members with a contractual right to "all books and records of the [LLCs]," not the Funds, although certain records pertaining to the Funds may become records of the LLCs and thus would fall within plaintiff's contractual right under Section 9.2. For example, the periodic financial reports and other records that would be used to produce monthly reports to members of the LLCs would constitute books and records of the LLCs. On plaintiff's statutory claim, the court held that plaintiff had no right to inspect the books and records of the Funds under Section 18-305 because the Funds were separate companies from the LLCs and the books and records of the Funds were not the books and records of the LLCs, and plaintiff had not proven that the corporate veil of the Funds should be pierced.

C. Indemnification and Advancement

1. *Tulum Mgmt. USA LLC v. Casten*, C.A. No. 11321-VCN (Del. Ch. Dec. 23, 2015)

On May 29, 2015, RED Parent LLC ("RED Parent") filed an action in Illinois (the "Illinois Action") against George Polk ("Polk") and others. RED Parent brought the Illinois Action in response to Polk, as a member of RED Parent's Investment Committee (the "Investment Committee"), requesting a valuation of RED Parent's assets pursuant to RED Parent's Operating Agreement. Polk would have the right to take control of RED Investment LLC ("RED Investment"), per RED Parent's Operating Agreement, if the valuation concluded that a "Trigger Event" had occurred. After Polk and the remaining managers on RED Parent's Board of Managers disagreed on matters relating to the valuation process, RED Parent filed the Illinois Action "to prevent Polk from acting contrary to the Operating Agreement and to ensure that the valuation process was conducted in accordance with the Operating Agreement." In July 2015, Polk filed a complaint in Delaware alleging breaches of fiduciary duty, contract and the implied covenant of good faith and fair dealing and seeking indemnification, advancement and fees on fees incurred in the Illinois Action and the Delaware Action.

In this decision, the court determined whether Polk was entitled to advancement for his litigation expenses that stemmed from the Illinois Action. Under RED Parent's Operating Agreement, Polk was entitled to indemnification and advancement in his capacity as a manager of RED Parent for actions "in connection with the business" of RED Parent. RED Parent claimed that Polk was not sued in the Illinois Action because of his status as a manager and that the Illinois Action was not in connection with the business of RED Parent, arguing instead that he was sued because of his involvement as a member of the Investment Committee. In addition, RED Parent asserted that the valuation process at the heart of the Illinois Action could result in a change in control of RED Investment, a subsidiary of RED Parent, which RED Parent asserted had nothing to do with the business of RED Parent. The court found RED Parent's arguments lacking in merit. The court stated that the valuation of RED Parent's assets, including RED Investment, was part of the business of RED Parent because RED Parent acted through its Investment Committee to conduct the valuation in accordance with its Operating Agreement. The court refused to adopt RED Parent's view that actions "in connection with the business" of RED Parent should be limited to those that directly generate income. In addition, the court noted that the "Operating Agreement does not limit advancement (or indemnification) to conduct carried out in the capacity of Manager, although one must be a Manager in order to be entitled to advancement." Therefore, the court held that Polk was entitled to advancement for his expenses incurred in defending the Illinois Action and to fees-on-fees for pursing the advancement action.

2. *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, C.A. No. 9742-VCL (Del. Ch. Oct. 26, 2015)

This case involved whether a special purpose entity's operating agreement superseded prior agreements between the parties. Zubin Mehta ("Mehta") and Gregory Shalov ("Shalov") created an asset management firm in 2003 called Finger Lakes Capital Partners, LLC ("Finger Lakes"). Finger Lakes' main capital provider was Lyrical Partners, L.P. ("Lyrical") through defendant Lyrical Opportunity Partners, L.P. After Finger Lake's portfolio companies performed poorly, Lyrical exercised its contractual rights to take control of the portfolio companies. Subsequently, one of the portfolio companies, Revolabs, Inc. ("Revolabs"), was successfully sold. Finger Lakes and Lyrical bickered over how to distribute the proceeds. As a result of this dispute, Finger Lakes filed this action to compel Lyrical to distribute the Revolabs sale proceeds in accordance with Revolabs' Operating Agreement (the "Operating Agreement").

In addition to the Operating Agreement, Finger Lakes' and Lyrical's relationship was also governed by a term sheet between the principal of Lyrical, Jeffrey Keswin, Mehta and Shalov (the "Term Sheet") and a clawback agreement between Lyrical and Finger Lakes (the "Clawback Agreement"). The Term Sheet provided that Lyrical had a 25% interest in Finger Lakes and a right to a portion of the management fees earned by Finger Lakes. The Clawback Agreement provided that Lyrical would recoup any losses from its investments in Finger Lakes' portfolio companies before Mehta and Shalov received their appropriate distribution. The main issue in this case was whether the Operating Agreement superseded the Term Sheet and the Clawback Agreement. Finger Lakes argued that as a result of the Operating Agreement's integration clause, the Operating Agreement superseded the Term Sheet and the Clawback Agreement—thus Finger Lakes was not bound by the Term Sheet and the Clawback Agreement. The integration clause stated that the agreement superseded all prior agreements "with respect to the subject matter hereof." The court held that the "subject matter hereof" was the investment in Revolabs and that "[a]s with all of the special purpose vehicles, the scope of the governing agreement did not extend to the ongoing business relationship between Finger Lakes and Lyrical." With respect to the Term Sheet, the court noted that Mehta and Shalov abided by the Term Sheet in their interactions with Lyrical. In addition, the court stated that it was never the intent of Mehta and Shalov to supersede the Term Sheet because Finger Lakes obtained its capital from Lyrical through the Term Sheet and superseding the Term Sheet would have gone against their own interest. In regard to the Clawback Agreement, the court noted that the Operating Agreement only discussed how to distribute proceeds to the members of Revolabs. Therefore, the court held that the Operating Agreement did not supersede the Term Sheet and the Clawback Agreement.

As a secondary issue, Finger Lakes attempted to recover all fees and expenses incurred in litigating this matter before the proceeds of the sale were distributed. Pursuant to the Operating Agreement, Revolabs would indemnify Finger Lakes for all fees and expenses incurred in matters it became involved in because it was a member of Revolabs. First, the court noted that Finger Lakes was entitled to indemnification even though it is a plaintiff because there was no restriction in the Operating Agreement limiting indemnification to defendants. However, the court restricted the amount that Finger Lakes received to the legal fees and expenses incurred for the "portion of the action [that] involved Finger Lakes' status as a member and its efforts to compel a distribution in that capacity." For the part of the case that pertained to the "implications of the Term Sheet and the Clawback Agreement," the court denied Finger Lakes request for indemnification because "[t]hose agreements did not govern Finger Lakes' rights as a member of Revolabs."

3. *Barry Henson, et al. v. Filomena Sousa, et al.*, C.A. No 8057-VCG (Del. Ch. Aug. 4, 2015)

Plaintiffs, Barry Henson and Walkabout II Pty Limited, sued defendants, Filomena Sousa and Daniel Wilkinson, for malfeasance related to Talsico, LLC (the "Company"). Henson, Sousa and Wilkinson were members of the Company. In an earlier order, the court placed the Company in receivership and ordered the receiver to marshal the Company's assets for the benefit of creditors and for distribution. Pursuant to that order, the receiver had plenary authority over the affairs of the Company; however, the court had final say on indemnification and advancement disputes.

In this case, the court addressed defendants' request for advancement of their defense costs arising from plaintiffs' malfeasance claims. The court denied the defendants' request on two grounds. First, the court held that a right to advancement must be set forth in an LLC agreement and because defendants' contested the validity of the LLC agreement on which they relied to receive advancement costs, the court held that it would be inequitable to provide defendants with a right to advancement based on the disputed agreement. Second, the court denied defendants' request because of creditors' interests in the assets of an LLC in receivership. Defendants' argued that advancement rights have priority over rights of any creditors. However, the court, adopting the rationale of *Andrikopoulos v. Silicon Valley Innovation*, C.A. No. 9899-VCP (Del. Ch. July 30, 2015), stated "that equity and public policy favored treating advancement claims as, in effect, indemnification claims in this limited circumstance, relegating those claims to an equivalency with other creditors' claims." For those reason, the court denied defendants' advancement request.

4. *Branin v. Stein Roe Inv. Counsel, LLC*, C.A. No. 8481-VCN (Del. Ch. June 30, 2014) and (July 31, 2015)

Plaintiff was an employee of defendants and sought indemnification under the limited liability company agreement (the "LLC Agreement") of one of the defendants, Stein Roe Investment Counsel LLC (the "Company"). Before joining the Company, plaintiff was a principal/owner and chief executive officer of another investment management firm. During that time, plaintiff's firm was acquired (the "Acquisition") by another investment management firm ("Bessemer"). The Acquisition was governed by a doctrine of New York law that prevented plaintiff from soliciting his former clients (the "Mohawk Doctrine"), although plaintiff could accept business from former clients if they approached him. While with the Company, plaintiff managed 30 clients that he previously managed while at Bessemer, and Bessemer sued plaintiff under the Mohawk Doctrine (the "Bessemer Action"). At the time plaintiff joined the Company and at the time the Bessemer Action was brought, the LLC Agreement provided broad indemnification rights that applied by its terms to employees of the Company (the "Original Indemnification Provision"). The Original Indemnification Provision provided indemnification "[t]o the full extent permitted by applicable law" for acts or omission taken on behalf of the Company in good faith and "in a manner reasonably believed to be within the scope of the authority conferred" by the LLC Agreement. A few months after Bessemer brought the Bessemer Action, the Company adopted an amendment to the LLC Agreement that excluded from the indemnification rights a claim based on actions by an employee that may have breached a contract between the employee and a third party that predated the employee's employment with the Company (the "Amended Indemnification Provision"). Defendants asserted that the Amended Indemnification Provision applied and precluded plaintiffs' claim.

The court held that, although there was no question that the Company could amend the LLC Agreement as it did, the Company's liability to plaintiff under the LLC Agreement matured when the Bessemer Action was filed, and the Original Indemnification Provision was still in place at that time. The court noted that plaintiff discussed the potential of bringing over his former clients with the Company's president and CEO and discussed the possible impacts of the Mohawk Doctrine. Further, the Company benefitted from plaintiff's clients, and therefore indemnifying plaintiff was consistent with the policy behind the terms of the Original Indemnification Provision. Additionally, at the time of plaintiff's conduct giving rise to the Bessemer Action, plaintiff reasonably anticipated he would have the protection of the Original Indemnification Provision, despite the language in the LLC Agreement allowing for modification of the LLC Agreement.

The court held that plaintiff established a right to pursue a claim for indemnification, and if plaintiff satisfied the other substantive requirements of the indemnification provision—acting in good faith and in a manner reasonably believed to be within the scope of his authority—the Company's liability for the claim was fixed before the Amended Indemnification Provision, which did not modify or eliminate any liability that already existed. The court rejected defendants' claim that plaintiff was sued in his personal capacity or by reason of his employment with Bessemer, noting that the Supreme Court of Delaware has stated that "if there is a nexus or causal connection between any of the underlying proceedings . . . and one's official capacity, those proceedings are 'by reason of the fact' that one was a corporate officer." *Quoting Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005). Noting plaintiff's discussions with the president and CEO of the Company, the court held that because plaintiff, as an employee of the Company, created tangible benefits for the Company because of his contacts and client accounts, such "nexus or causal connection" existed. However, the court dismissed plaintiff's motion for judgment on the pleadings because the parties disputed whether plaintiff acted in good faith and in a manner he reasonably believed to be within the scope of his authority, and thus there was a disputed question of fact.

In a subsequent decision, the court addressed whether accrual of a right to indemnification for purposes of the statute of limitations naturally flows from the vesting of a right to indemnification for purposes of coverage. The court held that it does not.

Plaintiff began working for defendant Stein Roe Investment Counsel LLC (the "Company") in 2002 and, shortly thereafter, he was sued by his former employer. Plaintiff defended himself against his former employer's allegations for ten years and, ultimately, all claims against plaintiff were dismissed. Plaintiff sought indemnification against defendants under a purported right to indemnification under the Company's limited liability company agreement (the "LLC Agreement"). In its July 30, 2014 decision (the "2014 Decision"), the court found that the first amendment to the LLC Agreement dictated plaintiff's indemnification rights, not the second amendment to the LLC Agreement that purported to remove plaintiff's indemnification rights related to his dispute with the former employer. However, based on the facts before it, the court could not resolve whether plaintiff was entitled to indemnification under the first amendment standard—that the party seeking indemnification must have acted in good faith on the Company's behalf and in a manner reasonably believed to be within the scope of the party's authority. The parties agreed to a stipulation and order on liability, which resolved those factual issues in plaintiff's favor. Defendants then amended their answer to add statute of limitations as an affirmative defense, and the parties cross-moved for summary judgment.

The court stated that the central issue to be resolved was whether the three-year statute of limitations on plaintiff's indemnification claim began to run when his contingent right to indemnification vested in 2002. The court noted the statute of limitations began to run when plaintiff could be confident any claim against him was resolved with certainty and found that plaintiff could not have enforced his right to indemnification until the nature of his conduct was determined in the action with his former employer, which was not dismissed until 2012.

The court then analyzed the applicability of the "law of the case doctrine"—that "once a matter has been addressed by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears"—because defendant argued that, in the 2014 Decision, the court held that plaintiff's right to indemnification vested in 2002 and, therefore, the three-year statute of limitations had run. The court rejected this argument, finding that "the vesting of a right under contract and the accrual of a claim for statute of limitations purposes are not inextricable tied together." In contrast to when a contractual right to indemnification is confirmed (in this case, the LLC Agreement indemnification provision in place when the conduct giving rise to the claim for indemnification occurred), a plaintiff must be able to bring suit for the statute of limitations on an indemnification claim to begin to run. Here, plaintiff could not have filed his indemnification action until the litigation concluded in 2012 because the court would have been unequipped to determine whether plaintiff's conduct had met the requisite standard for indemnification.

The court also found that, even if plaintiff's claim for indemnification accrued for statute of limitations purposes in 2002 (which it did not), defendants had a continuing duty to indemnify plaintiff under the theory of continuing breach.

Because plaintiff's claim for indemnification was timely, the court granted plaintiff's motion for summary judgment and held that he was entitled to prejudgment interest and fees on fees.

5. *Fillip v. Centerstone Linen Servs., LLC*, C.A. No. 8712-ML (Del. Ch. Dec. 3, 2013) and (Del. Ch. Feb. 27, 2014)

Plaintiff, Karl Fillip, was the former CEO of defendant Centerstone Linen Services, LLC (the "Company"). After resigning from his position as CEO, plaintiff sued the Company, alleging he was entitled to a severance payment which was refused by the Company. The Company filed counterclaims and affirmative defenses alleging, in part, breach of fiduciary duties and breach of contract. Plaintiff contended he was entitled to advancement of the fees and expenses he incurred as a result of the various claims, counterclaims, motions, and affirmative defenses related to the litigation.

Seeking to avoid advancement, the Company dismissed its breach of fiduciary duties claims, arguing that no advancement was due for the remaining breach of contract allegations. The Company maintained that plaintiff's advancement right was limited to expenses related to claims for fraud or bad faith, and even if not so limited, no advancement was required because the breach of contract claims were personal, thus not related actions taken "in the performance of his duties" as an officer of the Company. This advancement dispute was before the court on summary judgment.

The indemnification provision of the Company's LLC operating agreement provided:

The Company shall indemnify, defend and hold harmless each Manager and Officer for all costs, losses, liability, and damages whatsoever paid or incurred by such Manager or Officer in the performance of his duties in such capacity . . . to the fullest extent provided or permitted by [law]. Further, in the event fraud or bad faith claims are asserted . . . the Company shall nonetheless bear all of the aforesaid expenses subject to the obligation of such Manager or Officer to repay all such expenses if they are finally determined to have committed such [acts].

Reading the indemnification provision as a whole, the court held that the word "defend" in the first sentence of the indemnification provision created a mandatory advancement right. The court noted that a reference to "defend" is distinct from "indemnify and hold harmless," creating a duty to pay for defense on a current basis, thus a duty to advance expenses. The court found that the second sentence of the indemnification provision in this context did not create an independent advancement right, but merely clarified advancement rights created in the first sentence, which continued to apply when a manager or officer faced claims of fraud or bad faith.

The court also rejected the Company's assertion that the phrase, "in the performance of his duties in such capacity" created a narrower advancement right than the "by reason of the fact" standard found in corporate law under DGCL Section 145. The "by reason of the fact" standard means that when a corporate officer uses his official power in the commission of alleged misconduct, a nexus exists between the underlying proceeding and one's official capacity—that proceeding is "by reason of the fact" that one was a corporate officer. The court here found no substantive distinction between "in the performance of his duties in such capacity" and "by reason of the fact," remarking that both can be reconciled as encompassing wrongdoing committed by an officer in his official capacity and in the performance of his daily managerial duties. Moreover, since the indemnification provision permitted indemnification to fullest extent permitted by law, "in the performance of his duties in such capacity" was not read to be any narrower than the "by reason of the fact" standard.

Ultimately, the court ruled that use of the word "defend" in the indemnification provision extended mandatory advancement rights to plaintiff for all expenses incurred in litigation related to actions taken by plaintiff as CEO of the Company, including the breach of contract claims that were based on plaintiff's actions taken in the performance of his duties.

A subsequent decision in this case addressed exceptions taken by defendant to an interlocutory final report of the Master in Chancery on plaintiff's right to advancement of legal fees and expenses. The Master's report held that the limited liability company agreement of defendant mandated advancement of expenses and costs incurred by plaintiff by reason of his position with the defendant, subject to a duty to repay those expenses if found to have committed fraud or bad faith. The indemnification provision read as follows:

The Company shall indemnify, defend and hold harmless each Manager and Officer for all costs, losses, liabilities, and damages whatsoever paid or incurred by such Manager or Officer in the performance of his duties in such capacity, including, without limitation, reasonable attorney's fees, expert witness and court costs, to the fullest extent provided or permitted by the Act or other applicable laws. Further, in the event fraud or bad faith claims are asserted against such Manager or Officer, the Company shall nonetheless bear all of the aforesaid expenses subject to the obligation of such Manager or Officer to repay all such expenses if they are finally determined to have committed such fraud or bad faith acts.

The court noted that the parties were in agreement that the indemnification provision provided some form of mandatory advancement, however, the parties disputed the scope of that advancement. Specifically, defendant's position was that the indemnification provision was bifurcated, with the first sentence providing for indemnification and the second sentence providing for advancement only when the covered party was defending against a claim of fraud or bad faith—subject to a duty to repay any advancement if found to have committed fraud or bad faith.

In interpreting the indemnification provision, the court recognized that in common usage the obligation to defend is not equivalent to an obligation to advance defense costs. Thus, if the indemnification provision were limited to the first sentence, it would be ambiguous and not necessarily provide for mandatory advancement. The court, however, reading the provision as a whole, held that the second sentence clarified that "defend" encompassed advancement because the second sentence required repayment of the expenses covered in the first sentence if the covered party were found to have committed fraud or bad faith. This cured any ambiguity in the first sentence because only expenses that were advanced could be subject to an undertaking to repay. Therefore, the provision was not ambiguous, nor was any of it surplusage, and mandatory advancement existed. The case was remanded to the Master to determine the remaining factual issues in light of the court's legal analysis.

6. *Grace v. Ashbridge LLC*, C.A. No. 8348-VCN (Del. Ch. Dec. 31, 2013)

Plaintiff was the co-trustee of a family trust that held shares in Ashbridge Corporation, a Pennsylvania corporation (the "Corporation"), which was merged with and into a Delaware LLC, later named Ashbridge LLC, defendant. Plaintiff was a member of defendant, a manager serving on its board of managers, and its chairman. Plaintiff was also a shareholder of the Corporation, as well as the chairman and a member of its governing board.

The family trust's beneficiaries filed objections to trustee accountings in the Court of Common Pleas of Chester County, Pennsylvania, Orphans' Court Division, alleging, in part, breaches of fiduciary duty by the trustees and diminution in value of the trust's interest in the Corporation due to imprudent investments, improper loans, and self-dealing transactions by plaintiff (the "Orphans' Court Proceeding"). The objections were directed at various acts of mismanagement involving the Corporation and an affiliate entity, but not defendant.

Plaintiff filed this lawsuit (the "Delaware Action") seeking indemnification and advancement for expenses related to the Orphans' Court Proceeding, a failed mediation (the "Mediation"), and the Delaware Action. Plaintiff averred he was entitled to advancement and indemnification under defendant's operating agreement because it provided that persons holding an office, or otherwise having a relationship, with defendant or one of its managers or members would be entitled to indemnification and advancement.

Defendant moved to dismiss the Delaware Action for failure to state a claim because plaintiff's acts relating to the Orphans' Court Proceeding were taken in plaintiff's personal capacity or in his capacity as an officer of the Corporation or its affiliate and not in any capacity relating to defendant. Because the plain terms of the indemnification and advancement provision did not extend to predecessors or affiliates, defendant was not required to indemnify or advance expenses for any acts not taken on behalf of defendant.

The court held that successor entities are generally not liable for the actions of corporate officers of predecessor entities or affiliates when a fundamental change in identity has occurred. For purposes of advancement and indemnification, the court held that Delaware law considers a conversion from an LLC to a corporation to be a fundamental change in identity: mandating indemnification when corporate directors and officers successfully defend themselves, but not for LLCs, leaving indemnification to the terms of the operating agreement. The court ruled that the conversion from Ashbridge Corporation to Ashbridge LLC was a fundamental change in identity, remarking that the indemnification rights in defendant's operating agreement were different from those found in the Corporation's bylaws. Defendant was therefore not liable for the acts of its predecessor corporation simply because it was the successor entity; however, the court noted that it was expressing no opinion upon whether a successor entity could be responsible for indemnifying or granting advancement based upon the bylaws or operating agreement of a predecessor entity because plaintiff never properly presented that allegation.

Thus, in order to prevail, plaintiff had to prove that defendant's indemnification and advancement provisions applied retroactively to predecessor entities or affiliates. The court held that because the Orphans' Court Proceeding involved only defendant's predecessor and affiliate, and the plain terms of defendant's operating agreement did not provide for retroactive indemnification or advancement for its predecessor entities or affiliates, plaintiff was not entitled to indemnification. The court also held that no indemnification was due for expenses of the Mediation because plaintiff failed to plead any facts explaining his entitlement to relief. Finally, because plaintiff was denied indemnification and advancement for the Orphan's Court Proceeding or the Mediation, he was not entitled to indemnification or advancement for the Delaware Action.

7. *Costantini v. Swiss Farm Stores Acquisition LLC,* C.A. No. 8613-VCG (Del. Ch. Sept. 5, 2013) and (Del. Ch. Dec. 5, 2013)

In this case, plaintiffs, Edmond D. Costantini, Jr. ("Costantini") and James Kahn ("Kahn"), sought indemnification for their fees and costs in underlying litigation involving defendant, Swiss Farm Stores Acquisition LLC ("Swiss Farm"). In the underlying litigation, Swiss Farm sought damages against Costantini and Kahn for alleged breaches of fiduciary duty, but the court dismissed that action based on laches. In this decision, the court ruled on a motion for judgment on the pleadings brought by Costantini and Kahn seeking indemnification for their fees and costs incurred in defending the fiduciary duty action. Because Costantini was a member of the board of managers of Swiss Farm and Kahn was not, the court examined their indemnification claims individually.

With respect to Costantini's claim for indemnification, the court cited to the public policy underlying the grant of indemnification to corporate directors, officers and agents under the DGCL, which is to encourage able people to serve in those positions. The court stated that the same policy reasons supporting indemnification of corporate actors apply to actors of other entities, including LLCs such as Swiss Farm. The court went on to state that, because LLCs are creatures of contract, the LLC Act provides broad latitude for LLCs to allocate the rights and responsibilities of its members. In this case, Swiss Farm, however, chose to import into its operating agreement, near verbatim, the permissive and mandatory indemnification rights for members of its board of managers, officers, employees and agents as provided to corporate actors in DGCL Section 145.

Because Costantini was sued in his capacity as a member of Swiss Farm's board of managers, the court held that Swiss Farm's operating agreement unambiguously provided indemnification to Costantini under the undisputed facts of this case and thus granted Costantini's motion for judgment on the pleadings.

With respect to Kahn's claim for indemnification, the court stated that the parties had conceded that Kahn was not a member of the Swiss Farm board of managers and was not an officer, employee or agent of Swiss Farms. Kahn was apparently sued for breach of fiduciary duty in his capacity as a partner of a partnership that in turn was a member of Swiss Farm, which partnership had the right in its capacity as a member to appoint a member of the Swiss Farm board of managers. The court held that because Kahn did not fall within the categories of persons granted indemnification under the Swiss Farm operating agreement, he was not entitled to indemnification and therefore denied Kahn's motion for judgment on the pleadings.

In a subsequent decision in this case, the court ruled on Kahn's motion for reargument on the issue of whether Kahn was an agent of Swiss Farm. With his motion for reargument, Kahn submitted evidence claiming that he was an agent of Swiss Farm through certain brokerage and development management contracts his company had entered into with Swiss Farm. Because the indemnification clause in the Swiss Farm operating agreement borrowed language from Section 145 of the DGCL—indemnifying any person who was sued "by reason of the fact that he was an agent"—the court established that case law interpreting Section 145 was relevant to interpreting the clause's scope. The court's analysis, using DGCL precedent, found that the clause indemnified only agents whose agency position had a "causal connection or nexus" with the complained of act. In other words, one's agency capacity must have been "necessary or useful" to accomplish the act forming the basis of the underlying lawsuit. The court found that Khan had not sufficiently demonstrated that he was an agent of Swiss Farm or that the alleged breaches of fiduciary duty were sufficiently related to his claim of agency. The court thus denied Kahn's motion for judgment on the pleadings.

8. *Imbert v. LCM Interest Holding LLC*, C.A. No. 7845-ML (Del. Ch. May 7, 2013)

Plaintiff was a member and former manager of defendant LLCs and sought advancement of fees and expenses he incurred to defend a lawsuit filed against him after he was terminated from his position as manager of each defendant LLC. The LLC agreement of each defendant LLC required funds to be distributed to the members thereof to pay the income taxes of such members. Defendant LLCs claimed that plaintiff had been inflating his tax liability so that he would receive disproportionately large amounts of these distributions. Defendant LLCs filed suit against plaintiff in New York specifically alleging (i) that plaintiff owed fiduciary duties as a manager and had breached those duties by approving the allegedly improper distributions, (ii) that plaintiff was unjustly enriched by retaining the allegedly improper distributions, (iii) that plaintiff committed fraud in approving the allegedly improper distributions, and (iv) that plaintiff wrongfully used a business expense account for personal travel and entertainment expenses.

The relevant provisions in the LLC agreement of each defendant LLC provided that such LLC shall indemnify any person "made, or threatened to be made, a party to any action or proceeding . . . by reason of the fact that he . . . , whether before or after adoption of this Article (a) is or was a Manager, or an officer of the Company . . ." and such LLC shall advance or promptly reimburse "[a]ll expenses reasonably incurred by an Indemnified Person in connection with a threatened or actual action or proceeding with respect to which such Person is or may be entitled to indemnification . . . ." The court noted that summary judgment is an efficient and appropriate method to decide an advancement dispute because the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement.

The court first highlighted that advancement and indemnification were mandatory under the LLC agreements of the defendant LLCs and therefore the burden rested with the defendant LLCs to prove that advancement was not required. Defendant LLCs claimed that plaintiff was not entitled to advancement because the New York proceedings involved plaintiff as a member and not as a manager. In citing to Delaware case law, the court indicated that "if there is a nexus or causal connection between any of the underlying proceedings . . . and one's official capacity, those proceedings are 'by reason of the fact' that one was a corporate officer." The court further stated that the nexus is established if the "corporate powers were used or necessary for the commission of the alleged misconduct." The court found that each of defendant LLCs' claims against plaintiff related to plaintiff acting in his capacity as a manager and not as a member and, therefore, such nexus was sufficiently established except in the case of the unjust enrichment claim. With regard to the unjust enrichment claim, defendant LLCs claimed plaintiff retained, as a member, the allegedly improper distributions. The court agreed and found that this claim did not arise "by reason of the fact" that plaintiff was a manager of defendant LLCs.

Defendant LLCs also sought a declaratory judgment in the New York action that plaintiff was not a member of defendant LLCs. Because this determination would be based on whether plaintiff was properly removed as a manager (only a non-manager member could be expelled from the defendant LLCs), the court found that plaintiff was also entitled to advancement for the declaratory judgment action. In addition, the parties disputed plaintiff's request for advancement for fees he incurred in a books and records request. Although defendant LLCs claimed plaintiff had this right by virtue of being a member, the court found that this was not dispositive because he sought the books and records to defend claims asserted against him as a manager, which the court indicated was a legitimate part of "defending" a suit. Thus, the court granted advancement for the books and records request. Finally, the court granted plaintiff an award of "fees on fees" and prejudgment interest to the extent the court granted plaintiff's contractual right to advancement.

9. *Zimmerman v. Crothall,* C.A. No. 6001-VCP (Del. Ch. Mar. 5, 2012 and Jan. 31, 2013)

Plaintiff claimed that certain issuances of preferred units and convertible debt were self-interested transactions in Adhezion Biomedical LLC, a Delaware limited liability company ("Adhezion"), benefitted certain of the current directors and the VC Investors (as defined below) and unfairly diluted the common members. Plaintiff argued that the directors' actions violated the duty of care and the duty of loyalty and breached the LLC Agreement by authorizing additional units of existing series of units and creating a new series of units without the approval of a majority of the common members. The defendants included directors of Adhezion and certain venture capital investors in Adhezion (the "VC Investors"). This case was before the court on the defendant's motion for summary judgment.

The court granted the defendants' motion for summary judgment on the plaintiff's breach of the duty of care claim. The defendants argued that the LLC Agreement limited the directors' liability to only breaches of the duty of loyalty. However, the court found that the use of the word "recklessness" in the list of behavioral descriptors that were grounds for damages was equivalent to "gross negligence," and therefore the LLC Agreement implicated the duty of care. Nevertheless, the court found that the defendants' conduct did not amount to gross negligence because the board's actions were properly viewed through the business judgment rule. In order to overcome the applicability of the business judgment rule, the plaintiff needed to prove that the board's decision making process showed a "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." The court noted that this is an onerous standard and determined that the plaintiff was unable to show that the board's process was reckless. To the contrary, Adhezion needed capital and the board contacted over 40 potential investors, entering into serious discussions with a few. Although the board ultimately decided to raise capital from current investors, the defendants showed that the board received updates on the financial condition of Adhezion and discussed different financing options.

With respect to the plaintiff's breach of the duty of loyalty claim, the plaintiff alleged that the directors approved self-dealing transactions in bad faith, that they were standing on both sides of the transactions, and therefore, the entire fairness analysis should be applied. In order to prove a claim of bad faith, the court said that the plaintiff needed to show that the "board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." Also, the court noted that an intentional dereliction of a known duty is higher than a standard of recklessness. The court granted the defendant's motion for summary judgment on the plaintiff's bad faith claim for the same reasons it granted the motion on the breach of duty of care claims.

With respect to his claim of self-dealing, the plaintiff argued that the transactions entered into by Adhezion were self-dealing because a majority of the directors that approved the transactions were "standing on both sides" of the transactions and also because the VC Investors constituted a control group which also stood on both sides of the transactions. The court denied the motion for summary judgment on the claim that the VC Investors were a control group. A shareholder is "controlling" if it owns a majority interest or it exercises actual control over the board (actual control can be shown if the shareholder (or group) holds such power that it is similarly situated as if it had a majority interest). On the one hand, the court noted that it is very difficult to show that a shareholder is a "controlling shareholder." On the other hand, the VC Investors together held 66% of the voting shares and at least two of the five directors' seats. Furthermore, both were early stage investors and there were communications of the defendants that tended to show the VC Investors had considerable pull in the actions the board decided to pursue. Turning to the plaintiff's claim that a majority of the board was interested, the court determined that out of the five directors, two participated in the transactions individually and another was the managing partner of one of the VC Investors. Therefore, it was possible that the plaintiff could show a majority of the board was interested.

In addition to showing that the majority of the board was interested or that the VC Investors were a control group, the plaintiff also needed to show that those on both sides of the transaction received a benefit exclusive to them. The transaction that took place in 2009 was not open to all current unitholders of Adhezion. The defendants argued that it did not matter because the offering price was consistent with the price in other recent transactions. However, the plaintiff's claim was that the issuance took place at a price that was improperly low and, therefore, the overall value of Adhezion was diluted. In light of the plaintiff's claim, the court determined that the fact that the price was similar to other recent prices at the time did not warrant granting summary judgment. The court denied the defendants' request for summary judgment on the plaintiff's self-dealing claim with respect to the 2009 transaction because it was possible that it was subject to the entire fairness standard, and whether it passed such scrutiny could not be determined without expert valuations. The other transactions complained of did not treat all unitholders equally in that the defendants were given the opportunity to subscribe for the new interests first, with the leftovers (if any) available to be purchased by the common members. Based on this structure, the court determined that the transactions that took place in 2010 and 2011 conferred an exclusive benefit on the defendants because they were given the opportunity to participate first and fully in the additional offerings. Although the court noted that there is no inherent right against dilution in Delaware law, the structure of the transactions conferred an exclusive benefit on the defendants. The court denied summary judgment and in fact determined that the 2010 and 2011 transactions were self-dealing and subject to entire fairness review.

Two of the five directors on the board of Adhezion were allegedly independent and disinterested. The LLC Agreement included a safe harbor provision that the court found might have overridden the entire fairness review in the situation. The safe harbor provision closely tracked 8 Del. C. § 144 and the defendants argued that it entitled them to have the transactions at issue reviewed under the business judgment rule. However, the plaintiff argued that the safe harbor provision did not address monetary damages and only rendered a transaction itself not void or voidable solely because it was an interested transaction. The court sided with the plaintiff on this issue. The plaintiff also argued that the defendants had not satisfied the safe harbor provision anyway, citing reasons such as the VC Investors being a control group and the transactions being taken in bad faith. The court dismissed the defendants' motion for summary judgment in accordance with its earlier discussion regarding the VC Investors being a control group and granted it on the plaintiff's bad faith arguments.

Turning to the plaintiff's aiding and abetting claim, the court noted that in order to prevail on such a claim, the plaintiff needed to show the underlying breach of fiduciary duty. Therefore the court granted the defendants' motion for summary judgment with respect to the aiding and abetting claims regarding a breach of the duty of care. The court denied the motion with respect to the aiding and abetting claims based on the alleged breach of the duty of loyalty. Furthermore, the court granted the motion for summary judgment of the aiding and abetting claims based on a breach of contract, noting that there is no cause of action for aiding and abetting a breach of contract under Delaware law.

Finally, the plaintiff claimed that the defendants breached the amendment provisions of the LLC Agreement by creating a new preferred series of units without the consent of a majority of the common members. The LLC Agreement provided that amendments required the vote of a majority in interest of the common members. The only exception was "as otherwise provided in Section 3.8…with respect to the issuance of additional Units." Section 3.8 of the LLC Agreement provided that the board could "issue additional units…or create additional classes or series of units…." The defendants claimed that Section 3.8 gave the board a "blank check" to create, authorize and issue new units. Conversely, the plaintiff argued that "create" in Section 3.8 should be construed more narrowly, and, more importantly in the court's view, that the exception to the majority in interest of common members rule only spoke to issuance of additional units (and not the creation of a new series of units). The court determined that the language of the LLC Agreement in this situation was ambiguous, and therefore denied the defendants' motion for summary judgment on the breach of contract claim.

In its subsequent post-trial opinion, the court addressed the plaintiff's claims alleging breach of the LLC Agreement, breach of the duty of loyalty by the directors and the VC Investors and aiding and abetting of the directors' breach of the duty of loyalty as well as the plaintiff's requests for reformation and repayment of attorney's fees advanced by Adhezion to the defendants.

The court first turned to the breach of contract claim, which centered on whether the LLC Agreement required the approval of common unitholders (1) to increase the number of units Adhezion was authorized to issue and (2) to create additional classes or series of units. The court noted that the LLC Agreement used three terms with commonly-understood meanings in the corporate context: "create," "authorize" and "issue."

With respect to the approval required to authorize additional units, the defendants argued that the power to increase the number of authorized units was merely incidental to the Board's ability to create and issue units under the LLC Agreement and to unilaterally amend the LLC Agreement in connection therewith. The court disagreed with this argument. Relying on testimony of the attorney that drafted the LLC Agreement and noting that the LLC Agreement gave certain unitholders veto rights in connection with the authorization of units while providing the board with the power only to create and issue units, the court concluded that the use of "authorize" in the LLC Agreement was deliberate and additional units must therefore be authorized. Regarding the procedures necessary to authorize additional units, the court found that because the LLC Agreement was silent on the steps necessary to authorize additional units, the most reasonable interpretation was that the parties intended the LLC Agreement to be amended to accomplish the authorization of units. The court next considered what was required to amend the LLC Agreement. The LLC Agreement required unitholder approval, including common unitholder approval, of all amendments except with respect to the "issuance" of additional units pursuant to provisions of the LLC Agreement that authorized the board to "create" and "issue" additional units. The parties disputed the scope of the amendment exception and whether authorization of additional units fell within the exception. The court, reading the LLC Agreement as a whole, held that regardless of whether the board could unilaterally create or issue additional units, it clearly could not authorize additional units without obtaining the unitholder consent required by the LLC Agreement's amendment provision.

Next, the plaintiff contended that the LLC Agreement required common unitholder approval to create additional series or classes of units because the exception to the LLC Agreement's amendment provision referred only to "issuance" of units pursuant to provisions of the LLC Agreement that authorized the board both to "create" and "issue" additional units. The court concluded the LLC Agreement to be ambiguous on this point and therefore turned to extrinsic evidence. The court noted that at all relevant times, the amendment exception referred only to "issuance" of units, even when the section of the LLC Agreement cross-referenced in the exception gave the board the power only to "create" additional series or classes of units. The LLC Agreement was later amended to authorize the board to "create and "issue" additional series or classes of units. The court therefore declined to interpret the language of the amendment exception as limiting and instead found that the exception broadly referred to the subject matter of the cross-referenced section-namely, the "creation" and "issuance" of additional series or classes of units.

Having concluded that common unitholder approval was required to increase the number of authorized units but not to create additional series or classes of units, the court turned to whether the directors breached the LLC Agreement in connection with the challenged issuances. The court held that the directors breached the LLC Agreement because the directors had purported (1) to increase the number of authorized shares without obtaining the requisite unitholder consent and (2) to issue units that, although created in accordance with the provisions of the LLC Agreement, had not been properly authorized.

In reaching its conclusion on the breach of the LLC Agreement, the court noted that it is incumbent upon parties to an LLC Agreement to manifest their intent to deviate from the meaning that a reasonable investor would attribute to a term. The court therefore rejected the strained meaning of the familiar corporate law term "authorize" that the defendants advocated. The court also found the facts of this case supported application of the rule of contra proferentum, which requires that ambiguous contract terms be construed against the drafter. Specifically, the court concluded that the plaintiff reasonably understood the use of the term "authorize" in the LLC Agreement to place a limit on the level of dilution he faced subject to his consent, in his capacity as a common unitholder, to increase such dilution.

The court next addressed the plaintiff's claim of breach of the duty of loyalty. The plaintiff alleged breach of the duty of loyalty by the directors and by two unitholders that allegedly controlled Adhezion. The court first turned to plaintiff's claim against the unitholders. Because neither unitholder alone possessed the voting power to control Adhezion, the plaintiff needed to show that the unitholders acted together to exert control over the company. The court concluded that the plaintiff failed to allege facts demonstrating a concerted effort by the unitholders to control Adhezion.

In connection with its analysis of breach of the duty of loyalty by the directors, the court reviewed the LLC Agreement to determine what provisions, if any, addressed fiduciary duties. The court concluded that the LLC Agreement defined the scope of director fiduciary duties in two ways: first, by setting a general standard for fiduciary conduct and, second, by giving the directors the right to engage in conflicted transactions subject to certain requirements.

Having determined the scope of the duties owed by the directors, the court noted that it must determine the applicable standard of review and the party that bears the burden of proof. The provisions of the LLC Agreement pertaining to conflicted transactions gave directors the right to engage in a conflicted transaction provided that the payments made by Adhezion were "comparable to the payments or fees that would be paid to unrelated third parties providing the same property, goods, or services" to Adhezion. In addition, the LLC Agreement provided that a conflicted transaction would not be deemed void or voidable if the transaction was "fair" to Adhezion at the time it was authorized. The court noted that Delaware courts have interpreted similar provisions as effectively calling for review under the entire fairness standard, which requires a showing of a fair process and a fair price.

The court then addressed the question of which party must demonstrate that there was a fair process and a fair price. The court first noted that in the corporate context, or where default fiduciary duties are applicable in the LLC context, director-defendants bear the burden of proving that a transaction is entirely fair. The duties in this case, however, were set forth in the LLC Agreement and therefore contractual in nature. Focusing on the LLC Agreement provision requiring conflicted transactions to be on terms comparable to unrelated third party transactions—i.e., entirely fair—the court held that the plaintiff had the burden of proving a breach of the contractual requirement that the challenged transactions be entirely fair. The court recognized, however, that other provisions of the LLC Agreement pertaining to conflicted transactions rendered its conclusion not free from doubt. These other provisions deemed conflicted transactions not to be void or voidable if certain requirements were met. The court noted that it was unclear whether qualifying under one of these safe harbor provisions would trigger review under the business judgment rule or shift the burden to the party challenging the transaction. The court concluded that its approach of allocating to the plaintiff the burden to prove entire fairness harmonized all provisions of the LLC Agreement pertaining to conflicted transactions. According to the court, if the directors had the burden to prove entire fairness then one of the safe harbors, which deemed a transaction not to be void or voidable if it was fair to the company at the time it was authorized, would be redundant.

In connection with its discussion of the burden of proof, the court distinguished the conflicted transaction LLC Agreement provision at issue here with a similar provision interpreted by the Delaware Supreme Court in the recent *Auriga* case. The relevant LLC agreement provision in *Auriga* provided that members or managers could not, without the required consent, cause the company to enter into a conflicted transaction on terms less favorable than terms obtainable in an arm's length transaction. The Supreme Court concluded that under this provision the defendants had the burden to prove the entire fairness of the challenged transaction. In contrast, the court noted that Adhezion's LLC Agreement gave directors the affirmative right to enter into a conflicted transaction so long as the terms of such transaction were comparable to terms of unrelated third party transactions. The court also noted that dicta in the Supreme Court's *Auriga* decision indicated that compliance with one of the LLC Agreement's safe harbor provisions may trigger application of the business judgment rule. Specifically, in *Auriga*, the Supreme Court stated that if the transaction at issue had been conditioned on approval by an informed majority of nonaffiliated members as required by the LLC agreement, it would not have been reviewed under the contractual entire fairness standard and the Supreme Court contrasted such a result with the usual outcome of shifting the burden to prove entire fairness in the corporate law context.

The court concluded that the directors complied with one of the safe harbors: good faith approval of the challenged transaction by disinterested directors with knowledge of the material facts. According to the court, at least two of the directors were disinterested and both approved the challenged transactions. As a result, the court found that the directors should arguably receive the benefit of the business judgment rule or, at a minimum, the burden to demonstrate entire fairness should shift to the plaintiff, assuming the plaintiff did not already bear such burden.

Having addressed what standard of review applied and which party had the burden of proof, the court turned to the issue of whether the challenged transactions were entirely fair. The court noted that although its analysis assumed that the plaintiff had the burden to prove entire fairness, the facts of this case were sufficiently strong regardless of which party had the burden. Turning to the factual evidence, the court noted that at the time of each of the challenged transactions, Adhezion needed money to continue its business. Adhezion was a risky investment because of threatened patent litigation, lack of a strategic partner and a market dominated by a single competitor. Adhezion had solicited further outside investment without success and had considered offers to purchase that included a limited amount of cash up front. The court also found the defendants' expert witness' testimony regarding fairness of the transactions and the value of Adhezion to be more credible. As a result, the court concluded that, regardless of which party had the burden to prove the entire fairness of the challenged transactions, the transactions were entirely fair and the directors therefore had not breached the duty of loyalty. The court further noted that because there had been no breach of fiduciary duty the plaintiff's aiding and abetting claim could not succeed.

The court next turned to the issue of the remedy for the directors' breach of the LLC Agreement. The plaintiff requested reformation of the terms of the challenged transactions. Specifically, the plaintiff asked the court to cancel all warrants and certain options that were issued and to deem promissory notes to have been issued instead of units. The court refused to grant the plaintiff's request. The court noted that Adhezion needed cash at the time of the challenged transactions and received cash on fair terms. Moreover, the relief requested would create a windfall for the plaintiff. As a result, the court declined to award damages beyond nominal damages of one dollar.

Finally, the court turned to the plaintiff's request to require the defendants to reimburse Adhezion for legal fees advanced to the defendants. The court found that the directors were entitled to indemnification under the terms of the LLC Agreement and that the non-director defendants were entitled to indemnification under the terms of a purchase agreement entered into in connection with one of the challenged transactions. As a result, the court concluded, whether the defendants were also entitled to advancement was largely moot at this advanced stage of the proceeding. Moreover, the court noted that although the LLC Agreement did not expressly address advancement, it gave the directors broad authority to make decisions and take actions not otherwise provided for in the LLC Agreement. The court concluded that the directors therefore had authority to approve advancement of the defendants' legal fees.

10. *Whittington, II v. Dragon Grp., LLC*, C.A. No. 2291-VCP (Del. Ch. May 25, 2012)

Plaintiff was a member of a Delaware LLC and filed actions against the LLC and the other members of the LLC seeking, among other things, recognition of his status as a member of the LLC. While litigating the substantive claims in this litigation, the other members of the LLC authorized the LLC to pay the legal fees incurred to "defend the members and the LLC against actions attempting to diminish their share and force [plaintiff] on the LLC as a member." Pursuant to this authorization, the LLC paid the legal fees for itself and the defendant members. Plaintiff claimed that because he was ultimately found to be a member of the LLC, he was also entitled to have his attorneys' fees paid by the LLC or, alternatively, that the payment of the defendant members' attorneys' fees by the LLC was a de facto distribution and, therefore, he was entitled to his pro rata share of that distribution.

The court found that, because the authorization was for legal fees to "defend" the members, it could not have been intended to include plaintiff. Thus, the court found that plaintiff was not entitled to payment of his attorneys' fees. The court noted that under Delaware LLC law, members of an LLC may authorize the payment of attorneys' fees for all or a subset of the LLC's members so long as such action is not contrary to the terms of the LLC agreement. Because nothing in the LLC agreement prohibited payment of attorneys' fees and the authorization was given by the requisite number of members of the LLC, the court found that it was not invalid on its face and thus it would not be appropriate to treat the payments made pursuant to the authorization as a de facto distribution. The court noted that plaintiff could still pursue a claim that the defendant members' decision to reimburse their own attorneys' fees was wrongful.

11. *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, C.A. No. 6520-VCN (Del. Ch. Feb. 29, 2012)

In this decision in a long-running dispute in the Court of Chancery, one member of a Delaware LLC ("Krohn") sought, pursuant to a motion for judgment on the pleadings, to require the other member ("Lola") to pay Lola's share of legal fees incurred by the LLC, on behalf of Krohn and the LLC's chief executive office ("Hazell"), that Krohn had paid. Under the LLC's operating agreement, if the audited balance sheet of the LLC for any financial year showed negative net assets for the LLC, Lola was required to fund 51% of the amount of the negative net assets of the LLC. Krohn acknowledged that the LLC did not have an audited balance sheet but alleged that Lola's conduct had improperly prevented the preparation of an audited balance sheet. The court stated that if Lola had unjustifiably interfered with the effort to obtain an audit, Lola should not be able to benefit from the lack of an audit and avoid an obligation to provide additional funding to the LLC. However, the determination whether Lola was responsible for improperly preventing an audit was a factual matter that the court could not resolve on a motion for judgment on the pleadings. In addition, with respect to Hazell's legal fees, Lola argued that it could not be responsible for those fees because Hazell had no right to mandatory indemnification under the LLC's operating agreement. The court rejected this argument because, according to the court, the fact that an operating agreement could, but fails to, provide for mandatory indemnification does not preclude management of a Delaware LLC from deciding to provide an officer with assistance in paying legal fees arising out of work-related matters. The court held, again, that the determination of whether Hazell's legal fees were necessary and reasonable presented factual issues that could not be resolved on a motion for judgment on the pleadings.

12. *Hughes v. Kelly*, C.A. No. 4814-VCN (Del. Ch. June 30, 2010)

In this decision, the Court of Chancery addressed plaintiffs' motion to dismiss defendants' counterclaims in which defendants' sought to enforce indemnification, non-disparagement and release provisions in the LLC Agreement of Fund Administration Holdings, LLC, a Delaware limited liability company ("FAH"). In July 2002, FAH, a holding company that controlled International Fund Services (N.A.), LLC ("IFS"), sold IFS to State Street Bank and Trust Company ("State Street") in an asset sale transaction. One month prior to the sale, FAH's LLC Agreement had been amended to make defendant Kelly the managing member of FAH, thereby tasking Kelly with responsibility to distribute to FAH's members the proceeds of the sale. The sale agreement provided that part of the sale price was to be paid to FAH in a lump sum at closing, with the balance determined according to IFS's financial performance over the three year period following the sale. Under the sale agreement, Kelly was obligated to serve as CEO of IFS during the three year post-closing period and not to compete with IFS for two years after termination of his employment with IFS. Each plaintiff was an FAH member, a senior IFS executive before the sale, and a State Street employee after the sale.

In 2005, Kelly made distributions to FAH members, setting aside approximately $5.5 million to cover potential tax or legal liabilities and other costs. Kelly resigned from IFS in August 2005 and started a competing business in 2007. In May 2008, State Street filed suit in New York alleging, inter alia, breach of the sale agreement's non-competition provision. After settling with State Street in June 2009, Kelly subsequently made a distribution to all FAH members other than plaintiffs, claiming he was entitled to the withheld amount as indemnification pursuant to the indemnification provision of FAH's LLC Agreement and that he could choose from which members to seek such indemnification. Plaintiffs filed this suit and Kelly counterclaimed, seeking a declaration that plaintiffs were responsible under the indemnification provision for costs associated with the New York action and this action, claiming breach of a non-disparagement provision in FAH's LLC Agreement based on plaintiffs' alleged role in inducing State Street to bring the New York action against Kelly, and seeking either a declaration that plaintiffs' claims fell within the release provision in FAH's LLC Agreement or specific performance of the release in the alternative.

FAH's LLC Agreement indemnified Kelly against claims "relating to or arising out of the activities of [FAH], or activities undertaken in connection with [FAH], or otherwise relating to or arising out of" the LLC Agreement except for "bad faith" acts. Plaintiffs argued that the indemnification provision was limited to Kelly's role as the managing member of FAH and did not apply to the conduct at issue in the New York action—namely, wrongful acts as CEO of IFS and immediately thereafter. Defendants argued that Kelly's position as CEO of IFS allowed him to maximize distributions to FAH members and therefore was inextricably intertwined with his role as managing member of FAH. The court framed the issue as "whether an indemnification clause that facially limits itself to one role of many held by an executive can be expanded to include actions taken in other roles that have some relation to that role subject to indemnification." Although the court was "skeptical" of defendants' "expansive reading" of the clause, it held that the indemnity clause was susceptible to two opposing, yet reasonable, interpretations and, as a result, it refused to grant plaintiffs' motion to dismiss under the applicable standard requiring that all reasonable inferences be drawn in favor of the non-moving party. The court likewise found that the ambiguities as to the scope of the indemnification clause also precluded dismissal of defendants' counterclaim for indemnification with respect to this action. Moreover, the court noted, assuming indemnification was not granted for the New York action, questions of fact might remain as to whether Kelly's reliance on a broad interpretation of the indemnification clause in withholding funds from plaintiffs constituted bad faith.

Under FAH's LLC Agreement, each member agreed, for a period of one year following the member's "Effective Termination Date," not to "engage in any conduct or make any statement disparaging or criticizing, or that could reasonably be expected to impair the reputation or goodwill of [FAH,] the Managing Member, . . . any of their respective Affiliates, or any products or services of these, in each case except to the extent required by law or legal process." Plaintiffs argued defendants' claim that they breached this provision should be dismissed on a number of grounds. First, plaintiffs contended that criticism of Kelly in his capacity as CEO of IFS fell outside the scope of the provision. Because the LLC Agreement defined "Managing Member" as "James P. Kelly" but did not facially restrict the non-disparagement provision to his role as the FAH's managing member, the court found the clause to be ambiguous and therefore declined to dismiss defendants' counterclaim on this basis. Next, plaintiffs argued that the time period prescribed in the non-disparagement provision expired by the time of the New York action. The court rejected this argument, noting that because plaintiffs were still FAH members and IFS employees, their respective "Effective Termination Dates" had not yet occurred. Finally, plaintiffs contended that their disclosures were exempt under the provision's "legal process" exception. Plaintiffs argued that, under agency law principles, they were fiduciaries of State Street and therefore obligated to disclose relevant information that could affect the decisions of their principal. The court, however, concluded that plaintiffs failed to meet their burden of establishing that "legal process" should be read that expansively. The court also noted that inclusion of the word "required" suggested "mandated disclosure." Plaintiffs also attempted to take advantage of the absolute privilege afforded to trial witnesses, but the court declined to recognize such a privilege at this point in the litigation, noting that many factual questions were relevant to application of the privilege.

The release provision in FAH's LLC Agreement provided that each member released Kelly from all claims "relating to or arising out of the activities of [FAH], or activities undertaken in connection with [FAH], or otherwise relating to or arising out of" the LLC Agreement except for "bad faith" acts. Defendants argued that this clause required plaintiffs first to obtain a declaratory judgment that Kelly had acted in bad faith before plaintiffs could argue that the release clause did not apply to that conduct. The court, reading the LLC Agreement as a whole, declined to accept such a "hypertechnical approach" requiring a "two-stage litigation process in order to induce Kelly to carry out his primary obligations under the Agreement." The court therefore granted plaintiffs' motion to dismiss defendants' counterclaim based upon the release clause of the FAH LLC Agreement.

13. *Travelcenters of Am. LLC v. Brog*, C.A. No. 3751-CC (Del. Ch. Dec. 5, 2008)

Plaintiff, Travelcenters of America LLC (the "Company"), sought indemnification from defendants, who were shareholders of the Company, for costs incurred by the Company related to a proposal by defendants to nominate two persons to the board of directors of the Company which the court had previously held, in a declaratory judgment action brought by the Company, failed to comply with the detailed notice procedures required by the Company's LLC Agreement for a shareholder to nominate a member to the board of directors. The Company argued that it was entitled to indemnification pursuant to Section 10.3 of the Company's LLC Agreement, which provided that "each shareholder . . . will indemnify [the Company] from and against all costs and expenses, including reasonable attorneys' and other professional fees, arising from such shareholder's breach of any provision of the LLC Agreement." Defendants moved for judgment on the pleadings. This opinion addresses defendants' motion for judgment on the pleadings.

The court held that for the Company to recover under Section 10.3 of the Company's LLC Agreement, the Company would need to show that defendants breached the Company's LLC Agreement. The Company argued that defendants breached the Company's LLC Agreement by failing to comply with Section 9.7 of the Company's LLC Agreement, but the court rejected this argument. The court reasoned that there is a distinction between promises and conditions, and that while the non-performance of a promise can result in a breach of a contract, the non-occurrence of a condition is not considered a breach unless the party promised that the condition would occur. Accordingly, unless a party is under a duty that a condition occur, the non-performance of a condition is not a breach of that agreement. In this case the court concluded that the requirements of the notice provision were conditions to the Company's performance and not promises by the shareholders. Although the Company acknowledged that the notice provision was a condition, it argued that it was also a promise by shareholders not to submit non-compliant notices. In support of this contention, the Company relied on the "mandatory" language in the notice provision of the Company's LLC Agreement. In rejecting this argument, the court explained that the presence of mandatory words such as "must" and "shall" did not compel a finding that the notice requirements were promises not to submit non-compliant notices. The notice requirements were conditions to the nomination of a person for election as a director. Therefore, defendants' failure to comply with the notice provisions was not a breach of the Company's LLC Agreement entitling the Company to indemnification but rather was merely the non-occurrence of a condition. Thus, the court concluded that defendants were entitled to judgment as a matter of law and granted their motion for judgment on the pleadings.

14. *Donohue v. Corning*, C.A. No. 3733-VCS (Del. Ch. June 20, 2008)

Plaintiff, following his removal for cause as a managing partner, chairman of the board and a managing member of a Delaware LLC (the "Company") sought advancement of legal fees and expenses incurred in a legal proceeding that he initiated to challenge his removal, alleging that there was no "cause." In ruling on a motion by plaintiff for summary judgment, the Chancery Court addressed the issue of whether the Company's LLC Agreement provided plaintiff with a right to advancement for an action he brought to contest his removal. The court denied plaintiff's motion, finding that the relevant provision of the Company's LLC Agreement provided advancement only for the defense or other defensive disposition of an actual or threatened proceeding and that, because defendants did not threaten or initiate a proceeding against plaintiff, he is not entitled to advancement.

The relevant provision of the Company's LLC Agreement that plaintiff looked to in support of his claim for advancement provided in part that: "the Company shall indemnify and hold harmless . . . the Covered Persons from and against all liabilities and expenses . . . incurred in connection with the defense or disposition of any claim, action, suit, or proceeding . . . with which the Covered Person may be threatened . . . ." The court determined that the best reading of the advancement provision is that it was meant to apply only in situations in which a suit has been brought against or threatened against a person entitled to indemnification under the Company's LLC Agreement. Plaintiff argued that his removal for cause, which was based on an alleged breach of his fiduciary duties to the Company, constituted a threat of a proceeding against him. The court found, however, that defendants, who were clearly aware of the contours of the advancement provision, never actually threatened to bring an action for breach of fiduciary duty against plaintiff or otherwise took actions that could reasonably be interpreted as a threat of a proceeding and that the removal of plaintiff was the only consequence defendants intended to attach to the actions they alleged constituted "cause." The court thus held that plaintiff was not entitled to advancement because he could not identify a threatened "claim, action, suit or proceeding" and therefore denied his motion for summary judgment. In rendering its decision, the court noted that the LLC Agreement provided an adequate incentive for members and former members to bring meritorious suits to enforce their contractual rights under the LLC Agreement by requiring the losing party in such a suit to pay the fees and costs of the prevailing party.

15. *Bernstein v. Tractmanager, Inc.*, C.A. No. 2763-VCL (Del. Ch. Nov. 20, 2007)

Plaintiff had been a manager of a Delaware limited liability company (the "Company") that was converted to a Delaware corporation. Plaintiff also served as legal counsel for the Company prior to and following the conversion. Plaintiff brought suit in New York seeking recovery of legal fees and the Company counterclaimed against plaintiff. Thereafter plaintiff brought an action seeking advancement of the litigation expenses incurred by plaintiff in the New York action and expenses incurred in securing the advancement. Both parties filed motions for summary judgment. Defendant argued that the operating agreement of the Company prior to its conversion did not provide its managers with mandatory advancement and the bylaws of the Company following the conversion, although providing mandatory advancement to its directors and officers, did not provide any advancement to the persons who served as managers of the Company prior to its conversion. Additionally, defendant argued that the actions brought against plaintiff were brought "by reason of the fact" that he was the Company's attorney, not a director of the Company and, therefore, not covered by the mandatory advancement provisions of the Company's bylaws. With respect to defendant's first argument, the court reasoned that although under Section 18-216(h) of the LLC Act, upon a conversion the converted entity becomes liable for any contractual obligations of the LLC under its operating agreement including any contractual indemnification obligations, the scope of that liability would be the same as provided in the applicable operating agreement, and the operating agreement of the Company did not provide for mandatory advancement. Thus, the court concluded that plaintiff would not be entitled to advancement for actions taken as a manager of the Company. The court also rejected plaintiff's claim for advancement for acts occurring after the conversion when he was a director or officer of the Company finding that none of the claims brought against him in the New York litigation were "by reason of the fact" that he was a director or officer of the Company as required by the Company's bylaws, but rather rose out of actions taken by plaintiff as the Company's attorney. The court therefore granted the defendant's motion for summary judgment.

16. *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572 (Del. Ch. 2006)

Plaintiff, a former president and chief financial officer of American Image Management, Inc., an Illinois corporation ("AIM"), sought a declaration that he was entitled to advancement by American Image Management Services, LLC and American Imaging Management East, LLC, both of which were affiliates of AIM and Delaware limited liability companies (the "LLCs"), of his attorney's fees and expenses in connection with a dispute between plaintiff and AIM and another related company. The LLCs moved to dismiss for failure to state a claim asserting first that plaintiff's claim was subject to mandatory arbitration and, second, that as a substantive matter he had no rights to advancement. The court held that the claim was not subject to arbitration but agreed with defendants that plaintiff did not have a right to advancement and, therefore, granted the motion to dismiss.

In determining whether plaintiff's claim was subject to mandatory arbitration, the court had to determine whether the claim arose under a consulting agreement between AIM and another company for which plaintiff worked and which provided for mandatory arbitration of all claims arising thereunder. Although the court acknowledged that the arbitration clause was broad and that Delaware public policy favored arbitration, it concluded that plaintiff's claims arose by operation of Delaware law independent of the consulting agreement and that plaintiff had rights under the LLC agreements of the LLCs by virtue of his having been an officer of AIM. Consequently, the court held that plaintiff's claim was not subject to arbitration under the consulting agreement. However, in analyzing plaintiff's substantive claim, the court noted that Delaware law had traditionally recognized that indemnification and advancement were two distinct and different legal rights with the latter being a narrower and more provisional subset of the former. While the LLC agreements of the two LLCs contained indemnification language, the court noted that it was undisputed that they contained no express mention of any mandatory advancement rights. Plaintiff attempted to find an advancement right in the phrase "hold harmless" but the court was unpersuaded and held that plaintiff had no rights to advancement and, therefore, dismissed the claim.

17. *Citrin v. Int'l Airport Ctrs., LLC*, C.A. No. 2005-N (Del. Ch. Sept. 7, 2006)

This decision of the Court of Chancery followed a ruling by a federal appeals court (see *Int'l Airport Ctrs., LLC v. Citrin*, 455 F.3d 749 (7th Cir. 2006)) that a claim for advancement may be litigated outside of the lawsuit giving rise to such claim, which allowed this action in the Court of Chancery to proceed. Having previously determined in a judgment on the pleadings that the underlying lawsuit implicated plaintiff's right to advancement under the operative limited liability company agreement, the remaining issue addressed by the court in this opinion was whether plaintiff was entitled to pre-judgment interest on the amounts for which plaintiff was entitled to advancement. The court stated that when a plaintiff has a contractual right to advancement, as in this case, the time at which the defendant unjustifiably refuses to pay the amount due is the starting point for the accrual of interest, noting that the requirement to pay interest is to ensure that a plaintiff to whom payment was owed does not suffer injury by the defendant's unjustified delay in making such payment. The court acknowledged that in prior cases the time at which interest began to accrue was the time as which the specific amount of fees and expenses incurred was submitted to the defendant. In this case, however, defendant refused to identify to plaintiff to whom plaintiff should submit his invoices, which precluded plaintiff's submission of invoices specifying his fees and expenses. The court estimated that had defendant identified a person to whom fees and expenses should be sent as requested in plaintiff's demands for advancement, plaintiff would have delivered the invoices within ten days thereafter and thus determined that this was the appropriate date from which interest would accrue on expenses incurred before the date of his first demand and that interest would accrue on all later expenses from the date on which they were paid by plaintiff.

18. *Delucca v. KKAT Mgmt.*, L.L.C., C.A. No. 1384-N (Del. Ch. Jan. 23, 2006)

Plaintiff moved for a judgment on the pleadings seeking from defendants advancement of her legal fees and expenses in connection with a lawsuit brought against plaintiff by affiliates of the defendants. Plaintiff was a former employee and Managing Member of Katonah Capital, L.L.C ("Katonah") and a member of each of the defendant limited liability companies (the "KKAT Companies"). The KKAT Companies, affiliates of Kohlberg Capital, L.L.C. ("Kohlberg"), were formed by plaintiff and Kohlberg to invest in certain investment funds (the "Funds") of which Katonah served as the investment manager and plaintiff was the key money manager. During the course of plaintiff's employment with Katonah, many disputes arose including plaintiff's failure to hire another money manager when Kohlberg sought an additional manager to help manage the funds, plaintiff's alleged interference with meetings between Katonah employees and prospective buyers of Katonah during a proposed sale of Katonah and plaintiff's alleged formation of a competing venture and supposed sharing of confidential and proprietary information of Katonah with third parties. Plaintiff's alleged violations of fiduciary and contractual duties prompted Katonah and Kohlberg to bring an action against plaintiff (the "New York Action") and plaintiff sought advancement of her legal fees and expenses in connection with the New York Action from the KKAT Companies.

In relevant part, the Operating Agreement for each KKAT Company provided that "the Company shall, to the full extent permitted by applicable laws, indemnify and hold harmless each of the Indemnified Persons from and against any and all Losses to which such Indemnified Person may become subject…in connection with or arising out of or related to…the operations or affairs of the [KKAT Company] or the [Katonah Funds]." The Operating Agreement further provided that the KKAT Company would advance the legal and other expenses of "any Indemnified Person involved in any capacity in any action, proceeding or investigation in connection with any matter that may result in the indemnification." The court emphasized the importance of analyzing the plain language of the Operating Agreement as "advancement cases are particularly appropriate for resolution on a paper record, as they principally involve the question of whether claims pled in a complaint against a party…trigger a right to advancement under the terms of a corporate instrument."

The court first addressed whether plaintiff was an "Indemnified Person" under the Operating Agreement, which included any employee of an Affiliate of Kohlberg. Under the Operating Agreement, the term "Affiliate" included any "Person directly or indirectly…controlled by" Kohlberg. The court found Katonah to be an "Affiliate" of Kohlberg because Kohlberg was a majority stockholder in Katonah. Plaintiff, a former portfolio manager and managing principal of Katonah, was an "employee of an Affiliate" of Kohlberg and thus, an "Indemnified Person."

The next question for the court was whether plaintiff had "Losses" in order to seek advancement. Defendants asserted that plaintiff's company, not plaintiff, paid her legal fees thereby cutting off plaintiff's right to seek advancement of the fees. The court found defendants' argument to be inconsistent with the policy underlying Delaware law stating that defendant's argument "would encourage indemnitors to use the leverage of a denial of advancement to deprive indemnitees of appropriate legal advice, putting them under pressure to settle disputes not because of the merits, but because of doubts about whether they could obtain competent defense counsel."

The court next addressed whether the legal claims under the New York Action fell under the language of the advancement provision in the Operating Agreement. Noting that the language of the advancement provision was extremely broad using terms and phrases such as "to the full extent permitted by law," "in connection with or arising out of or related to," "operations" and "affairs," the court found that advancement could result from Losses connected with, arising out of or relating to either the operations or affairs of either the KKAT Companies or the Funds.

In trying to negate the broad provisions of the Operating Agreement, defendants first argued that allowing plaintiff to recover for advancement for defending claims such as stealing information and the tortious interference with the sale of Katonah would be a “startling proposition.” The court rejected defendants’ argument citing the Delaware Supreme Court in *Homestore, Inc. v. Tafeen* and noting that advancement rights were particularly critical “when a business official is accused of serious wrongdoing.”

Defendants next sought an implicit requirement that the “Losses” in the advancement provision result from a claim of either the Funds or KKAT Companies, “or by their stockholders or members, acting as plaintiffs in that precise capacity.” The court again focused on the precise language of the Operating Agreement stating that the Operating Agreement could have easily limited advancement to situations where plaintiff was causing an injury to the KKAT Companies or the Funds. The language of the advancement provision, however, was drafted broadly to include acts of Indemnified Persons relating to or in connection with the KKAT Companies or the Funds including “through their employment with an Affiliate of Kohlberg, such as Katonah.” Finding that the advancement provision in the Operating Agreement was, “by its plain terms, expansively written and mandatory,” the court held it would enforce the Operating Agreement as written. The complaints alleged in the New York Action included plaintiff’s breach of confidentiality agreements with Katonah and the KKAT Companies, breach of contractual duties with Katonah by creating a competing company, breach of fiduciary duties owed to Katonah and Kohlberg, misappropriation of trade secrets, tortious interference with the sale of Katonah and tortious interference of the relationship among Katonah, Kohlberg and investors of the Funds, all of which the court found to relate to the affairs of the Funds.

Defendants’ also argued that because the Operating Agreement provided for liability exclusion of Indemnified Persons in another section of the Operating Agreement, plaintiff could only receive indemnification and advancement if the claims against her fell within the liability exclusion provision. The court stated that there did not appear to be any dependence between the two sections other than the reliance of the indemnification and advancement provision on the definition of “Losses” in the liability exclusion provision. Again, the court stated that if the drafters intended to make indemnity and advancement rights dependent on liability immunity rights granted in the liability exclusion provision, they could have done so.

The court also found that plaintiff was not required to seek advancement from the Funds before seeking such advancement from the defendants even though the Operating Agreement stated that “to the extent that any Indemnified Persons may be entitled to indemnification…such Indemnified Person first shall be required to seek indemnification . . . from [Katonah Funds].” The court distinguished indemnification and advancement, stating that the Operating Agreement did not clearly combine the rights of advancement and indemnification.

Finally, the court awarded plaintiff the legal fees and expenses associated with the action to enforce the advancement provision (“fees on fees”) because of her success on the claim. Citing the Delaware Supreme Court in *Stifel Financial Corp. v. Cochran*, the court noted that “the only way out of the *Stifel* ‘fees on fees’ award was for the KKAT Companies ‘to tailor their indemnification . . . to exclude ‘fees on fees’ if that was a desirable goal,’” and the KKAT Companies failed to do so. Additionally, the Operating Agreements permitted indemnification “to the full extent permitted by applicable laws” thus including the rule established by *Stifel*, which the court stated applied to both corporations and LLCs. The court also ruled that an award of fees on fees did not depend on the outcome of the New York Action because the award of fees on fees focused on whether plaintiff succeeded in an action for advancement, not whether she succeeded in the New York Action.

19. *Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co. LLC*, C.A. No. 20187 (Del. Ch. Mar. 10, 2004)

Plaintiffs, who were two former managers of a Delaware LLC, sought advancement of litigation expenses in connection with their defense of a civil action claiming that they engaged in misconduct as managers of the LLC. The relevant provisions of the operating agreement of the LLC provided that the LLC was required to advance legal expenses to the fullest extent permitted by law. Defendant argued that the limits on indemnification in the operating agreement, which precluded indemnification for, among other things, actions or omissions that were grossly negligent or involved fraud, misrepresentation, bad faith or other willful misconduct, also applied to the right to advancement. The court stated that advancement and indemnification are distinct types of legal rights and that the right to advancement is not ordinarily dependent upon a determination that the party in question will ultimately be entitled to be indemnified. The court found that the omission of a reference to advancement in the limitations on indemnification in the operating agreement evidenced the parties' intent that such limitations did not apply to the right to advancement. Defendant also contended that plaintiffs as a condition to advancement were required to provide a written undertaking to repay the advanced amounts if it were determined plaintiffs were not entitled to indemnification, even though the LLC's operating agreement contained no such requirement. The court noted that the LLC Act, unlike the DGCL which in Section 145(e) conditions advancement of expenses to currently serving corporate officers and directors on the receipt of an undertaking, is completely silent on the issue of advancement but does in Section 108 give broad authority to members of LLCs to set the terms for indemnification in their operating agreements and does in general support freedom of contract. The court thus found that the members of the LLC clearly had the authority to require a written undertaking as a condition to advancement in the operating agreement. The court further noted that it had held on other occasions that the advancement implies a general obligation to repay if the underlying conduct is ultimately judged to be not indemnifiable but that an obligation to repay does not necessarily imply a precondition of giving a written undertaking to do so. The court thus refused to imply an obligation to provide a written undertaking into the LLC's operating agreement. The court held that plaintiffs were entitled to advancement and also held that plaintiffs were entitled to their fees for bringing this action to enforce a contractual right to advancement.

20. *Morgan v. Grace*, C.A. No. 20430 (Del. Ch. Oct. 29, 2003)

Plaintiffs, who were members of two Delaware LLCs—4000 Associates, L.L.C. ("4000 Associates") and Gramor, L.L.C. ("Gramor")—brought an action against the LLCs and the only other member of both LLCs for advancement of legal fees in connection with a pending civil action against the plaintiffs brought by such other member in the Superior Court of Delaware. Defendants argued that plaintiffs were not entitled to advancement of legal expenses because the conduct at issue in the civil action was expressly precluded from indemnification in the LLC agreements of both LLCs.

The LLC agreement of 4000 Associates provided that 4000 Associates was required to advance legal fees to the fullest extent permitted by applicable law subject to the requirement that person requesting advancement undertake to repay the advanced amounts if it were determined such person was not entitled to indemnification. The court rejected defendants' argument that the no advancement was due because plaintiffs would not be entitled to be indemnified if the conduct alleged in the civil action were eventually proven true, stating that this argument is fallacious because it conflates the indemnification and advancement sections of the LLC agreement and blurs the distinct purpose of advancement provisions. The court held that the determination whether plaintiffs are entitled to indemnification in connection with the civil action can only be made after the civil action has been adjudicated and that, in the meantime, 4000 Associates must advance expenses to plaintiffs subject to a suitable undertaking. The court also held that plaintiffs were entitled to an award of their fees for prosecuting this claim.

The LLC Agreement of 4000 Associates also contained an unusual provision that required, except to the extent otherwise provided by law, all attorneys fees and costs incurred in connection with the prosecution and defense of any action brought by a member against another member or members of 4000 Associates to be borne by the member bringing the action, regardless of the outcome of any such proceeding. Plaintiffs argued that the other member of 4000 Associates was personally liable to them for advancement of their expenses in the civil action under such provision. The court held that the provision speaks to an obligation for the eventual payment of legal expenses but does not address advancement of legal fees and therefore is not applicable to the issues before the court. The court also noted that there would most likely be legal limitations on the obligation created by such provision that depend on the nature of the conduct involved.

The LLC agreement of Gramor provided for indemnification but was silent on the issue of advancement. The court, noting that Delaware law is well settled that the right to indemnification and the right to advancement are distinct, found that the absence of a right to advancement in the

Gramor LLC agreement reflected the intent of the parties not to provide for advancement and denied plaintiffs' claim for advancement.

21. *Weinstock v. Lazard Debt Recovery GP, LLC*, C.A. No. 20048 (Del. Ch. Aug. 1, 2003)

Plaintiffs were co-portfolio managers of two investment funds operated by Lazard Frères & Co. LLC. Plaintiffs severed their relations with the investment funds very abruptly by terminating their employment without prior notice and then allegedly put pressure on Lazard to transfer the assets of the investment funds to a new fund that plaintiffs intended to form at a competitor of Lazard. Lazard filed two lawsuits against plaintiffs in response to their conduct, and plaintiffs brought this action seeking advancement of the litigation expenses in such lawsuits under the operating agreements of the investment funds' general partner and investment manager, each of which was a Delaware LLC. Although it was undisputed that plaintiffs were entitled to indemnification under the operating agreements of the general partner and the investment manager, defendants claimed that the operating agreements limited advancement to persons currently serving in specified official capacities and, because plaintiffs had resigned, they were not entitled to advancement.

In each case, the indemnification provisions of the operating agreement expressly applied to individuals who had ceased to serve in the covered capacities but the advancement provisions did not include the same clear language with respect to individuals who had ceased to serve in such capacities. The court closely analyzed the language of the indemnification and advancement provisions of the operating agreements and held that when read contextually the relevant provisions of both operating agreements did not make the right to advancement dependent on current service in a covered capacity. The court thus held that plaintiffs were entitled advancement and, in addition, held that plaintiffs were entitled to their reasonable fees for prosecuting this action.

D. Distributions

1. *Utilisave, LLC v. Khenin*, C.A. No. 7796-ML (Del. Ch. Aug. 18, 2015)

Plaintiff Utilisave, LLC ("Utilisave") was a Delaware limited liability company that audited utility bills to help customers find savings. Plaintiff MHS Venture Management Corp ("MHS") was a corporation wholly-owned and managed by Michael Steifman, who founded Utilisave and promoted defendant Mikhail Khenin to CEO in 2003. MHS had a 50 percent membership interest in Utilisave, Khenin a 40 percent interest, and Utilisave President Donna Miele a 10 percent interest. Steifman and Khenin entered into an Amended and Restated LLC Agreement of Utilisave (the "Operating Agreement") and separate employment agreements in 2006. Under the Operating Agreement, they were the co-managing members of Utilisave, which meant that Khenin could not take certain actions without approval from MHS. The Operating Agreement also provided that all distributions were to be made at the discretion of the majority of the members, and because MHS controlled a 50 percent interest in Utilisave, Khenin and Miele could not achieve the majority vote required to take these actions without approval from MHS.

The relationship between Steifman and Khenin soured in 2007, when Khenin began to exclude Steifman from the business. Khenin purported to fire Steifman and to unilaterally extend his employment agreement when it expired in January 2009. After he assumed sole control of Utilisave, Khenin unilaterally declared six distributions to Utilisave's members and continued to serve as de facto CEO of Utilisave until August 2011, when he was removed from this position by court order.

In a separate action in New York against Utilisave and Khenin, MHS and Steifman brought claims to recover unpaid distributions and to obtain a declaratory judgment that Khenin's unilateral extension of his Employment Agreement was unauthorized. In June 2011, the New York court entered a declaratory judgment that the extension was unauthorized and that Khenin wrongfully withheld portions of MHS's distributions to fund Utilisave's defense of the New York action.

There were multiple prior actions in the Delaware Court of Chancery as well. First, MHS filed a petition for dissolution of Utilisave in March 2009. In August 2011, the court appointed a liquidating trustee and appointed Steifman as interim CEO of Utilisave. After rejecting multiple requests for a distribution from Khenin, the trustee moved forward with a plan to sell Utilisave or its assets. MHS was the only bidder, and the trustee recommended the sale of Utilisave as a going concern to MHS, which would purchase all the assets and liabilities of Utilisave in exchange for waiving its priority claim to all proceeds from the sale of the company and any legal claims it or Steifman had against Utilisave. Khenin objected to the sale, arguing that only the dissolution of

Utilisave was permitted. The Chancellor rejected this objection, explaining that the purpose of dissolution proceedings was to create an economically productive resolution and that the form is not critical. The transaction closed on July 9, 2012 and MHS became the sole owner of Utilisave.

Plaintiffs then filed this action against Khenin in the Court of Chancery, alleging nine counts, including breach of the fiduciary duty of loyalty and various breach of contract claims that included allegations of breach of the Operating Agreement. The dispute was referred by the court to a Master in Chancery (the "Master"), whose report on plaintiffs' motions and post-trial report are summarized here. Khenin counterclaimed that Steifman breached the Operating Agreement by failing to make a distribution after Steifman was appointed CEO. Then-Chancellor Strine dismissed the counterclaim as a matter of law, finding it to be an unreasonable reading of the Operating Agreement, and Khenin re-pled two counterclaims after being granted leave to do so. Before the court was plaintiffs' motion for partial summary judgment on six of the nine counts.

Plaintiffs' first count alleged Khenin breached his fiduciary duty of loyalty to Utilisave by incorporating a new business called Benchmarking Solution Services, Inc. ("Benchmarking") under his own name, issuing all authorized shares in Benchmarking to himself, and arranging for Benchmarking's bank statements to be mailed to Khenin's home address. Khenin admitted he opened Benchmarking for himself, and plaintiffs claim that by doing so he usurped a corporate opportunity of Utilisave. The Master denied plaintiffs' motion on this count, since plaintiffs did not suggest Utilisave lost any business to Benchmarking and the trustee recovered the approximately $30,000 that was in Benchmarking's bank account.

In a separate count, plaintiffs alleged Khenin breached the Operating Agreement by unilaterally making distributions during 2010 and 2011 without authorization from a majority of the members. Section 3.3 of the Operating Agreement provided in part as follows: "All distributions will be made at the discretion of the majority of the Members. It will be presumed that cash in excess of required working capital will be distributed unless there is a compelling reason to accumulate additional cash reserves." Khenin argued that the first sentence should be read to apply only to "discretionary" distributions, while the second sentence should be interpreted to apply only to "mandatory" distributions. Thus, he argued, when a majority vote could be obtained, the distribution of all excess cash was required, and as CEO he had the authority to unilaterally make that decision.

The Master rejected this interpretation. First, she noted that the earlier decisions by the New York Court and the Court of Chancery mandated a conclusion that no distributions could be issued without MHS's approval. However, even if these decisions did not collaterally estop Khenin from making this argument, the Master found under her own independent reading that the challenged distributions were unauthorized because the unambiguous language of the Operating Agreement provided that all distributions were discretionary. The second sentence merely explained a "presumption" that the parties agreed would apply in determining the amount of the discretionary distributions. Thus, the Master concluded that Khenin made several unauthorized distributions, but recommended that the Court of Chancery award only nominal damages of $1 since plaintiffs did not show that Utilisave was harmed by the distributions.

The Master then addressed Khenin's counterclaims. His first counterclaim had two parts. First, he argued that Utilisave was required to make a distribution during the pendency of the dissolution action under Section 3.03 of the Operating Agreement. He claimed that, by the time Steifman was appointed as acting CEO, Utilisave had accumulated cash in excess of required working capital, and that the cash should have been distributed to the members. However, when Khenin requested that the trustee issue a distribution in February 2012, the trustee declined to do so, reasoning that Utilisave could require funds in excess of the agreed amount of working capital to cover liquidated-related expenses and possible litigation. The Master dismissed this prong of the counterclaim, finding that plaintiffs' arguments were collaterally estopped by the New York's court's interpretation of Section 3.03 of the Operating Agreement and by then-Chancellor Strine's interpretation of this section. Khenin also argued that Miele had no right to a final distribution of approximately $15,000 she received from Utilisave in December 2012, since her interest in Utilisave was cancelled five months prior pursuant to the sale to MHS. Steifman characterized that payment as an employment bonus. Although the Master found the timing of the payout curious, because MHS fully owned Utilisave, the Master found it was free to pay distributions or bonuses to its employees at its discretion.

The Master also rejected the second part of Khenin's first counterclaim, in which he argued that Utilisave breached Section 6.04 of the Operating Agreement, which provided that "[u]pon dissolution of the Company a proper accounting shall be made by the company's accountants of the Company's assets, liabilities and operations." Because Utilisave was sold to MHS and remained a going concern, no accounting was required.

In his second counterclaim, Khenin argued that Utilisave breached Section 6.05 of the Operating Agreement by failing to distribute the company's remaining assets – approximately $800,000 in cash and $2.9 million in accounts receivable, as determined by the trustee's final accounting – to the members after the sale. He claimed that in order to realize its priority claim, MHS had to actually pay cash consideration for the assets, but the court rejected this argument because it would elevate form over substance. Khenin then argued that the sale of Utilisave to MHS did not extinguish his claim under Section 6.05 of the Operating Agreement because the court order approving the sale specifically stated that it was without prejudice to Khenin's claims against Utilisave, including his claims for distributions. As such, Khenin claimed that Utilisave's remaining assets were available for distribution after the sale to MHS and, because Steifman waived his priority claim in connection with the sale, the priority claim did not reduce the assets available for distribution. The Master rejected this argument, finding that once Utilisave's assets were sold, there were no assets left to distribute under Section 6.5. Although the court in approving the sale did so without prejudice to the claims, it made no finding as to the merit of those claims.

2. *Hampton v. Turner*, C.A. No. 8963-VCN (Del. Ch. Apr. 29, 2015)

Plaintiffs David Hampton, Sorin Brull and Richard Szymke co-founded defendant T4Analytics LLC ("T4" or the "Company"). Defendant Michael Turner, another co-founder of T4, contributed $220,000 to the Company and raised another $829,000 from T4's non-founding members. Hampton, Brull and Szymke made no capital contributions, but along with Turner each received a 23.54% interest in T4.

Plaintiffs sought judicial dissolution of T4 pursuant to § 18-801 or § 18-802 of the Delaware LLC Act. The Company responded by exercising an option to purchase plaintiffs' units under Section 5.3 of T4's LLC agreement (the "Agreement"), which permitted it to purchase the units of a member who seeks dissolution under § 18-801 for the "Fair Market Value" of the member's units. Section 5.4 of the Agreement provided that Fair Market Value was to be determined by an appraiser. The parties mutually selected an appraiser, who determined T4's Fair Market Value to be $1.886 million. The appraiser determined that he could not make a final determination of the value of plaintiffs' units, however, because of the parties' conflicting interpretations of the Agreement. Subsequently, T4 issued each of plaintiffs' checks for $197,089, purporting to close on its acquisition of their membership interests. T4 arrived at this figure by deducting $1.049 million (the amount of Turner's and the non-founding members' capital contributions) from $1.886 million and multiplying the difference, $837,000, by 23.54%.

Defendants then moved for summary judgment, arguing that plaintiffs lacked standing to pursue dissolution because they were no longer members and that they paid plaintiffs the fair market value of their units under Section 4.3 of the Agreement, which they maintained was the only provision explicitly addressing distributions and which included a waterfall priority. Plaintiffs, on the other hand, contended that Section 5.4 required T4 to pay them 23.54% of $1.886 million, and therefore that T4 had not purchased their membership interests. They argued that they were each entitled to $443,964 because Section 4.3 was not applicable to membership repurchases under Section 5.4.

The court began by looking to Section 5.3 of the Agreement, which referred to Section 5.4 for more detail on payment. Because Section 5.4 mentioned an arms-length sale and an appraisal, and not a pro rata division or the waterfall provision of Section 4.3, the court found that the section seemed to consider net assets, not capital contributions. Bolstering the court's conclusion that Section 4.3 did not apply was that it referred to distributions of excess cash, assuming that T4 had to maintain cash for business needs, and that neither Section 5.3 nor 5.4 referenced Section 4.3.

The court held that under the plain meaning of Sections 5.3 and 5.4, T4 could buy plaintiffs' portion of T4's appraised value without taking capital contributions into account. It found that this conclusion was not inequitable considering that Hampton and Brull invented the technology key to T4's business, that the Agreement distinguished between founding members and other members and that defendants played a role in drafting the contract. It further reasoned that when Turner and the non-founding members made capital contributions to T4, they no longer fully owned these assets.

Had they wanted to protect their rights to their capital contributions upon termination of their relationship with the Company, they could have done so by referring to the distribution waterfall in describing the purchase option. In sum, the court found no reason to disrupt the objective language used in the Agreement.

Finally, the court denied defendants' motion for summary judgment on the grounds that plaintiffs lacked standing. There was an unresolved issue as to whether defendants were obligated to pay the purchase price pursuant to the court's interpretation of the purchase option or if they could choose whether to leave plaintiffs with their units. The court found that until this issue was resolved, the purchase of plaintiffs' units could not be completed and thus plaintiffs would remain members with standing to seek dissolution.

3. *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, C.A. No. 4586-CS (Del. Ch. May 13, 2013)

This post-trial opinion involved a fund (the "Fund") formed as a Delaware LLC to invest in retirement homes. Two of the plaintiffs, the former manager of the Fund (the "Manager") and its affiliate, held a 5% ownership interest in the Fund and the main defendant, the California Public Employees' Retirement System ("CalPERS"), held the remaining 95% ownership interest in the Fund. Plaintiffs sued CalPERS claiming that CalPERS was required to pay them under the LLC agreement of the Fund (i) an incentive distribution, (ii) the value of their membership interests upon their withdrawal as members of the Fund and (iii) certain asset management fees. CalPERS had not made these payments because it challenged appraisals that were performed to value assets of the Fund that were used as part of the calculation of each of these payments and essentially asked the court to perform its own appraisal.

The court first addressed the threshold issue of which judicial standard of review is appropriate when a party seeks to dispute a value determined by a contractually designated appraiser. The court noted that the provisions of the LLC agreement governing the appraisal process were based on form contracts CalPERS used with various investment managers and gave them unilateral authority over the process, including the selection of the appraisers. The Manager argued that the appraisal process was governed by the LLC agreement and that the court had no ability at all to review the appraisals for any reason. CalPERS, on the other hand, argued that the court must independently review the appraisals because there was no dispute resolution process in the appraisal process. The LLC agreement did not provide a dispute resolution mechanism for appraisals unless they were made at the end of a specified period. In highlighting that Delaware respects the freedom of contract, the court held that a court may not second-guess appraised values that have been committed by contract to determination by appraisers unless the contractual appraisal process has been tainted by a breach of the implied covenant of good faith and fair dealing (e.g., concerted bad faith action between the appraiser and the other party). The court observed that parties could agree in their LLC agreement to provide for whatever level of judicial review they desire, but the parties in this case did not provide for any such judicial review.

The court then addressed whether there was a breach by the Manager of the implied covenant in connection with the appraisal process. In this regard, CalPERS claimed that the Manager misled an appraiser by giving the appraiser bullish projections of the assets of the Fund's future performance. However, the court found that the evidence indicated that the appraiser made its own independent projections and, therefore, there was no breach of the implied covenant.

The incentive distribution was based on "distributions" made to CalPERS and CalPERS argued that the calculation of "distributions" was incorrect because the Manager included distributions in its calculation but had failed to transfer cash to CalPERS in accordance with the LLC agreement. A "distribution" was defined in the LLC agreement to mean any "cash payment . . . distributed by the Company to [a] Member . . . ." The LLC agreement also provided that cash would be swept into a bank account daily and that on a monthly basis the Manager would instruct the bank to remit to CalPERS its respective portion of cash. However, the LLC agreement also provided in the same section that the Manager was to manage cash in accordance with cash management policies established by CalPERS and these policies defined distributions as "deposits made by the partners into the collection account for ordinary income." The court found that this created an ambiguity in how distributions were to be made and looked to the parties' course of dealing as evidence of how the parties intended the contract to be interpreted. The court found that the parties, through their course of performance of the contract, understood that distributions could be made to CalPERS through the cash management system (i.e., by being swept into the collection account and not when distributed out of that account). For example, the court mentioned that the Manager made clear in its quarterly management reports that it was accounting for payments of cash to CalPERS through the cash management system as "distributions" and contained a specific line item for the incentive distribution and CalPERS never objected.

With respect to payment to the Manager and its affiliate for their membership interests, the LLC agreement required CalPERS to purchase their membership interests when they withdrew from the Fund. Under the LLC agreement, for purposes of valuing the membership interests, CalPERS was required to have the assets of the Fund appraised 120 days after the Manager gave notice of its intent to resign. CalPERS had an appraisal done on the 120th day. The court found as a factual matter that a representative of CalPERS spoke with the appraiser and persuaded them to reduce the value of the assets by increasing the discount rate and by taking into account a "hypothetical condition." The court found that the pressure that CalPERS applied was a violation of the implied covenant of good faith and fair dealing. The parties also disagreed on the date on which the payment for the membership interests would be calculated. The LLC agreement provided that upon a withdrawal, the date of "valuation" would be 120 days after the date of receipt of an intent to withdrawal. CalPERS argued that this referred only to the appraisal, which was only a part of the total calculation. The court found that the term "valuation" was used broadly to cover the entire value of the interest and that if the parties desired that this only refer to the appraisal, they could have stated this in the LLC agreement.

With regard to asset management fees, CalPERS claimed that the Manager erroneously included leasehold interests in its calculation of these fees. The court noted that the LLC agreement was silent on whether leasehold interests would be included. Therefore, the court looked to extrinsic evidence to determine the parties' intent and noted that the best extrinsic evidence was what the parties actually did. For five years, the asset management fee included the leasehold interest and CalPERS approved these fees during that period. Thus, the court indicated that it would not deviate from this established course of dealing between the parties.

Finally, the court addressed certain fiduciary claims asserted by the Manager but quickly ruled against the Manager because, citing to Delaware Supreme Court precedent, such claims arose out of the same facts as the alleged breach of contract claims and where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim and any fiduciary claims arising out of the same facts that underlie the contract obligations are foreclosed as superfluous.

4. *AM Gen. Holdings LLC v. The Renco Grp., Inc.*, C.A. No. 7639-VCN (Del. Ch. Dec. 21, 2012); *The Renco Grp., Inc. v. MacAndrews AMG Holdings LLC*, C.A. No. 7668-VCN (Del. Ch. Jan. 18, 2013)

These two related cases involved an organizational structure that included two LLCs: Ilshar Capital LLC ("Ilshar") and AM Gen. Holdings LLC ("Holdco"). Holdco was one of two members of Ilshar. The other member was ILR Capital LLC ("ILR"), which was Ilshar's managing member. Holdco's members, in turn, were MacAndrews AMG Holdings LLC ("AMG"), which was Holdco's managing member, and The Renco Group, Inc. ("Renco"). Ilshar's LLC agreement required ILR to cause Ilshar to pay Holdco a preferred return distribution on January 31 of each year, beginning in 2013. Under Holdco's LLC agreement, Holdco was required to distribute that preferred return to AMG and Renco; provided, that AMG's right to receive its portion of the distribution was limited when the distribution would cause AMG's "Revalued Capital Account" to be less than 20% of the aggregate value of the Revalued Capital Accounts. In that circumstance, Renco could eventually elect to receive the portion of the distribution that AMG would have otherwise been entitled to receive. In October 2012, ILR disclosed to Holdco and AMG that, instead of abiding by the terms of the Ilshar Agreement and making the preferred return distribution to Holdco, ILR instead caused Ilshar to pay or credit directly to Renco the portion of the preferred return distribution to which Renco would have been entitled under the Holdco Agreement if Holdco had received preferred return distribution.

In the *AM Gen. Holdings* case, Holdco moved for a preliminary injunction, alleging that ILR violated the express terms of the Ilshar Agreement by not making the preferred return distribution to Holdco as required under the Ilshar LLC Agreement. The court granted the preliminary injunction, finding that Holdco had established much more than a reasonable probability of success on its breach of contract claim and that ILR's breach deprived AMG of its contractual right as Holdco's managing member to assess the Revalued Capital Accounts and then disburse the preferred return distribution according to the Holdco LLC agreement.

In the *Renco Group* case, Renco asserted that AMG violated the Holdco LLC agreement by making an improper tax distribution solely to AMG. Renco requested an order for expedited discovery and scheduling of a hearing on its motion for preliminary injunction, which the court granted. The court found, among other things, that Renco pled a colorable claim regarding whether AMG had "reasonably determined" the balance of the Revalued Capital Accounts as required by the Holdco LLC agreement in connection with the distribution of funds, which could lead to improper transfers of funds and threaten Renco with irreparable harm. The court therefore granted Renco's motion.

5. *Borin v. Rasta Thomas LLC*, C.A. No. 5344-CC (Del. Ch. May 4, 2010)

In this decision, the Court of Chancery addressed a motion by defendants to alter or amend an earlier judgment by the court in an action arising out of the repurchase by Rasta Thomas LLC (the "Company") of a member's 40% interest in the Company. Under the repurchase agreement, the member received payments characterized as "closing date cash consideration," "unpaid annual salary," and "return of capital contribution," which were collectively characterized as the "purchase price," at the December, 2009 closing of the repurchase. The Company's LLC Agreement provided that 40% of the Company's income would be allocated to the member for tax reporting purposes and also provided that the Company would make a tax distribution of 35% of the income allocated to the member so that the member could pay her taxes. After the closing of the repurchase, the member received a Schedule K-1 from the Company which reflected the allocation to the member of $184,306 of the Company's income for 2009. The member requested a tax distribution from the Company of 35% of such amount and when the Company failed to make such tax distribution, the member initiated this action.

Defendants argued at trial that the Company did not have to pay the member a tax distribution because the LLC Agreement was superseded by the repurchase agreement. The court disagreed, finding that it was inconsistent for defendants' to treat the LLC Agreement as binding on the parties for purposes of allocating income to the member while simultaneously treating it as superseded and not binding for purposes of making the tax distribution tied to the income allocation. Defendants argued that the court's judgment would result in a windfall to the member, which would be manifestly unjust. The court found that the payments to the member under the repurchase agreement were not intended to satisfy the Company's tax distribution obligation and therefore denied defendants' motion.

6. *Monier, Inc. v. Boral Lifetile, Inc.*, C.A. No. 3117-VCN (Del. Ch. Feb. 28, 2008)

Plaintiff and defendant were the only members of a Delaware LLC, each owning a fifty percent membership interest. Following a dispute among the members as to the distribution policy of the LLC, plaintiff filed an action for declaratory judgment in the Court of Chancery seeking a declaration as to the percentage of the LLC's net income that was required under the LLC Agreement to be distributed. This opinion addressed defendant's motion to dismiss.

The LLC was managed by a six-member management committee (the "Management Committee"), of which plaintiff and defendant were each permitted to appoint three members. The LLC Agreement provided that 50% of the net income of the LLC was required to be distributed on or before March 31 of the following calendar year "or at such other times as determined by the Management Committee." The LLC Agreement further provided that the LLC could only make other distributions so long as the LLC distributed 50% of its net income to the members on at least an annual basis "unless the Management Committee approves greater or lesser distributions without dissenting vote." In 2000, the Management Committee unanimously decided that "[f]rom the year 2000, a dividend will be paid annually equal to the audited net profits of the [LLC]." This decision was reflected in the minutes of the LLC which were signed by the Secretary of the LLC. The LLC adhered to this distribution policy over the next five years. In 2005, the members of the Management Committee appointed by defendant questioned the prudence of continuing to adhere to this distribution policy and recommended a return to the 50% distribution rate. The members of the Management Committee appointed by plaintiff disagreed and, without agreement among its members, no formal Management Committee action was adopted regarding the proper distribution rate.

Plaintiff argued that the Management Committee's action in 2000 set the distribution rate at 100% in perpetuity unless and until the Management Committee acted unanimously to change it.

The court determined that it could not at this stage of the proceedings conclude that plaintiff's interpretation of the distribution provisions of the LLC Agreement was unreasonable. The court found the LLC Agreement to be unclear as to whether the Management Committee's authority to adjust the distribution rate was intended to endure until the Management Committee acted unanimously to change the rate. Defendant argued that such an interpretation of the LLC Agreement would be tantamount to permitting the Management Committee to amend the LLC Agreement contrary to other provisions of the LLC Agreement that provided for an amendment procedure involving all members. The court stated that while defendant's interpretation of the distribution provisions of the LLC Agreement may be the better reading, it could not find at this stage that it was the only reasonable reading of such provisions and thus could not grant defendant's motion to dismiss.

Defendant also claimed that if the Management Committee's action in 2000 had changed the distribution rate in perpetuity until the Management Committee unanimously decreed otherwise, it would constitute an abdication of the Management Committee's fiduciary obligations to the LLC and its members. The court rejected this argument, holding that if the members of the LLC intended to confer broad authority on the Management Committee to establish the distribution rate, and the Management Committee validly exercised that authority, there is no basis to claim that the Management Committee breached its fiduciary duty simply by adopting a change to the baseline distribution rate.

7. *The Pepsi-Cola Bottling Co. of Salisbury, Md. v. Handy*, C.A. No. 1973-S (Del. Ch. Mar. 15, 2000)

In this case, one of the individual defendants contracted to purchase property with the intent of forming a Delaware LLC with the two other individual defendants for the purpose of constructing a residential community on the property. After discovering that the property contained wetlands that adversely affected the property's development potential, the three individual defendants abandoned construction plans and decided to attempt to sell the property. One of the individual defendants negotiated an option with the plaintiff to purchase the property. The three individual defendants then formed the defendant Delaware LLC and took title to the property through the LLC pursuant to the purchase contract. Four months later the plaintiff exercised its option to purchase the property from the LLC, paying over twice the amount of the purchase price. The defendants never disclosed the existence of wetlands on the property. After the plaintiff learned that the property contained wetlands, plaintiff brought this action for rescission and damages based on, among other claims, fraud and unjust enrichment.

The individual defendants moved to dismiss the case against them claiming that plaintiff could not recover directly against them as LLC members because they never directly held legal or equitable title to the property. They argued that a plaintiff could recover distributions to members of an LLC only if (i) the plaintiff pierced the LLC's "corporate" veil or (ii) Section 18-607 of the LLC Act was applicable. Section 18-607(b) provides that if a member receives a distribution that results in the LLC becoming insolvent, and the member knew at the time of the distribution that the distribution would render the LLC insolvent, the member is liable to the LLC for the amount of the distribution. The individual defendants argued that because neither of those two circumstances was alleged, the case must be dismissed against them.

The individual defendants first argued that they were protected from liability by Section 18-303(a) of the LLC Act, which provides in relevant part that "no member or manager of a limited liability company shall be obligated personally for any . . . debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company." However, the court rejected this argument because the LLC was not formed and the property was not acquired by the LLC until after the allegedly wrongful acts had been committed and, therefore, the individual defendants could not have been acting solely as members of the LLC when they committed those acts and thus were not protected by Section 18-303. The individual defendants then claimed that they were protected from liability by Section 18-607(b) of the LLC Act. They argued that Section 18-607 is the only provision by which a third party can recover from an LLC member without piercing the LLC's corporate veil and, because the complaint did not allege a claim under Section 18-607, they could not be held personally liable. The court also rejected this argument finding the individual defendants' expansive reading of Section 18-607 of shielding LLC members against all claims except those that arise under Section 18-607 incorrect and inconsistent with the provisions of Section 18-303 noted above. Finally, the court held that it did not need to address veil piercing because the LLC Act did not protect the liability of LLC members who (as in this case) are sued in capacities other than as members of the LLC, and, therefore, denied the individual defendants' motion to dismiss the case against them.

8. *MHM/LLC, Inc. v. Horizon Mental Health Mgmt., Inc.*, C.A. No. 14465 (Del. Ch. Oct. 3, 1996), *aff'd*, 694 A.2d 844 (Del. 1997)

Plaintiff brought suit alleging a right to a pro rata distribution based on the time it had owned its limited liability company interests. Plaintiff had sold its interest in a Delaware limited liability company on March 20, 1995 and claimed an entitlement under the terms of the limited liability company agreement, and other agreements relating to the distribution of profits, to a pro rata distribution of its ownership interest for the first twenty days of March, 1995. After examining the agreements, the court found that the limited liability company agreement provided for the requested pro rata distribution and that such interpretation was supported by the relevant provisions of the other agreements. The court interpreted provisions of the limited liability company agreement limiting the purchaser of ownership interest to allocable distributions from the date of purchase to logically entitle the seller of such interest to the allocable distributions up until the time of the sale and held that if a less natural result was contemplated, it should have been expressly provided for in the agreement. Accordingly, a motion for summary judgment by the plaintiff was granted and the defendant's cross-motion for summary judgment was denied.

E. Removal of Managing Member/Manager

1. *2009 Caiola Family Trust v. PWA, LLC*, C.A. No. 8028-VCP (Del. Ch. Oct. 14, 2015)

Plaintiff, 2009 Caiola Family Trust, a Florida trust ("CFT"), owned 90% of the membership interests of Dunes Point West Associates, LLC, a Delaware limited liability company and the owner of an apartment complex in Kansas (the "Company"). Defendant, PWA, LLC, a Kansas limited liability company ("PWA"), owned 10% of the membership interests of the Company and was its managing member. PWA itself was managed by additional defendant Ward Katz ("Katz"), who owned 10% of the membership interests of PWA and was the CEO of the Company's property manager, Dunes Residential Services, Inc. ("DRS").

Plaintiffs, CFT and its trustee, suspected PWA had caused the Company to make distributions to members that were returns of member capital rather than returns on investment, misstated the Company's finances, paid asset management fees in violation of the limited liability company agreement of the Company and caused the Company to incur unreasonable expenses. Plaintiffs contended that in addition to the foregoing, defendants failed to participate in capital calls and committed other acts which, under the limited liability company agreement, permitted the removal of PWA as managing member and the recovery of damages. Defendants disputed these allegations and claimed that plaintiffs' claims were barred by laches. Based on these claims, plaintiffs asked the court to rule on the following: (1) whether plaintiffs could remove PWA as the managing member under the limited liability company agreement; (2) whether the alleged breaches of the limited liability company agreement by PWA established a basis to award money damages to the Company; (3) whether those same facts showed a breach of Katz's fiduciary duties owed to the Company; and (4) whether either party was entitled to attorney's fees from the other party. After trial, the court made the following ruling.

First, the court agreed that PWA could be removed as managing member because Katz ceased to be actively involved with the property manager's business when the Company replaced DRS with a new property manager, which was a violation of a provision in the limited liability company agreement of the Company that required Katz to remain actively involved with the property management and granted the removal of PWA as managing member.

Second, with respect to PWA's alleged breaches of the limited liability company agreement of the Company, the court held that plaintiffs proved that PWA materially breached the provisions that only permitted payment of asset management fees when the Company had sufficient net cash flow. The other claims either were not material or were barred by laches because the financial statements provided to plaintiffs put them on inquiry notice that the Company may not have had sufficient net cash flow to warrant payment of asset management fees at the time they were made.

Third, the court held that plaintiffs failed to meet their burden to prove that Katz breached his fiduciary duty to the Company or plaintiffs as a result of the asset management fees paid by the Company to the asset manager. The court concluded that under the *In re USACafes, L.P.* line of cases, Katz, as the managing member of PWA, would owe a duty of loyalty to the Company; however, plaintiffs' allegation that Katz caused the Company to pay the asset management fees in order to benefit his relationship with the asset manager was not supported by the facts. Plaintiffs failed to prove Katz's relationship to the asset manager was material to Katz and the asset management fees would have accrued regardless of whether they were paid out at the time they were.

Finally, the court decided to award plaintiffs only 50% of their attorneys' fees because they prevailed on their principal issue, removing the managing member, but only recovered a fraction of the money damages they sought due to laches.

2. *Feeley v. NHAOCG, LLC,* C.A. No. 7304-VCL (Del. Ch. Mar. 20, 2012); (Del. Ch. Oct. 12, 2012); and (Del. Ch. Nov. 28, 2012)

The Court of Chancery released three opinions in the *Feeley v. NHAOCG, LLC* matter. In the first two *Feeley* decisions, the court determined that: (1) it had jurisdiction over defendant NHA OCG, LLC ("NHA") based on LLC Act Sections 18-110(a) and 18-109(a), and (2) it would largely grant plaintiffs' motion for judgment on the pleadings based on defendants' failure to abide by the terms of the operating agreement of Oculus LLC (the "Oculus Operating Agreement").

The court found that plaintiff Feeley had entered into a business relationship with defendants A. Akel, G. Akel, Newman, Hughes, and NHA. The parties had formed two LLCs: Ak-Feel LLC ("Ak-Feel"), formed by Feeley and A. Akel, and Oculus LLC ("Oculus"), formed by Ak-Feel and NHA. Ak-Feel's Operating Agreement designated Feeley as its Managing Member; the Oculus Operating Agreement in turn designated Ak-Feel as its Managing Member. As Managing Members of the two entities, Feeley and Ak-Feel had full and exclusive authority to manage, control, administer and operate Ak-Feel and Oculus, respectively. Additionally, the Oculus Operating Agreement enumerated the only permissible ways to remove Ak-Feel as its Managing Member: unanimous member consent, termination of Feeley or Akel, or default without cure by Ak-Feel under the Oculus Operating Agreement. Feeley also entered into an employment agreement with Oculus to serve as its President and CEO.

When the business relationship between Feeley and defendants soured, defendant NHA attempted to give Feeley notice that his employment contract with Oculus would not be renewed but he would remain an Oculus officer. Later, NHA also attempted to remove Feeley as an Oculus officer. However, NHA was not Oculus's Managing Member—Ak-Feel was—and the Managing Member had exclusive authority to act on behalf of Oculus. NHA also gave notice to Ak-Feel that it was exercising its right to remove Ak-Feel as Oculus's Managing Member, replacing Ak-Feel with NHA.

Plaintiffs filed suit to determine the validity of NHA's removal of Ak-Feel as Oculus's Managing Member and Feeley as its President and CEO. Defendants moved to dismiss the complaint for lack of personal jurisdiction. Plaintiffs then moved for judgment on the pleadings.

In its first decision, the court held that Section 18-110(a) granted it *in rem* jurisdiction to determine who validly holds office as a manager of a Delaware LLC. Notice of the claims to each defendant was proper; therefore, the court found that it had constitutional authority to determine who the Managing Member of Oculus was: Ak-Feel or NHA. The court also found that, pursuant to Section 18-109(a), it could exercise personal jurisdiction over those serving as managers of an LLC for the purpose of adjudicating breach of duty claims. The court viewed NHA as a manager because NHA participated materially in Oculus's management not only by removing Ak-Feel as Managing Member, but also by purporting to remove Feeley as an employee, and later as an officer—an action that only the Managing Member of Oculus could take, pursuant to the Oculus Operating Agreement. Finally, the court stated that, since NHA was subject to personal jurisdiction under § 18-109(a), the court had jurisdiction over the other counts of the complaint, which arose out of a common nucleus of operative fact. The court deferred ruling on the individual defendants' lack of personal jurisdiction claims pending further discovery and briefing.

After determining the jurisdictional issues, the court, in its second decision, largely granted plaintiffs' motion for judgment on the pleadings and entered the following four judgments: (1) that letters sent by NHA purporting to replace AK-Feel as Oculus' Managing Member were invalid and void because the Oculus Operating Agreement stated the only grounds under which AK-Feel could be removed and none of those grounds applied; (2) that the termination letter sent by NHA attempting to terminate Feeley as President and CEO of Oculus was invalid because it was not sent by the Managing Member, AK-Feel, as required by the Oculus Operating Agreement; (3) that the attempted termination of both Feeley's employment and his position as President and CEO of Oculus was unlawful and void because the termination was not affected by Oculus' Managing Member, AK-Feel; and (4) that defendants' representations to third parties stating that AK-Feel and Feeley had been removed were incorrect.

In the court's third decision, it analyzed the five counterclaims of Oculus's non-managing member, NHA, against Oculus's managing member, Ak-Feel and Ak-Feel's managing member, Feeley.

NHA's counterclaims were largely based on Ak-Feel and Feeley's allegedly failed attempts at managing Oculus. NHA contended that Feeley did not identify a sufficient number of real estate projects for Oculus, that the projects that he did bring to Oculus "ended in disaster due to Feeley's gross negligence" and that Feeley negotiated certain real estate deals for himself rather than presenting the deals to NHA.

Count I alleged, *inter alia*, that Ak-Feel breached the Oculus Operating Agreement by engaging in self-dealing because Ak-Feel usurped opportunities that belonged to Oculus. The court rejected this allegation because Ak-Feel had no contractual obligation under the Oculus Operating Agreement to present opportunities to Oculus. Count I also alleged that Ak-Feel breached the Oculus Operating Agreement by taking action that amounted to gross negligence and willful misconduct; because Ak-Feel answered this portion of Count I, the court did not address the allegation in defendants' motion to dismiss.

Count II alleged that Feeley aided and abetted Ak-Feel's breaches of the Oculus Operating Agreement as discussed in Count I. The court denied plaintiffs' motion to dismiss these allegations, holding that Count II pled "a *Gotham Partners* claim against Feeley for aiding and abetting a breach of contract (odd as that sounds) to the same extent that a claim was pled in Count I." The court based this decision on the fact that Feeley, as the managing member of Ak-Feel, ultimately made Ak-Feel's decisions and carried out those decisions; therefore, Feeley knowingly participated in the contractual breaches of duty alleged in Count I.

Count III alleged that Ak-Feel and Feeley breached default fiduciary duties. The court determined that Ak-Feel, as Oculus's managing member, owed default fiduciaries to Oculus and that the Oculus Operating Agreement did not limit or eliminate those default fiduciary duties; therefore, the court denied plaintiffs' motion to dismiss Count III as to Ak-Feel. The court discussed the Delaware Supreme Court's decision in *Gatz* (which stated that the Court of Chancery's determination that the manager of an LLC owed default fiduciary duties was "dictum without any precedential value"), stating that "[t]he high court did not rule on whether the managers of an LLC owe default fiduciary duties." The court in this case stated that the Court of Chancery cases holding that default fiduciary duties apply to LLC managers were "appropriately viewed as *stare decisis* by this Court" and that a plain reading of LLC Act Section 18-1101(c) and its drafting history supported the existence of default fiduciary duties because "otherwise there would be nothing for the operating company agreement to expand, restrict, or eliminate." The court noted that the Supreme Court has the power to hold that no such default fiduciary duties exist, but that the Supreme Court had not yet made that determination. Then, the court looked to the Oculus Operating Agreement and found that it provided limited exculpation from monetary liability as permitted by Section 18-1101(e) but that it did not eliminate fiduciary duties under Section 18-1101(c). The court interpreted the language of the Oculus Operating Agreement, limiting liability for Oculus's members, as an assumption in the Oculus Operating Agreement that fiduciary duties existed and could give rise to liability unless the exculpation right was triggered.

The court also determined that Count III properly alleged claims that Ak-Feel breached its duty of care and that Feeley engaged in willful misconduct because Feeley allegedly negotiated deals for himself and, as the managing member of Ak-Feel, Feeley controlled Ak-Feel, meaning that he could not "mentally segregate his decision-making" so as to properly negotiate deals for himself while somehow not acting in his capacity as the managing member of Ak-Feel.

The court held that Count IV properly stated a claim for breach of the duty of care against Ak-Feel, but not against Feeley because, in Count IV, defendants named Feeley in his capacity as the party in control of Ak-Feel, which in turn was the managing member of Oculus, and not in his capacity as actual manager of Oculus.

Finally, in Count V, defendants sought a declaratory judgment stating that NHA had the unilateral right under the Oculus Operating Agreement to force Oculus to cease its business operations; the court granted plaintiffs' motion to dismiss Count V because the Oculus Operating Agreement did not give NHA such a right.

3. *R&R Capital, LLC v. Merritt*, C.A. No. 3989-CC (Del. Ch. Sept. 3, 2009)

In this proceeding relating to continued disputes regarding the management of nine Delaware LLCs, plaintiffs sought summary judgment declaring that defendant was properly removed as manager of the LLCs. Plaintiffs were members of the LLCs and based their suit on multiple instances of alleged mismanagement by defendant, including: selling certain real estate owned by one of the LLCs without plaintiffs' consent and failing to distribute proceeds from the sale to plaintiffs; using plaintiffs' investments in one of the LLCs to purchase properties that were actually titled in the name of a third party to whom defendant owed an obligation and selling other properties to such third party at below market value; purchasing and maintaining extra horses with a combined value of $1,300,000, either by using common LLC resources or making unauthorized purchases on behalf of one of the LLCs; allowing a building to fall into disrepair, leading to an action against one of the LLCs by the township in which the building was located; failing to dissolve one of the LLCs in accordance with its operating agreement; and failing to pay taxes relating to the LLCs. Further, plaintiffs asserted that based on defendant's conduct, the LLCs were subject to judgments and liens and certain of the LLCs had their certificates of formation cancelled by the State of Delaware for failure to pay their annual franchise taxes or failure to maintain a registered agent. For her part, defendant claimed that plaintiffs interfered with the operation of the LLCs and that her efforts on behalf of the LLCs were affected by the guilty plea of the owner of one of the LLCs in connection with the filing of a false tax return.

Plaintiffs had purported to remove defendant as manager of the LLCs for "cause" pursuant to provisions of the LLCs' operating agreements allowing such removal upon a written demand setting forth with specificity the events giving rise to "cause." Under the operating agreement, "cause" was defined as meaning that the manager "(a) engaged in fraud or embezzlement, (b) committed an act of dishonesty, gross negligence, willful misconduct, or malfeasance that has had a material adverse effect on the Company or any other Member, or (c) been convicted of any felony." Plaintiffs' removal notice to defendant cited an action in federal court in Pennsylvania in which defendant was found to have engaged in fraud in connection with the sale of certain horses to one of the LLCs. The Court of Chancery dismissed defendant's interpretation of the removal provisions of the LLCs' operating agreements that plaintiffs were required to prove that the manager's conduct had a material adverse effect on the LLCs or any other member. In the court's view, the only reasonable reading of such provisions was that the manager could be removed for cause if she committed fraud and the qualification that the manager's conduct have had a material adverse effect only qualified the ability to remove the manager based on dishonesty, gross negligence, willful misconduct, or malfeasance. The court found the provisions of the operating agreements were unambiguous on this point and granted summary judgment in favor of plaintiffs. Stating that the relationship of plaintiffs and defendant had become "completely dysfunctional and beyond repair or reconciliation," the court held that the removal of defendant as manager, which did not affect her continued status as member, was insufficient to resolve the parties' dispute and granted plaintiffs' request for the appointment of a receiver to dissolve and wind up the LLCs.

4. *Pharmalytica Servs., LLC v. Agno Pharms., LLC*, C.A. No. 3343-VCN (Del. Ch. July 9, 2008)

Plaintiff, a Delaware LLC, filed suit against defendants for breach of fiduciary duty, equitable and legal fraud, and breach of plaintiff's LLC agreement. The lawsuit was based upon actions by defendant James Chen ("Chen"), who was ousted from the management team and his positions as CEO and president of plaintiff when the other members discovered that he had formed a competitive entity that was pursuing business opportunities that otherwise would have been available to plaintiff. Although Chen objected to the calling of the meeting and did not attend, a quorum was present and a unanimous vote taken in favor of a resolution removing Chen from these positions. In connection with the lawsuit, plaintiff allegedly discovered that Chen had made modifications to its draft operating agreement after circulating the draft to the other members, which went unnoticed when the members later signed the agreement into effect, as modified. These changes, in part, gave Chen as CEO the power unilaterally to appoint and approve personnel to plaintiff's or any joint venture's board of directors or management team.

This opinion arose out of a motion filed by plaintiff for a preliminary injunction against Chen when it was discovered that he was asserting plaintiff's rights in China to appoint designees to the board of a joint venture established between plaintiff and another company. Chen was apparently using a "Certificate of Appointment," which identified him as the legal representative and CEO of plaintiff, to authorize these actions. Plaintiff's asserted justifications for a preliminary injunction to halt these activities were that Chen had no authority to represent the plaintiff, his conduct was antithetical to the plaintiff's interests, and he was duly and properly removed from any office within the plaintiff thereby making unauthorized his current efforts, which justifications were supported by the allegedly fraudulently inserted terms in the operating agreement. Defendants responded that the efforts to remove Chen from office failed primarily because the operating agreement required a unanimous vote of the board of directors for any "major decisions," which was rendered impossible by Chen's absence from the meeting.

Although plaintiffs sought a preliminary injunction, the court found that the relief sought more closely resembled that recoverable under Section 18-110 of the LLC Act, the companion section to Section 225 of the DGCL. Under that section, a venture may continue to operate according to the "status quo," with minimal disruption, while the identity of those individuals who are appropriate holders of corporate power are established. The court noted that the traditional analysis under those sections does not typically apply the formalistic test for a preliminary injunction; however, because plaintiff had presented its claim under this framework, the court in this case adhered to the preliminary injunction standards.

First, the court found that plaintiff had demonstrated a reasonable probability of success on the merits of its claim that Chen should not be acting on plaintiff's behalf because his recent actions in China were inconsistent with the reasonable expectations of the other members of plaintiff. Next, the court found the record to show that Chen's conduct without plaintiff's authority was likely to cause significant and irreparable harm to plaintiff. Finally, the court agreed with plaintiff that when the harms were balanced, the risks to plaintiff were obvious and material, whereas the potential harm to Chen was minimal. For these reasons, the court granted a status quo order to plaintiff prohibiting Chen and the other defendants, pending final resolution of the merits, from taking any action on behalf of the plaintiff and from holding themselves out, individually or collectively, as representatives of plaintiff with any power to act on its behalf.

5. *Child Care of Irvine, L.L.C. v. Facchina*, C.A. No. 16227 (Del. Ch. July 15, 1998); *Facchina v. Malley*, C.A. No. 783-N (Del. Ch. July 12, 2006)

Plaintiffs moved for summary judgment on their claim that they validly removed the defendant as the managing member of a Delaware limited liability company. Defendant, in turn, also moved for summary judgment, asserting that the plaintiffs did not have the authority to remove him as managing member. The individual plaintiffs and the defendant had organized a California corporation and entered into a shareholder agreement that appointed the defendant "to manage the corporation in a professional and efficient manner." When the California corporation was unable to obtain "S" corporation status, the plaintiffs and defendant agreed to convert the corporation to a Delaware LLC through a merger solely for the tax benefits. The shareholders of the corporation entered into a shareholder consent in which they approved the merger and a merger agreement, which stated that the LLC would be governed by the LLC agreement in effect immediately prior to the merger, and authorized the defendant to take the actions necessary to effectuate the merger of the California corporation into the Delaware LLC. The defendant formed the Delaware LLC but the plaintiffs and defendant never executed an LLC agreement. The defendant then effected the merger and managed the business of the LLC. The plaintiffs became dissatisfied with the management of the defendant and purported to remove him as manager through the delivery of two resolutions signed by the individual plaintiffs.

The issue before the court was whether a majority of the members of the LLC had the authority to remove the defendant as the managing member. The plaintiffs argued that the parties orally agreed that the provisions of the shareholder agreement would govern the LLC and that the manager could thus be removed if he acted "unprofessionally" or "inefficiently." In the alternative, the plaintiffs argued that there was no LLC agreement and that, under Section 18-402 of the LLC Act, the management of the LLC was vested in the members and, therefore, a majority of the members could remove the defendant. The defendant argued that the plaintiffs had accepted a draft LLC agreement he claimed to have circulated that appointed himself manager and contained no provision for removing the manager. He claimed that under Section 18-402 of the LLC Act, a manager may only be removed as specified in the LLC agreement and, absent a provision for removal, a manager is unable to be removed except through judicial dissolution of the LLC. In the alternative, the defendant argued that the merger agreement, which appointed himself as manager and did not include a removal provision, was the operative LLC agreement. Because facts necessary to resolve the issue were in dispute, the court denied the cross-motions for summary judgment. The court also noted that either of the agreements proffered by the parties as the rightful LLC agreement would require arbitration of the dispute and encouraged the parties to seek arbitration rather than to litigate the case further to determine the rightful LLC agreement and then have the court direct the parties to arbitrate the dispute in accordance with such agreement.

In a related subsequent proceeding, Facchina, the defendant in the prior proceeding, acting in unison with certain other members of the LLC, removed the then current managing member and installed Facchina in that capacity and also caused the LLC to merge with another Delaware LLC. Each of these actions was challenged by plaintiffs on several grounds. However, the court held that since Facchina and those acting in concert with him owned more than a majority of the membership interests in the LLC, pursuant to Section 18-402 of the LLC Act, they could designate Facchina as the managing member.

F. Removal and Resignation of Members and Forfeitures of Interests

1. *Touch of Italy Salumeria & Pasticceria, LLC v. Bascio*, C.A. No. 8602-VCG (Del. Ch. Jan. 13, 2014)

Three individuals formed an LLC, the business of which was to operate an Italian grocery in Rehoboth, Delaware. The business was successful. However, one of the defendants decided to withdraw as a member of the LLC and gave notice pursuant to the LLC agreement, which provided that any member could withdraw after giving written notice to the other members. The withdrawing member allegedly told the remaining members that he intended to move to Pennsylvania and possibly start a new business there. However, ten weeks after he withdrew from the LLC, he opened a competing Italian grocery on the same block as the original Italian store. Plaintiffs sued and defendants filed a motion to dismiss, the subject of this opinion.

The court first addressed plaintiffs’ breach of contract claim, looking to the LLC agreement itself to determine if defendant had breached the agreement. The court determined that the LLC agreement provided a mechanism for voluntary withdrawal and did not contain a non-compete provision. Further the court found that plaintiffs did not refer to any specific provision of the LLC agreement in support of their allegation of breach of the agreement. Therefore, the court dismissed this claim.

The court also dismissed plaintiffs’ claims of fraud and misrepresentation because plaintiffs did not adequately plead any reliance on defendant’s representations to their detriment in the complaint.

The court analyzed plaintiffs’ allegation that defendant breached the implied covenant of good faith and fair dealing, which prevents a party from denying his or her contractual partners the benefit of their bargain based on circumstances that the parties did not anticipate. However, the court found that member withdrawal was specifically anticipated by the parties in the LLC agreement, which provided for voluntary member withdrawal. Further, the parties omitted a covenant not to compete in their LLC agreement, a “staple of employee contracts,” which “omission the [p]laintiffs obviously now regret.” The court refused to use the implied covenant to shoehorn a covenant not to compete into the parties’ contract and dismissed this claim.

The court also dismissed plaintiffs’ allegation that defendant breached his fiduciary duty to the LLC by making arrangements to open a competing business while he was still employed by the LLC. The court found that plaintiffs did not include any inferences supporting the conclusory allegation of breach of fiduciary duty in their complaint. Further, defendant would have owed no duties to the LLC in the ten weeks after he left the LLC until he opened his competing business.

Finally, the court dismissed plaintiffs’ conversion claim because they failed to identify any specific property that defendant allegedly converted.

2. *Showell v.Pusey*, C.A. No. 3970-VCG (Del. Ch. Sept. 1, 2011)

After retiring as a member of an LLC, Plaintiff brought an action against the LLC and its other members to determine the amount owed by the LLC to plaintiff upon his retirement. The Operating Agreement of the LLC expressly did not allow for the withdrawal or resignation of members but provided that issues regarding transfer or repurchase among members could be addressed by supplemental agreement among the members. The Operating Agreement also provided that it could be amended with the consent of at least 75% of the membership interests. One of the members of the LLC and Plaintiff, who collectively owned 90% of the membership interests in the LLC, had earlier entered into a supplemental agreement (the "Supplemental Agreement") that addressed the repurchase of a member's interest upon the occurrence of a "retiring event," which was defined to include the death, bankruptcy or disability of a member. The Supplemental Agreement did not address the circumstance of a voluntary retirement, however, which was the case here. The Supplemental Agreement provided that upon a "retiring event" the LLC could purchase the entire membership interest of a retiring member for an amount equal to the retiring member's share of the liquidation value of the LLC.

Plaintiff argued that, because his retirement did not constitute a "retiring event" under the Supplemental Agreement, the Supplemental Agreement was not applicable to his retirement. Instead, he argued that under Section 18-604 of the LLC Act he was entitled to his share of the "going concern" value of the LLC. Section 18-604 provides in relevant part that if the amount to which a member of an LLC is entitled upon his resignation is ". . . not otherwise provided in a limited liability company agreement, such member is entitled to receive, within a reasonable time after resignation, the fair value of such member's limited liability company interest as of the date of resignation . . . ." Respondents disagreed, arguing that the formula under the Supplemental Agreement should be utilized to determine the amount to which plaintiff was entitled.

The court held that because greater than 75% of the membership interests in the LLC had agreed to allow plaintiff to retire from the LLC despite the provisions of the Operating Agreement and the Supplemental Agreement to the contrary, the parties had in fact agreed to modify the Operating Agreement and the Supplemental Agreement to permit such retirement but had neglected to reach agreement on the amount to which plaintiff was entitled upon his retirement. Rather than applying the provisions of Section 18-604, the court interpreted the terms of the Operating Agreement and the Supplemental Agreement as a whole in an attempt to harmonize plaintiff's retirement with the intent of the parties as expressed in such agreements and held that the amount to which plaintiff was entitled should be measured by the provisions in the Supplemental Agreement as though a "retiring event" had occurred. The court held that the provisions in the Supplemental Agreement for purchasing a retiring member's interest were meant to protect the ongoing existence of the LLC and to protect it from an obligation to make continuing distributions to members who are no longer contributing to the LLC's profitability. The court stated that, because the Operating Agreement and the Supplemental Agreement read as a whole contemplated the effects of a retirement and provided specifically for the obligations of the LLC upon such an event, the provisions of Section 18-604 were not applicable.

3. *Julian v. Julian,* C.A. No. 4137-VCP (Del. Ch. Sept. 9, 2009)

This case involved three brothers who owned and operated several LLCs together. The Plaintiff ("Gene") sued his brothers ("Francis" and "Richard") after he resigned as a member of several of the LLCs. The case also involved two different versions of Section 18-603 of the LLC Act. For those LLC Agreements entered into before July 31, 1996, the LLC Act permitted a member to resign with six months' notice. For LLC Agreements entered into after July 31, 1996, the LLC Act prohibited resignation except after dissolution and winding up, unless the LLC Agreement stated otherwise. In Count 1 of the complaint, Gene sought an award of fair value for his interest in the four pre-1996 companies. Count 2 sought an award of fair value for Gene's interest in the three post-1996 companies, but at argument Gene's counsel conceded that all claims in Count 2 should be pursued in arbitration and the court dismissed Count 2. In Count 3, Gene brought a derivative claim for damages on behalf of two LLCs for recovery of excess management fees that were charged by the management company owned by Francis and Richard.

In response to Count 1, the defendants moved to dismiss the fair value claims against one LLC ("FSG") as unripe, and against the remaining three LLCs as being subject to arbitration. On the issue of ripeness, the defendants noted that Gene filed his fair value claim a mere two days after his resignation from FSG. Section 18-604 of the LLC Act provides an LLC a "reasonable" time after resignation of a member to determine and distribute the resigning member's LLC interest. Defendants argued that two days was not a reasonable amount of time. The court denied the defendants' motion to dismiss for lack of ripeness on the view that when family members are engaged in litigation regarding valuation and other business issues, it is reasonable to infer that the members would not have agreed on the value of the business regardless of how long the plaintiff waited to file suit. In addition, the court noted that the timing of the commencement of the suit was not all that important when the valuation was based on facts as they existed at the time of the member's resignation. Finally, the court noted that dismissing the claim would be inefficient because Gene could simply re-file the action the next day.

In regard to the arbitration issue, the court ultimately granted the defendants' motion to dismiss the fair value claims against the remaining three pre-1996 LLCs because arbitration was appropriate. The court cited *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006), in dividing the arbitrability question into "procedural" and "substantive" arbitrability. The procedural arbitrability question revolved around whether or not the parties complied with the arbitration provisions of the LLC Agreement. A presumption exists that procedural arbitrability questions are answered by arbitrators, not by the courts.

The court noted that substantive arbitrability was less clear-cut. It included a determination of both the scope of an arbitration provision and the broader issues of whether the contract and/or the arbitration clause were valid and enforceable. The court cited *Carder v. Carl M. Freeman Cmtys.*, 2009 WL 106510 (Del. Ch. January 5, 2009), for the proposition that before reaching this question, it must address the question of who decides whether the parties decided to submit a particular dispute to arbitration or to a court. The presumption was that the court, and not an arbitrator, decided whether the parties agreed to arbitrate. Therefore, courts presumed the parties did not intend to arbitrate arbitrability, unless there was clear and unmistakable evidence to the contrary.

Clear and unmistakable evidence that the parties intended to arbitrate arbitrability existed if the arbitration clause: (1) generally refers all disputes to arbitration, and (2) references a set of arbitral rules that empowers arbitrators to decide arbitrability. The arbitration clause in the present case stated that any controversy "arising out of or relating to" the agreement shall be settled by arbitration. The court interpreted "arising out of or relating to" broadly, and found the arbitration clause sufficient to satisfy the first prong of the test by generally referring all disputes to arbitration. The provision also satisfied the second prong by requiring that the arbitration be conducted in accordance with the rules of the American Arbitration Association.

Gene also argued that his claims so clearly did not arise out of, and were not related to, the LLC Agreements that a court, and not an arbitrator, should determine that they fell outside the broad scope of the applicable arbitral provisions. Gene argued that his request for an award of fair value was based on Section 18-604 of the LLC Act, and not the LLC Agreement. He further argued that the breach of fiduciary duty claims did not arise out of the LLC Agreements because the agreements were "bare bones." Gene relied on *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156, n. 24 (Del. 2002), for the proposition that "actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract." Essentially, Gene asked the court to decide whether his claims arose out of, or related to, the LLC Agreements. The court found that if it answered that question, it would undermine the *Willie Gary* test. Although the court admitted that common sense required some minor inquiry into whether the arbitration clause covered the underlying dispute, it said that if there was a colorable basis that the dispute is covered by the arbitration clause, and the clause satisfies the *Willie Gary* test, then the question of substantive arbitrability should be answered by the arbitrator, not the court. The court decided that since LLCs were creatures of contract, Gene's request for fair value of his interest was, to some degree, related to the existence of the agreement and its terms. Finally, the court noted that when in doubt, the policy of the court was to defer to arbitration.

In response to Count 3, the defendants moved to stay Gene's prosecution of the derivative claims. The court noted that when considering a stay of claims that were not subject to arbitration, it would consider any preclusive effects of a pending arbitration elsewhere on the action before the court, in addition to any burden imposed by both litigating and arbitrating at the same time in different forums. The LLCs subject to the derivative claims did not have arbitration clauses in their agreements. Ultimately, the court denied the defendants' motion to stay on the basis that the LLCs, the LLC Agreements, and the claims involved in Count 3 were sufficiently different and distinct from those that the court determined would be arbitrated. Therefore, the court did not find that a significant risk of inconsistent judgments would be caused by allowing the litigation on Count 3 to continue while arbitration began on counts 1 and 2.

Furthermore, in response to Count 3, the defendants argued that Gene failed to state a claim for aiding and abetting a breach of fiduciary duty against Richard because the claim failed to state a breach of fiduciary duty by Francis. The court noted that aiding and abetting a breach of fiduciary duty requires (1) knowledge of the breach of a duty, and (2) participation in the wrongful conduct. In this case, Gene alleged a breach of fiduciary duty because the defendants' management company suddenly increased the fees it charged to a few of the LLCs by 400%. The court denied the defendants' motion to dismiss, stating that under the plaintiff-friendly motion to dismiss standard, the allegations that Richard consented to the increase in fees (which benefitted a company controlled by Richard and Francis) were sufficient to support a reasonable inference that Richard participated in the alleged wrongdoing. Finally, the court noted that the fact that one of the defendants could have increased the fees on his own did not negate a reasonable inference that the other may have been involved in the decision.

4. *Eureka VIII LLC v. Niagara Falls Holdings LLC*, C.A. No. 1203-N (Del. Ch. June 6, 2006)

Plaintiff, who held 50% of the voting and economic interests in a Delaware LLC, brought an action against defendant, who held the remaining 50% of the voting and economic interests, alleging several material breaches of the LLC agreement. Defendant's alleged breaches resulted in a creditor of a trust that controlled defendant gaining voting control, as well as legal and beneficial ownership, of defendant in violation of several anti-transfer provisions in the LLC agreement designed to prevent such an occurrence.

Plaintiff filed a motion for summary judgment seeking a declaration that defendant had relinquished its membership interest and retained only its economic rights in the LLC. The LLC agreement was silent as to the remedy for breach and thus plaintiff called upon the court to exercise its equitable powers to provide the requested declaration. Plaintiff drew support for its motion from Section 18-702(b)(3) of the LLC Act, which provides that "[a] member ceases to be a member and to have the power to exercise any rights of powers of a member upon assignment of all of the member's limited liability company interest." Although the court found that the statute does not directly apply to the facts of this case, the court agreed with plaintiff that it addressed a situation analogous to the one in this case and therefore provided a foundation for the remedy sought by plaintiff. Further, the court held that defendant's breaches of the LLC agreement ultimately had the same effect as a complete assignment for the benefit of creditors, which is the type of assignment that typically results in the statutory divestiture of a membership interest under Section 18-304 of the LLC Act. The court held that these statutory expressions of policy clearly support the right of a member of an LLC to craft provisions mandating that its fellow member either retain certain characteristics or lose its membership. Therefore, unless defendant was deprived of its membership rights, plaintiff would be denied its own contractual expectations. As a result, the court granted plaintiff's motion, noting that it was entirely fitting and proportionate for defendant, by virtue of the breaches committed in this case, to be declared as having lost its status as a member of the LLC and to be limited to the rights of an assignee as set forth in the LLC Act.

Defendant admitted breaching the LLC Agreement but asserted a counterclaim against plaintiff arguing that that plaintiff's own breach of the LLC agreement should bar plaintiff from asserting such breaches against defendant and depriving defendant of its status as a member. Defendant claimed plaintiff breached the buy/sell provision of the LLC agreement when plaintiff failed to close on the purchase of defendant's interest in the LLC following defendant's invocation of the buy/sell. The court dismissed defendant's counterclaims on the basis that defendant's first material breach of the LLC agreement predated its attempt to invoke the buy/sell provision and, therefore, defendant was in no equitable position to claim it was entitled to invoke the buy/sell provision when it did so. Further, the court found that defendant lacked the financial capacity to close on the terms of the buy/sell provision when it invoked the buy/sell.

The court also dismissed defendant's claim for dissolution. The court found that defendant's only plausible argument for dissolution was that plaintiff and the party now controlling defendant's interest did not get along and that the continuation of the LLC was therefore impracticable. However, having held that defendant's rights in the LLC were restricted to that of an assignee, the court held that plaintiff had the authority to act as the sole member of the LLC and, therefore, no impasse could exist that would support an action for dissolution.

5. *Milford Power Co., LLC v. PDC Milford Power, LLC*, C.A. No. 506-N (Del. Ch. Dec. 17, 2004)

Plaintiffs in this case were a Delaware LLC and the majority member of the LLC, which held a 95% interest in the LLC. They sought a declaration that defendant, who was the other member of the LLC and held a 5% interest, had lost its membership interest in the LLC as a result of defendant's filing a petition for bankruptcy. Although the defendant's bankruptcy petition was dismissed, plaintiffs alleged that both under the terms of the LLC agreement and the operation of Section 18-304 of the Delaware LLC Act, defendant ceased to be a member of the LLC upon filing its bankruptcy petition and, pursuant to the LLC agreement, defendant was not entitled to any compensation in respect of its LLC interest.

Defendant resisted plaintiffs' claims on several grounds. First, defendant argued that it was wrongly forced into a bankruptcy filing by the majority member of the LLC and certain lenders to the LLC and that the doctrine of unclean hands prevented plaintiff from profiting by the application of the *ipso facto* clause in the LLC agreement. The court acknowledged that it was possible to conceive of circumstances in which the improper conduct of one member of an LLC towards a fellow member could cause that member's insolvency and resulting bankruptcy filing, and that under those circumstances the member that had improperly caused the bankruptcy filing could be estopped from relying upon that event to deprive the other member of its ownership interest in the LLC. The court noted that such an argument was better characterized as a contractual defense under the implied covenant of good faith and fair dealing preventing one party from relying upon the occurrence of a condition its own behavior had brought about. Unfortunately for defendant, although agreeing with the legal principle it expounded, the court found no factual basis whatsoever to support its argument. However, with regard to defendant's second argument, namely that the operation of the *ipso facto* clause in the LLC agreement and under the Delaware LLC Act was preempted by the Federal Bankruptcy Code, the court took a different view. Plaintiffs had argued that under the Bankruptcy Code and applicable Delaware law, both the automatic withdrawal of defendant as a member of the LLC and the relinquishment of its interest without payment were enforceable notwithstanding the Bankruptcy Code's provisions regarding the unenforceability of certain *ipso facto* clauses. In contrast, defendant had argued that neither the deemed withdrawal of defendant nor the forfeiture of its interest without consideration were enforceable and that it should be returned to its position as it existed prior to its bankruptcy filing as a member with its full membership rights. The court acknowledged the arguments of both sides and the provisions of the Bankruptcy Code, applicable decisions and commentary that supported such arguments. The court ultimately adopted a position between those advocated by plaintiffs and defendant, based on the Bankruptcy Code's provisions that limit the right of a debtor to assume and assign an executory contract if under applicable law a party to such a contract, other than the debtor, would be excused from accepting performance from or rendering performance to an assignee of such contract. The court, in part in reliance on the case of *In re IT Grp., Inc.*, 302 B.R. 483 (D. Del. 2003), *aff'g In re IT Grp., Inc.*, No. 02-10118 (Bankr. D. Del. June 20, 2002), held that the interest of a member in a Delaware LLC (at least the interest of a member with management rights) is composed of both assignable rights and non-assignable rights – the former being the purely economic rights and the latter being the management and all other non-economic rights. The court therefore concluded that defendant, by virtue of its bankruptcy filing and the operation of Section 18-304 of the LLC Act and the terms of the LLC agreement, had withdrawn as a member of the LLC and thus had no management voting or other non-economic rights, but would be treated as an assignee under Section 18-702 of the Delaware LLC Act and thus retained its economic rights.

6. *Walker v. Resource Dev. Co. Ltd., L.L.C. (DE)*, C.A. No. 1843-S (Del. Ch. Aug. 29, 2000)

In a post-trial opinion, the court considered whether members who comprised a majority in interest of a Delaware LLC had the power to remove the entity's other member and declare his interest forfeit under either the LLC agreement or the LLC Act and, if not, did those members show that their consent to the terms of the LLC agreement was the product of fraud. With respect to the defendants' claim that the LLC agreement authorized them to remove the fourth member and forfeit his interest, the court noted that although members may put virtually any provision in their LLC agreements with confidence that it will be enforced, the LLC agreement at issue included no provision that could be read to allow the members holding a majority in interest to deprive the fourth member of his ownership interest in the circumstances presented. While the LLC agreement authorized the removal of the manager, it specifically said "removal shall be without prejudice to the [Manager's] contract rights" which the court held "implicitly include[ed] his ownership rights." The court acknowledged that the absence of a provision allowing the removal of the plaintiff was surprising considering what the other members knew about him at the time they entered into the LLC agreement and noted that the other members could have easily protected themselves in the LLC agreement. However, the court found that they failed to do so because the LLC agreement did not justify plaintiff's removal. With respect to defendants' argument that under applicable law they had the inherent power to remove plaintiff as a member and take away his membership interest due to an alleged breach of fiduciary duty, the court first noted that defendants identified virtually no legal support for that proposition. The court added that none of the authorities cited by defendants varied the "fundamental principle under Delaware law that a majority of members (or stockholders) of a business entity, unless expressly granted such power by contract, have no right to take the property of other members (or stockholders)." The court went on to say that "[o]ther mechanisms may be available to them to recast their business relations to eliminate persons from the enterprise, such as the merger provisions of the various business entity laws. But, these provisions do not provide the forfeiture of economic rights, requiring instead that persons whose interests are eliminated are entitled to receive fair value therefor." The court also rejected defendants' argument that plaintiff's failure to make capital contributions warranted his removal finding, among other things, that the letter from defendants notifying him of his removal did not mention his failure to honor a promise to make a capital contribution as a basis for removal but rather alleged a "breach of trust." As for defendants' fraud claim, the court found that it failed because defendants had not proven the required misrepresentation element. Finally, the court rejected defendants' argument that since they had relied in good faith on the provisions of the LLC agreement, albeit incorrectly, under Section 18-1101 of the LLC Act they were protected from liability. The court held that while Section 18-1101 of the LLC Act was intended to make clear that an apparent limit on liability for breach of fiduciary duty was to be interpreted broadly, "the legislature never intended this provision to allow members of an LLC to misappropriate property from another member and avoid returning that property or otherwise compensating the wronged member." Thus, the court concluded that plaintiff was entitled to 18% of the shares of a corporation that was the successor to the LLC interest and imposed a constructive trust on those shares in favor of plaintiff subject to payment by plaintiff of certain liabilities of the LLC.

G. Dissolution and Winding Up

1. Non-Judicial Dissolution

a. *Matthew v. Laudamiel*, C.A. No. 5957-VCN (Del. Ch. Feb. 21, 2012) and (Del. Ch. June 29, 2012); *Matthew v. Fläkt Woods Grp. SA*, C.A. No. 5957-VCN (Del. Nov. 20, 2012)

Plaintiff, a member and manager of Aeosphere LLC, a Delaware limited liability company (the "Company"), brought claims relating to the dissolution of the Company against the other managers of the Company and two companies with which the Company had business dealings. Defendants raised various defenses against plaintiff's claims and brought multiple counterclaims against plaintiff.

In the first decision by the Court of Chancery, the court addressed motions to dismiss for lack of personal jurisdiction by defendants Fläkt Woods Group SA ("Fläkt Woods") and SEMCO LLC ("SEMCO"), which were companies who had engaged in various business dealings with the Company. Plaintiff claimed that Fläkt Woods and SEMCO aided and abetted breaches of fiduciary duty by the other defendants and were otherwise complicit in the other defendants' wrongful actions. Plaintiff contended that the court had personal jurisdiction over Fläkt Woods under Delaware's long-arm statute by virtue of the conspiracy theory of jurisdiction. The court rejected plaintiff's conspiracy theory of jurisdiction because, although plaintiff pled sufficient facts to allow the court to infer that a conspiracy existed, plaintiff failed to show that Fläkt Woods knew or had reason to know of an act or effect in Delaware before the completion of the conspiracy, which is a requirement of the conspiracy theory of jurisdiction.

Plaintiff asserted that the court had personal jurisdiction over SEMCO under Delaware's long-arm statute by virtue of the conspiracy theory of jurisdiction and/or by virtue of the general jurisdiction test. The court rejected the conspiracy theory, finding that sufficient facts were not alleged to support SEMCO's participation in a conspiracy against plaintiff, and rejected plaintiff's general jurisdiction argument, finding that SEMCO's minimal business in Delaware was not sufficient to constitute a "persistent course of conduct" or "regularly do[ing] or solicit[ing] business" in Delaware. Moreover, the court found that SEMCO's presence in Delaware was not sufficient to meet the "minimum contacts" required by constitutional due process.

The court also addressed plaintiff's motion to dismiss several of defendants' counterclaims. The court first addressed defendants' counterclaim for breach by plaintiff of the implied covenant of good faith and fair dealing in the Company's LLC agreement. One of defendants' claims for breach of the implied covenant was based on plaintiff's alleged refusal to accept or reject various contracts and alleged refusal to take certain actions requiring his approval under the LLC agreement. However the LLC agreement contained specific provisions dealing with "deadlocks" among the Company's board of managers and disagreements between the parties and contained a general standard governing the performance of managerial duties by the Company's managers and the officers. Other of defendants' claims for breach of the implied covenant were based on plaintiff's alleged unreasonable refusal to cooperate in the management of the Company and alleged improper allocation of Company resources among various internal projects. These claims again were squarely addressed by provisions in the LLC agreement. In addition, defendants' claimed that plaintiff's refusal to attend or otherwise participate in an emergency meeting of the board of managers meeting breached the implied covenant. Because the LLC agreement provided a "best efforts" standard to govern attendance at meetings of the board of managers, the court found this issue was also explicitly addressed by the LLC agreement. The court thus dismissed each of defendants' claims for breach of the implied covenant, holding that the implied covenant only operates where an LLC agreement does not speak to the issue directly and provide an explicit answer, and, in this case, each of defendants' bases for the implied covenant were directly addressed by the LLC agreement. The court stated the misconduct alleged by defendants was more properly addressed by defendants' counterclaims against plaintiff for breach of the LLC agreement.

In its initial decision, the court also addressed defendants' counterclaims for damages resulting from plaintiff's alleged breach of the employment agreement between the Company and plaintiff and for unjust enrichment, both of which claims were based upon plaintiff's alleged improper charging of personal expenses to the Company. The court held that these claims belonged to the Company and that defendants did not have standing to bring them in their individual capacities and thus dismissed these claims. Since a certificate of cancellation had already been filed to terminate the existence of the Company, the court stated that these claims would have to be brought in the name of the Company by a trustee or receiver appointed under LLC Act Section 18-805 or, if the Company were revived, by the revived Company or derivatively by its members after the revival of the Company.

In a subsequent decision by the Court of Chancery, the court addressed plaintiff's motions for partial summary judgment on his claim that defendants breached the Company's LLC agreement by causing the dissolution and winding of the Company without plaintiff's consent and his claim that defendants' wrongful dissolution of the Company resulted in the unlawful conversion of his units in the Company. Plaintiff argued that his vote was required to approve the dissolution and winding up of the Company under Section 5.2.6(b) of the LLC agreement. The court held that that the plain language of Section 5.2.6(b) of the LLC agreement did not require plaintiff's vote to dissolve the Company but may have required plaintiff's vote to wind up the Company. Plaintiff argued that the apparent discrepancy in the LLC agreement between the vote required for dissolution and the vote required for winding up must be the result of a scrivener's error. The court rejected plaintiff's argument to reform the LLC agreement to correct the scrivener's error because plaintiff did not satisfy either of the standards for reformation, namely that there was a mutual mistake of the parties or a unilateral mistake by plaintiff of which defendants were aware but remained silent.

Plaintiff argued in the alternative that the voting provision in Section 5.6.2(a) of the LLC agreement required his vote for the dissolution of the Company, and therefore the vote to dissolve the Company without his approval breached the Company Agreement. Defendants' argued that, if such voting provision applied, plaintiff's refusal to attend the board meeting at which the vote was taken created a deadlock which would have allowed defendants to dissolve the Company without plaintiff's approval. The court denied plaintiff's motion for summary judgment on this issue, holding that the matter must be resolved on a more robust factual record.

With respect to plaintiff's claim that defendants' breached the LLC agreement by winding up of the Company without his approval, the court held that, unless defendants' prevailed on an affirmative defense, they would be liable for breach of the LLC agreement because the voting provision of the LLC agreement expressly required the unanimous approval of the board of managers to wind up the Company. The court rejected defendants' argument that "unanimous approval of the Board" meant unanimous approval of the managers present at a meeting, which interpretation would have resulted in actions requiring "unanimous approval of the Board" under the LLC agreement requiring a lesser vote than typical Board actions.

As an affirmative defense, defendants alleged that even if their approval of the decision to wind up the Company breached the LLC agreement, the breach was excused by plaintiff's prior material breaches of the LLC agreement, such as plaintiff's alleged refusal to approve or disapprove contracts requiring his approval and his alleged improper approval of contracts that also required another manager's approval. The court, noting that only a material breach, and not a nonmaterial or *de minimis* breach, will excuse another party from performing under a contract, stated that the issue of materiality is principally a question of fact and is not generally suited for disposition by summary judgment. The court held that defendants' allegations of plaintiff's breaches were not so severe or so insignificant as to allow the court to assess their materiality on the facts presented and without further development of the record. Since these allegations raised contested issues of fact, the court was unable to grant plaintiff's motion for partial summary judgment on plaintiff's breach claim with respect to the winding up of the Company.

The court also denied plaintiff's motion for partial summary judgment on his conversion claim. Since plaintiff was not granted summary judgment on his breach claims, which were the foundation for his conversion claim, he similarly could not be granted summary judgment on his conversion claim.

In a further proceeding in this case, the Supreme Court of Delaware reversed the Court of Chancery's earlier decision that the court lacked personal jurisdiction over Fläkt Woods. The court found that Delaware's long arm statute reached the alleged conduct. The Court of Chancery had held that plaintiff failed to show that Fläkt Woods knew or had reason to know of an act or effect in Delaware before the completion of the conspiracy. The Supreme Court disagreed with the Court of Chancery's holding, finding, among other things, that Fläkt Woods, a sophisticated company with global activities, would have done some minimal due diligence before entering into a long-term agreement with the Company, which would have revealed to Fläkt Woods that the Company was a Delaware LLC long before the Company was dissolved. Because Fläkt Woods' alleged co-conspirators filed a certificate of cancellation for the Company in Delaware, which constituted the transaction of business in Delaware for purposes of the long-arm statute, the Supreme Court held that Fläkt Woods was subject to personal jurisdiction under the long arm statute.

b. *Cline v. Grelock,* C.A. No. 4046-VCN (Del. Ch. Mar. 2, 2010)

This case involved a failed recovery and towing service; American Asset Recovery ("AAR"). AAR was organized as a Delaware LLC by two friends—the plaintiff ("Cline") and the defendant ("Grelock"). AAR operated mostly at a loss for about six months and was then dissolved unilaterally by Grelock. Grelock then started another similar company called Hound Dog Recovery ("Hound Dog") with his wife ("Crystal") and without Cline. Grelock then used the assets of AAR for the benefit of Hound Dog. Cline sued for damages and an ownership interest in Hound Dog.

There was a dispute over the parties' respective ownership percentages. The tax records for AAR reflected that the company was supposed to be owned equally between Cline and Grelock, 50/50. However, Grelock claimed that Cline had never made the required $25,000 capital contribution. Cline did not dispute the fact that he never made his capital contribution, but he claimed that he never signed the Operating Agreement that required it.

In fact, the only contribution that Cline made was as a co-guarantor on the truck that AAR purchased with a loan from Sovereign Bank. The court found that it was unreasonable for Cline to claim he was a 50% owner when he did not make a capital contribution.

Grelock unilaterally dissolved AAR and established Hound Dog, which the court found to be a breach of his fiduciary duty because Cline had been treated as a member of AAR. However, Cline was unable to prove any damages from the dissolution of AAR and did not demonstrate a reasonable basis for assessing damages, if there were any. In the alternative, Cline argued that as a wrongfully excluded co-owner of AAR, he was entitled to an ownership interest in Hound Dog. After agreeing that a former partner (or member of an LLC) may be held accountable for profits earned using partnership assets, the court determined that Cline failed to show what his interest should be or how the court should calculate it. Moreover, the court was not persuaded that a person who failed to make a capital contribution should be allowed to claim an interest in a successor company. Therefore, even though Grelock's unilateral dissolution was a breach of fiduciary duty, the court did not afford Cline relief on his claims because he did not prove that he was harmed in any way.

Next, Grelock asserted a counter-claim asking the court to compel Cline to make his capital contribution for the benefit of AAR. The court assumed the benefit would actually go to Grelock and refused, citing Grelock's breach of fiduciary duty in dissolving AAR. Since Grelock excluded Cline and deprived him of whatever benefit he might have received from the continuation of AAR, the court would not compel Cline to pay.

Finally, the court took up the issue of the outstanding loan on the truck that was purchased by AAR, guaranteed by Cline and Grelock, and used for the benefit of Hound Dog. The court ordered Grelock and Crystal to exercise all good faith efforts to obtain Cline's release from the guaranty. Furthermore, the court said that if they were unable to secure Cline's release, Grelock and Crystal had to individually indemnify and hold Cline harmless from any claim arising out of the guaranty. Lastly, the court assessed the costs of the action against Grelock because of his breach of fiduciary duty.

c. *Spellman v. Katz*, C.A. No. 1838-VCN (Del. Ch. Feb. 6, 2009)

Plaintiff and defendant each owned a 50% interest in a Delaware LLC formed for the purpose of constructing an office building in which the parties leased space for their joint medical practice. After a falling out between the two parties, plaintiff left to practice on his own and plaintiff and defendant were unable to agree on how to unwind their relationships. Plaintiff ultimately sought a decree of judicial dissolution of the LLC pursuant to Section 18-802 of the LLC Act or, alternatively, an order pursuant to Section 18-803 of the LLC Act appointing a liquidating trustee to effectuate the winding up of the LLC because the LLC had allegedly already dissolved by express will of its members pursuant to Section 5.1 of the LLC agreement. Section 5.1 of the LLC agreement provided, in relevant part, that the LLC "shall be dissolved and its affairs wound up as soon as possible after the construction of the building had been completed, the condominium documents have been finalized and a certificate of occupancy has been issued with respect to each condominium unit . . . ."

Both parties conceded that each of the preconditions to dissolution set forth in Section 5.1 of the LLC agreement had been satisfied. Defendant argued, however, that the dissolution and winding up of the LLC was improper because Section 5.1 of the LLC agreement did not accurately reflect the original intentions of the parties regarding dissolution. Defendant asserted that neither party knew that Section 5.1 was part of the LLC agreement and, thus, that it did not embody their true intentions and should not be enforced. In support of this position, defendant argued that the failure of either party to take steps to implement the dissolution and winding up of the LLC as called for in the LLC agreement was evidence of the parties' "true intent" to continue the LLC indefinitely.

Applying general contract principles to the construction of the LLC Agreement, the court concluded that Section 5.1 of the LLC Agreement was unambiguous and should be enforced in accordance with its terms. The court held that because Section 5.1 of the LLC agreement was found to be unambiguous on its face, the parol evidence rule precluded the introduction of outside evidence to dispute its terms. Consequently, the court held that the

LLC had been dissolved by express will of its members pursuant to Section 5.1 of the LLC agreement and that the winding up of its affairs was necessary.

With respect to plaintiff's request for the appointment of a liquidating trustee pursuant to Section 18-803 of the LLC Act, the court held that because the parties were deadlocked on how to proceed with the winding up of the LLC, the only rational and equitable result was for the court to appoint such a person. The court stated that because the LLC had been dissolved by the express will of its members and the parties were unable or unwilling to implement the winding up process that naturally follows dissolution in the life cycle of an LLC, "cause" within the meaning of Section 18-803(a) of the LLC Act existed for the court to appoint a liquidating trustee to wind up the LLC's affairs. Thus, plaintiff's motion for summary judgment on its petition for appointment of a liquidating trustee was granted.

In connection with plaintiff's petition for appointment of a liquidating trustee, defendant asserted a counterclaim, derivatively on behalf of the LLC, alleging that plaintiff had breached his fiduciary duties to the LLC by refusing to participate in the refinancing of the building's mortgage. Plaintiff moved to dismiss defendant's counterclaim for failure properly to plead demand futility with the particularity required by Court of Chancery Rule 23.1. Defendant argued that demand futility has been sufficiently demonstrated because plaintiff, by virtue of his 50% interest in the LLC, may effectively veto any proposed action and it would be futile to request that plaintiff grant permission to the LLC to sue himself for the alleged conduct. The court held that to show demand futility, defendant must (i) show a "substantial likelihood" of plaintiff's personal liability and (ii) plead "with particularity" the facts supporting his claim that there is a "substantial likelihood" of personal liability of plaintiff. The court held that the "mere threat" of personal liability is insufficient to show a substantial likelihood of personal liability. In this case, the court held that defendant had pleaded only the naked assertion of a breach of fiduciary duty by plaintiff and, thus, the counterclaim showed no more than a mere threat of personal liability, which was insufficient to satisfy the defendant's pleading requirements. Plaintiff's motion to dismiss the counterclaim was therefore granted.

2. Judicial Dissolution

a. *Meyer Natural Foods LLC v. Duff*, C.A. No. 9703-VCN (Del. Ch. June 4, 2015)

Respondents Kirk Duff, Todd Duff, and C.R. Freeman entered into a business relationship with petitioner Meyer Natural Foods LLC ("Meyer") to sell beef to a national grocery chain in 2011, formalized through three agreements: a Purchase Agreement, which focused on Respondents' sale of a 51% interest in Premium Natural Beef, LLC ("PNB") to Meyer; the PNB LLC Agreement, which set out the details of PNB's business, with Meyer as managing member; and the Output and Supply Agreement, under which separate companies (the "Respondent Companies") owned by the Duffs and by Freeman were to supply cattle to Meyer to sell. The LLC Agreement provided that the sole purpose of PNB was to market, distribute, and sell beef (the "PNB Business"). It also contained an integration clause. All three agreements addressed competitive activities – the Purchase Agreement provided that Respondents could not own or operate a competing business. These restrictive covenants were identified as "essential to protect the business and the goodwill of the Company" and were to immediately terminate if Respondents terminated the Output and Supply Agreement or the LLC Agreement. The Output and Supply Agreement granted Meyer and its subsidiaries exclusive rights to purchase qualifying cattle from the Respondent Companies, while the LLC Agreement required Meyer to use commercially reasonable efforts to promote and expand the PNB Business and subjected the parties' rights to engage in other activities to the restrictive covenants in the Purchase Agreement.

Respondents purported to terminate the Output and Supply Agreement in July 2012 and filed suit against Meyer and PNB in Oklahoma, alleging breaches of contractual and fiduciary duties. The Oklahoma court ordered termination of the exclusive supply and purchase obligations of the parties under the Output and Supply Agreement. Although the court order stated that it did not affect any rights the parties had against each other under the restrictive covenants in the Output and Supply Agreement or other contracts, respondents argued that they were no longer bound by these covenants.

Before the court was Meyer's motion for the judicial dissolution of PNB. Meyer asserted an inability to continue PNB's business in accordance with the parties' original agreement, arguing that the purpose of PNB was not only to sell beef but also to partner exclusively with respondents in a joint venture. Meyer further argued that because the Output and Supply Agreement was no longer effective, respondents believed they were free to compete against Meyer, making PNB's business impracticable. Respondents opposed dissolution based on concerns about prejudicing recovery in the ongoing Oklahoma litigation and asserted that the business remained reasonably practicable. They further argued that if the parties had wanted dissolution, there was a contractual mechanism they could have used to effectuate it.

The court began its analysis by noting that operational deadlock was not an issue because of the authority granted to Meyer as managing member, characterizing the dispute as one over PNB's purpose. Respondents argued for a broad characterization of PNB's purpose, whereas Meyer argued for a contextual interpretation based on the various non-compete and mutual obligations in the three relevant agreements. The court agreed with Meyer, interpreting precedent as providing that the purpose clause is of primary importance, but that other evidence of purpose may be helpful as long as the court is not asked to engage in speculation. It found that, despite the integration clause in the LLC Agreement, the entirety of the parties' agreement demonstrated that PNB was not intended to be a business where Meyer ran all of the operations and distributed profits to respondents as passive members with an incidental supply contract. Rather, the non-compete covenants in the Purchase Agreement demonstrated the importance of the parties' supply arrangement.

The court next considered whether it was no longer reasonably practicable to operate PNB in accordance with its purpose. Considering that the purpose of PNB was to market and sell beef supplied by the Respondent Companies according to Meyer's specifications, the court concluded that it was no longer reasonably practicable to operate PNB. Although there was no operational deadlock and PNB was profitable the prior year, it found that PNB could not achieve its purpose when respondents did not believe restrictive covenants applied to them and the Output and Supply Agreement had been terminated. Meyer had thus made a prima facia case for dissolution.

The court noted that the contractual dissolution mechanism did not affect its decision. It found that respondents had not agreed to dissolution, then discussed whether the LLC agreement forbade Meyer from filing an action for dissolution. Although the LLC agreement provided that "the Managing Member shall have no authority . . . to cause the Company to undertake or engage in . . . the dissolution" of PNB, Meyer argued that the contract could not trump the LLC Act and interpreted the LLC agreement as allowing Meyer to petition the court for judicial dissolution but not to directly take steps to dissolve PNB. The court accepted this reading and cited authority counseling against strict interpretation of an LLC agreement where the result would be inequitable.

Lastly, the court noted that the equities weighed in favor of dissolution, finding that PNB's dissolution would not materially prejudice the Oklahoma litigation and that the record did not suggest dissolution would affect respondents' ability to collect damages from Meyer in that litigation.

b. *In re Carlisle Etcetera LLC,* C.A. No. 10280-VCL (Del. Ch. Apr. 30, 2015)

One of two members of a Delaware LLC assigned its interests to its subsidiary. The management board of the LLC eventually deadlocked and the assignee petitioned the court to dissolve the LLC. The other of the original two members of the LLC moved to dismiss on grounds that the assignee was not a member and, thus, the assignee lacked standing to petition for statutory dissolution of the LLC under Section 18-802 of the Delaware LLC Act. The assignor joined the assignee as a co-petitioner.

The court first addressed whether the assignor or assignee had standing to seeking dissolution under Section 18-802 of the Delaware LLC Act. The court noted that Section 18-802 permits members and managers of an LLC to seek statutory dissolution. Neither the assignor nor the assignee claimed to be a manager; however, both claimed to be members. The court noted that because the LLC agreement was silent on assignments, the interest was freely assignable. The court then found that the assignor lost its status as a member of the LLC when it assigned its all of its interests in the LLC to its subsidiary because Section 18-702(b)(3) of the LLC Act states that, unless otherwise provided in the LLC Agreement (which, in this case, was silent on assignment), "a member ceases to be a member . . . upon assignment of all of the member's limited liability company interest." The court also analyzed whether the assignee was a member of the LLC, finding that the assignee did not automatically become a member upon the assignment of the interest. The court cited to Section 18-702(b)(1) of the LLC Act, which provides that, unless otherwise provided in an LLC Agreement, an "assignment of a limited liability company interest does not entitle the assignee to become . . . a member." The LLC Agreement did not otherwise provide and, therefore, the court found that the assignor's transfer of the interest to its subsidiary made the subsidiary as assignee, not a member. The court also noted that the LLC Agreement did not give assignees the right to seek statutory dissolution.

The court then turned to petitioners' allegations that the assignee became a *de facto* member by consent of the parties. The assignee claimed that, under Section 18-301(b)(1) of the Delaware LLC Act, the assignee became a member once its status was reflected in the books of the LLC. The assignee pointed to tax forms and a draft amended and restated LLC agreement that had never been adopted as "records" of the LLC that identified the assignee as a member. However, the court found the assignee's jump to Section 18-301 too hasty. The court reviewed Section 18-301(b), which states that an assignee may become a member as provided in Section 18-704(a). The court drew a distinction between the admission of a member and the time at which the admission takes effect and focused here on whether the assignee had been admitted as permitted under Section 18-704(a). Section 18-704(a) identifies two possibilities for a permitted admission of an assignee—either as provided in the LLC agreement or, unless otherwise provided in the LLC agreement, upon the affirmative vote or written consent of all members. The LLC agreement was silent on admission of assignees as members and the court found that "affirmative vote or written consent" meant a type of formal action of members contemplated in Section 18-302. No such formal action was pled in this case and, therefore, the court found that there was never a permitted admission of the assignee as a member of the LLC. Because the assignee was not a member, it could not seek judicial dissolution under Section 18-802.

However, the court continued its analysis. It refused to grant the motion to dismiss on the grounds that neither the assignor nor the assignee could seek statutory dissolution under Section 18-802. The court found that, under the facts of this case, the assignee had standing to seek dissolution in equity. The court stated:

> For Section 18-802 to provide the exclusive method of dissolving an LLC, it would . . . divest this court of a significant aspect of its traditional equitable jurisdiction. Section 18-802 does not state that it establishes an exclusive means to obtain dissolution, nor does it contain language overriding this court's equitable authority. To the contrary, the LLC Act elsewhere recognizes that equity backstops the LLC structure by providing generally that "the rules of law and equity" shall govern in "any case not provided for in this chapter." 6 *Del. C.* § 18-1104.

The court further noted that (i) an LLC agreement is not "an exclusively private contract among its members precisely because the LLC has powers that only the State of Delaware can confer," (ii) "dissolution is not a purely private affair" and, therefore, (iii) Delaware retains an interest in having the court available to hear a dissolution petition of an LLC "where equity demands." Therefore, because the assignee had standing to seek dissolution of the LLC in equity, the court denied the motion to dismiss.

c. *In re Mobilactive Media LLC*, C.A. No. 5725-VCP (Del. Ch. Jan 25, 2013)

In this case, two members of a joint venture formed as a Delaware LLC disputed the scope of a clause in the LLC agreement stating that interactive video and advertising activities in North America by either member or their affiliates must take place exclusively through the joint venture. The joint venture, Mobilactive Media LLC ("Mobilactive"), was formed by plaintiff Terry Bienstock ("Bienstock") and defendant Silverback Media, PLC

("Silverback). Other defendants included Adenyo, Inc. ("Adenyo"), which was the Canadian parent of Silverback, and two Delaware corporations that were subsidiary entities of Adenyo.

Bienstock alleged that Silverback and its affiliates breached the Mobilactive LLC Agreement, and usurped corporate opportunities belonging to Mobilactive by, among other things, acquiring competing businesses through subsidiaries without offering Mobilactive or Bienstock an opportunity to invest in these acquisitions. Silverback argued that these acquisitions did not violate the LLC agreement under Silverback's interpretation, but the court found that Silverback's interpretation was incorrect and that its conduct breached the LLC agreement.

The court next addressed Bienstock's claims that Silverback breached its fiduciary duties by usurping corporate opportunities rightfully belonging to Mobilactive. The LLC agreement provided that the parties were to act in the best interest of Mobilactive and exercise utmost good faith and fair dealing, and the court stated that under Delaware common law parties to a joint venture are required to act with the utmost good faith, fairness and honesty with each other with respect to the enterprise. The court found that certain of the alleged opportunities were within Mobilactive's line of business and that Mobilactive had an interest or expectancy in those opportunities. Silverback alleged that Mobilactive did not have the financial ability to exploit the opportunities. The court disagreed, but also held that, based on corporate precedent, there is no need to consider the financial ability of Mobilactive to exploit the opportunities in a corporate opportunity analysis where there is a parallel contractual obligation to present corporate opportunities. The court also found that, as a result of the alleged usurpation, Silverback stood in a position inimicable to its duties to Mobilactive. The court thus found that the elements of the corporate opportunity test were satisfied with respect to certain opportunities taken by Silverback and held that Silverback breached its fiduciary duties.

After Bienstock initially sued Silverback, Adenyo acquired all of the assets of Silverback in consideration solely for a deed of indemnity by Adenyo to pay all claims of Silverback's creditors in Silverback's liquidation. Bienstock alleged that such transfer constituted a fraudulent transfer because the transfer was made by Adenyo with actual intent to hinder Bienstock's ability to enforce his rights under the LLC agreement. In addition to other defenses, Adenyo argued that the court had no personal jurisdiction over it. The court found that it had personal jurisdiction over Adenyo under Delaware's long-arm statute because Adenyo "purposely availed" itself of the benefits and protections of Delaware by incorporating Delaware subsidiaries for the purpose of acquiring the entities that formed the basis of the Silverback's wrongful usurpation of Mobilactive's corporate opportunities. The court also found that Adenyo was subject to personal jurisdiction under LLC Act Section 18-109 (the LLC Act's implied consent statute) because Adenyo participated materially in the management of Mobilactive by causing a petition seeking judicial dissolution of Mobilactive be filed in the court. The court then held that the transfer by Silverback to Adenyo constituted a fraudulent transfer.

The court next addressed the petition for judicial dissolution of Mobilactive that had been filed by Adenyo on behalf of Silverback. The court noted that under existing Delaware case law even if the standard under LLC Act Section 18-802 for judicial dissolution is met, the court may decide in the exercise of its equitable powers not to grant the petition. In this case, the court found that it may not be reasonably practicable to carry on Mobilactive's business, but the court refused to order judicial dissolution. The court found that the breaches of contract and fiduciary duties by Silverback contributed materially to Mobilactive's inability to fulfill its business purpose and stated that Silverback should not be permitted to use its inequitable conduct to extricate itself from the joint venture. The court also found that a judicial dissolution might hinder Bienstock from recovering the damages he is due.

d. *Lola Cars Int'l Ltd. v. Krohn Racing, LLC,* C.A. No. 4479-VCN; *Lola Cars Int'l Ltd. v. Krohn Racing, LLC,* C.A. No. 4886-VCN (Del. Ch. Oct. 20, 2009); *Lola Cars Int'l. Ltd. v. Krohn Racing, LLC,* C. A. No. 4479-VCN; *Lola Cars Int'l. Ltd. v. Krohn Racing, LLC*, C.A. No. 4886-VCN (Del. Ch. Aug. 2, 2010); and *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, C.A. No. 6520-VCN (Del. Ch. Feb. 29, 2012)

This case involved a joint venture named Proto-Auto, LLC, a Delaware LLC (the "Company"), which was formed by an English company ("Lola") and a Delaware LLC ("Krohn"). Lola held 51% of the interest in the Company and Krohn held 49%, but the parties agreed to equal representation on the Company's board, each company appointing one director. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell's services as the Company's CEO. Hazell was also a defendant in this case. This decision addressed the Defendant's motion to dismiss both of Lola's complaints.

Lola's first complaint alleged that (1) Krohn breached the Company's Operating Agreement (the "Agreement"), (2) Hazell, as CEO and a director of the Company, breached his fiduciary duties of loyalty and care, and (3) Krohn aided and abetted Hazell's disloyalty. On these claims, Lola sought (1) dissolution of the Company and appointment of a liquidating receiver, (2) an injunction to prohibit the Company from taking action outside the ordinary course of business, and (3) damages against Krohn and Hazell.

Krohn argued that the Company should not be dissolved under Section 18-802 of the LLC Act because the facts alleged by Lola could not support a finding that it was "not reasonably practicable to carry on the business [of the Company]." Krohn interpreted the statutory reasonable practicability standard to mean that "the business has been abandoned or that its purpose is not being pursued." The court rejected this interpretation and applied the test from *Fisk Ventures, LLC v. Segal*, C.A. No. 2017-CC (Del. Ch. Jan. 13, 2009). The three *Fisk* factors, which provide guidance in evaluating a situation in regard to the reasonable practicability standard, are: (1) whether the members' vote is deadlocked at the Board level; (2) whether there exists a mechanism within the operating agreement to resolve the deadlock; and (3) whether there is still a business to operate based on the company's financial condition.

The court found at least two of the three *Fisk* factors were present. First, Lola and Krohn were deadlocked over whether to replace Hazell as CEO. Second, although the Agreement contained a buy-out provision in case of a member dispute, it was entirely voluntary. Third, there was serious doubt as to whether the Company could continue in light of its financial condition because Lola had been extending the Company significant additional capital to keep it running. Furthermore, the court found that Lola's claims of Hazell's mismanagement and disloyalty, plus the Company's overall failure, added to the reasonable conclusion that dissolution may be appropriate.

Krohn had also argued that judicial dissolution under Section 18-802 was inappropriate because the Agreement defined the circumstances upon which it could be terminated, and such circumstances did not include judicial dissolution. The court rejected Krohn's argument stating that, even assuming that Section 18-802 of the LLC Act could be precluded by contract, the fact that the Agreement (1) contained self-termination options, and (2) did not expressly allow for judicial dissolution, could not render judicial dissolution unavailable. Consequently, the court denied defendant's motion to dismiss the claim for judicial dissolution.

Krohn moved to dismiss Lola's fiduciary claims on the ground that Lola failed to plead demand futility with particularity as required by Section 18-1003 of the Act. The court noted that it relies on corporate precedent in interpreting Section 18-1003 of the Act, and that in the corporate context, demand is considered excused when allegations in the complaint create a reason to doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. (Citing *Wood v. Baum*). The court denied Krohn's motion because Lola satisfied the particularized pleading standard by claiming that Hazell faced a substantial risk of liability due to his failure to maintain appropriate inventory levels and pay state taxes in a timely fashion, and his use of Company assets for Krohn's benefit in violation of his duty of loyalty to the Company. Furthermore, the court noted that where the directors of a two-director board have equal voting power and one is interested, demand should be excused because that one interested director alone has the power to preclude litigation.

Krohn moved to dismiss Lola's claim of breach of the implied covenant of good faith and fair dealing because the Agreement specifically stated that Hazell was to be CEO and that Krohn could replace him if he resigned from that position. The court agreed with Krohn that the implied covenant could not be applied to matters covered by contract. Therefore, Krohn's argument went, since the contract spoke to the issues of who is CEO and which party had the right to replace him, the implied covenant did not apply. Furthermore, Krohn argued that Lola could have bargained for the right to replace the CEO if that is what it wanted. The court determined that although the Agreement did not require Krohn to assent to Lola's wishes regarding replacement of Hazell, Krohn's refusal to even consider replacing him, or even attend board meetings to discuss the matter, allowed the court a reasonable inference of a breach of the implied covenant. In other words, the implied covenant did not apply to who was CEO or who could replace him, but it did apply to Krohn's consideration of Lola's suggestions.

Lola's second complaint relied on the termination clause in Section 10.1 of the Agreement, which allowed a member to terminate the Agreement after a breach by the other by notifying the breaching party of (1) the breach, and (2) the consequences of a failure to rectify the breach. Under Section 10.1 of the Agreement, the breaching party then had 21 days to rectify the breach, after which time the non-breaching party was permitted to terminate. Lola argued that its first complaint served as the requisite notice to Krohn and that more than 21 days had passed since the first complaint was filed, so Lola was entitled to terminate the Agreement. Also, Lola contended that upon termination of the Agreement, it should receive the right to manage and control the Company because of its majority position. Lola requested relief in the form of a TRO and permanent injunction prohibiting Hazell and Krohn from interfering with Lola's control of the Company, or acting as its agents.

The court denied Lola's request for interim injunctive relief, and refused to declare a termination of the Agreement based on Section 10.1 of the Agreement because Lola's first complaint did not notify Krohn of the consequences of failing to rectify the breach. Lola then moved for leave to file a supplemental complaint, alleging that (1) it sent Krohn a letter giving notice that Krohn had materially breached the Agreement and outlining the consequences of Krohn's failure to rectify its breach, and (2) that more than 21 days had passed since the letter was sent. In the alternative, Lola asked the court to dismiss its second complaint without prejudice so that it could file a new complaint that incorporated the letter to Krohn, and the court granted this request.

In a subsequent decision in this case, the Chancery Court addressed Lola's claim that Hazell mismanaged the Company, thereby breaching his fiduciary duties of care and loyalty. As noted by the court, a manager of a Delaware LLC owes the LLC and its members the traditional fiduciary duties of care and loyalty; however, these duties may be contractually limited by agreement among the members. Because the members did not agree in the Agreement or otherwise to limit Hazell's fiduciary duties as the manager of the Company, the court found that Hazell was bound by the traditional duties of care and loyalty. Lola argued that Hazell's effort to challenge a recently amended design regulation constituted a violation of his duty of care. The court stated that to prove a claim for breach of duty of care, Lola needed to demonstrate that Hazell acted with gross negligence, which has been defined as "reckless indifference" or conduct beyond the "bounds of reason." The court determined that Lola failed to meet its burden. While Hazell had been advised that efforts to lobby for an exemption from the regulation were likely to fail, there were legitimate reasons for doing so. Lola also argued that Hazell's failure to sell any Company vehicles was motivated by his loyalty to Krohn. Not only did the court find that Hazell's lack of independence and potential conflicts were known from the outset, it also held that there was insufficient evidence to conclude that Hazell deliberately, or even recklessly, stunted the Company's sales efforts as a means of furthering Krohn's interests.

The court also addressed Lola's request for judicial dissolution. Under Section 18-802 of the LLC Act, upon "application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." The court stated that even if the high standard of "not reasonably practicable" is met, the decision to enter a decree of dissolution rests with the discretion of the court. The court stated that the exercise of its discretion in judicial dissolution cases has been guided, among other things, by: (1) whether there is deadlock between the members at the board level, (2) whether the operating agreement gives a means of navigating around the deadlock, and (3) whether, due to the company's financial position, there is still a business to operate." The court found that there was no deadlock among the members. While representation on the Company's board was split evenly between the members, management of the Company's daily business affairs was vested in Hazell, who could not be unilaterally removed. The court determined that the most significant fact, however, was the fact that the Agreement contained a provision whereby the parties could resolve any deadlock. Under the deadlock procedure, if a dispute between the members remained unresolved for approximately one month, one member (the "Terminator") had the right to offer a buyout price to the other member (the "Recipient"). The Recipient then had fifteen days in which to either accept the requirement to sell all of its interest to the Terminator or serve written notice upon the Terminator to require it to sell all of its interest to the Recipient at the same buyout price. According to the court, while it may have not been an ideal remedy for Lola's discontent with Hazell and Krohn, the deadlock procedure provided a method by which Lola could exit the business if it so chose. The court's determination that the deadlock procedure was a reasonable alternative for carrying on the business of the LLC stands in contrast to its holdings in both the *Fisk* case and *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004). In *Fisk*, the court found it inequitable to force the petitioner to use its put right to exit its investment if it did not deem it to be in its best interest. Similarly, in *Haley*, the court found the exit mechanism to be an unreasonable alternative to carrying on the business of the LLC both because neither party wanted to leave the LLC and because the exit mechanism would not have provided for the removal of Haley as a personal guarantor of a mortgage on property owned by the LLC even though he would no longer have had any interest in the LLC.

The court in *Lola* concluded by emphasizing that a party to an operating agreement may not seek judicial dissolution as a means of freeing itself from what it considers to be a bad deal. As stated by the court, such a rule would unfairly permit one party to defeat the reasonable expectations of the other.

In a subsequent decision, Krohn sought, pursuant to a motion for judgment on the pleadings, to recover Lola's share of legal fees incurred by the Company, on behalf of itself and Hazell, that Krohn had paid. Under the Company's operating agreement, if the audited balance sheet of the Company for any financial year showed negative net assets for the Company, Lola was required to fund 51% of the amount of the negative net assets of the Company. Krohn acknowledged that the Company did not have an audited balance sheet but alleged that Lola's conduct had improperly prevented the preparation of an audited balance sheet. The court stated that if Lola had unjustifiably interfered with the effort to obtain an audit, Lola should not be able to benefit from the lack of an audit and avoid an obligation to provide additional funding to the Company. However, the determination whether Lola was responsible for improperly preventing an audit was a factual matter that the court could not resolve on a motion for judgment on the pleadings. In addition, with respect to Hazell's legal fees, Lola argued that it could not be responsible for those fees because Hazell had no right to mandatory indemnification under the Company's operating agreement. The court rejected this argument because, according to the court, the fact that an operating agreement could, but fails to, provide for mandatory indemnification does not preclude management of a Delaware LLC from deciding to provide an officer with assistance in paying legal fees arising out of work-related matters. The court held, again, that the determination of whether Hazell's legal fees were necessary and reasonable presented factual issues that could not be resolved on a motion for judgment on the pleadings.

e. *Phillips v. Hove*, C.A. No. 3644-VCL (Del. Ch. Sept. 22, 2011)

The dispute arose out of a start-up business conducted through a Delaware LLC. In an earlier decision in which the court denied a motion to dismiss (*see Phillips v. Schifino*, C.A. No. 3644-VCL (Del. Ch. Dec. 18, 2009)), the court found that the transaction agreements involved were so ambiguous that it was unclear whether the central document, a four-page term sheet, was sufficient to constitute a limited liability company agreement. In this post-trial opinion, the court determined, among other issues, the identity of the voting members of the LLC. Noting that it had previously deemed the ownership provision in the term sheet to be ambiguous in denying a motion for summary judgment, the court now determined that the term sheet provided for an LLC composed of two members. One of the issues faced by the court was whether one of the members owned its membership interest in his individual capacity or through an investment entity. The term sheet referred both to the investment entity and to the individual as a member of the LLC and was executed by the individual in his individual capacity. Other agreements drafted in connection with the formation of the LLC, however, referred to the investment entity as a member of the LLC. The court noted that discussions between the parties indicated that the other member, who clearly owned his membership interest in his individual capacity, was aware that the investment entity, not the individual with whom the other member had negotiated, was intended to own the membership interest at issue. Based on the totality of the evidence, the court concluded that the membership interest was owned by the investment entity rather than the individual.

The court next considered whether it could exercise personal jurisdiction over an individual who was neither a member nor a manager of the LLC, but ran the day-to-day operations of the business and had filed a bankruptcy petition on behalf of the LLC. Noting that Section 18-109(a) of the LLC Act extends not only to formally designated managers but also to persons who "participate materially in the management" of an LLC, the court concluded that it could exercise jurisdiction in this case because an individual who manages the day-to-day operations of a business and files a bankruptcy petition on behalf of a business participates materially in the management of an LLC.

With the jurisdiction issue resolved, the court turned to a claim that the same individual breached his fiduciary duties. According to the court, an individual who asserts control over the operations of an LLC owes fiduciary duties to the LLC and its members even though such individual is not a member or manager. In making this determination, the court relied on past Delaware cases stating that one who controls property of another owes fiduciary duties when exerting such control over such property. The individual at issue had sold the LLC's inventory through a competing retailer, and the court concluded that this action constituted a breach of the duty of loyalty.

Finally, the court addressed an application for judicial dissolution of the LLC pursuant to LLC Act Section 18-802. Based on the history of animosity between the parties, the court concluded a deadlock existed. The court stated that the fact that the LLC had continued to operate marginally was irrelevant to whether a deadlock existed because the LLC never operated in conformity with the members' agreement. Although the term sheet provided for a mechanism to resolve disputes between the members, the court concluded judicial dissolution was appropriate because it was a more reasonable and equitable alternative than the contractual mechanism. Specifically, the term sheet called for resolution of member disputes by a five-member board. Each board member's appointment, however, had to be approved by both members of the LLC, which the court found to be unlikely given the state of relations between the members. In light of the members' history of disputes, the court also found it unlikely that the LLC would be wound down in an orderly and timely manner and therefore appointed a liquidating trustee pursuant to LLC Act Section 18-303(a).

f. *Achaian, Inc. v. Leemon Family LLC*, C.A. No. 6261-CS (Del. Ch. Aug. 9, 2011)

In this case, a member holding a 30% membership interest in a Delaware LLC purportedly assigned its entire interest to another existing member who had held a 20% interest. There was one remaining member who held a 50% membership interest. The transferee member then filed suit claiming a deadlock and requesting judicial dissolution pursuant to Section 18-802 of the LLC Act.

In its decision, the Court of Chancery addressed defendant's motion to dismiss for failure to state a claim. The primary issue was whether the purported assignment of the 30% membership interest conferred only economic rights or full member rights on the transferee in light of a provision of the LLC agreement requiring the affirmative consent of all members to the admission of a new member. Defendant claimed that plaintiff-assignee had no rights other than economic rights with respect to the 30% percent membership interest because plaintiff-assignee, although an existing member, was not admitted as member with respect to the assigned interest.

The court began its analysis by noting that the default rule under the LLC Act is that an assignment of a membership interest, by itself, does not entitle the assignee to become a member of the LLC. This rule, however, may be displaced by agreement, and, as a result, the court turned to the relevant provisions of the LLC agreement.

Reading the agreement as a whole, the court concluded that the LLC agreement permitted a member to assign its entire membership interest, including voting rights, to another existing member without obtaining the consent of all members. In support of its conclusion, the court noted that the LLC agreement defined "Interest" to mean a member's "entire ownership interest." The LLC agreement also provided that a member could "transfer all or any portion of its Interest." The court read these provisions to mean that a member may transfer all or any portion of its entire ownership interest, including voting rights.

Other provisions of the LLC agreement, the court noted, supported this reading. The LLC agreement, for example, provided that where a transfer of an "Interest" caused the LLC to have more than one member, it should be treated as a partnership for tax purposes. According to the court, this made clear that "Interest" as contemplated by the LLC agreement's transfer provision included every aspect of a member's interest in the LLC, not just economic rights.

Having found that a member could assign its entire interest, including voting rights, the court next addressed whether such an assignment required the consent of all members. The court concluded that the provision of the LLC agreement pertaining to admission of members, by its plain terms, applied only to assignees who were not yet admitted as members. The court noted this approach was consistent with the LLC Act, which, according to the court, contemplates a singular admission governed by the specific terms of the LLC agreement. As a result, the assignment at issue resulted in the LLC having two members, each with equal voting power.

The court then turned to plaintiff's request for judicial dissolution. Noting that the court, on prior occasions, had analogized an application for judicial dissolution of an LLC with two coequal managers to an application made under DGCL Section 273, the court concluded that plaintiff had pleaded the three prerequisites required under Section 273 to survive a motion to dismiss—(1) two 50% owners (2) engaged in a joint venture (3) who are unable to agree whether to discontinue the business or how to dispose of its assets. The court therefore denied defendant's motion to dismiss.

g. *Vila v. BVWebties LLC*, C.A. No. 4308-VCS (Del. Ch. Oct. 1, 2010)

Bob Vila, the well-known home improvement expert ("Vila"), and his friend, George Hill ("Hill"), entered into a joint venture called BVWebties LLC ("Webties") for the purpose of promoting Vila's website, BobVila.com. Webties' LLC Agreement provided that Vila and Hill were the managers, each owning 49% of Webties with the remaining 2% owned by a trust. The LLC Agreement required the consent of a majority of the managers for all decisions or actions to be made or taken. In order to promote BobVila.com, Webties entered into a licensing agreement with Vila that allowed Webties to use certain intellectual property owned by Vila. Either party could unilaterally terminate the licensing agreement at any time for any or no reason. In late 2007, after losing Webties' biggest advertiser and with the housing bubble about to burst, Vila and Hill began to disagree on the direction of Webties. The disagreement culminated in (a) a stalemate between Vila and Hill as to the strategic direction of Webties, (b) Vila's termination of the licensing agreement and a related suit by Hill in Massachusetts, and (c) Vila's initiation of the this action in the Court of Chancery seeking judicial dissolution of Webties under Section 18-802 of the LLC Act.

The court began by stating that in a judicial dissolution action, "the party seeking dissolution must prove by a preponderance of the evidence that he is (i) a member or manager, and (ii) that it is 'not reasonably practicable to carry on the business in conformity with a limited liability company agreement.'" Since it was clear that Vila was both a manager and a member of Webties, the court focused on whether it was no longer reasonably practicable to carry on the business of Webties in accordance with its LLC agreement. Vila advanced two arguments in support of judicial dissolution. First, he argued that since the purpose of Webties was to operate BobVila.com and Vila had terminated the licensing agreement with Webties, it was impossible for Webties to continue to perform its purpose. Second, he argued that the LLC agreement required both Vila and Hill, as managers of Webties, to consent to Webties' decisions and actions, and given that Vila and Hill could not agree on how to operate the business, no actions could be taken in accordance with Webties' LLC agreement.

The court stated that "[w]hen two coequal owners and managers whose mutual agreement is required for any company action are deadlocked as to the future direction and management of the enterprise and the LLC agreement provides no mechanism by which to break the deadlock, it is not reasonably practicable for the LLC to operate consistently with its operating agreement and a judicial dissolution will be ordered." The court analogized this situation to cases brought under DGCL Section 273, which sets forth the following three prerequisites for a judicial dissolution: (i) the corporation must have two 50% stockholders, (ii) those stockholders must be engaged in a joint venture, and (iii) those stockholders must be unable to agree upon whether to discontinue the business or how to dispose of its assets. The court found that Vila and Hill were deadlocked over serious managerial issues, including the strategic vision for and current operation of Webties and that the LLC agreement did not provide any alternative basis for resolving the deadlock. The court also found that Webties could not continue to operate in conformity the LLC agreement after Vila's termination of the licensing agreement. The court noted that this was not a case in which Vila in bad faith manufactured a phony deadlock, terminated the licensing agreement on short notice and sought dissolution so that he could take profits for himself that otherwise would have come to Webties. The court stated that "a business is not being operated in accordance with its governing instrument when one fiduciary acts as sole manager in a situation where the agreement of others is required." For these reasons, the court granted Vila's request for judicial dissolution of Webties.

Hill brought counterclaims alleging that Vila breached Webties' LLC agreement, breached the implied covenant of good faith and fair dealing and breached his fiduciary duties. The court found no basis for Hill's claims that Vila breached the LLC agreement. The court also denied Hill's claims that Vila breached the implied covenant of good faith and fair dealing. Hill argued that Vila breached the implied covenant by bringing the judicial dissolution action and refusing to accept supposed offers to purchase Webties. The court's denial was based on the fact that judicial dissolution is a remedy expressly contemplated by the LLC agreement and that Vila, as an equity owner, was under no contractual duty to consider selling his interest in Webties at a price that he viewed as suboptimal. Finally, the court dismissed Hill's fiduciary duty claims, finding them to have arisen out of the same facts that formed the basis for Hill's breach of contract claims and thus to fail because they were superfluous.

h. *The Homer C. Gutchess 1998 Irrevocable Trust v. Gutchess Companies, LLC*, C.A. No. 4916-VCN (Del. Ch. Feb. 22, 2010)

In this decision, the Court of Chancery amplified a bench ruling in a case in which a petitioner sought judicial dissolution of a Delaware LLC. Petitioner apparently was seeking dissolution on equitable grounds in the absence of a deadlock and cited to the Court of Chancery's decision in *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004), as precedent. The court distinguished this case from *Haley* because in *Haley*, the court found that the members of the LLC had envisioned co-equal management and, under the circumstances of that case, one of the members had become unable to influence the management of the LLC. In this case, the court found that the LLC was not intended to be a joint venture, but rather the intention was that one of the members would have 100% voting control over the LLC. The court did not find it compelling that another member of the LLC disagreed with how that member was managing the LLC. Petitioner also cited to the court's decision in *In re Arrow Inv. Advisors, LLC*, C.A. No. 4091-VCS (Del. Ch. Apr. 23 2009), for judicial dissolution of an LLC on equitable grounds in the absence of a deadlock. Similar to the facts in *Arrow*, petitioner alleged breaches of fiduciary duty as the basis for judicial dissolution. In *Arrow*, the court held that, where judicial dissolution is requested because of alleged breaches of fiduciary duty, the petition fails to state a claim unless such breaches have (i) been proven in a plenary action and (ii) there exists some basis for a dissolution notwithstanding whatever relief was granted in that plenary action. In this case, the court found that whether the manager was breached any fiduciary duties owed to the members had little effect on whether the LLC was carrying out the broad business purposes for which it had been organized. In addition, the court found that petitioner had not alleged the type of absolute frustration or futility required for the court to order judicial dissolution of the LLC in the absence of unachievable business purpose and/or deadlock. The court stated that if relief were appropriate for the alleged breaches of fiduciary duty, it appeared that such relief could be granted through less extreme judicial remedies than the remedy of judicial dissolution of the LLC.

i. *In re Arrow Inv. Advisors, LLC*, C.A. No. 4091-VCS (Del. Ch. Apr. 23, 2009)

In this case, the petitioner sought the judicial dissolution of Arrow Investment Advisors, LLC (the "Company"), which was founded by the petitioner and two other individuals. The petitioner held a 30% stake in the Company and also had served as the Company's CEO. The Company was formed for the purpose of acting as an investment advisor to certain investment funds and for such other lawful business as the management committee chose to pursue. In 2008, the Company encountered difficulties. A financial report sent to the members of the Company showed that the Company was operating at an almost $275,000 loss for the first seven months of 2008. Consequently, the Company sought capital contributions from each of the members to support the Company's entry into additional investment-related ventures.

Shortly after the request by the Company for additional capital contributions, petitioner sought judicial dissolution of the Company under Section 18-802 of the LLC Act. In response, the Company sought dismissal of petitioner's action under Rule 12(b)(6). The court stated that for petitioner to be successful, petitioner must allege specific facts supporting a rational inference that the standard set forth in Section 18-802 for judicial dissolution has been met. Thus, petitioner must demonstrate that "it is not reasonably practicable to carry on the business in conformity with [the] limited liability company agreement." The court further stated that the ultimate determination of whether to grant judicial dissolution was left to the discretion of the court. The court went on to state that due to the extreme nature of the remedy of judicial dissolution, the remedy was granted sparingly. Thus the court reasoned that the remedy would be granted only in situations "in which the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock or where the defined purpose of the entity has become impossible to fulfill."

Petitioner argued that the Company should be dissolved because it failed to meet projections contained in its initial business plan and sought to pursue strategies that were not set forth in its initial business plan. In rejecting this argument, the court noted that this argument did not suggest the Company was unable to operate in accordance with its governing document, which is the test required by Section 18-802 of the LLC Act. Petitioner also argued that although the LLC Agreement contained a broad purpose clause that allowed the Company to enter into any business that the management committee chose to pursue, the Company's purpose, nevertheless, should be read narrowly because a broad reading would render the court's power under Section 18-802 of the LLC Act meaningless and render Section 18-802 of the LLC Act superfluous. The court rejected this argument as unpersuasive and reasoned that there could be a confluence of specific circumstances that "make it nihilistic for the [Company] to continue." For example, dissolution might be appropriate where a petitioner is able to show that in spite of a manager's intentions to pursue a business line allowed by the LLC's governing instrument, it would be obviously futile and would not result in a business success. Further, the court reasoned that it could not conclude that a specifically negotiated provision of the LLC Agreement that allowed for a broad purpose should be used by petitioner prematurely to end the Company's existence because petitioner was unhappy with how the Company's management had chosen to exercise discretion granted to it in the LLC Agreement.

Petitioner also alleged breaches of fiduciary duty by the managers in support of his action to dissolve the Company. The court stated that the cursory nature of the allegations made in the complaint were inadequate and suffered from a number of deficiencies, including a failure to allege any specific facts to support allegations that the managers breached their fiduciary duties. Additionally, the court noted that termination of an LLC due to fiduciary breaches would be rare. Further, even if the allegations were sufficient, petitioner failed to pursue the action in the correct manner for at least two policy-based reasons. First, many breach of fiduciary duty claims belong to the entity itself, not its equityholders, and therefore the law has developed rules for bringing a derivative action. The LLC Act requires that a complaint set forth with particularity the effort of plaintiff to secure the initiation of the action by a manager or member or the reasons for not making the effort. Further, the demand rule exists, in part, to give an LLC the right to control litigation to address any alleged wrongs and Section 18-802 judicial dissolution actions should not be used to by-pass this right of the LLC. Second, petitioner's action to allege breaches of fiduciary duty also sought to by-pass certain procedural mechanisms set forth in the LLC Agreement, principally the requirement that "any questions, issues or disputes arising out of or relating to the" LLC Agreement be handled through negotiation then mandatory mediation and then, finally, binding arbitration prior to any lawsuit being brought. Because Delaware policy favors alternative dispute resolution mechanisms, the court held that petitioner could not use a Section 18-802 action as an end-run around the dispute resolution mechanisms contained in the LLC Agreement. Thus, the court granted the Company's motion to dismiss the petition with prejudice except that the court held dissolution could be sought at the end of the arbitration process if breaches of fiduciary duty were proven and a good faith argument could be made that the remedies granted by the arbitrator supported an order of dissolution.

j. *Estate of Burke v. Eric S. Burke Home Improvement*, C.A. No. 3322-CC (Del. Ch. Apr. 14, 2009)

This case involved a Delaware LLC formed by two brothers, each of whom owned a 50% membership interest. Following the death of one of the brothers, his wife became vested in his 50% share of the LLC. The wife had a very contentious relationship with the other brother and filed a petition seeking judicial dissolution of the LLC, claiming that she and the other brother were hopelessly deadlocked. This decision addressed the parties' cross-motions for summary judgment.

The court denied the motions, stating that in this case the determination of "whether it is 'reasonably practicable' to carry on the business and operations of the LLC" is a mixed question of law and fact that must be determined by a trial. The court stated, however, that based on the precedent set in *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004), in which the court ordered the dissolution of a two 50% member LLC where the members were deadlocked over business strategy, it was "exceedingly likely" that the court would order the dissolution of the LLC. The court urged the parties to reach an amicable compromise to unwind their relationship to avoid a difficult and expensive trial and cautioned that the result of such a trial likely will be a court-ordered sale of the business, the costs of which may well result in nothing being left to divide among the members.

k. *In re ECH Mgmt., LLC*, C.A. No. 3126-CC (Del. Ch. Mar. 12, 2009); *In re ECH, LLC*, C.A. No. 3127-CC (Del. Ch. Mar. 12, 2009)

Two Delaware limited liabilities companies (the "LLCs") were formed by four siblings to hold and manage certain real property. To take significant action with respect to the respective real property, each LLC operating agreement required the unanimous consent of the members, who were the four siblings. The members could not agree on whether to keep the properties or sell them. Because of this deadlock, three of the members sought judicial dissolution under Section 18-802 of the LLC Act. The other member-sibling opposed judicial dissolution and filed a counterclaim (among others) in which she alleged that her right to vote under the operating agreements had been interfered with or coerced by her siblings' refusal to accede to her position regarding the sale of the properties. She specifically requested that the court enjoin her siblings from proceeding with the litigation in order to vindicate her "right to vote" under the operating agreements. The court was presented with a motion to dismiss this claim brought by the other members. The court did not reach the merits of this issue as it determined the issue was premature, but the court noted that it seemed "highly dubious" that the court would conclude that the member's right to vote had somehow been infringed upon or coerced in the context of the family feud. In this regard, the court observed that the member asserting this counterclaim attested in her own pleadings to her full exercise of her voting authority by withholding her consent to the sale of the properties or the dissolution of the LLCs.

l. *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC (Del. Ch. Jan. 13, 2009)

Petitioner, Fisk Ventures, LLC, sought judicial dissolution of Ginitrix, LLC (the "Company") pursuant to Section 18-802 of the LLC Act. Petitioner was a Class B member of the Company and the respondent, Andrew Segal ("Segal"), was the sole holder of Class A membership interests in the Company. Under the Company's LLC Agreement, the Company's board could only act pursuant to approval of 75% of the members of the board. Thus, the Company could not act without the agreement of the Class A representatives and the Class B representatives. The Company had been involved in a long-lived corporate dispute that resulted in a deadlocked board. The issue before the court was whether it was "reasonably practicable" under Section 18-802 of the LLC Act for the Company to continue to operate its business in conformity with its LLC Agreement. Petitioner made a motion for judgment on the pleadings which the court granted.

In reviewing petitioner's motion, the court stated that the test for judicial dissolution is whether it is reasonably practicable for the Company to carry on its business, not whether it is impossible. The court stated that several factual circumstances have frequently been cited in the case law: (1) whether the members' vote is deadlocked at the board level; (2) whether the operating agreement gives no means of navigating around the deadlock; and (3) whether due to the financial condition of the company, there is effectively no business to operate. The court noted that the foregoing circumstances were not individual dispositive, nor did they all have to exist for the standard to be met. In the present case, however, the court found more than sufficient undisputed evidence that all three factors were present and, therefore, it was not reasonably practicable to carry on the business of the Company in conformity with its LLC agreement. Segal had argued that the LLC Agreement granted petitioner a "put right" which would permit petitioner to exit the Company at fair market value for any reason or for no reason, and this put right was a provision that could resolve the board's deadlock. The court, however, rejected this argument, reasoning that the put right was a right of petitioner's and not a right of the Company. Thus, it would be inequitable for the court to force petitioner to use its put right to exit its investment if it did not deem it to be in its best interest. The court went on to state that it would not second guess a party's business decision in choosing whether to exercise its previously negotiated option rights.

Segal also argued that a dissolution would destroy any value the Company had preserved in valuable patent rights. The court rejected this argument reasoning that a potential purchaser could structure the transaction to reap the benefits of the Company's patent rights. Further the court found that the parties would never be able to reach agreement on how to dispose of the patent rights regardless of their potential value. Finally, Segal argued that petitioner could not seek judicial dissolution because it came to the court with unclean hands. Segal argued that petitioner had unclean hands because it had used its contractually negotiated rights under the LLC Agreement to benefit itself, but the court held that petitioner had the right to maximize its position in accordance with the terms of the LLC Agreement. Finally, the court rejected Segal's argument that petitioner sought dissolution simply to buy the Company's assets at fire sale prices, finding that he presented no support for such contention. The court concluded that because the Company's financial progress was impeded by a deadlock in the boardroom and the deadlock could not be remedied through a legal mechanism set forth within the four corners of the operating agreement, dissolution was the only remedy available as a matter of law. The court stated that it would not re-draft the LLC Agreement for the sophisticated and well-represented parties. Thus, the court granted petitioner's motion seeking judgment on the pleadings on its petition for dissolution of the Company.

m. *In re Seneca Invs. LLC*, C.A. No. 3624-CC (Del. Ch. Sept. 23, 2008)

Petitioner, a member and the former CEO of a Delaware LLC filed a petition seeking judicial dissolution of the LLC, alleging that since his removal as CEO the LLC had not had a business plan and had not made any investments, sought or received any additional capital, held any director or member meeting or sought to hire anyone to conduct the business of the LLC. The LLC's operating agreement provided that, subject to certain exceptions, the "[LLC] will be governed in all respects as if it were a corporation organized under and governed by the Delaware General Corporation Law . . . and the rights of its Stockholders will be governed by the DGCL." Petitioner thus sought judicial dissolution of the LLC under both Section 18-802 of the LLC Act and Section 226(a)(3) of the Delaware General Corporation Law (the "DGCL"). In this opinion, the Court of Chancery addressed the LLC's motion for judgment on the pleadings.

Under Section 18-802 of the LLC Act, the Court of Chancery may decree dissolution "whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." Based on the lack of extensive case law interpreting Section 18-802 of the LLC Act, the court looked to case law involving judicial dissolution of limited partnerships and observed that judicial dissolution has been ordered where there was a "deadlock" that prevented a company from operating and where the defined purpose of the company was fulfilled or impossible to carry out. The court stated that since there is no allegation of a deadlock, the inquiry must focus on whether it is impracticable for the LLC to fulfill its business purpose. To determine whether it was reasonably practicable to carry on the business of the LLC, the court looked to the purpose clause set forth in the governing document of the LLC, which provided that the LLC could "engage in any lawful act or activity for which corporations may be organized under the [DGCL]." Because petitioner alleged that the LLC was functioning as a passive instrumentality, which is a function that is both lawful and common for an LLC, the court found that petitioner had not alleged sufficient facts to support a claim that it is not reasonably practicable for the LLC to carry on business in conformity with its operating agreement. The court stated that it will not attempt to divine some other business purpose by interpreting provisions of the LLC's governing documents other than the purpose clause. In addition, the court rejected petitioner's further argument that the court should order judicial dissolution of the LLC because the LLC had allegedly failed to comply with the certain provisions of its operating agreement, including, for example, failing to make required cash distributions. The court stated that violations of an operating agreement are not necessarily grounds to order dissolution. The court also noted that the LLC had filed several counterclaims, including claims for conversion and unjust enrichment, against petitioner, and under Delaware case law, a non-deadlocked LLC pursuing claims is a legitimate business activity that can defeat a petition for dissolution.

Because the LLC had elected to be governed by the DGCL, the court also analyzed whether dissolution could be warranted under Section 226(a)(3) of the DGCL. Under Section 226(a)(3) of the DGCL, the Court of Chancery has the power to appoint a custodian or receiver for a corporation when the "corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute assets." The court again looked to the LLC's purpose clause and observed that a corporation can lawfully function as a passive holding company. Citing prior case law, the court stated that "waiting to see if an opportunity presents itself to realize a return on its investment" is "a rational, lawful use of the corporate form."

Finally, the court addressed petitioner's claim that the LLC cannot take any action other than liquidation because a provision of its operating agreement provides that "[d]istributions of available cash for any Fiscal Year shall be made to the Stockholders in accordance with the number of Common Shares held by each." The court acknowledged that a court should not decide between reasonable interpretations of a contract provision on a motion for judgment on the pleadings; however, the court found petitioner's interpretation of the foregoing provision was not reasonable and thus dismissed the petition for judicial dissolution.

n. *Willie Gary LLC v. James & Jackson LLC*, C.A. No. 1781 (Del. Ch. Jan. 10, 2006) and (Del. Mar. 14, 2006), *aff'g*, (Del. Ch. Jan. 10, 2006)

Plaintiff and defendant were co-owners of a Delaware LLC that was in need of a significant infusion of capital to succeed. Plaintiff negotiated an agreement with a third-party investor who was willing to provide capital, but the defendant refused to agree to a pro rata reduction of its interest in order to generate the equity needed to compensate the investor. As a result, plaintiff could not consummate the agreement and the parties became deadlocked with respect to the business of the LLC.

Plaintiff filed a suit in the Court of Chancery seeking a mandatory injunction and specific performance or, in the alternative, judicial dissolution of the LLC. Defendant filed a motion to dismiss the complaint, arguing that plaintiff's claims were required to be arbitrated pursuant to the terms of the LLC agreement. Prior to determining the issue of arbitrability, the court first had to determine whether the arbitrability of the claims should be decided by the court or an arbitrator. Following United States Supreme Court and Delaware Supreme Court precedent, the court held that, as a general rule, the issue of substantive arbitrability required judicial resolution unless there was clear and unmistakable evidence that the parties intended otherwise. In determining that the issue was properly before the court, the court held that the mere reference to the rules of the American Arbitration Association (the "AAA Rules") in the arbitration clause of the LLC Agreement did not provide clear and unmistakable evidence that the issue of substantive arbitrability was to be decided by an arbitrator.

Upon determining that the court should decide the issue of arbitrability, the court denied defendant's motion to dismiss the complaint, finding that none of plaintiff's claims were subject to the mandatory arbitration clause in the LLC agreement. To the contrary, the court held that the LLC agreement itself expressly authorized members of the LLC to apply to courts for the remedies of injunctive relief and specific performance. Further, with respect to plaintiff's claim for judicial dissolution, the court distinguished the dissolution clause in this case from that examined in *Terex Corp. v. STV USA, Inc*. and held that the provisions in the LLC agreement relating to judicial dissolution under the LLC Act explicitly contemplated judicial involvement in the dissolution process.

In a subsequent decision in this case, the Delaware Supreme Court affirmed the Chancery Court's decision that the plaintiff's claims were not required to be arbitrated. With respect to the issue of substantive arbitrability, however, the Supreme Court did not totally agree with the Chancery Court's analysis regarding the significance of a reference to the AAA Rules in the arbitration clause. As a matter of policy, the Delaware Supreme Court held that Delaware follows the majority federal view that references to the AAA Rules in an arbitration agreement are clear and unmistakable evidence that the parties intended to arbitrate issues of substantive arbitrability. The Supreme Court stated that the majority view, however, does not require that arbitrators decide the arbitrability of all cases where an arbitration clause incorporates the AAA Rules. Instead, it only applies where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability. Thus, since the arbitration provision in the LLC agreement did not subject all disputes to arbitration, the Supreme Court held that the Chancery Court was correct in not applying the federal majority rule in this case.

o. *Terex Corp. v. STV USA, Inc.*, C.A. No. 1614-N (Del. Ch. Oct. 20, 2005)

In an action seeking judicial dissolution of a Delaware LLC, defendant filed this motion to dismiss the complaint pursuant to a broad mandatory arbitration clause in the LLC Agreement. In construing the scope of the arbitration clause, which unequivocally required all disputes arising out of or relating to the LLC Agreement to be resolved through arbitration, the court stated that the broad scope of the arbitration mandate would only be limited where a plain reading of the text specifically indicated such a limitation. The court held that a clause requiring members of the LLC to take appropriate steps required by law following the entry of a judicial dissolution under the LLC Act did not carve out judicial dissolution from the reach of the arbitration clause, stating that dissolution could be entered in accordance with, and following, dissolution proceedings before an arbitrator. The court therefore granted defendant's motion to dismiss.

p. *In re Silver Leaf, L.L.C.*, C.A. No. 20611 (Del. Ch. Aug. 18, 2005)

In a further decision in this case relating to a dispute among three members of a Delaware LLC formed for the purpose of acquiring a license to sell, market, sublease and distribute vending machines, the court addressed plaintiff's motion for judicial dissolution of the LLC. Plaintiff moved for judicial dissolution following the termination of a sales and marketing agreement between the LLC and the manufacturer of the vending machines, which was the LLC's primary asset. In addition, due to a provision in the LLC Agreement requiring the vote of a majority of interests in order for any member to take certain key business actions on behalf of the LLC, plaintiff and defendants, who each collectively owned 50% of the LLC, were deadlocked with respect to the future operations of the LLC. The court granted plaintiff's motion to judicially dissolved the LLC pursuant to Section 18-802 of the LLC Act, finding that the LLC was no longer reasonably practicable to carry on its business in a reasonably practicable manner. The defendants also asserted various counterclaims against plaintiff but, having determined that the business in which the LLC was involved was nothing more than a penny stock fraud, the court applied the doctrine of unclean hands to bar all other claims among the parties arising out of the LLC, including petitions by both parties for the appointment of a receiver.

q. *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004)

Matthew James Haley ("Haley") and Gregory L. Talcott ("Talcott") were the only members of a Delaware LLC in which each held a fifty percent interest. The principal asset of the LLC was certain real property leased by a restaurant jointly operated by Haley and Talcott. When the parties had a falling out regarding the operation of the restaurant, Haley asserted several positions as a member of the LLC following the expiration of the restaurant's lease, including voting to reject a new lease for the restaurant, voting to terminate any existing lease arrangement by which the restaurant asserted a right to possession of the property and voting to put the real property up for sale. Talcott, on the other hand, took no action, content to maintain the status quo, with the restaurant continuing to occupy the property under a month-to-month arrangement. Haley sought judicial dissolution of the LLC under Section 18-802 of the Delaware LLC Act alleging that it was not reasonably practicable to carry on the business of the LLC in conformity with the LLC agreement because the two members of the LLC were deadlocked. This was the court's decision on Haley's motion for summary judgment.

In analyzing this case under Section 18-802 of the Delaware LLC Act, the court found it was appropriate to analogize to Section 273 of the DGCL, which provides for judicial dissolution of a joint venture corporation having two stockholders who are deadlocked. The court stated that there are three prerequisites for a judicial order of dissolution under DGCL Section 273: (1) the corporation must have two 50% stockholders, (2) those stockholders must be engaged in a joint venture and (3) the stockholders must be unable to agree upon whether to discontinue the business or how to dispose of its assets. The court found each of these prerequisites to be satisfied in the context of the LLC.

Talcott argued that the LLC should not be judicially dissolved, however, because the business of the LLC could be carried on in conformity with the LLC agreement through the operation of an exit mechanism in the LLC agreement. The exit mechanism a procedure under which a member would purchase for fair market value the membership interest of another member who wished to "quit" the LLC. The court found that the exit mechanism was not a reasonable alternative for carrying on the business of the LLC because neither party desired to leave the LLC and because, if Haley were forced to use the exit mechanism to leave the LLC as Talcott suggested, the exit mechanism would not provide for the removal of Haley as a personal guarantor of the mortgage on the property owned by the LLC even though he would no longer have any interest in the LLC. The court determined that it would not be equitable for Haley to remain personally liable for the guaranty when he retained no interest in the LLC and concluded that judicial dissolution was the only equitable way to break the deadlock and effect the separation of the parties.

3. Waiver of Right to Seek Dissolution

a. *Huatuco v. Satellite Healthcare*, C.A. No. 8465-VCG (Del. Ch. Dec. 9, 2013)

Plaintiff, a member of Satellite Dialysis of Tracy LLC, a Delaware LLC (the "Company"), filed a complaint against the Company and its other member, Satellite Health Care ("Satellite"), seeking judicial dissolution of the Company on the basis of a deadlock between plaintiff and Satellite (each owning 50% of the Company member interests). In response, defendants moved to dismiss for failure to state a claim. Although the complaint alleged that defendants breached the Company's LLC agreement (the "Agreement"), the court found that the parties had agreed that the motion to dismiss was not reliant on the underlying facts alleged in the complaint, but rather on whether plaintiff would be entitled to judicial dissolution based on the interplay of LLC Act Section 18-802 and certain provisions of the Agreement.

The court held that the terms of the Agreement precluded plaintiff from seeking judicial dissolution. Citing *R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008), and the broad policy of freedom of contract underlying the LLC Act, the court held that judicial dissolution is a default rule which may be displaced by contract. Here, the Agreement included the following provision: "Except as otherwise required by applicable law, the Members shall only have the power to exercise any and all rights expressly granted to the Members pursuant to the terms of this Agreement." The court found that this applied to member rights generally—which included the right to seek judicial dissolution.

As the Agreement did not expressly provide any right to judicial dissolution and because judicial dissolution was a default rule, and so not included by virtue of the clause "as required by applicable law," the court concluded that judicial dissolution was intentionally excluded and was not available to plaintiff.

b. *Lola Cars Int'l Ltd. v. Krohn Racing, LLC,* C.A. No. 4479-VCN; *Lola Cars Int'l Ltd. v. Krohn Racing, LLC,* C.A. No. 4886-VCN (Del. Ch. Oct. 20, 2009); *Lola Cars Int'l. Ltd. v. Krohn Racing, LLC*, C. A. No. 4479-VCN; *Lola Cars Int'l. Ltd. v. Krohn Racing, LLC*, C.A. No. 4886-VCN (Del. Ch. Aug. 2, 2010); and *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, C.A. No. 6520-VCN (Del. Ch. Feb. 29, 2012)

This case involved a joint venture named Proto-Auto, LLC, a Delaware LLC (the "Company"), which was formed by an English company ("Lola") and a Delaware LLC ("Krohn"). Lola held 51% of the interest in the Company and Krohn held 49%, but the parties agreed to equal representation on the Company's board, each company appointing one director. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell's services as the Company's CEO. Hazell was also a defendant in this case. This decision addressed the Defendant's motion to dismiss both of Lola's complaints.

Lola's first complaint alleged that (1) Krohn breached the Company's Operating Agreement (the "Agreement"), (2) Hazell, as CEO and a director of the Company, breached his fiduciary duties of loyalty and care, and (3) Krohn aided and abetted Hazell's disloyalty. On these claims, Lola sought (1) dissolution of the Company and appointment of a liquidating receiver, (2) an injunction to prohibit the Company from taking action outside the ordinary course of business, and (3) damages against Krohn and Hazell.

Krohn argued that the Company should not be dissolved under Section 18-802 of the LLC Act because the facts alleged by Lola could not support a finding that it was "not reasonably practicable to carry on the business [of the Company]." Krohn interpreted the statutory reasonable practicability standard to mean that "the business has been abandoned or that its purpose is not being pursued." The court rejected this interpretation and applied the test from *Fisk Ventures, LLC v. Segal*, C.A. No. 2017-CC (Del. Ch. Jan. 13, 2009). The three *Fisk* factors, which provide guidance in evaluating a situation in regard to the reasonable practicability standard, are: (1) whether the members' vote is deadlocked at the Board level; (2) whether there exists a mechanism within the operating agreement to resolve the deadlock; and (3) whether there is still a business to operate based on the company's financial condition.

The court found at least two of the three *Fisk* factors were present. First, Lola and Krohn were deadlocked over whether to replace Hazell as CEO. Second, although the Agreement contained a buy-out provision in case of a member dispute, it was entirely voluntary. Third, there was serious doubt as to whether the Company could continue in light of its financial condition because Lola had been extending the Company significant additional capital to keep it running. Furthermore, the court found that Lola's claims of Hazell's mismanagement and disloyalty, plus the Company's overall failure, added to the reasonable conclusion that dissolution may be appropriate.

Krohn had also argued that judicial dissolution under Section 18-802 was inappropriate because the Agreement defined the circumstances upon which it could be terminated, and such circumstances did not include judicial dissolution. The court rejected Krohn's argument stating that, even assuming that Section 18-802 of the LLC Act could be precluded by contract, the fact that the Agreement (1) contained self-termination options, and (2) did not expressly allow for judicial dissolution, could not render judicial dissolution unavailable. Consequently, the court denied defendant's motion to dismiss the claim for judicial dissolution.

Krohn moved to dismiss Lola's fiduciary claims on the ground that Lola failed to plead demand futility with particularity as required by Section 18-1003 of the Act. The court noted that it relies on corporate precedent in interpreting Section 18-1003 of the Act, and that in the corporate context, demand is considered excused when allegations in the complaint create a reason to doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. (Citing *Wood v. Baum*). The court denied Krohn's motion because Lola satisfied the particularized pleading standard by claiming that Hazell faced a substantial risk of liability due to his failure to maintain appropriate inventory levels and pay state taxes in a timely fashion, and his use of Company assets for Krohn's benefit in violation of his duty of loyalty to the Company. Furthermore, the court noted that where the directors of a two-director board have equal voting power and one is interested, demand should be excused because that one interested director alone has the power to preclude litigation.

Krohn moved to dismiss Lola's claim of breach of the implied covenant of good faith and fair dealing because the Agreement specifically stated that Hazell was to be CEO and that Krohn could replace him if he resigned from that position. The court agreed with Krohn that the implied covenant could not be applied to matters covered by contract. Therefore, Krohn's argument went, since the contract spoke to the issues of who is CEO and which party had the right to replace him, the implied covenant did not apply. Furthermore, Krohn argued that Lola could have bargained for the right to replace the CEO if that is what it wanted. The court determined that although the Agreement did not require Krohn to assent to Lola's wishes regarding replacement of Hazell, Krohn's refusal to even consider replacing him, or even attend board meetings to discuss the matter, allowed the court a reasonable inference of a breach of the implied covenant. In other words, the implied covenant did not apply to who was CEO or who could replace him, but it did apply to Krohn's consideration of Lola's suggestions.

Lola's second complaint relied on the termination clause in Section 10.1 of the Agreement, which allowed a member to terminate the Agreement after a breach by the other by notifying the breaching party of (1) the breach, and (2) the consequences of a failure to rectify the breach. Under Section 10.1 of the Agreement, the breaching party then had 21 days to rectify the breach, after which time the non-breaching party was permitted to terminate. Lola argued that its first complaint served as the requisite notice to Krohn and that more than 21 days had passed since the first complaint was filed, so Lola was entitled to terminate the Agreement. Also, Lola contended that upon termination of the Agreement, it should receive the right to manage and control the Company because of its majority position. Lola requested relief in the form of a TRO and permanent injunction prohibiting Hazell and Krohn from interfering with Lola's control of the Company, or acting as its agents.

The court denied Lola's request for interim injunctive relief, and refused to declare a termination of the Agreement based on Section 10.1 of the Agreement because Lola's first complaint did not notify Krohn of the consequences of failing to rectify the breach. Lola then moved for leave to file a supplemental complaint, alleging that (1) it sent Krohn a letter giving notice that Krohn had materially breached the Agreement and outlining the consequences of Krohn's failure to rectify its breach, and (2) that more than 21 days had passed since the letter was sent. In the alternative, Lola asked the court to dismiss its second complaint without prejudice so that it could file a new complaint that incorporated the letter to Krohn, and the court granted this request.

In a subsequent decision in this case, the Chancery Court addressed Lola's claim that Hazell mismanaged the Company, thereby breaching his fiduciary duties of care and loyalty. As noted by the court, a manager of a Delaware LLC owes the LLC and its members the traditional fiduciary duties of care and loyalty; however, these duties may be contractually limited by agreement among the members. Because the members did not agree in the Agreement or otherwise to limit Hazell's fiduciary duties as the manager of the Company, the court found that Hazell was bound by the traditional duties of care and loyalty. Lola argued that Hazell's effort to challenge a recently amended design regulation constituted a violation of his duty of care. The court stated that to prove a claim for breach of duty of care, Lola needed to demonstrate that Hazell acted with gross negligence, which has been defined as "reckless indifference" or conduct beyond the "bounds of reason." The court determined that Lola failed to meet its burden. While Hazell had been advised that efforts to lobby for an exemption from the regulation were likely to fail, there were legitimate reasons for doing so. Lola also argued that Hazell's failure to sell any Company vehicles was motivated by his loyalty to Krohn. Not only did the court find that Hazell's lack of independence and potential conflicts were known from the outset, it also held that there was insufficient evidence to conclude that Hazell deliberately, or even recklessly, stunted the Company's sales efforts as a means of furthering Krohn's interests.

The court also addressed Lola's request for judicial dissolution. Under Section 18-802 of the LLC Act, upon "application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." The court stated that even if the high standard of "not reasonably practicable" is met, the decision to enter a decree of dissolution rests with the discretion of the court. The court stated that the exercise of its discretion in judicial dissolution cases has been guided, among other things, by: (1) whether there is deadlock between the members at the board level, (2) whether the operating agreement gives a means of navigating around the deadlock, and (3) whether, due to the company's financial position, there is still a business to operate." The court found that there was no deadlock among the members. While representation on the Company's board was split evenly between the members, management of the Company's daily business affairs was vested in Hazell, who could not be unilaterally removed. The court determined that the most significant fact, however, was the fact that the Agreement contained a provision whereby the parties could resolve any deadlock. Under the deadlock procedure, if a dispute between the members remained unresolved for approximately one month, one member (the "Terminator") had the right to offer a buyout price to the other member (the "Recipient"). The Recipient then had fifteen days in which to either accept the requirement to sell all of its interest to the Terminator or serve written notice upon the Terminator to require it to sell all of its interest to the Recipient at the same buyout price. According to the court, while it may have not been an ideal remedy for Lola's discontent with Hazell and Krohn, the deadlock procedure provided a method by which Lola could exit the business if it so chose. The court's determination that the deadlock procedure was a reasonable alternative for carrying on the business of the LLC stands in contrast to its holdings in both the *Fisk* case and *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004). In *Fisk*, the court found it inequitable to force the petitioner to use its put right to exit its investment if it did not deem it to be in its best interest. Similarly, in *Haley*, the court found the exit mechanism to be an unreasonable alternative to carrying on the business of the LLC both because neither party wanted to leave the LLC and because the exit mechanism would not have provided for the removal of Haley as a personal guarantor of a mortgage on property owned by the LLC even though he would no longer have had any interest in the LLC.

The court in *Lola* concluded by emphasizing that a party to an operating agreement may not seek judicial dissolution as a means of freeing itself from what it considers to be a bad deal. As stated by the court, such a rule would unfairly permit one party to defeat the reasonable expectations of the other.

In a subsequent decision, Krohn sought, pursuant to a motion for judgment on the pleadings, to recover Lola's share of legal fees incurred by the Company, on behalf of itself and Hazell, that Krohn had paid. Under the Company's operating agreement, if the audited balance sheet of the Company for any financial year showed negative net assets for the Company, Lola was required to fund 51% of the amount of the negative net assets of the Company. Krohn acknowledged that the Company did not have an audited balance sheet but alleged that Lola's conduct had improperly prevented the preparation of an audited balance sheet. The court stated that if Lola had unjustifiably interfered with the effort to obtain an audit, Lola should not be able to benefit from the lack of an audit and avoid an obligation to provide additional funding to the Company. However, the determination whether Lola was responsible for improperly preventing an audit was a factual matter that the court could not resolve on a motion for judgment on the pleadings. In addition, with respect to Hazell's legal fees, Lola argued that it could not be responsible for those fees because Hazell had no right to mandatory indemnification under the Company's operating agreement. The court rejected this argument because, according to the court, the fact that an operating agreement could, but fails to, provide for mandatory indemnification does not preclude management of a Delaware LLC from deciding to provide an officer with assistance in paying legal fees arising out of work-related matters. The court held, again, that the determination of whether Hazell's legal fees were necessary and reasonable presented factual issues that could not be resolved on a motion for judgment on the pleadings.

c. *R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, C.A. No. 3803-CC (Del. Ch. Aug. 19, 2008); *R&R Capital, LLC v. Merritt*, C.A. No. 3989-CC (Del. Ch. Sept. 3, 2009)

Plaintiffs sought judicial dissolution under Section 18-802 of the LLC Act or in the alternative the winding up under Section 18-803 of the LLC Act or the appointment of a receiver under Section 18-805 of the LLC Act of nine Delaware LLCs. The Delaware LLCs were managed by an individual manager who was not made a party to the lawsuit. The respondent LLCs moved to dismiss the petition and made two arguments in support of their motion. First, in support of their motion to dismiss with respect to two of the nine LLCs (the "Pandora Entities"), respondents argued that petitioners lacked standing to seek the dissolution or winding up of the LLCs under Sections 18-802 or 18-803 of the LLC Act because both sections by their terms only permit members and managers to act and petitioners were neither members nor managers of the Pandora Entities and therefore lacked standing. The court agreed and dismissed petitioners' claims under Section 18-802 and 18-803 of the LLC Act. Petitioners also sought the appointment of a receiver for the Pandora Entities under Section 18-805 of the LLC Act, which provides that any "creditor, member or manager of the limited liability company, or any other person who shows good cause" may seek the appointment of a receiver. The court found that respondents did not challenge petitioners' ability to seek relief under Section 18-805 of the LLC Act and therefore denied the motion with respect to Section 18-805 of the LLC Act.

Petitioners were members of the other seven Delaware LLCs (the "Waiver Entities") and therefore there was no question that they had standing to seek relief under Sections 18-802, 18-803 and 18-805 of the LLC Act. Respondents argued that pursuant to the applicable LLC agreement of each of the Waiver Entities (the "LLC Agreements"), petitioners waived their right to seek dissolution or appointment of a liquidator. Petitioners conceded that the contractual language in the applicable LLC agreements purported to effect a waiver of such rights but nevertheless argued that the waiver was invalid as a matter of law. The court, however, rejected this argument and granted respondents' motion with respect to the Waiver Entities. The court began its analysis by observing that the policy behind the LLC Act is to provide the parties involved with the maximum amount of freedom of contract, private ordering and flexibility. The court noted that petitioners obviously availed themselves of this flexibility to tailor the respective LLC Agreements in such a way as to meet each LLC's needs including by providing for a waiver of members' rights to seek dissolution or the appointment of a liquidator. In support of their argument that the waiver provisions contained in each of the LLC Agreements were unenforceable as a matter of law, petitioners first argued that Section 18-109(d) of the LLC Act stood for the proposition that "non-managing members may not waive their rights to maintain legal actions in Delaware courts absent an agreement to arbitrate." Thus, because petitioners were non-managing members and had not agreed to arbitrate, the waiver provision violated the statute and was therefore void. The court rejected this argument, finding that Section 18-109(d) was essentially a venue provision. The court went on to state that if the statute were interpreted in the manner asserted by petitioners, the LLC Act would conflict with itself and the rules of statutory construction would caution against such a conclusion.

Petitioners' second argument was that certain provisions of the LLC Act, including those governing judicial dissolution or the appointment of a receiver were mandatory and non-waivable. In support of this proposition, petitioners argued that any "statutory provisions that did not contain the qualification 'unless otherwise provided in a limited liability company agreement (or a variation thereof)' are mandatory and may not be waived." In rejecting this broad rule offered by petitioners, the court noted that in general the mandatory provisions of the LLC Act are those that are intended to protect third parties, not the contracting members. Additionally, the use of the word "may" indicates the "voluntary, not mandatory or exclusive, set of options." Thus, the court found that sections 18-802, 18-803 and 18-805 of the LLC Act were not mandatory for three reasons. First, the LLC Act does not expressly say that these provisions cannot be modified by agreement. Second, the provisions employ permissive rather than mandatory language in that each provision uses the auxiliary verb "may" to indicate the options of the court under the subject provisions. Third, and the court stated most importantly, none of the rights conferred by the applicable statutory provisions were designed to protect third parties.

Petitioners also argued that the waiver of a member's right to seek dissolution or the appointment of a receiver violated the public policy of Delaware and offended notions of equity. The court also rejected this argument for three reasons. First, the court reasoned that the LLC Act was based on the policy of freedom of contract and allowing the members of an LLC to order their affairs contractually as they deemed appropriate. Further, Delaware as a freedom of contract state has a policy of enforcing the voluntary agreement of sophisticated parties, such as those party to the LLC Agreements. Thus, because the LLC Agreements were among sophisticated parties, the court concluded that the state's policy "mandates that [the] Court respect and enforce the parties' agreement." Second, the court reasoned that there are legitimate business reasons why members of an LLC would want to include a provision whereby members prospectively waive their right to seek dissolution or the appointment of a receiver in its LLC agreement. For example, a lender under a loan agreement may require an LLC prospectively to agree to waive their rights to judicial dissolution to protect the LLC, otherwise a disgruntled member could push the LLC into default on all of its outstanding loans simply by filing a petition with the court. Third, the court found petitioners' plea to the court's sense of equity misplaced, finding that the LLC Act did not leave petitioners without any recourse. The court emphasized that the LLC Act prohibits parties from waiving the implied covenant of good faith and fair dealing and it is the protection of the "implied covenant that allows the vast majority of the remainder of the LLC Act to be so flexible."

In a further decision in this case, after holding that the manager of the nine LLCs had been properly removed for cause, the court stated that the relationship of petitioners and the manager had become "completely dysfunctional and beyond repair or reconciliation" and that the removal of the manager, which did not affect her continued status as member, was insufficient to resolve the parties' dispute. The court thus granted petitioners' request for the appointment of a receiver to dissolve and wind up the LLCs.

4. Winding Up

a. *In re Interstate Gen. Media Holdings, LLC*, C.A. No. 9221-VCP (Del. Ch. Apr. 25, 2014)

In this subsequent decision, the court determined the method by which a certain LLC's assets should be auctioned upon its judicial dissolution. In 2012, Interstate General Media Holdings, LLC ("Interstate") acquired Philadelphia Media Network LLC ("PMN") and its subsidiaries, including the Philadelphia Inquirer, the Daily News, and Philly.com. Interstate's interests were owned by two principle companies, General American Holdings, Inc. ("General American") and Intertrust GCN, LP ("Intertrust"), each of which had the right to appoint a member to Interstate's two-member management committee which directed Interstate's day-to-day business and required the unanimous consent of both committee members to act. Following Interstate's acquisition of PMN, the committee members could not agree on the management of Interstate, frustrating Interstate's ability to effectuate business. Intertrust petitioned the court to dissolve Interstate. The instant dispute involved the type of auction that would be most appropriate to wind down Interstate's affairs—an "English-style" open-outcry auction, favored by General American, or a public auction orchestrated by an auctioneer, advocated by Intertrust.

The court first noted that a company's LLC agreement will control the manner in which its assets should be auctioned. Interstate's LLC agreement, however, lacked a provision governing auction form and, thus, the court found that the parties' likely intended that the court select the appropriate type of auction. In light of this, the court found that the LLC agreement was "essentially irrelevant" to the instant dispute and, instead, the court should select the best auction method that would result in Interstate being wound up in a manner that best maximized its value.

The court determined that a public auction would be unlikely to maximize the company's value because the record contained evidence supporting a reasonably probability that no serious outside bidders would emerge to bid on Interstate. Because only the parties involved desire to purchase Interstate, a private auction, such as the one advocated by General American, would be more likely to expediently and efficiently liquidate Interstate. The court also concluded that a private "English-style" auction would be cheaper and thus, the best method to auction assets.

b. *Poppiti v. Conaty,* C.A. No. 6920-VCG (Del. Ch. May 1, 2013)

In this letter opinion, the court addressed a dispute as to whether a liquidating trustee of a law firm organized as an LLC (the "Firm") had authority to receive and distribute certain legal fees distributed after the dissolution of the Firm and to distribute those fees 50/50 between the two members of the Firm.

The court granted a motion for partial summary judgment regarding whether the liquidating trustee had the authority under the liquidation agreement to receive and distribute the fees because the party disputing the trustee's authority conceded the issue in his brief.

As to the decision to distribute the fees 50/50 to the two Firm members, the court noted that the liquidation agreement specified that the Firm should be wound up and the assets distributed according to Section 18-804 of the LLC Act. As applied, Section 18-804 provided that, after firm creditors were paid and capital contributions reimbursed, the assets should be distributed to the members in the proportion in which the members shared an interest in the firm. The Firm operating agreement provided that the two members shared the Firm's profits 50/50. Further, the members were not creditors by virtue of their post-dissolution efforts. Therefore, the court instructed the liquidating trustee to distribute the residual assets to the Firm's members in proportion to their membership interests.

c. *Matthew v. Laudamiel,* C.A. No. 5957-VCN (Del. Ch. Feb. 21, 2012) and (Del. Ch. June 29, 2012); *Matthew v. Fläkt Woods Grp. SA,* C.A. No. 5957-VCN (Del. Nov. 20, 2012)

Plaintiff, a member and manager of Aeosphere LLC, a Delaware limited liability company (the "Company"), brought claims relating to the dissolution of the Company against the other managers of the Company and two companies with which the Company had business dealings. Defendants raised various defenses against plaintiff's claims and brought multiple counterclaims against plaintiff.

In the first decision by the Court of Chancery, the court addressed motions to dismiss for lack of personal jurisdiction by defendants Fläkt Woods Group SA ("Fläkt Woods") and SEMCO LLC ("SEMCO"), which were companies who had engaged in various business dealings with the Company. Plaintiff claimed that Fläkt Woods and SEMCO aided and abetted breaches of fiduciary duty by the other defendants and were otherwise complicit in the other defendants' wrongful actions. Plaintiff contended that the court had personal jurisdiction over Fläkt Woods under Delaware's long-arm statute by virtue of the conspiracy theory of jurisdiction. The court rejected plaintiff's conspiracy theory of jurisdiction because, although plaintiff pled sufficient facts to allow the court to infer that a conspiracy existed, plaintiff failed to show that Fläkt Woods knew or had reason to know of an act or effect in Delaware before the completion of the conspiracy, which is a requirement of the conspiracy theory of jurisdiction.

Plaintiff asserted that the court had personal jurisdiction over SEMCO under Delaware's long-arm statute by virtue of the conspiracy theory of jurisdiction and/or by virtue of the general jurisdiction test. The court rejected the conspiracy theory, finding that sufficient facts were not alleged to support SEMCO's participation in a conspiracy against plaintiff, and rejected plaintiff's general jurisdiction argument, finding that SEMCO's minimal business in Delaware was not sufficient to constitute a "persistent course of conduct" or "regularly do[ing] or solicit[ing] business" in Delaware. Moreover, the court found that SEMCO's presence in Delaware was not sufficient to meet the "minimum contacts" required by constitutional due process.

The court also addressed plaintiff's motion to dismiss several of defendants' counterclaims. The court first addressed defendants' counterclaim for breach by plaintiff of the implied covenant of good faith and fair dealing in the Company's LLC agreement. One of defendants' claims for breach of the implied covenant was based on plaintiff's alleged refusal to accept or reject various contracts and alleged refusal to take certain actions requiring his approval under the LLC agreement. However the LLC agreement contained specific provisions dealing with "deadlocks" among the Company's board of managers and disagreements between the parties and contained a general standard governing the performance of managerial duties by the Company's managers and the officers. Other of defendants' claims for breach of the implied covenant were based on plaintiff's alleged unreasonable refusal to cooperate in the management of the Company and alleged improper allocation of Company resources among various internal projects. These claims again were squarely addressed by provisions in the LLC agreement. In addition, defendants' claimed that plaintiff's refusal to attend or otherwise participate in an emergency meeting of the board of managers meeting breached the implied covenant. Because the LLC agreement provided a "best efforts" standard to govern attendance at meetings of the board of managers, the court found this issue was also explicitly addressed by the LLC agreement. The court thus dismissed each of defendants' claims for breach of the implied covenant, holding that the implied covenant only operates where an LLC agreement does not speak to the issue directly and provide an explicit answer, and, in this case, each of defendants' bases for the implied covenant were directly addressed by the LLC agreement. The court stated the misconduct alleged by defendants was more properly addressed by defendants' counterclaims against plaintiff for breach of the LLC agreement.

In its initial decision, the court also addressed defendants' counterclaims for damages resulting from plaintiff's alleged breach of the employment agreement between the Company and plaintiff and for unjust enrichment, both of which claims were based upon plaintiff's alleged improper charging of personal expenses to the Company. The court held that these claims belonged to the Company and that defendants did not have standing to bring them in their individual capacities and thus dismissed these claims. Since a certificate of cancellation had already been filed to terminate the existence of the Company, the court stated that these claims would have to be brought in the name of the Company by a trustee or receiver appointed under LLC Act Section 18-805 or, if the Company were revived, by the revived Company or derivatively by its members after the revival of the Company.

In a subsequent decision by the Court of Chancery, the court addressed plaintiff's motions for partial summary judgment on his claim that defendants breached the Company's LLC agreement by causing the dissolution and winding of the Company without plaintiff's consent and his claim that defendants' wrongful dissolution of the Company resulted in the unlawful conversion of his units in the Company. Plaintiff argued that his vote was required to approve the dissolution and winding up of the Company under Section 5.2.6(b) of the LLC agreement. The court held that that the plain language of Section 5.2.6(b) of the LLC agreement did not require plaintiff's vote to dissolve the Company but may have required plaintiff's vote to wind up the Company. Plaintiff argued that the apparent discrepancy in the LLC agreement between the vote required for dissolution and the vote required for winding up must be the result of a scrivener's error. The court rejected plaintiff's argument to reform the LLC agreement to correct the scrivener's error because plaintiff did not satisfy either of the standards for reformation, namely that there was a mutual mistake of the parties or a unilateral mistake by plaintiff of which defendants were aware but remained silent.

Plaintiff argued in the alternative that the voting provision in Section 5.6.2(a) of the LLC agreement required his vote for the dissolution of the Company, and therefore the vote to dissolve the Company without his approval breached the Company Agreement. Defendants' argued that, if such voting provision applied, plaintiff's refusal to attend the board meeting at which the vote was taken created a deadlock which would have allowed defendants to dissolve the Company without plaintiff's approval. The court denied plaintiff's motion for summary judgment on this issue, holding that the matter must be resolved on a more robust factual record.

With respect to plaintiff's claim that defendants' breached the LLC agreement by winding up of the Company without his approval, the court held that, unless defendants' prevailed on an affirmative defense, they would be liable for breach of the LLC agreement because the voting provision of the LLC agreement expressly required the unanimous approval of the board of managers to wind up the Company. The court rejected defendants' argument that "unanimous approval of the Board" meant unanimous approval of the managers present at a meeting, which interpretation would have resulted in actions requiring "unanimous approval of the Board" under the LLC agreement requiring a lesser vote than typical Board actions.

As an affirmative defense, defendants alleged that even if their approval of the decision to wind up the Company breached the LLC agreement, the breach was excused by plaintiff's prior material breaches of the LLC agreement, such as plaintiff's alleged refusal to approve or disapprove contracts requiring his approval and his alleged improper approval of contracts that also required another manager's approval. The court, noting that only a material breach, and not a nonmaterial or *de minimis* breach, will excuse another party from performing under a contract, stated that the issue of materiality is principally a question of fact and is not generally suited for disposition by summary judgment. The court held that defendants' allegations of plaintiff's breaches were not so severe or so insignificant as to allow the court to assess their materiality on the facts presented and without further development of the record. Since these allegations raised contested issues of fact, the court was unable to grant plaintiff's motion for partial summary judgment on plaintiff's breach claim with respect to the winding up of the Company.

The court also denied plaintiff's motion for partial summary judgment on his conversion claim. Since plaintiff was not granted summary judgment on his breach claims, which were the foundation for his conversion claim, he similarly could not be granted summary judgment on his conversion claim.

In a further proceeding in this case, the Supreme Court of Delaware reversed the Court of Chancery's earlier decision that the court lacked personal jurisdiction over Fläkt Woods. The court found that Delaware's long arm statute reached the alleged conduct. The Court of Chancery had held that plaintiff failed to show that Fläkt Woods knew or had reason to know of an act or effect in Delaware before the completion of the conspiracy. The Supreme Court disagreed with the Court of Chancery's holding, finding, among other things, that Fläkt Woods, a sophisticated company with global activities, would have done some minimal due diligence before entering into a long-term agreement with the Company, which would have revealed to Fläkt Woods that the Company was a Delaware LLC long before the Company was dissolved. Because Fläkt Woods' alleged co-conspirators filed a certificate of cancellation for the Company in Delaware, which constituted the transaction of business in Delaware for purposes of the long-arm statute, the Supreme Court held that Fläkt Woods was subject to personal jurisdiction under the long arm statute.

d. *Thor Merritt Square, LLC v. Bayview Malls LLC*, C.A. No. 4480-VCP (Del. Ch. Mar. 5, 2010)

Plaintiffs purchased a shopping center from two Delaware LLCs pursuant to a purchase and sale agreement (the "PSA"). The PSA contained a provision that made the LLCs responsible for all costs incurred in connection with the work required to bring a JC Penney store in the shopping center into compliance with the fire code. In connection with this obligation, the LLCs deposited $242,115 into an escrow account pursuant to an escrow agreement. The escrow agreement provided that the LLCs were obligated to complete and pay for the work, whether or not the escrowed money was sufficient to pay for it. Almost immediately after closing under the PSA, the LLCs distributed virtually all of their assets to their members. The LLCs, however, failed to perform the remedial work required under the PSA. When the LLCs would not respond to plaintiffs' repeated demands to perform the work, plaintiffs arranged to have the work completed, which cost over $1 million. Plaintiffs wrote to the LLCs to inform them that the work had been completed and the cost of the work. However, shortly before such notification, defendants had filed certificates of cancellation terminating the LLCs' legal existence. After learning of the filing of the certificates of cancellation, plaintiffs filed this action seeking nullification of the LLCs' certificates of cancellation on the basis that defendants had failed to make reasonable provision for the unmatured contract claims of the LLCs prior to the filing as required by Section 18-804(b) of the LLC Act. This decision addressed defendants' motion to dismiss.

Defendants contended that the escrow agreement constituted reasonable provision for the LLCs' unmatured contract claims and that the LLC Act cannot be read to require an entity to make reasonable provision for claims that it could not anticipate until after its certificate of cancellation was filed. Plaintiffs argued that defendants were liable for all costs of the remedial work, including costs in excess of the escrow, that the cost of the work exceeded the escrow and that defendants knew before the filing of the certificates of cancellation that the cost of the work would exceed the escrow. In the context of a motion to dismiss, the court assumed the truthfulness of plaintiffs' allegations and thus denied defendants' motion to dismiss on this basis.

Defendants also argued that it was pointless to nullify the filing of the LLCs' certificates of cancellation because any claims that plaintiffs could make against the LLCs would be time-barred. Plaintiffs argued that their claims would not be time-barred, and the court held that defendants had not proven otherwise. The court thus denied defendants' motion to dismiss.

e. *Metro Commc'n Corp. BVI v. Advanced MobileComm Techs. Inc.*, C.A. No. 20099 (Del. Ch. May 3, 2004)

Plaintiff, a former member of a Delaware LLC, brought an action against other former members and the managers of the LLC alleging, *inter alia*, breach of fiduciary duty and breach of contract. Plaintiff's investments in the LLC were made through contractually required capital calls during and after a period in which one of the defendants, and the employees of another of the defendants, were implicated in a bribery scandal. As a result of the bribery scandal, the LLC self-referred itself to the Department of Justice for activities that may have involved violations of federal law. These facts were not described in the management reports received by plaintiff during the course of its investment. In addition, the LLC Agreement specifically required the LLC to disclose to the members any event reasonably likely to result in a material adverse effect (an "MAE Notice"). The LLC was dissolved in 2000 in connection with a reorganization.

Plaintiff asserted breach of contract claims against certain of defendants, based on both express provisions of the LLC Agreement and implied contractual duties allegedly owed to plaintiff. The court noted that, pursuant to the language in Section 18-803(b) stating that "until the filing of a certificate of cancellation . . . the persons winding up the limited liability company's affairs may . . . defend suits," no claim may be brought against an LLC once the certificate of cancellation has been filed. Plaintiff sought to have the certificate of cancellation previously filed in connection with the dissolution of the LLC nullified on the grounds that the LLC's affairs were not wound up in compliance with the LLC Act. More specifically, plaintiff asserted that defendants were aware of the bribery allegations and failed to make such provision as would be reasonably likely to be sufficient to provide compensation for that claim, as required by Section 18-804(b)(3). The court found, consistent with the holding in *In re CC&F Fox Hill Assocs. Ltd. P'ship* (nullifying a certificate of cancellation in part because the affairs of the partnership were not wound up in compliance with Section 17-804 of the DRULPA), that the complaint plead facts that supported an application to nullify the certificate of cancellation, and denied defendants' motion to dismiss plaintiff's breach of contract claim.

f. *Gonzalez v. Ward*, C.A. No. 19224 (Del. Jan. 15, 2004)

This action challenged the compensation of the managers of a Delaware LLC during the winding up of the business of the LLC. Plaintiff resigned his position as manager at the time of the decision to dissolve the LLC but continued to hold a one-third interest in the LLC, along with the two other members, each of whom continued to serve as a manager following the dissolution. Under the LLC's operating agreement, managers were compensated according to a formula pursuant to which the managers would be paid $500 per day, capped at $180,000 per year. Prior to the dissolution of the LLC, each of plaintiff and the other two managers received $60,000 per year under this formula. Upon the dissolution, plaintiff, who was responsible for sales, abandoned his position as manager while the other two managers, who were responsible for financial and legal services, continued working to wind up the LLC. The remaining managers spent approximately two years winding up the LLC and, under the formula set forth in the operating agreement, each earned $90,000 during the first year of the wind up and $41,000 for part of the second year.

Plaintiff filed suit in the Court of Chancery challenging the compensation paid to the remaining managers for their work to wind up the LLC. The Court of Chancery denied the challenge based on its findings that (i) the level of work performed by the managers justified the increased compensation, (ii) the LLC would have incurred greater costs had it employed others to wind up the company, (iii) the compensation formula was set before plaintiff's resignation as a manager and (iv) the compensation formula was applied correctly by the remaining managers for their work in winding up the LLC. Plaintiff appealed these findings and argued that the Court of Chancery should have applied the entire fairness standard in assessing the compensation the managers paid to themselves. The Supreme Court held that plaintiff's claims that the remaining managers arbitrarily awarded themselves compensation were unsupported by the facts, as the managers had to deal with a substantial increase in their workload, and that Delaware case law applying a stricter standard when executives fix their own salaries was inapplicable, given that the managers applied a specific compensation formula that had been agreed upon beforehand by all members and managers of the LLC. The Supreme Court also upheld the Court of Chancery's determination that, regardless of whether the entire fairness standard applied, the remaining managers acted fairly and reasonably with respect to their compensation decisions.

5. Appointment of Liquidating Trustees and Receivers

a. *Comerica Bank v. Global Payments Direct, Inc*., C.A. No. 9707-CB (Del. Ch. July 21, 2014); *Comerica Bank v. Global Payments Direct, Inc*., C.A. No. 9707-CB (Del. Ch. Aug. 1, 2014)

Plaintiff, a financial institution, and defendant, a payment processor, formed a Delaware limited liability company as a joint venture called Global Payments Comerica Alliance, L.L.C. ("Alliance") to process credit and debit card transactions. Alliance was owned and managed by the parties (acting through their appointed representatives) with plaintiff owning a 49% membership interest and defendant owning a 51% membership interest. The parties' relationship was governed by a limited liability company agreement (the "LLC Agreement"), Contribution Agreements and a Service Agreement (collectively, the "Alliance Agreements"), where, in relevant part, the plaintiff agreed to refer merchants to Alliance exclusively and defendant agreed to be the exclusive payment processor for Alliance (these merchant-customer contracts are, collectively, the "Merchant Portfolio").

Sections 2 and 6(a) of the Service Agreement imposed exclusivity obligations on the parties for the services they provided and stated that this exclusivity was to exist during the term of the Service Agreement. The Service Agreement would automatically terminate on January 31, 2014 unless the parties agreed to renew. Section 15(d) of the Service Agreement permitted either party to extend the Service Agreement for a period of up to one year on the same "terms and conditions" as expressed in the Service Agreement; provided, however, that the party extending the agreement could choose which services it would be obligated to purchase from the other party and that other party could increase its fees to reflect commercially reasonable market rates (the "Exceptions"). The parties were also subject to certain non-competition obligations under the Contribution Agreements, but those obligations would end upon the termination of the LLC Agreement or Service Agreement or the dissolution of Alliance.

The LLC Agreement provided that upon the termination of the Service Agreement one member could negotiate to purchase the other member's interest in Alliance and if not exercised, that member could cause Alliance to be dissolved. Section 21 of the LLC Agreement governed dissolution and provided that upon dissolution, the members would wind up Alliance's affairs in accordance with the Delaware LLC Act, including settling and closing Alliance's business, distributing Alliance's assets (the principal asset being the Merchant Portfolio) and providing for Alliance's liabilities, with any remaining assets distributed to members according to their membership interests. During the wind up, the Merchant Portfolio was to be divided by mutual decision of the members or, if the members could not agree, pursuant to a predetermined formula and distributed in kind according to the membership interests.

The parties agreed that the Service Agreement would not be renewed, but plaintiff exercised its right to extend certain services for up to one year to allow it time to transition to a new payment processor (the "Transition Period"). Defendant agreed to the extension, however, it took the position that the Service Agreement's exclusivity provisions would continue to apply during the Transition Period. The termination of the Service Agreement was a triggering event under the LLC Agreement allowing the members to dissolve Alliance. Plaintiff informed defendant that it had elected to dissolve Alliance and that Alliance would be wound up. The parties were unable to come to an agreement on the division of the Merchant Portfolio and plaintiff filed suit.

The principal relief sought by plaintiff was (i) a judicial declaration that plaintiff's exclusivity obligations under the Service Agreement ended upon termination of the Service Agreement and that all non-competition obligations under the Contribution Agreements ended upon Alliance's dissolution or termination of the Service Agreement and (ii) the appointment of a liquidating trustee under Section 18-803(a) of the Delaware LLC Act to divide Alliance's assets in an equitable manner as required under the LLC Agreement. In its first decision, the court addressed the issues of exclusively and non-competition, postponing its decision on the appointment of a liquidating trustee for its second decision.

Plaintiff contended that the exclusivity obligations were terminated along with the Service Agreement because Sections 2 and 6(a) of the Service Agreement (the exclusivity provisions) stated that they only applied for the term of the Service Agreement, and further argued that extending the exclusivity obligations conflicted with the other Alliance Agreements and was contrary to the parties' intent—specifically, the LLC Agreement required the closing of Alliance's business after dissolution and that upon dissolution there should be no restrictions on a member's ability to obtain processing services. Defendant argued that Section 15(d) of the Service Agreement required the extension of the Service Agreement to be on the same "terms and conditions" as expressed in the Service Agreement, and therefore, the exclusivity provisions survived.

The court first decided that it would look outside the four corners of the Service Agreement despite its integration clause which stated that the Service Agreement embodied the full understanding of the parties with respect to the subject matter of that agreement. The court found that this was an appropriate circumstance to apply the rule that contemporaneous contracts between the same parties concerning the same subject matter should be read together because (i) the LLC Agreement's integration clause expressly included the Contribution Agreements and the Service Agreement as being the entire agreement of the parties, (ii) the original Service Agreement was entered into simultaneously with the LLC Agreement, (ii) both agreements indisputably constituted parts of an integrated transaction concerning the same overall subject matter, and (iii) the Service Agreement concerned one area of subject matter that was part of the overall relationship of the parties reflected in the Alliance Agreements.

The court declined to adopt defendant's argument that the exclusivity obligations survived termination of the Service Agreement for three reasons. First, extending the exclusivity obligations would conflict with (i) the LLC Agreement's provisions that precluded any restrictions on obtaining processing services and required the closing of Alliance's business post-dissolution, and (ii) the provisions in the Contribution Agreements that permitted plaintiff to compete with Alliance over the Merchant Portfolio upon the termination of the Service Agreement or dissolution of Alliance. Second, Section 15(d) of the Service Agreement did not unambiguously extend the exclusivity obligations because if the parties had intended to extend the entire Service Agreement beyond the termination date they could have so stated; instead, the agreement stated only that the terms and conditions of the Service Agreement would continue. Third, the purpose of Section 15(d) of the Service Agreement was to allow for a transition period, which could not practically occur if the exclusivity obligations remained in place.

Ultimately, the court held that the terms and conditions of the Service Agreement that were necessary to perform services during the Transition Period and which were requested to be extended by plaintiff would be extended under Section 15(d) of the Service Agreement, whereas those terms and conditions that would hinder the transition of services terminated with the Service Agreement. Additionally, in accordance with the express terms of the Contribution Agreements, the non-competition obligations provided for in the Contribution Agreements, the court held that the non-competition obligations ended upon termination of the Service Agreement.

In its second decision, the court ruled on Count 3 of plaintiff's complaint, which presented two issues: (1) whether plaintiff was entitled to receive information and assistance from defendant in order to effectuate its transition to a new payment processor, and, if so, was defendant required to incur the cost of this assistance; and (2) whether the court should intervene in the winding up of Alliance, and appoint a liquidating trustee. The court held that plaintiff was entitled to the information and assistance relating to the transition to a new payment processor it requested from defendant but that expenses relating to that transition would be borne by Alliance as a wind-up cost, and that cause existed for the court to appoint a liquidating trustee.

Plaintiff advised defendant that, during the Transition Period, it would initiate a request for proposals (the "RFP") for a new payment processor—defendant was encouraged to and did participate in the RFP, but was not selected. Plaintiff in the end decided that it would exercise its right to dissolve and wind up Alliance. Defendant allegedly reacted to plaintiff's desire not to renew the Service Agreement, the RFP and the requested dissolution of Alliance by (i) cutting off plaintiff's access to Alliance's transaction management system for 24 to 48 hours; (ii) tripling the fees it charged for its services; (iii) investigating what special treatment it was giving plaintiff as a result of the parties' relationship; (iv) attempting to appropriate the entire Merchant Portfolio for itself; (v) delaying negotiations regarding the proper division of the Merchant Portfolio; (vi) delaying the transfer of Merchant Portfolio information requested by plaintiff; and (vii) refusing to agree to an equitable division of the Merchant Portfolio that defendant itself had proposed. Plaintiff filed this action after failing come to an agreement with defendant regarding the division of Alliance's assets.

As part of the transition of the Merchant Portfolio and Alliance dissolution, plaintiff had requested information and assistance from defendant in order to migrate its merchant customers to its new payment processor. Defendant contended it had no obligation to provide any assistance but agreed to perform the transfer services by the end of the one-year Transition Period. Plaintiff argued that (1) it was entitled to the migration information and assistance it requested under the Service Agreement and the LLC Agreement, which established a right to possess the information associated with its merchant agreements once divided between the members and (2) that the LLC Agreement obligated defendant to provide this assistance at its expense.

The court agreed with plaintiff in part and held that the LLC Agreement provided that upon dissolution all of Alliance's property would be equitably divided and that the Service Agreement assigned to each party the information applicable to merchant agreements owned by such party, barring any proprietary information. Thus, plaintiff was entitled to the information and assistance it sought. The court, however, did not agree that defendant was to bear the cost of providing that information and assistance because the provision in the LLC Agreement that plaintiff claimed created this cost-shifting only required that members "execute and deliver" documents reasonably requested by the other member, which the court found to mean that each member was to provide to the other such documentation necessary to transfer title to portion of the Merchant Portfolio owned by the other member as a result of the division—the LLC Agreement was silent as to who should bear the cost. Another section of the LLC Agreement contemplated that Alliance, not the member, would bear the cost of a member's assistance. Furthermore, contemporaneous agreements indicated that the parties knew how to expressly include a cost-shifting provision with respect to this type of assistance. Accordingly, Alliance, not defendant, would bear the expense of providing the requested information and assistance.

With respect to the division of Alliance's assets, the court determined that it would intervene and appoint a liquidating trustee. Under the Delaware LLC Act, the court has the power to wind up a company's affairs and appoint a liquidating trustee upon a showing of "cause" by any member. The court noted that "cause" was not defined in the Delaware LLC Act, but cited cases where an LLC was wound up through judicial intervention when the parties were unable to agree as to how the wind up should proceed and where member animosity between the parties created a deadlock. Defendant argued that the court could only appoint a liquidating trustee where there was a deadlock among the parties entitled to conduct the wind up, and since defendant had control over Alliance through its majority position, there was no deadlock. The court refused to adopt this reasoning because, taken to its logical end, it would render the court powerless to appoint a liquidating trustee in situations where one party had the authority to control a wind up irrespective of how poorly or faithlessly that party performed its duties. Since the standard for judicial intervention was "cause" as determined by the court, not a deadlock, the court was left with the discretion to appoint a liquidating trustee on a case-by-case basis. The court here held that appointment of a liquidating trustee was appropriate because the parties were deeply divided over the winding up of Alliance and defendant was unwilling to conduct the wind-up process in an orderly and timely manner, as evidenced by defendant's confrontational approach since the termination of the Service Agreement. The court added that the default fiduciary duties owed by the manager of an LLC require it to distribute assets of the company promptly to maximize their value. Defendant did not act in the best interest of Alliance or its other member, but purely out of its own self-interest to extract higher fees from plaintiff when it delayed the wind up and made plaintiff's transition of its portion of the Merchant Portfolio unduly difficult. The court ordered the liquidating trustee to divide the Alliance assets according to a prior agreement of the parties that was never finalized.

b. *Phillips v. Hove*, C.A. No. 3644-VCL (Del. Ch. Sept. 22, 2011)

The dispute arose out of a start-up business conducted through a Delaware LLC. In an earlier decision in which the court denied a motion to dismiss (*see Phillips v. Schifino*, C.A. No. 3644-VCL (Del. Ch. Dec. 18, 2009)), the court found that the transaction agreements involved were so ambiguous that it was unclear whether the central document, a four-page term sheet, was sufficient to constitute a limited liability company agreement. In this post-trial opinion, the court determined, among other issues, the identity of the voting members of the LLC. Noting that it had previously deemed the ownership provision in the term sheet to be ambiguous in denying a motion for summary judgment, the court now determined that the term sheet provided for an LLC composed of two members. One of the issues faced by the court was whether one of the members owned its membership interest in his individual capacity or through an investment entity. The term sheet referred both to the investment entity and to the individual as a member of the LLC and was executed by the individual in his individual capacity. Other agreements drafted in connection with the formation of the LLC, however, referred to the investment entity as a member of the LLC. The court noted that discussions between the parties indicated that the other member, who clearly owned his membership interest in his individual capacity, was aware that the investment entity, not the individual with whom the other member had negotiated, was intended to own the membership interest at issue. Based on the totality of the evidence, the court concluded that the membership interest was owned by the investment entity rather than the individual.

The court next considered whether it could exercise personal jurisdiction over an individual who was neither a member nor a manager of the LLC, but ran the day-to-day operations of the business and had filed a bankruptcy petition on behalf of the LLC. Noting that Section 18-109(a) of the LLC Act extends not only to formally designated managers but also to persons who "participate materially in the management" of an LLC, the court concluded that it could exercise jurisdiction in this case because an individual who manages the day-to-day operations of a business and files a bankruptcy petition on behalf of a business participates materially in the management of an LLC.

With the jurisdiction issue resolved, the court turned to a claim that the same individual breached his fiduciary duties. According to the court, an individual who asserts control over the operations of an LLC owes fiduciary duties to the LLC and its members even though such individual is not a member or manager. In making this determination, the court relied on past Delaware cases stating that one who controls property of another owes fiduciary duties when exerting such control over such property. The individual at issue had sold the LLC's inventory through a competing retailer, and the court concluded that this action constituted a breach of the duty of loyalty.

Finally, the court addressed an application for judicial dissolution of the LLC pursuant to LLC Act Section 18-802. Based on the history of animosity between the parties, the court concluded a deadlock existed. The court stated that the fact that the LLC had continued to operate marginally was irrelevant to whether a deadlock existed because the LLC never operated in conformity with the members' agreement. Although the term sheet provided for a mechanism to resolve disputes between the members, the court concluded judicial dissolution was appropriate because it was a more reasonable and equitable alternative than the contractual mechanism. Specifically, the term sheet called for resolution of member disputes by a five-member board. Each board member's appointment, however, had to be approved by both members of the LLC, which the court found to be unlikely given the state of relations between the members. In light of the members' history of disputes, the court also found it unlikely that the LLC would be wound down in an orderly and timely manner and therefore appointed a liquidating trustee pursuant to LLC Act Section 18-303(a).

c. *Spellman v. Katz,* C.A. No. 1838-VCN (Del. Ch. Feb. 6, 2009)

Plaintiff and defendant each owned a 50% interest in a Delaware LLC formed for the purpose of constructing an office building in which the parties leased space for their joint medical practice. After a falling out between the two parties, plaintiff left to practice on his own and plaintiff and defendant were unable to agree on how to unwind their relationships. Plaintiff ultimately sought a decree of judicial dissolution of the LLC pursuant to Section 18-802 of the LLC Act or, alternatively, an order pursuant to Section 18-803 of the LLC Act appointing a liquidating trustee to effectuate the winding up of the LLC because the LLC had allegedly already dissolved by express will of its members pursuant to Section 5.1 of the LLC agreement. Section 5.1 of the LLC agreement provided, in relevant part, that the LLC "shall be dissolved and its affairs wound up as soon as possible after the construction of the building had been completed, the condominium documents have been finalized and a certificate of occupancy has been issued with respect to each condominium unit . . . ."

Both parties conceded that each of the preconditions to dissolution set forth in Section 5.1 of the LLC agreement had been satisfied. Defendant argued, however, that the dissolution and winding up of the LLC was improper because Section 5.1 of the LLC agreement did not accurately reflect the original intentions of the parties regarding dissolution. Defendant asserted that neither party knew that Section 5.1 was part of the LLC agreement and, thus, that it did not embody their true intentions and should not be enforced. In support of this position, defendant argued that the failure of either party to take steps to implement the dissolution and winding up of the LLC as called for in the LLC agreement was evidence of the parties' "true intent" to continue the LLC indefinitely.

Applying general contract principles to the construction of the LLC Agreement, the court concluded that Section 5.1 of the LLC Agreement was unambiguous and should be enforced in accordance with its terms. The court held that because Section 5.1 of the LLC agreement was found to be unambiguous on its face, the parol evidence rule precluded the introduction of outside evidence to dispute its terms. Consequently, the court held that the LLC had been dissolved by express will of its members pursuant to Section 5.1 of the LLC agreement and that the winding up of its affairs was necessary.

With respect to plaintiff's request for the appointment of a liquidating trustee pursuant to Section 18-803 of the LLC Act, the court held that because the parties were deadlocked on how to proceed with the winding up of the LLC, the only rational and equitable result was for the court to appoint such a person. The court stated that because the LLC had been dissolved by the express will of its members and the parties were unable or unwilling to implement the winding up process that naturally follows dissolution in the life cycle of an LLC, "cause" within the meaning of Section 18-803(a) of the LLC Act existed for the court to appoint a liquidating trustee to wind up the LLC's affairs. Thus, plaintiff's motion for summary judgment on its petition for appointment of a liquidating trustee was granted.

In connection with plaintiff's petition for appointment of a liquidating trustee, defendant asserted a counterclaim, derivatively on behalf of the LLC, alleging that plaintiff had breached his fiduciary duties to the LLC by refusing to participate in the refinancing of the building's mortgage. Plaintiff moved to dismiss defendant's counterclaim for failure properly to plead demand futility with the particularity required by Court of Chancery Rule 23.1. Defendant argued that demand futility has been sufficiently demonstrated because plaintiff, by virtue of his 50% interest in the LLC, may effectively veto any proposed action and it would be futile to request that plaintiff grant permission to the LLC to sue himself for the alleged conduct. The court held that to show demand futility, defendant must (i) show a "substantial likelihood" of plaintiff's personal liability and (ii) plead "with particularity" the facts supporting his claim that there is a "substantial likelihood" of personal liability of plaintiff. The court held that the "mere threat" of personal liability is insufficient to show a substantial likelihood of personal liability. In this case, the court held that defendant had pleaded only the naked assertion of a breach of fiduciary duty by plaintiff and, thus, the counterclaim showed no more than a mere threat of personal liability, which was insufficient to satisfy the defendant's pleading requirements. Plaintiff's motion to dismiss the counterclaim was therefore granted.

H. Derivative Actions

1. *CMS Inv. Holdings, LLC v. Castle,* C.A. No. 9468-VCP (Del. Ch. June 23, 2015)

This case involved a dispute between plaintiff, an investor in a Delaware LLC, RP Holdings Group, LLC ("RPH"), and several defendants that managed RPH together with law firms run by such defendants and their holding companies. RPH was in the business of providing non-legal services to law firms, including law firms run by defendants. RPH was managed by a board of managers (the "Board of Managers"). Plaintiff, who owned most of the Class A units in RPH, had the right to appoint three members to the Board of Managers, and two defendants served as appointees of the Class B unitholders. These two defendants together with other defendants provided services to and consulted for RPH as members of an "Operating Board," which allowed them to work as independent contractors while exercising control over the day-to-day operations of RPH.

Plaintiff alleged that although RPH's business was performing remarkably well during the 2008 recession, defendants failed to pay RPH for the services it provided to law firms run by defendants. Plaintiff further alleged that defendants diverted those fees away from RPH and instead paid themselves directly. Although RPH accrued substantial accounts receivable balances, plaintiff and its appointees to the Board of Managers relied on defendants' reassurances that they would make good on the fees owed to RPH. In 2011, plaintiff's suspicions were corroborated by an accounting firm that they hired to investigate RPH's operational efficiency issues—particularly in regards to its accounts receivable collections processes—which found that defendants were indeed retaining all or part of the payments owed to RPH. The accounting firm also found that defendants had intentionally concealed RPH's true financial condition from plaintiff and its appointees on the Board of Managers.

In 2012, RPH defaulted on a credit agreement it entered into with Freeport Financial, which allowed Freeport Financial to foreclose on RPH's collateral. Plaintiff claimed that defendants secretly engaged in a self-dealing scheme with Freeport Financial to orchestrate the sale of the still-valuable services businesses to defendants while leaving RPH, and by extension plaintiff, empty-handed.

Plaintiff filed suit against defendants in March 2014, charging them with a myriad of claims, including: breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duties, aiding and abetting, civil conspiracy, and fraudulent transfer. Defendants moved to dismiss plaintiff's complaint as it related to them.

As an initial inquiry, the court found defendants' arguments that plaintiff's claims were derivative—rather than direct—to be unpersuasive. In applying the Tooley analysis, the court found that plaintiff's claims were more direct than derivative in nature, and at least dually direct and derivative. The court reasoned that if plaintiff's fiduciary duty and breach of contract claims are proven, then the Class A unitholders—including plaintiff—would recover individually rather than on a pro rata basis. In this regard, these claims were largely based on distributions that should have been made to plaintiff as a Class A unitholder but were improperly distributed to certain defendants. The court found that the predominant harm thus fell upon the Class A unitholders, despite defendants' argument that RPH itself was harmed.

The court then addressed defendants' arguments for dismissal of plaintiff's claims for breach of contract, breach of implied covenants and unjust enrichment. With regard to the breach of contract claims, a defendant on the Board of Managers argued that although his holding company, LEC Holdings, LLC ("LEC"), was bound as a member of RPH by being a signatory to the LLC agreement of RPH, he was personally not bound by the LLC agreement because he was not a party to it, and therefore could not be liable for any alleged breaches thereof. Citing Section 18-101(7) of the Delaware LLC Act, the court reasoned that his role as a member of the Board of Managers bound him to the LLC agreement. Certain other defendants conceded that they were bound but argued that the breach of contract claims against them must be dismissed because the relevant sections of the LLC agreement bound the Board of Managers and not such defendants as members. However, these defendants did have positions on the Operating Board and the court found that their positions of influence in the operational structure of RPH could lead to a plausible inference that they caused improper distributions in contravention of the provisions of the LLC agreement. As to another defendant, Caren Castle ("Castle"), despite her role as a member of the Operating Board and a high-level executive of RPH, the court found nothing in the record to support a reasonable inference that she intended to be bound by the LLC agreement of RPH as she was not directly a member or on the Board of Managers.

In regards to the breach of implied covenants claims against defendants, the court noted that the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain. For this claim, the court looked to an opinion (the "Opinion") that was received in connection with the formation of RPH that outlined the structure of the intent of RPH. In this regard, the court found that compliance with the Opinion was an implied term of the LLC agreement and that defendants breached the implied covenant by receiving fees directly instead of properly channeling them through RPH. In this regard, the court found that defendants frustrated the overarching purpose of the LLC agreement as evidenced by the Opinion by taking advantage of their positions to control implementation of the LLC agreement's terms. However, the court did dismiss the claim against Castle, as it reasoned that one cannot breach an implied covenant of an LLC agreement if that defendant is not bound by the express terms of the agreement.

The court next turned to fiduciary duty claims brought by plaintiff. It found that the LLC agreement did not alter the traditional standards of care underlying the fiduciary duties of care and loyalty. Relying on that finding, the court then found that defendants on the Board of Managers were fiduciaries given their role as members of the Board of Managers. The court also found that certain other defendants, including Castle, were fiduciaries through their roles as high-level officers of RPH. In addition, the court found that one defendant acted as a fiduciary through his role as CEO of a particular region because he was "vested with discretionary power to manage the business of the LLC." However, the court noted that a more fully developed record could contradict this finding at a later procedural stage. Finally, the court dismissed plaintiff's breach of fiduciary duty claims against the holding company defendants, reasoning that neither entity was a managing member of RPH, nor were they in a position to exercise control over the business and affairs of the LLC.

Concerning defendants' alleged breaches of fiduciary duty, the court found that, assuming plaintiff's factual pleadings were true, certain defendants could have plausibly breached their fiduciary duties by purposefully taking action to force RPH into insolvency and colluding with Freeport Financial to purchase its business assets at a favorable price out of receivership. The court similarly reasoned that a defendant member of the Board of Managers could have breached his fiduciary duties by failing to do more than simply resign from his position as a Board member if he was privy to the other defendant's machinations.

Reasoning that one cannot have both direct and secondary liability for a breach of fiduciary duty, the court dismissed the aiding and abetting claims against defendants who were found by the court to be fiduciaries. However, the court held that if the record later reflected that Castle and another defendant were not fiduciaries to RPH, they could very well be secondarily liable under the aiding and abetting theory. In regard to the individual defendants' various affiliated entities, such as the various law firms and holding companies, the court noted that secondary liability could exist where an entity acts as "'middleman for and beneficiary of improper disbursements by' the allegedly faithless fiduciaries with which they are affiliated." Thus, the court denied those entity-defendants' motions to dismiss plaintiff's aiding and abetting claim.

2. *Zimmerman v. Crothall*, C.A. No. 6001-VCP (Del. Ch. Oct. 14, 2013); *Crothall v. Zimmerman*, No. 608, 2013 (Del. June 9, 2014)

After a full trial in this case, the court had earlier issued an opinion holding that defendants breached the operating agreement of Adhezion Biomedical LLC, a Delaware LLC (the "Company"), by entering into certain transactions without first obtaining the approval of the Class A unitholders of the Company but, because the court found that the breach caused no damage to the Company, the court awarded nominal damages of $1. At the conclusion of its opinion, the court directed the parties to confer and submit a final, post-trial order. After the parties later failed to agree on a form of final order, plaintiff moved for entry of his proposed final order. Plaintiff later sold all of his units in the Company before the court ruled on his motion. Defendants then moved to dismiss this derivative action, arguing that the sale of all of plaintiff's interests in the Company prior to the entry of a final judgment extinguished his standing to prosecute claims derivatively on behalf of the Company.

In their motion to dismiss for lack of standing, defendants requested that the court apply, by analogy, the "continuous ownership rule" found in corporate law, which requires a plaintiff stockholder suing derivatively on behalf of the corporation to own stock in the corporation throughout the litigation. The court stated that the "continuous ownership rule" is embodied in DGCL Section 327 and Court of Chancery Rule 23.1. Defendants argued that Section 18-1002 of the LLC Act includes similar requirements as those found in DGCL Section 327 and Court of Chancery Rule 23.1, making application of the "continuous ownership rule" appropriate in the LLC context and therefore necessitating dismissal. The court held that the "continuous ownership rule" applied in this case and that, because plaintiff no longer held any interests in the Company and no exception to the "continuous ownership rule" had been established by plaintiff, defendants' motion to dismiss for lack of standing was granted and no final judgment was issued.

Appeal was taken by defendants below to the Court of Chancery's award of attorney's fees to plaintiff's intervening attorney for allegedly creating a corporate benefit. In its post-trial opinion, the Court of Chancery ruled in favor of plaintiff on only one of his derivative claims—that defendant's operating agreement had been violated by the issuance of units without an amendment approved by the common unitholders. Prior to agreeing to a form of final judgment, however, plaintiff sold his units, lost standing to pursue his derivative claims and his suit was dismissed. Seeking attorney's fees, plaintiff's attorney was granted leave to intervene and the Court of Chancery ultimately awarded $300,000 in attorney's fees for successfully arguing that the operating agreement had been violated, which was a corporate benefit.

The Supreme Court declined to address the merits of the Court of Chancery's mooted ruling on the breach of contract claim, but concluded that attorney's fees were improperly awarded. Since no final judgment was ever rendered upon which an appeal could be taken, plaintiff's attorney never obtained an authoritative ruling of the Court of Chancery and therefore did not create a corporate benefit. Plaintiff's attorney unsuccessfully argued that attorney's fees were previously granted in cases where claims were mooted prior to a final judgment. The Supreme Court found those cases to be distinguishable because the claims therein were mooted by actions taken by defendants and not plaintiffs. In reversing the award of attorney's fees the court stated, "A plaintiff who generates a favorable trial court decision on a closely contested issue of corporate governance but then abandons his claim and renders the decision moot before it becomes final has not created a corporate benefit, he has merely caused uncertainty." Furthermore, the Supreme Court reasoned that to rule otherwise would bring it "perilously close to rendering an advisory opinion" and require the use of limited judicial resources to rule on a claim that a plaintiff voluntarily withdrew.

3. *Allen v. El Paso Pipeline GP Co., L.L.C.*, C.A. No. 7520-VCL (Del. Ch. May 19, 2014)

Plaintiff, a unitholder of El Paso Pipeline Partners, L.P., a Delaware master limited partnership (the "Partnership"), challenged a transaction (the "Transaction") wherein the Partnership acquired a 25% interest in Southern Natural Gas Co. ("Southern") from El Paso Corporation ("El Paso Parent"), the parent company and 100% owner of the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"). Plaintiff asserted directly that the Transaction violated the Partnership's limited partnership agreement (the "LPA") and the implied covenant of good faith and fair dealing and moved to certify a class consisting of unitholders of the Partnership. Defendants, the Partnership, the General Partner and the members of the board of directors of the General Partner (the "GP Board"), opposed the motion on the grounds that plaintiff's claims were derivative, not direct.

The Transaction created a conflict of interest for the General Partner because El Paso Parent controlled the Partnership and owned the interest in Southern that would be acquired by the Partnership. The LPA eliminated all common law duties that defendants would otherwise owe to the Partnership and its limited partners. In place of common law duties, the LPA established express contractual duties for decisions made by the General Partner in its capacity as general partner that involved a conflict of interest. Specifically, the LPA provided, in the case of a conflict transaction, that the transaction be (i) approved in good faith by a committee of disinterested members of the GP Board (the "Committee"), (ii) approved by a majority of disinterested common unitholders, (iii) on terms no less favorable to the Partnership than those generally being provided to or available from unrelated third parties or (iv) fair and reasonable to the Partnership, taking into account the totality of the relationships between the parties involved.

The General Partner elected to have the Transaction approved by the Committee. After reviewing the Transaction with advisors over several meetings, the Committee approved the Transaction. Plaintiff filed his complaint, asserting that the Transaction involved a conflict of interest and defendants violated the LPA when the Committee approved the Transaction because certain incentive distribution rights held by the El Paso Parent would cause the Transaction to be dilutive to the unaffiliated unitholders and the GP Board's failure to consider this dilutive effect caused its decision to not have been made in good faith, violating the LPA.

In ruling on whether the claim was direct or derivative, the court recognized that the test for distinguishing between direct and derivative claims in the limited partnership context is substantially the same as in the corporate context, and thus, the standard established by the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* controlled. The *Tooley* test asks: "(1) who suffered the alleged harm (the [partnership] or the suing [unitholders], individually); and (2) who would receive the benefit of any recovery or other remedy (the [partnership] or the [unitholders], individually)." Defendants argued that plaintiff essentially claimed the Partnership paid too much in the Transaction and therefore the injury was to the Partnership. The court, however, viewed the issue not just as a claim that the Partnership overpaid, but also as a breach of a contractual right possessed by plaintiff under the LPA—the right to have the conflict transaction procedure followed—and although the breach affected each unitholder equally, the right implicated belonged to the unitholders, not the Partnership.

To support its reasoning, the court cited to post-*Tooley* cases that permitted direct suits for breach of contractual rights held by all stockholders. For example, stockholders were permitted to sue directly when a certificate of incorporation or bylaws contained a protective provision for the benefit of stockholders (e.g., class vote, consent right, etc.). Stockholders were also permitted to sue directly to enforce a statutorily created constraint on board authority, the violation of which injured the stockholders, not the corporation. Important to the court's analysis was Delaware precedent holding that the question of whether a contractual relationship was violated presented an issue of law that could not be within the realm of a board's business judgment (i.e., board discretion) and consequently not subject to a demand requirement. The court also noted that, although suits by a limited partner for breach of the LPA might be direct, suits challenging the discretion afforded a general partner may still be derivative. Plaintiff here not only claimed that the Partnership overpaid in the Transaction, but that the General Partner breached the LPA by not following the express procedure for conflict transactions, making the claim direct.

In addressing the second prong of *Tooley*, the court noted that although one possible remedy for the alleged breach would be for El Paso Parent to pay back some of the Transaction consideration to the

Partnership—supporting a derivative claim—that was not the only remedy. Since defendants were also unitholders of the Partnership, if plaintiff was ultimately successful, then the court could award the returned consideration to only the innocent unitholders or provide injunctive relief that would operate only at the unitholder level without benefiting the Partnership itself. Accordingly, the court held that the remedy could support direct or derivative claims, therefore, the first *Tooley* prong carried more weight and ultimately supported the finding that plaintiff's claims were direct.

4. *CML V, LLC v. JetDirect Aviation Holdings, LLC,* C.A. No. 5373-VCL (Del. Ch. Nov. 3, 2010), aff'd No. 735, 2010 (Del. Sept. 2, 2011)

In this case, the Court of Chancery held that creditors of a Delaware LLC do not have standing to bring a derivative suit against fiduciaries of the LLC for breach of fiduciary duties committed while the LLC was insolvent or in the zone of insolvency. The case involved a loan by CML V, LLC ("CML") to JetDirect Aviation Holdings, LLC ("JetDirect"), a Delaware LLC that was engaged in an aggressive strategy of acquiring small to mid-sized jet charter and service companies. Insufficient internal controls at JetDirect and poor financial reporting procedures, combined with ill-advised acquisitions resulted in several JetDirect subsidiaries filing for bankruptcy and ultimately the insolvency of JetDirect. After defaulting on CML's loan, JetDirect liquidated some of its assets, with some JetDirect assets sold to entities controlled by certain of JetDirect's managers. CML brought a derivative action alleging breach of fiduciary duty claims against JetDirect. Defendants moved to dismiss these claims based on Section 18-1002 of the LLC Act.

Section 18-1002 provides, in relevant part, that "in a derivative action, plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action . . . ." The court stated that Section 18-1002 "limits standing to bring a derivative claim to holders of membership interests in an [LLC] and their assignees. Section 18-1002 does not grant standing to creditors. Although this limitation might surprise wizened veterans of the debates over corporate creditor standing, JetDirect is not a corporation. JetDirect is an LLC, and the plain language of the LLC Act controls."

The court contrasted the provisions of Section 18-1002 with the provisions of Section 327 of the DGCL, which is the only Delaware corporate statute that addresses derivative actions. Section 327 provides that "in any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law." The court distinguished Section 327 from Section 18-1002 by finding that Section 327, which by its terms applies to any derivative suit instituted by a stockholder, does not limit creditors or any other person from bringing a derivative suit while Section 18-1002, which by its terms states that in a derivative action plaintiff must be a member or an assignee, creates an exclusive right for members and assignees to bring derivative suits involving an LLC. The court found that Section 327 of the DGCL is non-exclusive—i.e., it speaks only to the "subset of derivative suits" instituted by a stockholder of a corporation—while Section 18-1002 of the LLC Act, on the other hand, is exclusive—i.e., it provides that a plaintiff bringing a derivative claim in the LLC context must be a member or an assignee of a member interest. Thus, the court concluded, a literal reading of the plain language of the LLC Act precludes recognition of derivative standing to creditors of an insolvent LLC.

The court acknowledged that previous decisions of the Chancery Court and most of the commentary on this issue appear to have assumed that the precedent on a creditor's standing to bring a derivative suit against an insolvent corporation also applied to allow derivative suits by creditors in the context of insolvent alternative entities. However, the court determined that the literal terms of the LLC Act barred such a result. The court found support for its literal reading of Section 18-1002 in two earlier Chancery Court decisions, Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc., 1996 WL 652773 (Del. Ch. Nov. 4, 1996), and U-H Acq. Co. v. Barbo, 1994 WL 34688 (Del. Ch. Jan. 31, 1994), in which the derivative action statutes of the DRULPA and the LLC Act had been read strictly to bar suits by assignees of LP or LLC interests (as opposed to partners or members). The court noted that DRULPA and LLC Act were each amended in 1998 to authorize assignees of LP or LLC interests to sue derivatively.

The court recognized that it had the power to avoid a literal interpretation of Section 18-1002 "if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature." CML argued that a plain reading of Section 18-1002 would produce an absurd distinction between insolvent corporations, where creditors can sue derivatively, and insolvent LLC, where they cannot. The court disagreed, stating that "[a]s a threshold matter, there is nothing absurd about different legal principles applying to corporations and LLCs," and that limiting creditors to their bargained-for contractual rights and denying them the additional right to sue derivatively on behalf of an insolvent entity is consistent with the "contractarian environment created by the LLC Act." The court then cited to multiple provisions of the LLC Act that allow for the protection of the interests of creditors, including (a) Section 18-101(7), which permits an LLC agreement to provide rights to any person, including a person who is not a party to the LLC agreement, (b) Section 18-306, which provides that members may be subject to specified penalties or consequences for breaching the LLC agreement, and (c) Section18-502(b), which provides a creditor with the right to enforce a member's obligation to contribute capital to an LLC. The court thus dismissed CML's derivative claims for lack of standing.

In an appeal of this decision, the Delaware Supreme Court affirmed the Court of Chancery's judgment that the LLC Act denies derivative standing to creditors of insolvent LLCs. In so doing, the Supreme Court rejected CML's argument that Section 18-1002 of the LLC Act was unconstitutional because its limitation of derivative standing "strips the Court of Chancery of equitable jurisdiction to extend standing to sue derivatively in cases where derivative standing is necessary to prevent a complete failure of justice." Since the Delaware Constitution prohibits the legislature from limiting the Court of Chancery's equitable jurisdiction to less than the general equity jurisdiction of the High Court of Chancery of Great Britain existing at the time of Delaware's separation from England, CML argued that Section 18-1002 violates the constitution because courts of equity extended derivative standing to stockholders of corporations at common law.

The Supreme Court noted that although the doctrine of derivative standing has been extended to creditors of corporations, this was only done to prevent failures of justice and only in the corporate context. JetDirect was a limited liability company, not a corporation, and limited liability companies did not exist until 200 years after the separation with England. Courts look to the LLC Act to determine rights and remedies associated with LLCs because LLCs did not exist at common law. Common law only applies where the LLC Act is silent. On the issue of derivative standing, the LLC Act is not silent. In fact, Section 18-1002 unambiguously limits derivative standing to members and assignees. Moreover, the Supreme Court did not think that extending derivative standing to CML in this case was necessary to prevent a failure of justice. Rather, the Supreme Court noted that CML could have bargained for additional rights—perhaps even the right to become an assignee upon the insolvency of JetDirect.

5. *Kelly v. Blum*, C.A. No. 4516-VCP (Del. Ch. Feb. 24, 2010)

Plaintiff was a member, manager and the president of Marconi Broadcasting Company, LLC, a Delaware limited liability company (the "Company"). The Company was initially funded by Plaintiff, who received Class B common membership units in consideration of his investment, and MBC Investment, L.P. ("MBC Investment"), which provided a loan to the Company plus an equity investment in Class A preferred units. MBC Investment was a wholly-owned subsidiary of ELB Capital Management, LLC ("ELB"). The Company began to experience cash flow problems and entered into an additional loan agreement with another wholly-owned subsidiary of ELB. In connection with this loan, the Company entered into an amended limited liability company agreement of the Company (the "LLC Agreement"), pursuant to which MBC Lender received Class C common membership units in the Company. The LLC Agreement required that all actions of the Company be approved by managers holding a majority of the voting power. The LLC Agreement also provided that the Company could not enter into any merger without the prior written approval of the Class A member or managers and the Class C member or managers. At all relevant times, Class A managers held 24%, Class B managers held 25% and Class C managers held 51% of the voting power. At a March 18, 2009 board meeting for the Company, a Class A manager of the Company, proposed a transaction by which a wholly-owned subsidiary of ELB would merge into the Company with "New Marconi" being the surviving entity (the "Merger"). The purchase price included a cash component, an assumption of the MBC Investment debt, and preferred units in New Marconi to be issued to MBC Investment. Further, all of the Class A, B and C common units in the Company would convert pursuant to the Merger into the right to receive $1 per class. Several weeks after the March 18, 2009 board meeting, MBC Investment and MBC Lender signed a written consent approving the Merger without plaintiff's consent. On April 8, 2009, MBC Investment and MBC Lender sent a copy of such written consent to plaintiff by fax and email, the confirmation of which was sent by FedEx on April 9, 2009. The Certificate of Merger was filed on April 17, 2009 to consummate the Merger. Plaintiff filed his complaint and all amendments thereto after the Merger was consummated.

The Delaware Court of Chancery first addressed plaintiff's motion for partial summary judgment on his claim for a declaratory judgment that the Merger was void either (1) because plaintiff did not receive adequate notice of its approval by written action as required by the LLC Agreement or (2) because the Merger closed before the notice period required by the LLC Agreement elapsed. The court noted that notwithstanding Section 18-209(b) of the LLC Act which provides that a merger of a Delaware limited liability company generally must be approved by members who own more than 50% of the then current percentage or other interest in the profits of such company, parties may contract to impose additional requirements as was the case in the LLC Agreement. As noted above, the LLC Agreement required prior written approval of the Class A member or Class A managers and the Class C member or Class C managers. The LLC Agreement further provided that any written consent that is not executed by any member "must be delivered to such Member no less than five (5) business days prior to the effective date of such consent." The LLC Agreement also provided that in the event notice was given by fax, a confirmation copy must be sent on the same day of the fax "by first class mail." Plaintiff asserted that the Defendants that approved the Merger technically violated this notice provision because the confirmation copy was sent the day after the fax. The court held that if the notice provision applied to a written consent (the court acknowledged that it may not apply as these provisions could be construed as ambiguous), the notice was in "substantial compliance." The court cited to corporate case law by analogy in indicating that substantial compliance "is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met."

The court then turned to Defendants' motion to dismiss each of plaintiff's other claims (each as explained below) for lack of standing. In this regard, Defendants claimed that plaintiff could not maintain standing subsequent to the Merger because plaintiff's claims were derivative in nature, plaintiff was no longer a member of the Company as a result of the Merger, and only members of the Company could assert derivative claims. The court agreed that under Section 18-1002 of the LLC Act, a plaintiff must be a "member or an assignee of a limited liability company interest" at the time of bringing a derivative action, and thus, plaintiff could only assert direct claims. The court noted two exceptions to this general rule under corporate case law precedent whereby a former shareholder could bring a derivative suit following a merger that terminates its interest (1) if the merger itself is subject to a claim of fraud being perpetrated merely to deprive shareholders of standing to bring a derivative action and (2) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise. Plaintiff did not allege these situations and thus they did not apply to this case. The court then applied the standing analysis set forth in the corporate case of *Tooley* to determine whether plaintiff's claims were direct or derivative.

The court first addressed plaintiff's claim that the Defendants that were members and managers of the Company violated their fiduciary duties of loyalty and care, which each owed to plaintiff as the minority equity holder, in approving a self-interested transaction (i.e., the Merger) on terms unfair to plaintiff. The court noted that Delaware cases interpreting Section 18-1101(c) of the LLC Act have concluded that despite the contractual freedom to restrict or eliminate duties owed by members and managers of a limited liability company, in the absence of a contrary provision in a limited liability company agreement, traditional fiduciary duties of loyalty (including good faith) and care apply. The LLC Agreement provided in a section entitled "Duties" that the board of managers "shall manage the Company in a prudent and businesslike manner . . . ." The LLC Agreement also contained an exculpatory provision which provided that managers of the Company would not be liable for money damages "for breach of fiduciary duty to the Company nor to any Member for their good faith actions . . . but only for their own willful or fraudulent misconduct or willful breach of their contractual or fiduciary duties under [the LLC Agreement]." The court found that these clauses did not explicitly disclaim or limit the applicability of default fiduciary duties. Further, the court held that if the Defendant managers of the Company entered into the Merger, as plaintiff alleged, to profit from squeezing out plaintiff and obtaining control of property held by the Company, this stated a direct duty of loyalty claim sufficient to survive a motion to dismiss. With respect to the exculpatory provision, the court noted that members could limit or eliminate a manager's or member's liability for breach of contract and fiduciary duties under Section 18-1101(e) of the LLC Act except for liability arising from a bad faith violation of the implied contractual covenant of good faith and fair dealing. The court interpreted the exculpatory language set forth in the LLC Agreement to require plaintiff to allege a "willful" breach of the Defendant managers' contractual or fiduciary duties to have a valid claim. The court did not determine whether "willful" required "evil intent to harm" or "acting recklessly and outside the bounds of reason" as the defendant managers asserted, but found that plaintiff had satisfied this standard by alleging facts sufficient to suggest that the Defendant managers "actually and specifically intended to extinguish [plaintiff's] membership interest in [the Company], knowing that such action would harm plaintiff." Accordingly, the court denied the motion to dismiss.

The court next addressed whether MBC Investment and MBC Lender owed fiduciary duties to plaintiff as controlling members of the Company. The court noted that, like managers of a limited liability company, in the absence of provisions to the contrary in a limited liability company agreement, controlling members in a manager-managed limited liability company owe minority members "the traditional fiduciary duties" that controlling shareholders owe to minority shareholders. Citing to corporate precedent, the court stated that these fiduciary duties include the duty "not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders." In respect of the Company, MBC Investment and MBC Lender were controlling members as they had the authority to appoint managers with 24% and 51% of the voting power, respectively, and further, they had the collective power to cause the Company to enter into merger agreements, among other things. The court found that plaintiff sufficiently alleged facts that, if true, showed that MBC Investment and MBC Lender, with the aid of their respective managers of the Company, effected the Merger to benefit themselves at the expense of plaintiff, and accordingly, the court denied the motion to dismiss.

With respect to plaintiff's claim that MBC Investment and MBC Lender breached their implied contractual covenant of good faith and fair dealing under the LLC Agreement by approving the Merger, not seeking alternative strategies for the Company and allowing the Company to enter into a self-interested transaction, the court noted that to have a valid claim, plaintiff must have alleged a "specific implied contractual obligation and allege how the violation of that obligation denied [plaintiff] the fruits of its contract." The court found that plaintiff did not sufficiently allege any specific implied contractual obligation, how it was breached, or how he was damaged by such breach. In this regard, the court observed that the LLC Agreement expressly addressed self-interested transactions. Therefore, the court granted the motion to dismiss this claim.

The court then addressed plaintiff's claim that ELB aided and abetted the alleged breaches of fiduciary duties explained above. The court stated that under Delaware law, to state such a claim, plaintiff must show "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) the defendant, who is not a fiduciary, knowingly participated in the breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that plaintiff had sufficiently alleged that ELB knowingly participated in the breaches of fiduciary duty by the other Defendants through the acts of ELB's officers and its two wholly-owned subsidiaries (MBC Investment and MBC Lender) that directly harmed plaintiff for the same reasons as discussed above. Accordingly, the motion to dismiss was denied.

Finally, plaintiff also sought a declaratory judgment to invalidate the loan agreement between the Company and MBC Lender. The court specifically noted that plaintiff consented to such loan and pledged his membership interest in the Company to obtain the loan. On that basis, the court dismissed this claim.

6. *Vichi v. Koninklijke Philips Electronics N.V.*, C.A. No. 2578-VCP (Del. Ch. Dec. 1, 2009)

This case involved an individual ("Vichi") who loaned a substantial amount of money to a Delaware LLC ("Finance"), a subsidiary of a joint venture ("LPD") between a Netherlands holding company ("Philips") and South Korean Company ("LGE"). Philips, LGE, LPD, Kiam-Kong Ho ("Ho"), and Peter Warmerdam ("Warmerdam") were defendants. Ho was an employee of LPD and another LPD subsidiary ("International," which was the sole member and manager of Finance). Warmerdam was an employee of Philips. LPD and Finance went bankrupt and defaulted on the loan to Vichi. Vichi then sued the defendants, claiming that he entered the transaction with the belief that the loan was done on behalf of, and would be backed directly by, Philips.

Among other claims, Vichi had brought breach of fiduciary duty claims against Ho. Ho successfully moved to have the court dismiss the claims against him for lack of personal jurisdiction. However, the court stated that even if it had not dismissed the claims against Ho for lack of personal jurisdiction, it would have dismissed Vichi's breach of fiduciary duty claims against Ho for failure to state a claim because Vichi failed to demonstrate that his fiduciary claims were cognizable under Delaware law.

The court cited *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007), for the proposition that creditors of a Delaware corporation that is either insolvent or in the zone of insolvency may have standing to bring derivative claims but have no right to assert direct breach of fiduciary claims and relied on *VGS, Inc. v. Castiel*, 2003 WL 723285 (Del. Ch. Feb. 28, 2003), to apply the same rule to creditors of LLCs. The court then turned to *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), in order to determine whether Vichi's fiduciary claim was direct or derivative. The *Tooley* test directed the court to consider solely (1) who suffered the alleged harm, and (2) who would receive the benefit of recovery. The court found that, in his complaint, Vichi alleged that Ho breached his fiduciary duty to Vichi as a creditor and that Vichi had personally suffered damages. Moreover, Vichi's prayer for relief demanded that he personally receive recompense for the value of the notes, among other damages. The court therefore found that (1) under *Tooley*, Vichi's breach of fiduciary duty claims were direct, and (2) applying *Gheewalla*, Vichi, as a creditor of a Delaware LLC, could not bring a direct claim for breach of fiduciary duty. Thus, the court concluded that Vichi had failed to state a claim for which relief could be granted under Delaware law with respect to his fiduciary duty claims against Ho.

7. *Lola Cars Int'l Ltd. v. Krohn Racing, LLC,* C.A. No. 4479-VCN; *Lola Cars Int'l Ltd. v. Krohn Racing, LLC,* C.A. No. 4886-VCN (Del. Ch. Oct. 20, 2009)

This case involved a joint venture named Proto-Auto, LLC, a Delaware LLC (the "Company"), which was formed by an English company ("Lola") and a Delaware LLC ("Krohn"). Lola held 51% of the interest in the Company and Krohn held 49%, but the parties agreed to equal representation on the Company's board, each company appointing one director. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell's services as the Company's CEO. Hazell was also a defendant in this case. This decision addressed the Defendant's motion to dismiss both of Lola's complaints.

Lola's first complaint alleged that (1) Krohn breached the Company's Operating Agreement (the "Agreement"), (2) Hazell, as CEO and a director of the Company, breached his fiduciary duties of loyalty and care, and (3) Krohn aided and abetted Hazell's disloyalty. On these claims, Lola sought (1) dissolution of the Company and appointment of a liquidating receiver, (2) an injunction to prohibit the Company from taking action outside the ordinary course of business, and (3) damages against Krohn and Hazell.

Krohn argued that the Company should not be dissolved under Section 18-802 of the LLC Act because the facts alleged by Lola could not support a finding that it was "not reasonably practicable to carry on the business [of the Company]." Krohn interpreted the statutory reasonable practicability standard to mean that "the business has been abandoned or that its purpose is not being pursued." The court rejected this interpretation and applied the test from *Fisk Ventures, LLC v. Segal*. The three *Fisk* factors, which provide guidance in evaluating a situation in regard to the reasonable practicability standard, are: (1) whether the members' vote is deadlocked at the Board level; (2) whether there exists a mechanism within the operating agreement to resolve the deadlock; and (3) whether there is still a business to operate based on the company's financial condition.

The court found at least two of the three *Fisk* factors were present. First, Lola and Krohn were deadlocked over whether to replace Hazell as CEO. Second, although the Agreement contained a buy-out provision in case of a member dispute, it was entirely voluntary. Third, there was serious doubt as to whether the Company could continue in light of its financial condition because Lola had been extending the Company significant additional capital to keep it running. Furthermore, the court found that Lola's claims of Hazell's mismanagement and disloyalty, plus the Company's overall failure, added to the reasonable conclusion that dissolution may be appropriate.

Krohn had also argued that judicial dissolution under Section 18-802 was inappropriate because the Agreement defined the circumstances upon which it could be terminated, and such circumstances did not include judicial dissolution. The court rejected Krohn's argument stating that, even assuming that Section 18-802 of the LLC Act could be precluded by contract, the fact that the Agreement (1) contained self-termination options, and (2) did not expressly allow for judicial dissolution, could not render judicial dissolution unavailable. Consequently, the court denied defendant's motion to dismiss the claim for judicial dissolution.

Krohn moved to dismiss Lola's fiduciary claims on the ground that Lola failed to plead demand futility with particularity as required by Section 18-1003 of the Act. The court noted that it relies on corporate precedent in interpreting Section 18-1003 of the Act, and that in the corporate context, demand is considered excused when allegations in the complaint create a reason to doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. (Citing *Wood v. Baum*). The court denied Krohn's motion because Lola satisfied the particularized pleading standard by claiming that Hazell faced a substantial risk of liability due to his failure to maintain appropriate inventory levels and pay state taxes in a timely fashion, and his use of Company assets for Krohn's benefit in violation of his duty of loyalty to the Company. Furthermore, the court noted that where the directors of a two-director board have equal voting power and one is interested, demand should be excused because that one interested director alone has the power to preclude litigation.

Krohn moved to dismiss Lola's claim of breach of the implied covenant of good faith and fair dealing because the Agreement specifically stated that Hazell was to be CEO and that Krohn could replace him if he resigned from that position. The court agreed with Krohn that the implied covenant could not be applied to matters covered by contract. Therefore, Krohn's argument went, since the contract spoke to the issues of who is CEO and which party had the right to replace him, the implied covenant did not apply. Furthermore, Krohn argued that Lola could have bargained for the right to replace the CEO if that is what it wanted. The court determined that although the Agreement did not require Krohn to assent to Lola's wishes regarding replacement of Hazell, Krohn's refusal to even consider replacing him, or even attend board meetings to discuss the matter, allowed the court a reasonable inference of a breach of the implied covenant. In other words, the implied covenant did not apply to who was CEO or who could replace him, but it did apply to Krohn's consideration of Lola's suggestions.

Lola's second complaint relied on the termination clause in Section 10.1 of the Agreement, which allowed a member to terminate the Agreement after a breach by the other by notifying the breaching party of (1) the breach, and (2) the consequences of a failure to rectify the breach. Under Section 10.1 of the Agreement, the breaching party then had 21 days to rectify the breach, after which time the non-breaching party was permitted to terminate. Lola argued that its first complaint served as the requisite notice to Krohn and that more than 21 days had passed since the first complaint was filed, so Lola was entitled to terminate the Agreement. Also, Lola contended that upon termination of the Agreement, it should receive the right to manage and control the Company because of its majority position. Lola requested relief in the form of a TRO and permanent injunction prohibiting Hazell and Krohn from interfering with Lola's control of the Company, or acting as its agents.

The court denied Lola's request for interim injunctive relief, and refused to declare a termination of the Agreement based on Section 10.1 of the Agreement because Lola's first complaint did not notify Krohn of the consequences of failing to rectify the breach. Lola then moved for leave to file a supplemental complaint, alleging that (1) it sent Krohn a letter giving notice that Krohn had materially breached the Agreement and outlining the consequences of Krohn's failure to rectify its breach, and (2) that more than 21 days had passed since the letter was sent. In the alternative, Lola asked the court to dismiss its second complaint without prejudice so that it could file a new complaint that incorporated the letter to Krohn, and the court granted this request.

8. *Kahn v. Portnoy*, C.A. No. 3515-CC (Del. Ch. Dec. 11, 2008)

Plaintiff initiated the present litigation by filing a derivative complaint alleging that defendants, who were directors of Travel Centers of America, LLC (the "Company"), breached their fiduciary duties to the Company. The individual directors filed a motion to dismiss plaintiff's action under Rules 12(b)(6) and 23.1. This opinion addresses defendants' motion. In 2007, the Company along with Hospitality Trust ("HPT"), a company controlled by defendant director Barry Portnoy ("Portnoy"), acquired Petro Stopping Holdings, L.P. and Petro Stopping Centers, L.P. In connection with this transaction, HPT leased the real estate it acquired in the transaction to the Company (the "Petro Lease Agreement"). Plaintiff alleged that the terms of the Petro Lease Agreement were more favorable to HPT than to the Company and required the Company to pay HPT above-market rent. Plaintiff also alleged that the directors breached their fiduciary duties by approving the transaction to benefit, at the expense of the Company, HPT, Portnoy and Reit Management & Research ("RMR"), a company controlled by Portnoy, which provided management and administrative services to the Company. According to plaintiff, pursuant to the RMR management agreement, the Petro Lease Agreement benefited HPT because it was able to collect above-market rents and it benefited RMR (and therefore Portnoy) because RMR collects a fee percentage of the gross rent collected by HPT.

The court began its analysis by looking at the terms of the LLC Agreement to determine what fiduciary duties the directors owed the Company and whether the directors could be personally liable if they breached those duties. The LLC Agreement provided that the authority, powers, functions and duties (including fiduciary duties) of the board would be identical to those of a board of directors of a Delaware corporation under the DGCL, unless otherwise specifically provided for in the LLC agreement. Defendants argued that Section 7.5(a) of the LLC Agreement modified the board of directors' duties and altered the pleading standard required under Rule 12(b)(6) by creating a presumption that the board of directors acted in accordance with its duties, notwithstanding that the board's decision might have been interested. Further, plaintiff could only overcome that presumption by clear and convincing evidence. The court, however, found that defendants' interpretation of Section 7.5(a) was not the only reasonable interpretation of that provision. Specifically, defendants interpreted Section 7.5(a) as applying to a conflict between directors and the Company, but the court found that Section 7.5(a) could also reasonably be interpreted as applying only to conflicts between (i) a shareholder and the board or (ii) a shareholder and the Company. Here, the conflict was between Portnoy who was a director, and the Company; thus under one of the two reasonable interpretations of Section 7.5(a), that section would not apply to the conflict at issue. On a Rule 12(b)(6) motion, the court held that it was required to adopt the reasonable interpretation that favored the nonmoving party. Furthermore, the court noted that even assuming that Section 7.5(a) applied, it would not necessarily alter the pleading standard as the court would not apply a standard of proof at the motion to dismiss stage and, therefore, plaintiff would not need to meet the heightened evidentiary standard set forth in the applicable provision at the pleading stage.

Next, the court discussed what fiduciary duties the directors owed to the Company. The LLC Agreement provided that the directors had the same powers and duties (including fiduciary duties) as a board of directors of a Delaware corporation, meaning they would owe the dual duties of due care and loyalty. Although the LLC Agreement modified the directors' duties for certain transactions, under one of the two reasonable interpretations of Section 7.5(a), that modification would not apply to conflicts between directors and the Company. Therefore, for purposes of the motion to dismiss, the court assumed that the directors' duties were defined by the duties owed by directors of a Delaware corporation.

Next the court discussed whether the director defendants could be personally liable for violating their duties. The LLC Agreement contained two different, and arguably conflicting exculpation provisions. Although both provisions provided the directors with exculpation for their acts under various circumstances, neither provision provided exculpation for personal liability where the director acted in bad faith. Given the allegations, the court concluded that based on the limited record and the requisite assumptions made in plaintiff's favor at this stage, plaintiff made a sufficient showing to rebut the presumption that the directors acted in good faith. The court stated that Portnoy's loyalties were divided with respect to the Petro Lease Agreement because in approving the transaction he was acting as a director for both HPT and the Company, which at least raised a reasonable doubt as to whether he was acting in the best interest of the Company. Further Portnoy would benefit personally due to his interest in RMR if the Company were bound to pay above market rents. With respect to the other directors, the court concluded that the complaint contained sufficient allegations to support the claim that each director was beholden to Portnoy and approved the Petro Lease Agreement to benefit Portnoy. Thus because the court concluded that it was possible for plaintiff to show that the directors acted in bad faith, plaintiff had met the notice pleading burden of Rule 12(b)(6).

To maintain a derivative suit on behalf of an LLC, a member must either (i) make demand on the managers to bring the suit or (ii) show that "an effort to cause the managers or members to bring the action is not likely to succeed." Thus, because plaintiff did not claim that demand was made on the board, the analysis turns on whether plaintiff properly alleged demand futility. Under the familiar Aronson test, applicable to derivative suits, the allegations in the complaint must allege particularized facts that establish a reasonable doubt that "(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." Defendants argued that the first prong of the Aronson test was unavailable to plaintiff because Section 7.5(a) modified the requirement for demand futility by creating a presumption that the decision of whether to pursue a lawsuit was disinterested, notwithstanding that the board may be interested. First, the court reiterated that the LLC Agreement could be interpreted as not applying in a conflict between a director and the Company and therefore Section 7.5(a) did not alter the application of the Aronson test. Further, even assuming Section 7.5(a) applied, because plaintiff was not required to meet any standard of proof, the court was not convinced Section 7.5(a) would change the Aronson test. Therefore, the court went on to apply the Aronson test to determine if a demand on the board would have been futile and under the first prong stated that the plaintiff must create a reasonable doubt as to the disinterestedness or independence of at least three of the five directors of the Company. The court concluded that plaintiff's complaint created a reasonable doubt as to the disinterestedness or independence of a majority of the Company's board.

With respect to Portnoy and defendant Thomas M. O'Brien ("O'Brien"), the court concluded that they were both interested under the first prong of Aronson. Portnoy was interested in the Petro Lease Agreement because he was a director for both the Company and HPT and owed fiduciary duties to both companies. Additionally, Portnoy was owner of RMR, which would receive fees from HPT which were allegedly increased by above-market rent payments from the Company. O'Brien was a director of the Company, a senior officer of RMR and held positions with a number of other Portnoy-related entities. The court concluded that because of the payments RMR would receive from HPT and his position as Senior Vice President of RMR, there was a reasonable doubt as to whether O'Brien stood on both sides of the transaction. Further, the court noted that due to the "extensive relationships" between O'Brien and several Portnoy-related entities, there was also a reasonable doubt as to whether he was so beholden to Portnoy that he would be unable to exercise independent business judgment regarding the derivative action.

With respect to the other defendant directors Arthur G. Koumantzelis ("Koumantzelis"), Barbara D. Gilmore ("Gilmore") and Patrick F. Donelan ("Donelan"), the court concluded that plaintiff's complaint was sufficient to create a reasonable doubt as to their independence. The court noted that ordinarily, reasonable director compensation, without more, is not enough to establish that a director was not independent. However, in this case the facts alleged in the complaint suggested that Koumantzelis, Gilmore and Donelan had relationships with numerous other Portnoy-related entities and received compensation for serving as directors or officers for such entities. Thus, due to the relationships of Koumantzelis, Gilmore and Donelan with Portnoy-related entities and the compensation received by them for their service to Portnoy-related entities, the court concluded that the complaint created a reasonable doubt as to their independence. Further, the court stated "there is not a single director on the [Company] board who could serve as an independent voice, free of the potential influence of serving in a paid position of another Portnoy-related entity." The court also noted that when the relationships of each of the Company directors to other Portnoy-related entities are considered together with the allegations of a conflicted transaction with Portnoy-related entities, it was clear that there was a reasonable doubt that the Company board would be able to exercise disinterested and independent business judgment in deciding whether to pursue the derivative action. Thus the court found that demand was futile and ultimately denied defendants' motion to dismiss.

9. *Wood v. Baum*, C.A. No. 2404 (Del. July 1, 2008)

Plaintiff appealed the Court of Chancery's decision to dismiss her derivative action on behalf of Municipal Mortgage & Equity, LLC (the "LLC"). The LLC was managed by a ten-member Board of Directors (the "Board"), of which eight were independent and two were inside directors. Plaintiff claimed the members of the Board, and one former member, breached their fiduciary duties by (a) improperly valuing certain assets which allegedly resulted in false financial statements, (b) making improper charitable contributions to conceal the deterioration of the LLC's bond portfolio, (c) engaging in related-party transactions to inflate the LLC's financial performance and (d) "fail[ing] properly to institute, administer and maintain adequate accounting and reporting controls, practices and procedures . . . ." The Court of Chancery had dismissed the complaint for failure to allege particularized facts sufficient to establish that demand on the Board would have been futile in accordance with Court of Chancery Rule 23.1.

Applying Delaware corporate law principles, by analogy, the Delaware Supreme Court highlighted that a stockholder may not pursue a derivative suit against a corporation unless the stockholder: (a) has first demanded that the directors pursue the corporate claim and the directors have wrongfully refused to do so; or (b) establishes that pre-suit demand is excused because the directors are deemed incapable of making an impartial decision regarding the pursuit of the litigation. In this instance, plaintiff sought to establish demand futility. Accordingly, to satisfy demand futility under

Court of Chancery Rule 23.1, plaintiff had to satisfy either the Aronson test for those claims contesting a transaction that allegedly arose out of a conscious business decision in breach of the directors' fiduciary duties, or the Rales test for those claims that the Board violated its oversight duties. Under Aronson, a plaintiff must allege particularized facts creating a reason to doubt that (1) the directors were disinterested or independent or that (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. Under Rales, a plaintiff must allege particularized facts establishing a reason to doubt that "the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."

The gravamen of plaintiff's complaint alleged that the Board could not exercise valid business judgment because of a substantial risk of personal liability. The court noted that the operating agreement of the LLC included a provision that exempted directors from liability "except in the case of fraudulent or illegal conduct . . . ." The court also cited Section 18-1101(e) of the LLC Act which permits an LLC to "provide for the limitation or elimination of any and all liabilities . . . for breach of duties (including fiduciary duties) of a [director]," except that an LLC "may not eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing." The court stated that where directors are contractually or otherwise exculpated from liability, and a plaintiff alleges demand futility based on risk of personal liability to the directors, then a plaintiff must plead a non-exculpated claim based on particularized facts. Because the members of the Board were exculpated except for "fraudulent," "illegal" or "bad faith" conduct, the court also required plaintiff to plead that the members had "knowingly" engaged in "fraudulent" or "illegal" conduct or a "bad faith" breach of the covenant of good faith and fair dealing. The court observed that plaintiff failed to plead sufficiently that the Board had knowledge and plaintiff's allegations that the Board made affirmative misrepresentations in the financial statements of the LLC were also not sufficient. The Board's execution of financial reports, without more, was insufficient to create an inference of actual or constructive notice of any illegality. The court also rejected plaintiff's assertion that Board approval of a transaction or membership on a company's audit committee was sufficient to infer culpable knowledge or bad faith. Accordingly, the court affirmed the Court of Chancery's decision that the Board's approval of the financial reports, without more, was insufficient to create an inference either that (i) each member of the Board knew that the alleged transactions were improper or that (ii) the Board consciously and in bad faith failed to discharge fiduciary contractual responsibilities with respect to those transactions.

Plaintiff also claimed the Board knowingly ignored "red flags." Under Delaware law, the court stated, red flags "are only useful when they are either waved in one's face or displayed so that they are visible to the careful observers." In this case, there were no cognizable "red flags" to infer that the Board knew certain accounting requirements were being improperly applied.

Finally, the court also held that the complaint did not purport to allege a "bad faith violation of the implied contractual covenant of good faith and fair dealing." In this regard, the court stated that such covenant applies to protect stockholders' expectations that the company and its board will properly perform contractual obligations under the organizational documents, including the operating agreement. Here, the complaint did not allege any contractual claims let alone a bad faith breach of the implied covenant.

10. *JJ&B, LLC v. Joseph Rizzo & Sons Const. Co.*, 2007 WL 1114079 (Del. Ch. 2007)

This was a derivative case involving a family business that had been split up over time into a number of different entities. Plaintiff held an interest in one of the entities, JJ&B, LLC ("JJ&B"). JJ&B owned the real estate on which the family business operated. Plaintiff alleged that the operating entities of the family business (the "Operating Entities") used their control over JJ&B to benefit themselves at the expense of JJ&B's members. Plaintiff alleged that the Operating Entities occupied JJ&B's land without any formal rental agreement and without paying any rent to JJ&B. Plaintiff's derivative claims included separate counts for injunctive relief, unjust enrichment, breach of fiduciary duty, and ejectment.

Defendants asserted that the Court of Chancery lacked subject matter jurisdiction over the ejectment count, and filed a motion to dismiss. Defendants argued that because an action for ejectment is a legal claim and not equitable, the court could not exercise jurisdiction over this count. The court disagreed. The court noted that a derivative claim is cognizable only in equity and held that a derivative action can be brought to enforce a purely legal right of a corporation. Thus, while the ejectment count was a legal claim, the court held that it became a "creature of equity when asserted derivatively," and, therefore, the court had proper jurisdiction over the claim.

11. *Bakerman v. Sidney Frank Importing Co., Inc.*, C.A. No. 1844-N (Del. Ch. Oct. 10, 2006)

Plaintiff was chief legal counsel to Sidney Frank Importing Co., Inc. ("SFIC") and individually owned a membership interest in a subsidiary of SFIC, Grey Goose LLC (the "LLC"). SFIC and the LLC conducted the Grey Goose vodka business. Despite plaintiff's position as chief legal counsel, management of SFIC and the LLC negotiated a sale of the vodka business without the knowledge of plaintiff. Shortly before the scheduled public announcement of the sale, management of the LLC advised plaintiff of the sale and requested plaintiff's consent to the sale in his capacity as a member of the LLC, which was required under the LLC's operating agreement. Of the $2.25 billion dollar cash purchase price, less than 0.49% was proposed to be allocated to the LLC, and on this basis plaintiff initially refused to give his consent. After management threatened to sue plaintiff and terminate his employment, plaintiff consented to the sale. Plaintiff then brought this action, which alleged several derivative and direct claims. In this decision, the court addressed defendants' motion to dismiss.

The court first addressed defendants' motion to dismiss plaintiff's derivative claims for failure to make a proper demand. The court stated that the standard for alleging demand futility in Delaware (as established in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) requires the pleading of particularized facts raising a reasonable doubt that (i) management is disinterested and independent or (ii) the contested transaction was otherwise the result of a valid exercise of business judgment. As to the first element of the first prong, the court stated that "disinterested" means that a manager is not on both sides of the transaction and is not due to receive a benefit from the transaction that is not shared by the company or other interest holders. In this case, the court determined that the substantial benefit that the managers of the LLC received in their capacity as shareholders of SFIC, at the expense of the LLC, satisfied this element of demand-futility. As to the second element of the first prong, the court stated that the independence of a manager is sufficiently compromised for the purposes of demand-futility when the manager is beholden to a controlling person or so under the influence of a controlling person that the manager's discretion is effectively sterilized. In this case, the control that SFIC and Sidney Frank, who was the founder, chairman, chief executive officer and majority shareholder of SFIC, exerted with respect to the LLC and the sale transaction created a reasonable doubt as to the independence of the managers of the LLC. Despite concluding that demand was excused under the first prong, the court went on to analyze the second prong of the demand-futility test. The court stated that managers of an LLC are presumed to have acted on an informed basis and in the honest belief that their decisions were in furtherance of the LLC and its members. The court stated that, in determining whether such a presumption is overcome by the facts, which typically requires a showing tantamount to corporate waste, both the substance of the transaction and the process by which it was adopted are reviewed. As to the substance of the transaction, the court found that under the facts presented it could not be reasonably concluded that the allocation of the purchase price between SFIC and the LLC was appropriate. As to process, plaintiff alleged that defendants failed to utilize mechanisms typically employed to produce a fair process, such as obtaining an independent appraisal of the assets or appointing a special committee to assess the fairness of the transaction. The court thus held that plaintiff had met his burden of demonstrating demand futility.

Defendants also alleged that plaintiff was an inadequate derivative representative of the LLC because (i) at the time of the sale he was SFIC's chief legal counsel, (ii) he allegedly violated New York's attorney disciplinary rules by accepting an interest in the LLC while serving as SFIC's legal counsel and (iii) the lawsuit was not supported by other members of the LLC. The court found that plaintiff's position as legal counsel to SFIC did not preclude him from bringing a derivative suit because, as defendants excluded him from the negotiations regarding the sale, he never served as legal advisor on the transaction, and thus his representation of SFIC did not involve issues that were "substantially related" to the derivative claims. In addition, the court found that the derivative claims may be maintained without the support of the other members of the LLC, stating that a derivative representative is assessed by his ability to advance the interest of similarly situated interest holders (even if there is only one interest holder with such interest), regardless of the support of other interest holders.

Turning to the substance of plaintiff's derivative claims, the court first addressed plaintiff's claim of breach of fiduciary duty based on the alleged coercion that led plaintiff to consent to the sale. The court disagreed with plaintiff's assertion that the inequitable coercion doctrine, which is the doctrine Delaware courts have applied in the context of proxy voting by diffuse shareholders of public corporations, was applicable in this case. The court found that this doctrine was not applicable to a member of a closely held LLC, which, unlike diffuse shareholders, is not hampered by the difficulties of collective action. Instead, the court applied the standards relating to coercion and duress in bilateral contract negotiations, stating that a party alleging coercion or duress must plead (i) a wrongful act, (ii) which overcomes the will of the aggrieved part and (iii) that he has no adequate legal remedy to protect himself. The court determined that the application of these standards in this context by the fact that the managers of the LLC, in their position as fiduciaries, had a duty to disclose to plaintiff any information that carried a substantial likelihood that a reasonable interest holder would view as significantly changing the total mix of information bearing on the decision. The court concluded that the threats of litigation and loss of employment, combined with the brief time period in which plaintiff was forced to make a decision without the assistance of counsel, coerced his consent, and thus the court refused to dismiss these claims.

The court then examined defendants' allegations that plaintiff's direct claims were in fact derivative in nature. The court stated that the classification of a claim as derivative or direct turns on (i) who suffered the harm (the company or the suing interest holder individually) and (ii) who would receive the benefit of the remedy (the company or the interest holder individually). Based on this test, plaintiff's breach of contract and breach of good faith and fair dealing claims were judged to be direct because plaintiff suffered the unique harm of the deprivation of his voting rights under the LLC's operating agreement through the defendants' economic coercion and the remedy for such harm would be due solely to plaintiff. The court thus concluded that these claims were direct claims and determined that plaintiff's pleadings with respect to these claims were sufficient to survive defendants' motion to dismiss.

12. *Ishimaru v. Fung*, C.A. No. 929 (Del. Ch. Oct. 26, 2005)

The plaintiff and one of the defendants, Fung, formed a Delaware LLC for the purposes of managing and marketing hedge funds to Japanese investors. The LLC formed a joint venture with a subsidiary of defendant Ivy Asset Management ("Ivy") which had experience and products that would complement the LLC's business. After Ivy was bought by a third-party bank, it began to market non-J.V. products to the Japanese market in competition with the LLC and in contravention of the amended joint venture agreement.

The complaint alleged that Ivy breached the amended joint venture agreement by failing to adhere to the terms on which Ivy would market certain investment funds in Japan. However, rather than plead facts showing that the plaintiff was entitled to proceed on behalf of the LLC, the complaint instead alleged that Fung, the managing member, breached his fiduciary duties by refusing to bring suit against Ivy. The court found that in essence, the case was a derivative suit against Ivy and to clarify matters, ordered the plaintiff to seek judgment on the pleadings as to whether she could proceed derivatively. The court then held that demand was excused and that the plaintiff could proceed on behalf of the LLC.

The court held that demand was excused because Fung had waived any argument that the plaintiff could not sue derivatively. Fung had argued that the suit against Ivy should be adjudicated before the suit against him, and he twice lead the court and plaintiff to believe he was not objecting to the plaintiff's purported derivative action. Additionally, the court applied precedent from the corporate context and held that demand was excused because the plaintiff articulated particularized facts that, if true, demonstrated that Fung was incapable of disinterestingly determining whether to cause the LLC to sue Ivy. According to the complaint, Fung was planning to leave the LLC and to begin marketing in Europe products substantively identical to the joint venture's. These actions probably violated provisions of the amended joint venture agreement and the LLC agreement, but Fung was allegedly willing to trade away the LLC's claims against Ivy in exchange for Ivy's concessions allowing him to conduct his European marketing. However, the court dismissed the plaintiff's complaint, holding that the LLC would have to arbitrate its claims in accordance with an arbitration provision contained in the joint venture agreement.

13. *VGS, Inc. v. Castiel*, C.A. No. 17995 (Del. Ch. Mar. 10, 2003)

This case is a subsequent proceeding in the case in which the court, after trial, voided a merger by which Peter Sahagen ("Sahagen"), the controlling person of one of the three members of a Delaware limited liability company and a manager of the LLC, attempted to take control of the LLC from its founder, David Castiel ("Castiel"), who controlled the other members. In this subsequent proceeding, the court addressed various counter-claims and cross-counterclaims brought by the parties that were not resolved in the original action. The two members of the LLC controlled by Castiel had filed a counterclaim alleging that Sahagen and Tom Quinn ("Quinn"), another manager, had breached their duty of loyalty when they attempted to take control of the LLC without Castiel's consent through the merger with an entity controlled by Sahagen. In response, Sahagen and the member that he controlled (the "Sahagen Parties") filed cross-counterclaims alleging, among other things, breach of fiduciary duties.

The Sahagen Parties brought direct claims against Castiel for breach of his fiduciary duties of loyalty and care and against Castiel, the two members controlled by Castiel and one of Castiel's affiliated entities (the "Castiel Parties") for aiding and abetting Castiel. The court determined that the claims amounted to claims for waste, mismanagement and self-dealing and that such claims were derivative, rather than direct, in nature. In reaching its determination, the court looked to Delaware corporate law principles and found that "[t]o maintain a direct lawsuit, the injury alleged must affect a stockholder alone or affect a particular stockholder right 'such as his preemptive rights as a stockholder, rights involving control of the corporation, or a wrong affecting the stockholders and not the corporation'" and that claims of waste and self-dealing have been held to be derivative in nature. In the LLC context, the right of a member to bring a derivative claim is governed by Section 18-1001 of the LLC Act and an individual plaintiff may only bring a derivative claim against an LLC without first making a demand on the managers if such demand would be futile. "A demand is considered futile when a reasonable doubt exists as to whether '(a) the [managers] were disinterested or independent, [or] (b) the challenged transaction was the product of a valid exercise of business judgment." In the instant case, the Sahagen Parties conceded that they did not make a demand on the LLC's board of managers. Thus, the court had to determine whether the making of a demand by them on the board of managers would have been futile. The sole issue relating to whether the making of a demand on the board would have been futile depended upon whether Quinn's successor as the one remaining manager other than Castiel and Sahagen would be disinterested and independent in a demand made by the Sahagen Parties to pursue an action against Castiel for breach of fiduciary duty. The Sahagen Parties argued that such manager would not have been disinterested and independent because he was entirely dependent upon Castiel for his only other employment opportunity as an officer in a company controlled by Castiel. However, the court found that the evidence showed that the manager had other substantial sources of income and that the Sahagen Parties' other arguments were insufficient to demonstrate the futility of bringing a derivative claim on behalf of the LLC, and granted summary judgment in favor of the Castiel Parties based on the Sahagen Parties' failure to seek a demand and inability to demonstrate that such demand would have been futile.

With respect to Castiel's breach of duty of loyalty claim against Sahagen and Quinn, the court noted that in the June 2000 trial Vice Chancellor Steele held that "Sahagen and Quinn 'owed a duty of loyalty to [the LLC], its investors and Castiel, their fellow manager,' and 'that the actions of Sahagen and Quinn, in their capacity as managers constituted a breach of their duty of loyalty.'" Relying upon the fact that there had been no changed circumstances since Vice Chancellor Steele issued his opinion and that his opinion was affirmed by the Delaware Supreme Court, the court concluded that the "law of the case" doctrine applied to the facts at hand and that there would be no injustice if the doctrine were applied only with respect to whether or not Sahagen and Quinn breached their fiduciary duty of loyalty and, thus, the court entered summary judgment in favor of the Castiel Parties with respect to that issue.

14. *Omnicare, Inc. v. Alterra Healthcare Corp.*, C.A. No. 18831 (Oct. 10, 2001) (transcript of bench ruling)

Plaintiff and defendant were the two members of a Delaware LLC in the process of being liquidated. Control of the LLC was divided equally between plaintiff and defendant. Plaintiff alleged that defendant owed the LLC payment for services rendered by the LLC to defendant. The services were provided by plaintiff for the LLC's benefit to defendant.

Plaintiff brought this action as a derivative claim on behalf of the LLC under Section 18-1001 of the LLC Act and as an individual or direct claim on behalf of plaintiff against defendant. Defendant moved to dismiss the action for lack of subject of matter jurisdiction. The court stated that if this action were simply a direct contract claim for damages arising out of a breach of contract, then there would be an adequate remedy at law and the Court of Chancery would not have subject matter jurisdiction over the claim, but if the claim were derivative, then the Court of Chancery would have subject matter jurisdiction pursuant to the grant of such jurisdiction in Section 18-1001.

Section 18-1001 provides that:

> [a] member . . . of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

The court stated that because plaintiff sought judgment for the LLC on a claim that the LLC had against defendant and alleged that the LLC could not or was not likely to bring the action because one half of the control of the LLC was held by the entity that was alleged to owe the money, the action appeared to fit within the standards of Section 18-1001.

Defendant argued that the action was not a derivative action based on the Court of Chancery's decision in the *In re Cencom Cable Income Partners, L.P. Litig.* case, in which the court held that a claim is direct where:

> If: (1) a business association consists of only two parties in interest, one a putative class of injured plaintiffs and the other the defendant party that controls the business association; and, (2) the business association is effectively ended, but for the winding up of its affairs; and, (3) the two sides oppose each other in the final dispute over the liquidation of that association.

The court held, however, that the rule set forth in the *Cencom* case did not apply to this action. The court noted the recognition by the court in *Cencom* that direct claims seek relief for injuries that fall distinctly upon individual participants or involve participants' contractual rights while derivative claims involve injury to the business association as a whole. The court stated that the collection of a business debt is a critical function of the business association in the liquidation process and is more appropriately considered within the context of what the business association itself should be doing and thus is more closely in line with the standard notions of derivative actions. In addition, the court stated that the decision in *Cencom* was driven by practical considerations and that the practical considerations in this case favor allowing the derivative action to proceed because, for example, if plaintiff had filed this action as a direct action in Superior Court, defendant could have argued that plaintiff had no claim and instead that any claim was a claim of the LLC. Further, the court stated that it was reluctant to apply the rule in *Cencom* to this situation because, although not an issue in this case, it was concerned about potential impairment of the rights of creditors if any asset of the LLC were treated as belonging to one of the members and that, as a general rule, the assets of the LLC should be treated as one normally treats efforts to recover on assets of entities and that would be as a derivative action. Therefore, the court denied defendant's motion to dismiss for lack of subject matter jurisdiction.

I. Disclosures

1. *Marie Raymond Revocable Trust v. MAT Five LLC*, C.A. No. 3843-VCL (Del. Ch. June 26, 2008) and (Del. Ch. Dec. 19, 2008)

Plaintiffs, who were investors in a Delaware limited liability company operating as a private hedge fund (the "Company"), filed a class action against the Company and its management claiming breaches of fiduciary duty for failing to adequately disclose material information necessary for investors to adequately assess their options under a tender offer by the Company to repurchase interests in the Company. The tender offer followed a significant infusion of capital into the Company by an affiliated entity, which became necessary due to a severe decrease in the value of the Company's assets. The tender offer offered the investors monetary and other financial consideration for their interests but required the tendering investors to release defendants from all legal claims directly or indirectly arising from the operation, management, supervision and investment of the Company's assets. This decision addressed plaintiffs' motion to expedite the proceedings based on allegations that the exchange memorandum delivered in connection with the tender offer contained material omissions.

Plaintiffs claimed that the exchange memorandum failed, among other things, to disclose the manner in which the equity in the Company received by the affiliated entity in consideration for its capital infusion was valued or to provide information on the nature of claims investors were being asked to release. Defendants responded with several arguments, none of which the court found convincing. Among defendants' arguments was an argument that plaintiffs could not demonstrate a colorable claim because the information they sought was not material. The court stated that in order to state a claim for breach by omission of the duty to disclose, a plaintiff must plead facts identifying material, reasonably available information that was omitted from the proxy materials and further stated that omitted information is material if a reasonable stockholder would consider it important in deciding whether to tender his shares or would find that the information has altered the total mix of information available. In this case, the court held that plaintiffs had articulated a colorable claim for breach of the duty of disclosure, finding that how the Company's assets were valued and the nature of the claims being released, including a description of an SEC investigation, would alter the "total mix of information" and that a reasonable shareholder would consider this information important in deciding whether to accept the tender offer. The court thus granted plaintiffs motion to expedite the proceedings.

Following the grant of the motion to expedite proceedings, the court conducted a preliminary injunction hearing in which it held that the disclosures in the exchange memorandum were insufficient and that the tender offer would be enjoined if not supplemented. Three months later, the parties entered into a memorandum of understanding that included terms of a settlement. As part of the settlement, the Company issued a revised exchange memorandum and tender offer that included significantly more disclosure, increased the monetary consideration for investors and expanded the options offered to investors. In a subsequent opinion, the court, among other things, analyzed the adequacy of the settlement and held it to be fair and reasonable.

2. *Bakerman v. Sidney Frank Importing Co., Inc.*, C.A. No. 1844-N (Del. Ch. Oct. 10, 2006)

Plaintiff was chief legal counsel to Sidney Frank Importing Co., Inc. ("SFIC") and individually owned a membership interest in a subsidiary of SFIC, Grey Goose LLC (the "LLC"). SFIC and the LLC conducted the Grey Goose vodka business. Despite plaintiff's position as chief legal counsel, management of SFIC and the LLC negotiated a sale of the vodka business without the knowledge of plaintiff. Shortly before the scheduled public announcement of the sale, management of the LLC advised plaintiff of the sale and requested plaintiff's consent to the sale in his capacity as a member of the LLC, which was required under the LLC's operating agreement. Of the $2.25 billion dollar cash purchase price, less than 0.49% was proposed to be allocated to the LLC, and on this basis plaintiff initially refused to give his consent. After management threatened to sue plaintiff and terminate his employment, plaintiff consented to the sale. Plaintiff then brought this action, which alleged several derivative and direct claims. In this decision, the court addressed defendants' motion to dismiss.

The court first addressed defendants' motion to dismiss plaintiff's derivative claims for failure to make a proper demand. The court stated that the standard for alleging demand futility in Delaware (as established in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) requires the pleading of particularized facts raising a reasonable doubt that (i) management is disinterested and independent or (ii) the contested transaction was otherwise the result of a valid exercise of business judgment. As to the first element of the first prong, the court stated that "disinterested" means that a manager is not on both sides of the transaction and is not due to receive a benefit from the transaction that is not shared by the company or other interest holders. In this case, the court determined that the substantial benefit that the managers of the LLC received in their capacity as shareholders of SFIC, at the expense of the LLC, satisfied this element of demand-futility. As to the second element of the first prong, the court stated that the independence of a manager is sufficiently compromised for the purposes of demand-futility when the manager is beholden to a controlling person or so under the influence of a controlling person that the manager's discretion is effectively sterilized. In this case, the control that SFIC and Sidney Frank, who was the founder, chairman, chief executive officer and majority shareholder of SFIC, exerted with respect to the LLC and the sale transaction created a reasonable doubt as to the independence of the managers of the LLC. Despite concluding that demand was excused under the first prong, the court went on to analyze the second prong of the demand-futility test. The court stated that managers of an LLC are presumed to have acted on an informed basis and in the honest belief that their decisions were in furtherance of the LLC and its members. The court stated that, in determining whether such a presumption is overcome by the facts, which typically requires a showing tantamount to corporate waste, both the substance of the transaction and the process by which it was adopted are reviewed. As to the substance of the transaction, the court found that under the facts presented it could not be reasonably concluded that the allocation of the purchase price between SFIC and the LLC was appropriate. As to process, plaintiff alleged that defendants failed to utilize mechanisms typically employed to produce a fair process, such as obtaining an independent appraisal of the assets or appointing a special committee to assess the fairness of the transaction. The court thus held that plaintiff had met his burden of demonstrating demand futility.

Defendants also alleged that plaintiff was an inadequate derivative representative of the LLC because (i) at the time of the sale he was SFIC's chief legal counsel, (ii) he allegedly violated New York's attorney disciplinary rules by accepting an interest in the LLC while serving as SFIC's legal counsel and (iii) the lawsuit was not supported by other members of the LLC. The court found that plaintiff's position as legal counsel to SFIC did not preclude him from bringing a derivative suit because, as defendants excluded him from the negotiations regarding the sale, he never served as legal advisor on the transaction, and thus his representation of SFIC did not involve issues that were "substantially related" to the derivative claims. In addition, the court found that the derivative claims may be maintained without the support of the other members of the LLC, stating that a derivative representative is assessed by his ability to advance the interest of similarly situated interest holders (even if there is only one interest holder with such interest), regardless of the support of other interest holders.

Turning to the substance of plaintiff's derivative claims, the court first addressed plaintiff's claim of breach of fiduciary duty based on the alleged coercion that led plaintiff to consent to the sale. The court disagreed with plaintiff's assertion that the inequitable coercion doctrine, which is the doctrine Delaware courts have applied in the context of proxy voting by diffuse shareholders of public corporations, was applicable in this case. The court found that this doctrine was not applicable to a member of a closely held LLC, which, unlike diffuse shareholders, is not hampered by the difficulties of collective action. Instead, the court applied the standards relating to coercion and duress in bilateral contract negotiations, stating that a party alleging coercion or duress must plead (i) a wrongful act, (ii) which overcomes the will of the aggrieved part and (iii) that he has no adequate legal remedy to protect himself. The court determined that the application of these standards in this context by the fact that the managers of the LLC, in their position as fiduciaries, had a duty to disclose to plaintiff any information that carried a substantial likelihood that a reasonable interest holder would view as significantly changing the total mix of information bearing on the decision. The court concluded that the threats of litigation and loss of employment, combined with the brief time period in which plaintiff was forced to make a decision without the assistance of counsel, coerced his consent, and thus the court refused to dismiss these claims.

The court then examined defendants' allegations that plaintiff's direct claims were in fact derivative in nature. The court stated that the classification of a claim as derivative or direct turns on (i) who suffered the harm (the company or the suing interest holder individually) and (ii) who would receive the benefit of the remedy (the company or the interest holder individually). Based on this test, plaintiff's breach of contract and breach of good faith and fair dealing claims were judged to be direct because plaintiff suffered the unique harm of the deprivation of his voting rights under the LLC's operating agreement through the defendants' economic coercion and the remedy for such harm would be due solely to plaintiff. The court thus concluded that these claims were direct claims and determined that plaintiff's pleadings with respect to these claims were sufficient to survive defendants' motion to dismiss.

3. *Metro Commc'n Corp. BVI v. Advanced MobileComm Techs. Inc.*, C.A. No. 20099 (Del. Ch. May 3, 2004)

Plaintiff, a former member of a Delaware LLC, brought an action against other former members and the managers of the LLC alleging, *inter alia*, breach of fiduciary duty and breach of contract. Plaintiff's investments in the LLC were made through contractually required capital calls during and after a period in which one of the defendants, and the employees of another of the defendants, were implicated in a bribery scandal. As a result of the bribery scandal, the LLC self-referred itself to the Department of Justice for activities that may have involved violations of federal law. These facts were not described in the management reports received by plaintiff during the course of its investment. In addition, the LLC Agreement specifically required the LLC to disclose to the members any event reasonably likely to result in a material adverse effect (an "MAE Notice"). The LLC was dissolved in 2000 in connection with a reorganization.

On a motion to dismiss filed by the defendants, the court held that the self-referral to the Department of Justice demonstrated knowledge of the bribery on the part of the managers and that defendants breached their fiduciary duty to the members in failing to give an MAE Notice as a result of the bribery. Two defendants had argued that the requirement to give the MAE Notice applied only to the LLC, not the managers, but the court stated that a manager of an LLC who knowingly permits the LLC to violate a contractual duty owed to a member breaches its fiduciary duties and found that the failure to provide an MAE Notice to the members supported a claim for breach of fiduciary duty.

With respect to fiduciary duties relating to disclosure obligations, the court ruled that the requirement of plaintiff to respond to capital calls did not trigger a duty on the part of the LLC's managers to disclose all material facts each time a capital call was made. Rather, plaintiff was required to show that defendants acted with scienter, and that plaintiff reasonably relied on defendant's misstatements. The court ruled that plaintiff's allegations that one of the defendants, who had participated in the bribery and sent a misleading e-mail to plaintiff, were sufficient allegations that such defendant knowingly misled defendant, and therefore acted with scienter. With respect to the remaining defendants, the issue was the date from which such defendants could have breached their fiduciary duty of disclosure, when it was not alleged that such defendants knew of the bribery scheme prior to the LLC self-referring itself to the Department of Justice. The court found that once a fiduciary comes into knowledge of the misleading nature of a prior communication, it has a duty to correct such misleading communication. Therefore, the court ruled that plaintiff alleged a viable fiduciary duty claim based on the remaining defendants' failure to correct the previous misleading communications once the self-referral to the Department of Justice occurred and they were aware of the bribery scheme.

J. Liability of Members

1. *Thomas v. Hobbs*, C.A. No. 04C-02-010-RFS (Del. Super. Ct. Apr. 27, 2005)

The plaintiff brought a breach of contract action against the defendant, the sole member of a limited liability company, Tara Venture, LLC ("Tara Venture"), based on a written construction contract between the plaintiff and Tara Venture. The defendant filed a motion for summary judgment claiming that the plaintiff did not have a cause of action against her personally, but only had a cause of action against Tara Venture. This opinion was the court's decision with respect to such motion.

The court stated that similar to a corporation, "a member of a limited liability company may not be held liable for the debts, obligations and liabilities of the company" unless the member signed a contract on her own behalf, rather than for the company or the member agreed to be obligated personally for the obligations and liabilities of the company. Additionally, the Delaware Superior Court has no jurisdiction to pierce the corporate veil of a limited liability company.

The court found that the defendant, who signed the contract as a member of Tara Venture, was not personally liable for the obligations of Tara Venture under the contract. The contract clearly stated that it was between the plaintiff and "Taraventures L.L.C. c/o Debra A. Hobbs," as the Contractor and that it was signed with "Taraventure LLC" listed as the Contractor, by the defendant, as the member of Tara Venture. (While there was a dispute surrounding the name of Tara Venture since the contract stated that the contract was between the plaintiff and "Taraventures L.L.C.," the contract was signed by the defendant as the member of "Taraventure LLC" and the company was formed under the name "Tara Venture, LLC," it was clear to the court that the mistakes in the contract were clerical errors and Tara Venture, Taraventures and Taraventure were all the same company.) The body of the contract also referred to the "Contractor" rather than the defendant in her individual capacity. Additionally, there was no evidence of a limited liability company agreement clause in which the defendant agreed to be personally obligated for the obligations and liabilities of the company. The plaintiff asserted that the defendant orally agreed to be personally responsible for the obligations of the contract, however the court considered such statements as extrinsic evidence barred under the parol evidence rule since the contract was fully integrated and no exceptions to the parol evidence rule applied. The court granted the defendant's motion for summary judgment and dismissed the defendant from the case.

2. *The Pepsi-Cola Bottling Co. of Salisbury, Md. v. Handy*, C.A. No. 1973-S (Del. Ch. Mar. 15, 2000)

In this case, one of the individual defendants contracted to purchase property with the intent of forming a Delaware LLC with the two other individual defendants for the purpose of constructing a residential community on the property. After discovering that the property contained wetlands that adversely affected the property's development potential, the three individual defendants abandoned construction plans and decided to attempt to sell the property. One of the individual defendants negotiated an option with the plaintiff to purchase the property. The three individual defendants then formed the defendant Delaware LLC and took title to the property through the LLC pursuant to the purchase contract. Four months later the plaintiff exercised its option to purchase the property from the LLC, paying over twice the amount of the purchase price. The defendants never disclosed the existence of wetlands on the property. After the plaintiff learned that the property contained wetlands, the plaintiff brought this action for rescission and damages based on, among other claims, fraud and unjust enrichment.

The individual defendants moved to dismiss the case against them claiming that the plaintiff could not recover directly against them as LLC members because they never directly held legal or equitable title to the property. They argued that a plaintiff could recover distributions to members of an LLC only if (i) the plaintiff pierced the LLC's "corporate" veil or (ii) Section 18-607 of the LLC Act was applicable. Section 18-607(b) provides that if a member receives a distribution that results in the LLC becoming insolvent, and the member knew at the time of the distribution that the distribution would render the LLC insolvent, the member is liable to the LLC for the amount of the distribution. The individual defendants argued that because neither of those two circumstances was alleged, the case must be dismissed against them.

The individual defendants first argued that they were protected from liability by Section 18-303(a) of the LLC Act, which provides in relevant part that "no member or manager of a limited liability company shall be obligated personally for any . . . debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company." However, the court rejected this argument because the LLC was not formed and the property was not acquired by the LLC until after the allegedly wrongful acts had been committed and, therefore, the individual defendants could not have been acting solely as members of the LLC when they committed those acts and thus were not protected by Section 18-303. The individual defendants then claimed that they were protected from liability by Section 18-607(b) of the LLC Act. They argued that Section 18-607 is the only provision by which a third party can recover from an LLC member without piercing the LLC's corporate veil and, because the complaint did not allege a claim under Section 18-607, they could not be held personally liable. The court also rejected this argument finding the individual defendants' expansive reading of Section 18-607 of shielding LLC members against all claims except those that arise under Section 18-607 incorrect and inconsistent with the provisions of Section 18-303 noted above. Finally, the court held that it did not need to address veil piercing because the LLC Act did not protect the liability of LLC members who (as in this case) are sued in capacities other than as members of the LLC, and, therefore, denied the individual defendants' motion to dismiss the case against them.

K. Procedural Issues

1. Arbitration

a. *AM Gen. Holdings LLC v. The Renco Grp., Inc.,* C.A. No 7639-VCN (Del. Ch. May 29, 2015)

In this decision, defendant, The Renco Group, Inc., asked the court to reconsider its appointment of Valuation Research Corporation ("VRC") as an appraiser of plaintiff, AM Gen. Holdings LLC. The court denied defendant's motion to reconsider.

The court, under the evident partiality standard, may invalidate an arbitrator or appraiser if the arbitrator or appraiser failed "to disclose a substantial personal or financial relationship with a party, a party's agent or a party's attorney that a reasonable person would conclude was powerfully suggestive of bias." Defendant claimed that VRC was conflicted and thus disqualified from acting as appraiser in this case because VRC and plaintiff's counsel, Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), worked for mutual clients over the past five years. In addition, defendant asserted that VRC could not serve as an appraiser because plaintiff did not disclose VRC and Paul Weiss' relationship before the court appointed VRC as an appraiser. The court rejected the defendant's argument, reasoning that the alleged conflict was "not so serious as to be disqualifying," Paul Weiss did not recommend, select, hire, retain, or pay VRC in any of the instances where Paul Weiss and VRC had mutual clients, and most importantly, the relationship was disclosed before VRC began its work. The court noted that it should not interfere with an appraiser's judgment of his or her own ability to serve after the appraiser disclosed the possible conflict. Based on the forgoing, the court denied defendant's request to remove VRC as an appraiser.

b. *Utilipath LLC v. Hayes*, C.A. No. 9922-VCP (Del. Ch. Apr. 15, 2015)

Defendants Baxter Hayes, Jr., Baxter Hayes, III and Jarrod Hayes, the sole members of Utilipath, LLC, a North Carolina limited liability company ("Old Utilipath"), transferred all of their membership interests in Old Utilipath to defendant Utilipath Holdings, Inc., a North Carolina corporation ("Holdings"). Old Utilipath then merged with Utilipath, LLC, a Delaware limited liability company ("Utilipath"), making Utilipath a wholly-owned subsidiary of Holdings. Subsequently, defendants caused Holdings to sell certain of its membership units in Utilipath to Utilipath via a Redemption Agreement (the "Agreement"). The Agreement provided that the purchase price could be adjusted post-closing if Utilipath's net working capital ("NWC") fell below a certain amount. If a dispute arose as to the calculation of the NWC, an alternative dispute resolution ("ADR") provision in the Agreement provided that the parties would select an independent accounting firm to perform the calculation. The ADR provision also stipulated that it was subject to the Federal Arbitration Act (the "FAA").

When Utilipath provided defendants with its calculation of the closing working capital, defendants objected. In this action, Utilipath sought to compel enforcement of the Agreement as it related to the NWC adjustment. Defendants moved to dismiss on procedural and substantive grounds. They argued, among other things, that the action should be dismissed under the *McWane* doctrine, on the grounds that the Agreement was already being litigated in a first-filed action in the Eastern District of Pennsylvania, and that the ADR provision in the Agreement was an unenforceable "agreement to agree" that did not provide an adequate means of selecting an arbitrator.

The court denied defendants' motion to dismiss under the *McWane* doctrine, noting that the doctrine is a default rule of common law which parties may displace by contract. The parties agreed in the Agreement that venue in any Delaware court would be proper and waived any objection that any such court was an improper or inconvenient forum to resolve disputes. The fact that this forum selection clause did not provide for exclusive jurisdiction in Delaware courts did not change the fact that venue was proper in Delaware. However, the court declined to decide whether the dispute was arbitrable at this stage of the litigation.

The court also denied defendant's motion to dismiss on the grounds that the arbitration provision was unenforceable. The Agreement did not lack an essential term relating to the selection of an arbitrator, since it referenced the FAA. The FAA provides that if the parties cannot agree on an arbitrator, a court shall designate an arbitrator. Thus, if the parties could not agree on an independent accounting firm to calculate the NWC, the court could designate one.

c. *3850 & 3860 Colonial Blvd., LLC v. Griffin*, C.A. No. 9575-VCN (Del. Ch. Mar. 30, 2015)

This case involved the arbitrability of a dispute between a Delaware LLC and a Delaware corporation. Prior to the litigation's commencement, defendant Christopher E. Griffin ("Griffin") caused the conversion of Rubicon Media, LLC ("Rubicon LLC") into a corporation, Rubicon Media, Inc. ("Rubicon Inc."). Plaintiff filed an action in the Court of Chancery, consistent with the certificate of incorporation of defendant Rubicon Inc., claiming that Griffin breached his fiduciary duties when he effectuated the recapitalization of Rubicon LLC. Defendants sought to dismiss the complaint for lack of subject matter jurisdiction as the parties agreed to arbitrate in the operating agreement of Rubicon LLC. Before the court was plaintiff's application for certification of an interlocutory appeal to the Delaware Supreme Court of the court's February 26, 2015 ruling to stay the proceedings pending arbitration.

Rubicon LLC's operating agreement provided that any dispute arising under or relating to the agreement would go through mediation followed by arbitration. Rubicon Inc.'s certificate of incorporation stated that the Court of Chancery was the exclusive forum for any stockholder fiduciary duty litigation. The conduct at issue in this litigation occurred during the existence of Rubicon LLC. Pursuant to Supreme Court Rule 42, to certify an interlocutory appeal, the court must be convinced that its earlier decision determined a substantial issue and established a legal right. To satisfy this requirement, the issue must go to the merits of the case. The appellant must also fulfill one of the requirements enumerated in Supreme Court Rule 42(b).

Because the arbitrability of a matter does not go to the actual merits of plaintiff's fiduciary duty claim, the court held that plaintiff did not satisfy the substantial issue and legal right requirements of Supreme Court Rule 42. The court also rejected plaintiff's attempt to satisfy one of the criteria listed in Supreme Court Rule 42(b). First, the court held that plaintiff did not present a novel question of law because while this case is the first application of a legal standard, that fact alone does not make it a novel question of law. Second, the court held that its earlier decision did not conflict with other decisions of the Court of Chancery because whether a later contract displaces a prior contract depends upon the facts and circumstances—some later contracts displace prior contracts and some do not displace prior contracts. Therefore, the court denied plaintiff's application for certification of an interlocutory appeal.

d. *Li v. Standard Fiber, LLC*, C.A. No. 8191-VCN (Del. Ch. Mar. 28, 2013)

Plaintiff Li sought advancement of legal fees pursuant to an indemnification agreement between Li and defendant Standard Fiber, LLC ("Standard Fiber"). Standard Fiber moved to stay the action in favor of arbitration, which the court granted.

Li was the founder of Standard Fiber's predecessor and became the 25% owner of Standard Fiber when he sold all the assets of the predecessor company to Standard Fiber for cash and a 25% interest pursuant to an asset purchase agreement, which contained a broad arbitration provision and an integration clause. The Standard Fiber LLC Agreement contained a mandatory arbitration provision and an integration clause, as did Li's employment agreement. The indemnification provision under which Li sought his legal fees contained an integration clause; it did not include an arbitration clause, but provided that if Standard Fiber contested Li's right to indemnification "the question of [Li's] right to indemnification shall be for an arbitrator or the court to decide."

Standard Fiber's controlling shareholders initiated an arbitration proceeding against Li in August 2012, claiming Li breached his fiduciary duties to the company. Li's counsel made a demand for advancement and indemnification in connection with that action and the parties executed an affirmation and undertaking, but no formal deal was reached. Li then filed a complaint in January 2013, submitting invoices for all fees in connection with the August 2012 proceeding. Standard Fiber sought to dismiss the complaint because it alleged that a mandatory arbitration provision applied.

The court applied the standard established in *James & Jackson, LLC v. Willie Gary*, 906 A.2d 76 (Del. 2006), which parallels federal law and presumes that the question of arbitrability is one for the court to decide, not arbitrators, unless there is "clear and unmistakable" evidence that the parties agreed to arbitrate. *Willie Gary* held that such evidence was present if the arbitration clause either generally provided for arbitration of all disputes or incorporated a set of arbitration rules that empowered arbitrators to decide arbitrability. Under *Julian v. Julian*, 2009 WL 2937121 (Del. Ch. Sept. 9, 2009), another element was added to the *Willie Gary* test providing that, even if the *Willie Gary* test were technically satisfied, the court must still "make a preliminary evaluation of whether the party seeking to avoid arbitration of arbitrability has made a clear showing that its adversary has made essentially no non-frivolous argument about substantive arbitrability." Turning to the facts of the case, the court held that the LLC Agreement and the asset purchase agreement provided generally for arbitration of all disputes, satisfying the first prong of *Willie Gary* and referenced the rules of Judicial Arbitration and Mediation Services, satisfying the second prong of *Willie Gary*. Because Standard Fiber had a colorable argument that Li's claims for indemnification and advancement touched upon those prior agreements, the court found that Li could not make the required showing under *Julian*. Therefore, the court granted Standard Fiber's request to stay the action pending an arbitrator's determination of arbitrability.

e. *GTSI Corp. v. EYAK Technology, LLC,* C.A. No. 5815-VCL (Del. Ch. Nov. 15, 2010)

This case was before the court on a motion to stay pending arbitration. The plaintiff owned 37% of the membership interest in the defendant LLC. The LLC Agreement contained a provision that called for the winding up and dissolution of the company upon certain events, unless Members with at least 65% of the vote agreed to continue the business. One of the requisite events occurred and the plaintiff, with its 37% membership interest, blocked continuation of the company. The defendant refused to hold a meeting of the members and the plaintiff sought various forms of permanent relief from the court.

The LLC Agreement contained a broad arbitration clause that covered "any dispute . . . (including the validity, scope, and enforceability of these arbitration provisions)." However, another clause stated that "notwithstanding the foregoing agreement to arbitrate, the parties expressly reserve the right to seek provisional relief from any court of competent jurisdiction to preserve their respective rights pending arbitration."

The plaintiff argued that, under *James & Jackson, LLC v. Willie Gary, LLC* (Del. 2006), the court first had to determine whether the LLC Agreement generally provided for the arbitration of all disputes. However, the *Willie Gary* LLC Agreement did not contain language regarding whether the parties were to arbitrate substantive arbitrability. In contrast to *Willie Gary*, the language in the defendant's LLC Agreement clearly showed that the parties intended the arbitrator to determine substantive arbitrability. The lone exception set forth in the defendant's LLC Agreement was that the parties could seek provisional relief from the court, rather than from an arbitrator. However, the plaintiff in this case was seeking permanent, not provisional, relief. Therefore, the court granted the defendant's motion to stay.

f. *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC,* C.A. No. 4712-VCS (Del. Ch. July 29, 2010)

In this motion to dismiss, the court considered defendants' argument that plaintiff member's claims all implicated either a mandatory arbitration provision in the LLC agreement or a mandatory Louisiana forum selection provision in the key employment agreements. In addition to the foregoing two provisions, the agreements between the parties contained a third permissive forum clause for Delaware, but such provision did not require that any dispute be litigated in Delaware.

As stated by the court, "Delaware respects the contractual freedom of parties to enter arbitration agreements and will not allow a party to escape its promise to resolve claims by arbitration by filing in our courts." Because Delaware law favors the enforcement of arbitration clauses, the court stressed that Delaware courts "ordinarily resolve any doubts in favor of arbitration." Additionally, under Court of Chancery Rule 12(b)(3), Delaware courts will honor contractual choice of forum provisions where the parties "use express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action." Despite PPF's attempts to evade both the arbitration clause and the Louisiana forum selection clause, the court found that PPF's claims were based on interrelated allegations that implicated both clauses and, therefore, by contract, the bulk of PPF's claims must be either arbitrated or litigated in Louisiana. According to the court, "[t]he plaintiff is bound to honor its contractual promise and to press any of these claims in the mandated forums it freely selected." The court acknowledged the difficult task a Louisiana court or arbitrator would have in dividing up responsibility for hearing claims subject to the overlapping dispute resolution provisions, but stated that it would be a disservice to the parties and to the interest of a justice system faced with limited resources for the court to further complicate such a task by failing to honor the primacy of those tribunals.

g. *Milton Inv., LLC v. Lockwood Bros., II, LLC,* C.A. No. 4909-VCC (Del. Ch. July 20, 2010)

This case involved disputes regarding an arbitration clause in an LLC agreement and the choice of an arbitrator. The parties entered into an LLC agreement that included an arbitration clause and selected a particular individual to arbitrate disputes that might arise. At the time the parties chose the arbitrator, both knew that the individual chosen had represented, or was representing, the other party. All conflicts were disclosed before the choice was made and both parties waived any conflicts of interest.

The court initially determined that the court, and not the arbitrator, had jurisdiction to determine the arbitrability of the claims. Next, the court found that the categories of arbitrable issues under the LLC agreement were very broad, and that all of the issues brought before the court fell within those categories.

The court then turned to the conflict of interest claim. Notwithstanding that both parties had previously waived the arbitrator's conflicts of interest, the plaintiff now claimed that the arbitrator was not impartial and argued that statements the arbitrator made before the arbitration indicated that we has biased against the plaintiff. Generally speaking, the court stated, arbitrators should be neutral and impartial, and parties normally agree on the necessity of these attributes. When partiality is evident, courts may be justified in vacating an arbitration award. However, the court noted that vacating an arbitration award on the basis that the arbitrator was not impartial requires that the parties appoint a neutral arbitrator. In this case, the court determined that even if the statements made by the arbitrator prior to the arbitration showed that he was incapable of neutrality (which they did not), the parties chose an arbitrator with known conflicts of interest, so neutrality of the arbitrator was not required in this case. Rather, the parties selected the particular individual precisely because both parties knew him well and had worked on previous projects with him. The court determined that by appointing an arbitrator with known conflicts of interest, the parties waived any argument to disqualification of the arbitrator on the basis that he had in the past, or was currently, representing either party.

h. *Orix v. Inscap Asset Mgmt., LLC,* C.A. No. 5063-VCS (Del. Ch. Apr. 13, 2010)

This case examined the issue of substantive arbitrability: namely, whether it is for the court or an arbitrator to decide if a claim is subject to arbitration. The matter involved a dispute between defendants, Life Insurance Fund LLC (the "Fund") and its management, and two of the Fund's investors, Orix LF, LP ("Orix") and Swiss Re Financial Products Corporation ("Swiss Re"). Orix sought to enjoin defendants' arbitration claims because defendants failed to obtain Swiss Re's consent to such an action, which Orix claimed was required under one of the contracts (the "ISM Agreement") that the parties executed in conjunction with the formation of the Fund. Defendants, however, argued that their claims were properly committed to arbitration under a second contract (the "Fund Agreement"), which contained a broad arbitration clause. The ISM Agreement both contained a merger clause and specifically referenced the Fund Agreement; thus, the Fund Agreement and the ISM Agreement together embodied the entire agreement of the parties. While the ISM Agreement did not contain an arbitration provision, the notice provision contemplated service of process upon the parties in connection with arbitrations.

For questions of substantive arbitrability, the presumption is for the court, not the arbitrator, to decide unless, as the Supreme Court held in *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006), there is "clear and unmistakable evidence that the parties intended otherwise." In the absence of a statement that the arbitrator should decide the issue of substantive arbitrability, the *Willie Gary* standard is satisfied when (1) the contract generally refers all disputes to arbitration and (2) the contract refers to a set of rules that would empower arbitrators to decide arbitrability. The Fund Agreement met this standard, as it provided that "any dispute" arising out of or relating to the Fund Agreement was to be arbitrated and such arbitration would proceed under the rules of the AAA.

Additionally, Orix argued that defendants sought to cast disputes related solely to the ISM Agreement as ones arising under the Fund Agreement. The court held, however, that even if that were the case, the broad "relating to" language in the arbitration clause encompassed such disputes, especially when considered in connection with the fact that (1) the two agreements were executed on the same day, (2) the ISM Agreement contained a merger clause, (3) the ISM Agreement expressly referred to the Fund Agreement as the "Operating Agreement" and (4) the ISM Agreement provided for service of process for arbitrations. Further, as the court held in *McLaughlin v. McCann*, 942 A.2d 616 (Del. Ch. 2008), "absent a clear showing that the party desiring arbitration has essentially no non-frivolous argument about substantive arbitrability to make before the arbitrator, the court should require the signatory to address its arguments against arbitrability to the arbitrator."

Finally, any procedural question regarding whether the Fund could initiate proceedings against Orix and Swiss Re without Swiss Re's consent was for the arbitrator, and not the court, to answer.

i. *Julian v. Julian,* C.A. No. 4137-VCP (Del. Ch. Sept. 9, 2009)

This case involved three brothers who owned and operated several LLCs together. The Plaintiff ("Gene") sued his brothers ("Francis" and "Richard") after he resigned as a member of several of the LLCs. The case also involved two different versions of Section 18-603 of the LLC Act. For those LLC Agreements entered into before July 31, 1996, the LLC Act permitted a member to resign with six months' notice. For LLC Agreements entered into after July 31, 1996, the LLC Act prohibited resignation except after dissolution and winding up, unless the LLC Agreement stated otherwise. In Count 1 of the complaint, Gene sought an award of fair value for his interest in the four pre-1996 companies. Count 2 sought an award of fair value for Gene's interest in the three post-1996 companies, but at argument Gene's counsel conceded that all claims in Count 2 should be pursued in arbitration and the court dismissed Count 2. In Count 3, Gene brought a derivative claim for damages on behalf of two LLCs for recovery of excess management fees that were charged by the management company owned by Francis and Richard.

In response to Count 1, the defendants moved to dismiss the fair value claims against one LLC ("FSG") as unripe, and against the remaining three LLCs as being subject to arbitration. On the issue of ripeness, the defendants noted that Gene filed his fair value claim a mere two days after his resignation from FSG. Section 18-604 of the LLC Act provides an LLC a "reasonable" time after resignation of a member to determine and distribute the resigning member's LLC interest. Defendants argued that two days was not a reasonable amount of time. The court denied the defendants' motion to dismiss for lack of ripeness on the view that when family members are engaged in litigation regarding valuation and other business issues, it is reasonable to infer that the members would not have agreed on the value of the business regardless of how long the plaintiff waited to file suit. In addition, the court noted that the timing of the commencement of the suit was not all that important when the valuation was based on facts as they existed at the time of the member's resignation. Finally, the court noted that dismissing the claim would be inefficient because Gene could simply re-file the action the next day.

In regard to the arbitration issue, the court ultimately granted the defendants' motion to dismiss the fair value claims against the remaining three pre-1996 LLCs because arbitration was appropriate. The court cited *James & Jackson, LLC v. Willie Gary, LLC,* 906 A.2d 76, 79 (Del. 2006), in dividing the arbitrability question into "procedural" and "substantive" arbitrability. The procedural arbitrability question revolved around whether or not the parties complied with the arbitration provisions of the LLC Agreement. A presumption exists that procedural arbitrability questions are answered by arbitrators, not by the courts.

The court noted that substantive arbitrability was less clear-cut. It included a determination of both the scope of an arbitration provision and the broader issues of whether the contract and/or the arbitration clause were valid and enforceable. The court cited *Carder v. Carl M. Freeman Cmtys.*, 2009 WL 106510 (Del. Ch. Jan. 5, 2009), for the proposition that before reaching this question, it must address the question of who decides whether the parties decided to submit a particular dispute to arbitration or to a court. The presumption was that the court, and not an arbitrator, decided whether the parties agreed to arbitrate. Therefore, courts presumed the parties did not intend to arbitrate arbitrability, unless there was clear and unmistakable evidence to the contrary.

Clear and unmistakable evidence that the parties intended to arbitrate arbitrability existed if the arbitration clause: (1) generally refers all disputes to arbitration, and (2) references a set of arbitral rules that empowers arbitrators to decide arbitrability. The arbitration clause in the present case stated that any controversy "arising out of or relating to" the agreement shall be settled by arbitration. The court interpreted "arising out of or relating to" broadly, and found the arbitration clause sufficient to satisfy the first prong of the test by generally referring all disputes to arbitration. The provision also satisfied the second prong by requiring that the arbitration be conducted in accordance with the rules of the American Arbitration Association.

Gene also argued that his claims so clearly did not arise out of, and were not related to, the LLC Agreements that a court, and not an arbitrator, should determine that they fell outside the broad scope of the applicable arbitral provisions. Gene argued that his request for an award of fair value was based on Section 18-604 of the LLC Act, and not the LLC Agreement. He further argued that the breach of fiduciary duty claims did not arise out of the LLC Agreements because the agreements were "bare bones." Gene relied on *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156, n. 24 (Del. 2002), for the proposition that "actions do not touch matters implicated in a contract if the independent cause of action could be brought had the parties not signed a contract." Essentially, Gene asked the court to decide whether his claims arose out of, or related to, the LLC Agreements. The court found that if it answered that question, it would undermine the *Willie Gary* test. Although the court admitted that common sense required some minor inquiry into whether the arbitration clause covered the underlying dispute, it said that if there was a colorable basis that the dispute is covered by the arbitration clause, and the clause satisfies the *Willie Gary* test, then the question of substantive arbitrability should be answered by the arbitrator, not the court. The court decided that since LLCs were creatures of contract, Gene's request for fair value of his interest was, to some degree, related to the existence of the agreement and its terms. Finally, the court noted that when in doubt, the policy of the court was to defer to arbitration.

In response to Count 3, the defendants moved to stay Gene's prosecution of the derivative claims. The court noted that when considering a stay of claims that were not subject to arbitration, it would consider any preclusive effects of a pending arbitration elsewhere on the action before the court, in addition to any burden imposed by both litigating and arbitrating at the same time in different forums. The LLCs subject to the derivative claims did not have arbitration clauses in their agreements. Ultimately, the court denied the defendants' motion to stay on the basis that the LLCs, the LLC Agreements, and the claims involved in Count 3 were sufficiently different and distinct from those that the court determined would be arbitrated. Therefore, the court did not find that a significant risk of inconsistent judgments would be caused by allowing the litigation on Count 3 to continue while arbitration began on counts 1 and 2.

Furthermore, in response to Count 3, the defendants argued that Gene failed to state a claim for aiding and abetting a breach of fiduciary duty against Richard because the claim failed to state a breach of fiduciary duty by Francis. The court noted that aiding and abetting a breach of fiduciary duty requires (1) knowledge of the breach of a duty, and (2) participation in the wrongful conduct. In this case, Gene alleged a breach of fiduciary duty because the defendants' management company suddenly increased the fees it charged to a few of the LLCs by 400%. The court denied the defendants' motion to dismiss, stating that under the plaintiff-friendly motion to dismiss standard, the allegations that Richard consented to the increase in fees (which benefitted a company controlled by Richard and Francis) were sufficient to support a reasonable inference that Richard participated in the alleged wrongdoing. Finally, the court noted that the fact that one of the defendants could have increased the fees on his own did not negate a reasonable inference that the other may have been involved in the decision.

j. *Brown v. T-Ink, LLC*, C.A. No. 2190-VCP (Del. Ch. Dec. 18, 2007)

The parties, who were members of a Delaware limited liability company (the "Company"), brought various actions against one another in the state and federal courts of Michigan. Additionally, defendant brought an AAA arbitration proceeding pursuant to the Company's LLC Agreement. Plaintiff filed an action in the Court of Chancery seeking to enjoin defendant from proceeding with arbitration pending final resolution of the parties' claims in the Michigan courts. Defendant filed a motion to dismiss for lack of subject matter jurisdiction because the two issues raised in plaintiff's complaint – substantive arbitrability (i.e., whether defendant's claims were arbitrable) and procedural arbitrability (i.e., whether defendant complied with the terms of the arbitration clause of the LLC agreement) – were themselves subject to mandatory arbitration under the LLC agreement. The court held that under Delaware law there is a presumption that a court, not an arbitrator, will have jurisdiction to decide issues of substantive arbitrability and that such presumption is not overcome unless the applicable arbitration clause evidences a "clear and unmistakable" intent to submit the issues of substantive arbitrability to an arbitrator. In this case, the scope of the arbitration clause in the LLC agreement limited arbitrable matters to those "concerning the interpretation or performance of the [LLC agreement]," and the court concluded that this language failed to show such a clear and unmistakable intent. Thus, the court held that it had subject matter jurisdiction to determine whether defendant's claims were arbitrable and found that defendant's contract based claims were subject to arbitration but that defendant's fraud claims as well as those of defendant's fiduciary duty claims that arose from general fiduciary duty principles under Delaware law, as opposed to those related to specific aspects of the LLC agreement, were not subject to arbitration. The court also held that under Delaware law wrongful enforcement of an arbitration clause constituted irreparable harm and that the balance of the equities slightly favored the plaintiff. Thus, the court found that plaintiff had satisfied the requirements for injunctive relief with regard to certain of its claims and enjoined the defendant from pursuing those claims in arbitration, although it denied plaintiff's request for an injunction with respect to claims it had found to be covered by the arbitration clause of the LLC agreement. With regard to the matters of procedural arbitrability, the court held that under Delaware law those questions presumptively are for an arbitrator to decide. Thus, with respect to those matters, the court also denied plaintiff's request for injunctive relief and allowed defendant to proceed to arbitration.

k. *NAMA Holdings, LLC v. Related World Market Ctr., LLC*, C.A. No. 2755-VCL (Del. Ch. Apr. 27, 2007) and *NAMA Holdings, LLC v. World Market Ctr. Venture, LLC*, C.A. No. 2756-VCL (Del. Ch. Apr. 27, 2007)

In two related cases, plaintiff, a Nevada limited liability company and indirect owner of one of the defendant Delaware limited liability companies, sought to enforce certain provisions in the operating agreement of that LLC with respect to which plaintiff was an intended third party beneficiary. Plaintiff's claims involved a demand for books and records and an action for specific performance limiting distributions and segregating the disputed funds. Defendants asserted that all of plaintiff's claims were subject to mandatory arbitration, that the inspection claim was moot because defendants had already voluntarily provided access to the requested documents and that plaintiff's claim for a specific performance should be dismissed because of failure to join indispensable parties and because plaintiff had an adequate remedy at law. The court rejected defendants' arguments on all grounds. First, it found that the disputes at issue did not come within the ambit of the arbitration language inasmuch as under the arbitration clause neither of the parties to that contract could compel arbitration and, therefore, it would be inequitable to allow them to compel arbitration with a third party beneficiary. The court also ruled that plaintiff had not been provided the requested information and with respect to the claim of indispensable parties held that "merely because a non-joined party may have a claim to a disputed amount does not inevitably deprive a court of the ability to render complete relief to the parties before it." Finally, with regard to defendant's claim that plaintiff could be adequately compensated with money damages and therefore had no right to specific performance, the court held "a remedy at law, i.e. money damages, will foreclose the equitable remedy of specific performance when that remedy is 'complete, practical and as efficient to the end of justice as the remedy in equity, and is obtainable as [a matter] of right.'" Under this standard, the court rejected defendants' argument. Under the LLC agreement, the duties of one of the defendants were stated to be purely ministerial in nature and that such defendant would incur no liability for any action taken or omitted under the relevant section except for willful misconduct, gross negligence or bad faith so long as such defendant acted in good faith. Under the standard, the court found that even if plaintiff proved noncompliance by such defendant with the relevant section, such defendant would have no liability if its noncompliance occurred only negligently and in good faith, therefore, plaintiff would be left without a legal remedy against such defendant. Moreover, the court also found that money damages, even if not barred by that section, would fail to provide a complete and efficient remedy to plaintiff. It held that a contractual covenant allowing a party to restrict distributions to others necessarily involved a bargained-for-benefit that money could not adequately compensate. The court held that the "leverage that type of covenant creates provides a 'material commercial advantage' to the party that can invoke it, and for a court to hold that money damages are an appropriate substitute for specific performance in a dispute like this one 'would essentially involve the judicial nullification of the leverage-conferring aspects of such a provision.'"

l. *Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146 (Del. Ch. 2006)

Plaintiffs, who were minority members of a Delaware LLC, brought this action against the managing member asserting claims for breach of fiduciary duty. Plaintiffs also asserted various claims against affiliates of the managing member arising from the same course of conduct by the managing member.

Defendants argued that plaintiffs' claims against the managing member were required to be arbitrated pursuant to broad language in the LLC agreement that made arbitration the exclusive method for resolving any dispute arising under or relating to the LLC agreement. In so arguing, defendants' relied heavily on the Delaware Supreme Court's decision in *Elf Atochem North Am., Inc. Jaffari*, in which the Supreme Court indicated that a broad arbitration provision in an LLC Agreement could encompass fiduciary duty claims raised by a member. Plaintiffs disagreed, arguing that their fiduciary duty claims did not require reference to the LLC agreement and, therefore, were not subject to mandatory arbitration thereunder. In support of this contention, plaintiffs argued for the application of the Supreme Court's teaching in *Parfi Holding AB v. Mirror Image Internet Inc., 817 A.2d 149 (Del. 2002),* rather than *Elf Atochem*.

The court first addressed the choice of law provision in the LLC agreement, which provided that "except to the extent any provision hereof is mandatorily required to be governed by the [LLC Act], this agreement is governed by and shall be construed in accordance with the law of the state of Texas." The court found, and the parties agreed, that there were no material differences between Texas law and Delaware law regarding the issues raised in this case. The court thus primarily looked to Delaware precedent in rendering this decision but cited Texas precedent, where relevant, to demonstrate the consistency of Texas law with its decision.

With regard to plaintiffs' claims against the managing member, the court found that the facts of this case were more analogous to those in *Elf Atochem* than *Parfi Holding* and, thus held that the parties were required to arbitrate the claims in accordance with the LLC agreement. Significant to the court's finding was the fact that the arbitration clause at issue here, as in *Elf Atochem*, was contained in an LLC agreement, which was the basic contract that gave rise to the fiduciary relationship. The court rejected plaintiff's contention that *Parfi Holding* was applicable precedent in large part because the arbitration provision at issue in that case was not in the company's basic governing document but rather in an underwriting agreement that bore no relation to the parties' fiduciary duties. As a result, the court held, as in *Elf Atochem*, that the scope of the arbitration clause encompassed claims for breach of fiduciary duty. Further, unlike *Parfi Holding,* this case and *Elf Atochem* arose in the alternative entity context, in which the governing statutes, such as the LLC Act, permit contracting parties to expand or restrict fiduciary duties in their governing contract. As a result, the court concluded that no fiduciary duty claim could be decided in the alternative entity context without a close examination of the governing document because as any person adjudicating the claims would be required to interpret various provisions in the governing document in order to determine the breadth and nature of the fiduciary duties thereunder, if any.

With respect to plaintiffs' claims against the affiliates of the managing member, plaintiffs argued that those claims were not subject to mandatory arbitration under the LLC agreement because the affiliates were not members of the LLC and thus not subject to the LLC agreement. The court rejected plaintiffs' argument and ordered arbitration of all such claims based on a theory of equitable estoppel. The court cited *MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942 (11thCir. 1999)*, for the proposition that where a signatory to a contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract, equitable estoppel frequently warrants arbitration of all claims because a refusal to do so would render the arbitration clause meaningless and thwart state and federal policy favoring arbitration.

m. *Willie Gary LLC v. James & Jackson LLC*, C.A. No. 1781 (Del. Ch. Jan. 10, 2006) and (Del. Mar. 14, 2006), *aff'g*, (Del. Ch. Jan. 10, 2006)

Plaintiff and defendant were co-owners of a Delaware LLC that was in need of a significant infusion of capital to succeed. Plaintiff negotiated an agreement with a third-party investor who was willing to provide capital, but the defendant refused to agree to a pro rata reduction of its interest in order to generate the equity needed to compensate the investor. As a result, plaintiff could not consummate the agreement and the parties became deadlocked with respect to the business of the LLC.

Plaintiff filed a suit in the Court of Chancery seeking a mandatory injunction and specific performance or, in the alternative, judicial dissolution of the LLC. Defendant filed a motion to dismiss the complaint, arguing that plaintiff's claims were required to be arbitrated pursuant to the terms of the LLC agreement. Prior to determining the issue of arbitrability, the court first had to determine whether the arbitrability of the claims should be decided by the court or an arbitrator. Following United States Supreme Court and Delaware Supreme Court precedent, the court held that, as a general rule, the issue of substantive arbitrability required judicial resolution unless there was clear and unmistakable evidence that the parties intended otherwise. In determining that the issue was properly before the court, the court held that the mere reference to the rules of the American Arbitration Association (the "AAA Rules") in the arbitration clause of the LLC Agreement did not provide clear and unmistakable evidence that the issue of substantive arbitrability was to be decided by an arbitrator.

Upon determining that the court should decide the issue of arbitrability, the court denied defendant's motion to dismiss the complaint, finding that none of plaintiff's claims were subject to the mandatory arbitration clause in the LLC agreement. To the contrary, the court held that the LLC agreement itself expressly authorized members of the LLC to apply to courts for the remedies of injunctive relief and specific performance. Further, with respect to plaintiff's claim for judicial dissolution, the court distinguished the dissolution clause in this case from that examined in *Terex Corp. v. STV USA, Inc.* and held that the provisions in the LLC agreement relating to judicial dissolution under the LLC Act explicitly contemplated judicial involvement in the dissolution process.

In a subsequent decision in this case, the Delaware Supreme Court affirmed the Chancery Court's decision that the plaintiff's claims were not required to be arbitrated. With respect to the issue of substantive arbitrability, however, the Supreme Court did not totally agree with the Chancery Court's analysis regarding the significance of a reference to the AAA Rules in the arbitration clause. As a matter of policy, the Delaware Supreme Court held that Delaware follows the majority federal view that references to the AAA Rules in an arbitration agreement are clear and unmistakable evidence that the parties intended to arbitrate issues of substantive arbitrability. The Supreme Court stated that the majority view, however, does not require that arbitrators decide the arbitrability of all cases where an arbitration clause incorporates the AAA Rules. Instead, it only applies where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability. Thus, since the arbitration provision in the LLC agreement did not subject all disputes to arbitration, the Supreme Court held that the Chancery Court was correct in not applying the federal majority rule in this case.

n. *Ishimaru v. Fung*, C.A. No. 929 (Del. Ch. Oct. 26, 2005)

The plaintiff and one of the defendants, Fung, formed a Delaware LLC for the purposes of managing and marketing hedge funds to Japanese investors. The LLC formed a joint venture with a subsidiary of defendant Ivy Asset Management ("Ivy") which had experience and products that would complement the LLC's business. After Ivy was bought by a third-party bank, it began to market non-J.V. products to the Japanese market in competition with the LLC and in contravention of the amended joint venture agreement.

After holding that the plaintiff could sue derivatively on behalf of the Company and that demand was excused, the court dismissed the plaintiff's complaint holding that the LLC would have to arbitrate its claims in accordance with an arbitration provision contained in the joint venture agreement. In doing so, the court relied upon Delaware and federal public policy which requires that doubts be resolved in favor of arbitration when that conclusion is a reasonable interpretation of the parties contract. Although Ivy Asset was not, by its literal terms, bound by the arbitration clause, the court nonetheless held that the dispute was subject to arbitration. The LLC was bound by the arbitration clause, and the plaintiff's allegations effectively argued that Ivy Asset signed a contract fundamentally amending the terms of the Joint Venture Agreement and then breached that amendment. The court, therefore, found that the claims plaintiffs sought to bring derivatively were contingent upon the proposition that Ivy Asset was effectively admitted as a party to the joint venture agreement, altered the formal terms of that agreement and thereafter breached the altered joint venture agreement. Hence, the plaintiff was equitably estopped from denying Ivy Asset's demand to arbitrate in accordance with the joint venture agreement.

o. *Terex Corp. v. STV USA, Inc.*, C.A. No. 1614-N (Del. Ch. Oct. 20, 2005)

In an action seeking judicial dissolution of a Delaware LLC, defendant filed this motion to dismiss the complaint pursuant to a broad mandatory arbitration clause in the LLC Agreement. In construing the scope of the arbitration clause, which unequivocally required all disputes arising out of or relating to the LLC Agreement to be resolved through arbitration, the court stated that the broad scope of the arbitration mandate would only be limited where a plain reading of the text specifically indicated such a limitation. The court held that a clause requiring members of the LLC to take appropriate steps required by law following the entry of a judicial dissolution under the LLC Act did not carve out judicial dissolution from the reach of the arbitration clause, stating that dissolution could be entered in accordance with, and following, dissolution proceedings before an arbitrator. The court therefore granted defendant's motion to dismiss.

p. *Flight Options Int'l, Inc. v. Flight Options, LLC*, C.A. No. 1459-N (Del. Ch. July 11, 2005)

The plaintiff, a member of the defendant limited liability company (the "Company"), sought a preliminary injunction to enjoin the Company from implementing a Purchase Agreement with Raytheon Travel Air Company ("RTA"), another member of the Company, pending arbitration of their disputes. The plaintiff alleged that the Purchase Agreement, which would reduce the plaintiff's equity interest in the Company from 31% to 1%, violated the LLC agreement of the Company and that the managers breached their fiduciary duties and obligations under the LLC agreement.

The Company had been in constant indebtedness which has been mainly supported by Raytheon Company ("Raytheon"), the parent company of RTA, and its affiliates. From 2004 to 2005, the Company received reports from two consulting firms as to the poor financial outlook of the Company and an appraisal of the Company's common equity units from Standard & Poor's. In May 2005, RTA submitted a term sheet for its purchase of new equity which included the issuance of $50 million of common units of the Company, valued at $0.01 per unit, to RTA and any other equity holder who chose to exercise its preemptive rights. Despite opposition from the managers of the Company who represented the plaintiff, the Company executed the Purchase Agreement with Raytheon on June 9, 2005. While the Company sought investments from external investors, none of their negotiations were successful before July 11, 2005, the date the Purchase Agreement was to be implemented. Despite efforts by the Company to enhance the terms of the Purchase Agreement, Raytheon only agreed to a "fiduciary out" and following execution of the Purchase Agreement, all eligible equity holders, including the plaintiff, were sent a preemptive rights notice. The plaintiff did not exercise its preemptive rights.

The plaintiff sought a preliminary injunction to enjoin the Company from implementing the Purchase Agreement. For a preliminary injunction, the plaintiff must prove 1) a reasonable probability of success on the merits at trial; 2) that it will suffer imminent, irreparable harm if its application is denied; and 3) that the harm to the plaintiff, if relief is denied, outweighs the harm to the defendant if relief is granted. In this case, the preliminary injunction was sought in aid of arbitration thus requiring the plaintiff to show in connection with success on the merits, its entitlement to arbitration and the merits of its arbitration claims. The court stated that where the right to arbitrate is clear, the party seeking the preliminary injunction need only "establish a reasonable probability that its arbitration position is sound." In other words, the plaintiff must "persuade the court that the arbitration panel could find in its favor and that there is a reasonable possibility of such a result."

With respect to the first prong regarding the probability of success on the merits, the court found that the conduct of the RTA Managers was to be evaluated by an "arm's length" standard under the LLC Agreement rather than the entire fairness standard. The LLC Agreement provided that for transactions between the Company and its affiliates, the general fiduciary duties of managers were limited to requiring that the transaction be on "arm's length terms and conditions" and carried out in good faith and through fair dealing. The plaintiff questioned the process by which the RTA Managers valued the common units by asserting that the Company did not retain an investment adviser and failed to receive a formal opinion from either of the consulting firms from which it received reports as to the company's outlook. The court agreed with the plaintiff's position and placed importance on the lack of formal opinions from the consulting firms in presenting their conclusions as well as the lack of coordination and process for reading market perception. The court stated that "the process chosen [to value the equity] was so informal as to undermine substantially the ability of the RTA Managers to show that the price is the equivalent of an arm's length transaction's result, at least within the projected views of an arbitration panel." The court found that the plaintiff met its burden with respect to the first prong of the test for a preliminary injunction.

The court next addressed whether irreparable harm would result if the preliminary injunction was denied. Even though a severe dilution of a party's equity interest in a company had been found to constitute irreparable harm, the court stated that the determination was a case-by-case analysis in which the potential consequences of the dilution must be considered. The defendants argued that no irreparable harm would result since Raytheon would receive the benefits of the dilution, and rescission of the agreement was a possibility. The defendants also asserted that the value of the plaintiff's interest before and after the issuance of the new equity could be fairly measured and that dilution of the plaintiff's equity interest would not impair its right to designate two members of the board of the Company. The court, however, concluded that the dilution of the plaintiff's equity interest in the Company could be characterized as irreparable harm since rescission could be impeded by Raytheon's sale of its interests and calculating the damages would be a "daunting task."

In balancing the equities between the Company and the plaintiff, the court found that restoring the plaintiff's equity position following a dilution of its equity interest would be "problematic." With respect to harm to the Company, the court found that even though Raytheon could act in its discretion to cause harm to the Company if the injunction were granted, the court found such actions to be unlikely since Raytheon owned 69% of the Company's equity and would be similarly harmed by such actions. Therefore, the court concluded that the balance of equities tipped slightly in favor of the plaintiff.

Finding all of the requirements for a preliminary injunction satisfied, the court granted the preliminary injunction enjoining implementation of the Purchase Agreement pending commencement of the arbitration proceedings, but, noting that the LLC Agreement specifically authorized the parties to pursue interim relief through arbitration, the court's order provided that the injunction would expire in 30 days during which period plaintiff could take its claims to arbitration and seek interim relief there.

q. *CAPROC Manager, Inc. v. The Policemen's & Firemen's Ret. Sys. of the City of Pontiac*, C.A. No. 1059-N (Del. Ch. Apr. 18, 2005)

Prior to the commencement of this case, defendants had sought to remove one of the plaintiffs as the managing shareholder of an LLC in which defendants and plaintiff were members. This action by the defendants prompted plaintiffs to seek a declaration under Section 18-110 of the LLC Act that the plaintiff who had been the managing shareholder remained the managing shareholder as well as the entry of a status quo order. Defendants moved to have the action dismissed in favor of arbitration based on a broad arbitration clause in the LLC Agreement requiring arbitration of any “dispute or controversy arising under” the LLC Agreement. The court noted that it did not have jurisdiction over claims that were properly committed to arbitration because the availability of arbitration provided an adequate legal remedy and that Delaware public policy favored resolution of disputes through arbitration and required that any doubt regarding the arbitrability of a dispute be resolved in favor of arbitration. The court stated the issue as whether a removal action by defendants arose under the LLC agreement so as to come within the mandatory arbitration provision. Plaintiffs argued that it did not because the LLC agreement contained no provision for removal. Defendants disagreed arguing that removal by a majority vote pursuant to the default rule for management in Section 18-402 of the LLC Act as well as removal as a remedy implicitly available as a response to breach of contract would both arise under the LLC agreement. However, although plaintiffs argued that the removal question did not arise under the LLC agreement, in their complaint, they noted that the managing shareholder derived its authority from the LLC agreement and could cease to be a manager under the LLC agreement only by resignation or amendment pursuant to the terms of the LLC agreement and further alleged that defendants’ conduct violated the LLC agreement. The court found this to suggest strongly that plaintiffs’ claims did arise under the LLC agreement. This finding was bolstered by the court’s conclusion that the intent of the parties in entering into the LLC agreement would also need to be determined to resolve the dispute. In addition, the court found no evidence that there was an express provision in the LLC agreement excluding removal from arbitration or forceful evidence of a purpose to exclude it (the sole exceptions to the arbitration requirement). Based on the foregoing, particularly the breadth of the arbitration clause and the fact that to resolve the dispute the court would necessarily have to address factual and legal questions that involved interpretation of the LLC agreement, the court concluded that the dispute was subject to mandatory arbitration and dismissed the complaint.

r. *Karish v. SI Int’l, Inc.*, C.A. No. 19501 (Del. Ch. June 24, 2002)

Plaintiff was a member and an executive of a Delaware LLC. On January 15, 1999, plaintiff and the other members of the LLC amended the original LLC agreement of the LLC and plaintiff entered into a management agreement with, among others, the LLC. The management agreement contained provisions for the repurchase by the LLC of membership units from departing executives. Under the management agreement, when an executive was terminated for any reason, the executive’s membership units were subject to repurchase at “fair market value.” Although no correlative repurchase provisions were included in the LLC agreement, the LLC agreement was relevant to the repurchase of an executive’s membership units because, pursuant to the management agreement, a person determining the fair market value of the membership units was first required to calculate the “total equity value” of the LLC as that amount was defined in the LLC agreement. Under the management agreement, disputes were permitted to be litigated in court but, under the LLC agreement, disputes “arising out of or relating to” the LLC agreement were subject to a broad and binding arbitration clause. Additionally, the LLC agreement provided that in the event of a conflict between the LLC agreement and any other agreement, the LLC agreement controlled but solely to the extent of the conflict.

In March, 2001, plaintiff’s responsibilities were dramatically reduced and plaintiff alleged he was constructively terminated. The LLC then sought to repurchase plaintiff’s membership units pursuant to the management agreement. When plaintiff disputed the valuation of his membership units, the LLC filed an arbitration claim pursuant to the LLC agreement to resolve the dispute. Plaintiff responded by filing an action seeking a stay of arbitration in the Delaware Court of Chancery which named the LLC and certain affiliated persons as defendants.

Defendants filed a motion to dismiss the action for lack of subject matter jurisdiction, claiming that any dispute concerning the valuation of plaintiff’s membership units subject to repurchase under the management agreement must be arbitrated because the valuation required a determination of the “total equity value” of the LLC under the LLC agreement and thus arose out of or was related to the LLC agreement. Citing the interrelationship between the LLC agreement and the management agreement and the fact that they were executed on the same day, the court sided with defendants, holding that the two agreements must be read together as forming one agreement between the parties. The court then held that, pursuant to the provision of the LLC agreement providing that it controlled in the event of a conflict between the LLC agreement and any other agreement, whenever a claim asserted under the management agreement also fell within the scope of the LLC agreement's arbitration clause, the arbitration clause would control. The court next held that, assuming plaintiff's claim did not arise out of the LLC agreement because the valuation of an executive's units was not specifically mentioned in that agreement, plaintiff's claim related to the LLC agreement because it required interpretation and application of the provisions of the LLC agreement and thus fell within the scope of the LLC agreement's arbitration clause. The court thus denied plaintiff's motion to stay the arbitration and granted defendants' motion to dismiss for lack of subject matter jurisdiction.

s. *Child Care* of *Irvine, L.L.C. v. Facchina*, C.A. No. 16227 (Del. Ch. July 15, 1998)

Plaintiffs moved for summary judgment on their claim that they validly removed the defendant as the managing member of a Delaware limited liability company. Defendant, in turn, also moved for summary judgment, asserting that the plaintiffs did not have the authority to remove him as managing member. The individual plaintiffs and the defendant had organized a California corporation and entered into a shareholder agreement that appointed the defendant "to manage the corporation in a professional and efficient manner." When the California corporation was unable to obtain "S" corporation status, the plaintiffs and defendant agreed to convert the corporation to a Delaware LLC through a merger solely for the tax benefits. The shareholders of the corporation entered into a shareholder consent in which they approved the merger and a merger agreement, which stated that the LLC would be governed by the LLC agreement in effect immediately prior to the merger, and authorized the defendant to take the actions necessary to effectuate the merger of the California corporation into the Delaware LLC. The defendant formed the Delaware LLC but the plaintiffs and defendant never executed an LLC agreement. The defendant then effected the merger and managed the business of the LLC. The plaintiffs became dissatisfied with the management of the defendant and purported to remove him as manager through the delivery of two resolutions signed by the individual plaintiffs.

The issue before the court was whether a majority of the members of the LLC had the authority to remove the defendant as the managing member. The plaintiffs argued that the parties orally agreed that the provisions of the shareholder agreement would govern the LLC and that the manager could thus be removed if he acted "unprofessionally" or "inefficiently." In the alternative, the plaintiffs argued that there was no LLC agreement and that, under Section 18-402 of the LLC Act, the management of the LLC was vested in the members and, therefore, a majority of the members could remove the defendant. The defendant argued that the plaintiffs had accepted a draft LLC agreement he claimed to have circulated that appointed himself manager and contained no provision for removing the manager. He claimed that under Section 18-402 of the LLC Act, a manager may only be removed as specified in the LLC agreement and, absent a provision for removal, a manager is unable to be removed except through judicial dissolution of the LLC. In the alternative, the defendant argued that the merger agreement, which appointed himself as manager and did not include a removal provision, was the operative LLC agreement. Because facts necessary to resolve the issue were in dispute, the court denied the cross-motions for summary judgment. The court also noted that either of the agreements proffered by the partners as the rightful LLC agreement would require arbitration of the dispute and encouraged the parties to seek arbitration rather than to litigate the case further to determine the rightful LLC agreement and then have the court direct the parties to arbitrate the dispute in accordance with such agreement.

t. *Elf Atochem North Am., Inc. v. Jaffari*, C.A. No. 16320 (Del. Apr. 6, 1999), *aff'g*, (Del. Ch. June 9, 1998)

A member of a limited liability company filed suit against the manager and the company, individually and derivatively, on behalf of the company, asserting various claims including breach of the fiduciary duties of loyalty and care. The company's limited liability company agreement included a jurisdictional provision stating that the courts of California had exclusive jurisdiction over any action on a claim arising out of, under or in connection with the LLC agreement or the transactions contemplated therein; provided that the claim was not required to be arbitrated pursuant to another provision in the LLC agreement. Claims to be submitted to arbitration were those involving any controversy or dispute arising out of the LLC agreement, the interpretation of any of the provisions of the LLC agreement or the action or inaction of any member of manager. The Court of Chancery granted defendants' motion to dismiss for lack of subject matter jurisdiction finding that it was clear that plaintiff's claims arose under the LLC agreement or the transactions contemplated therein and were directly related to the manager's action or inaction in connection with his role as manager. As a result, the court held that the LLC agreement governed the question of jurisdiction, that plaintiff's claims must be decided in California either by a court of law or an arbitrator and that the Court of Chancery did not have subject matter jurisdiction to consider plaintiff's claims. In affirming the Court of Chancery's holding, the Supreme Court began with a review of the history of the LLC Act noting that its architecture and much of its wording are almost identical to the DRULPA and that the policy of freedom of contract underlies both the LLC Act and the DRULPA. Specifically, the court noted that Section 18-1101(b) of the LLC Act, like the essentially identical Section 17-1101(c) of the DRULPA, provides that "[i]t is the policy of [the LLC Act] to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." The Supreme Court first dealt with an argument not addressed in the lower court's opinion that the LLC itself could not be compelled to arbitrate since it had not signed the LLC agreement. The court rejected this argument, however, noting that the members of the LLC were the "real parties in interest" and that the LLC was "simply their joint business vehicle." The court also rejected plaintiff's argument that its claims were derivative in nature and therefore should not be subject to the forum selection clauses. In rejecting this claim, the court held that plaintiff had contracted away its right to bring a derivative action in Delaware when it agreed instead to dispute resolution in California and noted that the dispute resolution provisions in the LLC agreement did not distinguish between direct and derivative claims. The court concluded that because of the policy of the LLC Act to give maximum effect to the principle of freedom of contract and the enforceability of LLC agreements, the parties may contract away their right to file suit in Delaware and may agree to exclusive jurisdiction in California. In so holding, the court rejected plaintiff's argument that Section 18-109(d) of the LLC Act prohibited granting exclusive jurisdiction to the courts of any state other than Delaware. The court noted that Section 18-109(d) used the word "may" rather than "shall" and thus held it to be permissive and not intended to restrict the parties to a LLC agreement from agreeing to exclusive jurisdiction of a foreign jurisdiction. The court bolstered this finding by reference to Delaware's strong public policy in favor of arbitration noting that California was the exclusive jurisdiction in which any action at law or in equity relating to the LLC agreement could be brought but only to enforce arbitration in California.

2. Representation

   a. *Poore v. Fox Hollow Enters.*, C.A. No. 93A-09-005 (Del. Super. Ct. Mar. 29, 1994)

   The Superior Court held limited liability companies to be prohibited from representing themselves in Delaware courts. Based on the contractual nature of, and the limited liability inherent in, limited liability companies, the court found that the Delaware Legislature did not intend that a member or manager of an LLC could represent the entity in court without representation by Delaware legal counsel, and thus held the rule prohibiting the appearance of corporations in Delaware courts by anyone other than a Delaware attorney applicable to the representation of limited liability companies.

3. Jurisdiction

   a. *2009 Caiola Family Trust v. PWA, LLC*, C.A. No. 8028-VCP (Del. Ch. Dec. 18, 2014)

   Nominal defendant Dunes Point West, LLC ("Dunes Point"), a Delaware limited liability company, was appointed by defendant PWA, LLC ("PWA"), a Kansas limited liability company, to serve as property manager of an apartment complex. Plaintiffs, non-managing members of Dunes Point, accused defendants PWA and Ward Katz, its managing member, of various breaches of Dunes Point's operating agreement (the "Agreement"). These included improper payment of asset management fees, provision of misleading financial reports, failure to improve and maintain the property, waste and other fiduciary duty breaches, and violation of the Agreement's "key person" provision. Both defendants moved to dismiss for failure to state a claim or, alternatively, on grounds of forum non conveniens. Katz also sought dismissal on grounds that he lacked sufficient minimum contacts with the State of Delaware for the court to exercise personal jurisdiction over him. Plaintiffs cross-moved for summary judgment, arguing that defendants' alleged actions justified removal of PWA from its position as managing member.

The court first addressed its jurisdiction over Katz, which was a two-part analysis. First, the court found that plaintiffs had authority to serve process on Katz under Delaware's long-arm statute, which gives the state jurisdiction over persons transacting business in the state. Several facts showed that Katz controlled and managed PWA, which managed Dunes Point, including that Katz executed multiple documents relating to Dunes Point, was listed as its principal manager, had sole authority to draw checks on its bank account, mailed its Delaware partnership returns, signed checks for its Delaware franchise tax payments, and signed and filed its tax returns. The court indicated that the fact that neither Katz nor PWA filed the documents related to Dunes Point's formation did not exempt them from the court's jurisdiction. Second, the court found that exercising jurisdiction over Katz comported with due process. Since he expected a significant monetary return from his management of Dunes Point, it was reasonable to require him to answer for alleging wrongdoing relating thereto in the court. The court rejected Katz's argument that expected benefits below a certain dollar amount would allow non-residents to avoid Delaware jurisdiction.

The court went on to deny defendant's motion to dismiss with respect to four of plaintiffs' claims, finding the complaint plead sufficient facts from which it could be inferred defendants (i) breached the Agreement by allegedly paying management fees in violation of the Agreement, by providing misleading financial reports to plaintiffs and by mismanaging Dunes Point, and (ii) breached their fiduciary duties by, for example, engaging in self-dealing by causing Dunes Point to pay management fees to an entity that was owned by Katz. Although the defendants argued the fiduciary duties claims should be dismissed because they were essentially in the nature of contract claims, the court found that the fiduciary duty claims were broader in scope than the contract claims. In so finding, the court highlighted that Katz was not a party to the Agreement and thus the claims against him could not constitute breach of contract claims. The court also found that the duty of loyalty could be implicated by the claimed self-dealing with respect to the alleged improper payment of management fees. The court dismissed the waste claim, however, since the standard for such a claim is extremely high and was not satisfied by plaintiffs' allegation that defendants charged somewhat lower rent than the alleged market rate for comparable apartments.

Finally, the court denied plaintiffs' cross-motion, finding there were genuine issues of material fact as to whether defendants improperly commingled tenant security deposits or whether Katz violated the "key person" provision by failing to remain actively involved in the management of the apartment complex.

b. *VTB Bank v. Navitron Projects Corp.*, C.A. No. 8514-VCN (Del. Ch. Apr. 28, 2014)

Plaintiff, VTB Bank, a Ukrainian company, provided loans in 2008 to two Ukrainian entities that were part of a corporate family (the "AIS Group") owned and controlled by defendants, Development Max, LLC, a Delaware limited liability company ("Development Max"), and its managing member, Navitron Projects Corp., a Panamanian corporation ("Navitron"). The AIS Group's principal business was selling cars in Ukraine and under the loan terms it pledged to plaintiff real and personal property held in Ukraine. Plaintiff alleged that the AIS Group fraudulently transferred cars it purchased with proceeds of the loans to shell companies with the sale proceeds going to defendants. The AIS Group eventually defaulted on the loans and plaintiff initiated litigation in Ukraine to foreclose on the loan collateral. The litigation in Ukraine was purportedly delayed by the AIS Group, during which time defendants allegedly facilitated the fraudulent transfer of the collateral to defendants. In its complaint, plaintiff made claims of fraudulent transfer and unjust enrichment and sought the remedy of constructive trust and equitable appointment of a receiver.

Navitron moved to dismiss plaintiff's claims for lack of personal jurisdiction. Plaintiff asserted that the court had personal jurisdiction over Navitron by virtue of the Delaware Long-Arm Statute, 10 Del. C. § 3104, and Section 18-109 of the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "LLC Act"). The court deemed plaintiff to have waived the Long-Arm Statute argument for failing to brief or argue it to the court. The court then decided whether Section 18-109 LLC Act provided it with personal jurisdiction over Navitron.

Section 18-109 authorizes service of process on managers of Delaware limited liability companies in actions "involving or relating to the business of the limited liability company or a violation of the manager . . . of a duty to the limited liability company or any member of the limited liability company." The court read this implied consent provision in a manner consistent with constitutional due process and Delaware precedent, stating, "[the] implied consent provision does not establish a statutory basis for personal jurisdiction over a manager where claims do not relate to the 'rights, duties and responsibilities' that the manager owes to the company or to the manager's involvement in the company's 'internal business affairs' or 'day-to-day operations.'"

Plaintiff argued that the court may exercise personal jurisdiction over Navitron because a party subjects itself to the court's jurisdiction generally when it becomes the managing member of a Delaware limited liability company. The court disagreed and granted the motion to dismiss because plaintiff's complaint asserted that plaintiff was harmed by defendants' conduct independent of their corporate structure, and therefore the claim was not related to Navitron's rights, duties, or responsibilities as a managing member of Development Max.

Development Max moved to dismiss the complaint on forum non conveniens grounds, asserting it would face an overwhelming hardship in defending itself in Delaware. The court applied the forum non conveniens analysis wherein the court must weigh the *Cryo-Maid* factors in order to determine whether an overwhelming hardship would result. Although the court found (i) that most of the evidence and witnesses were based in Ukraine, (ii) the matter involved Ukrainian law, (iii) the parties had pending litigation on this matter in Ukraine, and (iv) there were significant practical difficulties in maintaining this litigation in Delaware, the court denied the motion to dismiss. In so holding, the court emphasized that the primary remedy sought by plaintiff—equitable appointment of a receiver—implicated the court's fundamental and immutable responsibility to supervise Delaware entities and, in light of the allegation of systemic and systematic fraudulent conduct, the court concluded this responsibility outweighed any hardship on the defendant in litigating in Delaware.

c. *Northside Cmty. Bank v. Friedman*, C.A. No. 8405-VCG (Del. Ch. Nov. 20, 2013)

Two defendants, who were individuals that personally guaranteed a loan made by plaintiff bank, allegedly created multiple Delaware entities, including an LLC, a limited partnership and two corporations, as part of a plan to fraudulently transfer assets beyond the bank's reach with the help of a third defendant, who allegedly facilitated the fraudulent transfers. Defendants moved to dismiss the bank's allegations of fraudulent transfer for lack of personal jurisdiction.

Upon learning that the loan they had personally guaranteed was going into default, the guarantors allegedly established a labyrinth of Delaware entities and, with the help of the third defendant, transferred their assets into certain of those entities and used other entities to hold and transfer interests in those entities.

In analyzing defendants' motion to dismiss for lack of personal jurisdiction, the court first found that it had personal jurisdiction over the two defendants who guaranteed the bank loan under Delaware's long-arm statute, which gives the court jurisdiction over any nonresident who, either in person or through an agent, transacted any business in Delaware. The court stated that the allegations that the guarantors made corporate filings with the Delaware Secretary of State through an agent to form Delaware entities and transferred their assets into these entities were sufficient to make a prima facie case that the guarantors engaged in business transactions in Delaware. Further, the court found that the transfer of the assets into these Delaware entities arose out of the forum transactions and that exercising personal jurisdiction over the guarantors in these circumstances did not offend due process.

Second, the court found that it had personal jurisdiction over the third defendant, who facilitated the alleged fraudulent transfers by acquiring ownership interests in the Delaware entities and serving as a director of the Delaware corporations, under the conspiracy theory of jurisdiction because the bank sufficiently alleged facts to support an inference that the conspiracy elements were satisfied.

Finally, the court also found that it had personal jurisdiction over certain non-Delaware trusts under the conspiracy theory of jurisdiction. The non-Delaware trusts, which were created for the benefit of the guarantors' children, acquired interests in the Delaware entities formed by the guarantors. The court stated that a nonresident co-conspirator transacts business in Delaware under the long-arm statute when its alleged co-conspirators transacted business in Delaware. The court attributed the acts of the guarantors to the trusts as co-conspirators and found that the exercise of personal jurisdiction over the trusts was appropriate.

d. *Fla. R&D Fund Inv'rs, LLC v. Fla. BOCA/Deerfield R&D Inv'rs, LLC*, C.A. No. 8400-VCN (Del. Ch. Aug. 30, 2013)

Plaintiff, a member of a joint venture formed as a Delaware LLC (the "Joint Venture"), brought a books and records action under Section 18-305 of the LLC Act and the Joint Venture's LLC Agreement seeking certain information for the purposes of appointing a new asset manager and investigating possible mismanagement of the Joint Venture due to certain alleged improper payments to the Joint Venture's former asset manager (the "Asset Manager"). Plaintiff named the Joint Venture, the Asset Manager, the other members of the Joint Venture and certain other affiliated parties as defendants. Defendants, other than the Joint Venture, moved to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiff alleged the court had personal jurisdiction over the Asset Manager, an Indiana corporation with an Indiana address, pursuant to the Delaware long-arm statute or LLC Act Section 18-109. The court declined to exercise jurisdiction over the Asset Manager under the Delaware long-arm statute, noting that merely participating in the management of a Delaware entity – with no allegation of extensive and continuing contacts with Delaware – does not subject a party to the court's long-arm jurisdiction. The court stated that plaintiff failed to allege that the Asset Manager took any actions inside the State of Delaware with respect to the Joint Venture or that the Asset Manager was involved in the formation of the Joint Venture.

The court next addressed whether the Asset Manager was subject to the court's jurisdiction under Section 18-109, which provides that service as a manager of an LLC constitutes implied consent to the court's jurisdiction. For purpose of Section 18-109, the term "manager" refers "(i) to a person who is a manager as defined in [LLC Act Section 18-101(10)] and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in [LLC Act Section 18-101(10)], participates materially in the management of the limited liability company; provided however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in [LLC Act Section 18-101(10)] shall not, by itself, constitute participation in the management of the limited liability company." Because the Joint Venture's LLC Agreement explicitly provided that the Board of Directors of the Joint Venture was the manager of the Joint Venture for purposes of the LLC Act and the LLC Agreement did not name or designate the Asset Manager as a manager of the Joint Venture, the court held that the Asset Manager was not a manager of the Joint Venture for purposes of the first prong of Section 18-109.

The court then examined whether the Asset Manager had participated materially in the management of the Joint Venture so as to make it a manager of the Joint Venture for purposes of the second prong of Section 18-109. Under the Asset Manager's asset management agreement with the Joint Venture, the Asset Manager was identified as an independent contractor and was confined to acting as the asset manager and providing certain enumerated services in a manner consistent with the Joint Venture's business plan and budget. The court did not determine whether this level of authority was sufficient to constitute material participation in the manager of the Joint Venture because the court found that plaintiff had not alleged that the Asset Manager actually engaged in any of its contractually authorized conduct. The court stated that merely having the capacity to participate in management does not constitute material participation in management and thus dismissed plaintiff's claim against the Asset Manager for lack of personal jurisdiction.

The court then turned to plaintiff's claim against defendants other than the Joint Venture and the Asset Manager seeking a right to inspect records allegedly held by such defendants, which defendants were other members of the Joint Venture and affiliates of such members. The court granted defendants' motion to dismiss, holding that the complaint did not state a claim against those defendants because plaintiff failed to identify any contractual or statutory basis that would provide it with a right to inspect the books and records of members or parties affiliated with such members.

e. *In re Mobilactive Media LLC*, C.A. No. 5725-VCP (Del. Ch. Jan 25, 2013)

In this case, two members of a joint venture formed as a Delaware LLC disputed the scope of a clause in the LLC agreement stating that interactive video and advertising activities in North America by either member or their affiliates must take place exclusively through the joint venture. The joint venture, Mobilactive Media LLC ("Mobilactive"), was formed by plaintiff Terry Bienstock ("Bienstock") and defendant Silverback Media, PLC ("Silverback). Other defendants included Adenyo, Inc. ("Adenyo"), which was the Canadian parent of Silverback, and two Delaware corporations that were subsidiary entities of Adenyo.

Bienstock alleged that Silverback and its affiliates breached the Mobilactive LLC Agreement, and usurped corporate opportunities belonging to Mobilactive by, among other things, acquiring competing businesses through subsidiaries without offering Mobilactive or Bienstock an opportunity to invest in these acquisitions. Silverback argued that these acquisitions did not violate the LLC agreement under Silverback's interpretation, but the court found that Silverback's interpretation was incorrect and that its conduct breached the LLC agreement.

The court next addressed Bienstock's claims that Silverback breached its fiduciary duties by usurping corporate opportunities rightfully belonging to Mobilactive. The LLC agreement provided that the parties were to act in the best interest of Mobilactive and exercise utmost good faith and fair dealing, and the court stated that under Delaware common law parties to a joint venture are required to act with the utmost good faith, fairness and honesty with each other with respect to the enterprise. The court found that certain of the alleged opportunities were within Mobilactive's line of business and that Mobilactive had an interest or expectancy in those opportunities. Silverback alleged that Mobilactive did not have the financial ability to exploit the opportunities. The court disagreed, but also held that, based on corporate precedent, there is no need to consider the financial ability of Mobilactive to exploit the opportunities in a corporate opportunity analysis where there is a parallel contractual obligation to present corporate opportunities. The court also found that, as a result of the alleged usurpation, Silverback stood in a position inimicable to its duties to Mobilactive. The court thus found that the elements of the corporate opportunity test were satisfied with respect to certain opportunities taken by Silverback and held that Silverback breached its fiduciary duties.

After Bienstock initially sued Silverback, Adenyo acquired all of the assets of Silverback in consideration solely for a deed of indemnity by Adenyo to pay all claims of Silverback's creditors in Silverback's liquidation. Bienstock alleged that such transfer constituted a fraudulent transfer because the transfer was made by Adenyo with actual intent to hinder Bienstock's ability to enforce his rights under the LLC agreement. In addition to other defenses, Adenyo argued that the court had no personal jurisdiction over it. The court found that it had personal jurisdiction over Adenyo under Delaware's long-arm statute because Adenyo "purposely availed" itself of the benefits and protections of Delaware by incorporating Delaware subsidiaries for the purpose of acquiring the entities that formed the basis of the Silverback's wrongful usurpation of Mobilactive's corporate opportunities. The court also found that Adenyo was subject to personal jurisdiction under LLC Act

Section 18-109 (the LLC Act's implied consent statute) because Adenyo participated materially in the management of Mobilactive by causing a petition seeking judicial dissolution of Mobilactive be filed in the court. The court then held that the transfer by Silverback to Adenyo constituted a fraudulent transfer.

The court next addressed the petition for judicial dissolution of Mobilactive that had been filed by Adenyo on behalf of Silverback. The court noted that under existing Delaware case law even if the standard under LLC Act Section 18-802 for judicial dissolution is met, the court may decide in the exercise of its equitable powers not to grant the petition. In this case, the court found that it may not be reasonably practicable to carry on Mobilactive's business, but the court refused to order judicial dissolution. The court found that the breaches of contract and fiduciary duties by Silverback contributed materially to Mobilactive's inability to fulfill its business purpose and stated that Silverback should not be permitted to use its inequitable conduct to extricate itself from the joint venture. The court also found that a judicial dissolution might hinder Bienstock from recovering the damages he is due.

f. *Duff v. Innovative Discovery LLC*, C.A. No. 7599-VCP (Del. Ch. Dec. 7, 2012)

Plaintiffs, former members of the defendant limited liability company (the "Company"), brought various claims relating to identical redemption agreements (the "Redemption Agreements") by which each sold their interests back to the Company. Plaintiffs alleged the Redemption Agreements contained a warranty limiting plaintiffs' tax liability for the years 2011 and 2012, which was exceeded when the Company allocated taxable income to each plaintiff that exceeded the purported limit. Plaintiffs brought a breach of contract claim for breach of the warranty, requested an accounting, and requested a declaratory judgment with respect to plaintiffs' rights under the Redemption Agreements for the 2012 tax year. Plaintiffs also asserted that the Company breached license agreements (the "License Agreements") and consulting agreements (the "Consulting Agreements") entered into in by each of plaintiff and the Company in connection with the Redemption Agreements for failure to pay plaintiffs for their services under such agreements.

The court held that it had subject matter jurisdiction over plaintiffs' claims for breach of the Redemption Agreements pursuant to Section 18-111 of the LLC Act, which confers jurisdiction on the Court of Chancery to hear actions regarding the internal affairs of LLCs. The Redemption Agreements were specifically contemplated by the LLC Act under Section 18-702, which provides that an LLC "may acquire, by purchase, redemption or otherwise, any limited liability company interest . . . of a member . . . ." Because Section 18-111 confers on the Court of Chancery subject matter jurisdiction to hear actions to interpret, apply and enforce documents and agreements "contemplated by any provision" of the LLC Act, the court had jurisdiction to hear plaintiffs' claims under the Redemption Agreements. The court rejected the Company's argument that the court had discretion in exercising jurisdiction over plaintiffs' claims. Although Section 18-111 provides for concurrent jurisdiction with other courts, once plaintiffs selected the Court of Chancery, the court had no discretion as to whether to hear the case. Furthermore, the court noted that the Redemption Agreements related to the duties and obligations of the Company vis-à-vis the plaintiff-members. The fact that plaintiffs' interests were redeemed was of no import because redemption agreements are technically agreements among current members of an LLC and the LLC regarding the repurchase of the members' interests. Moreover, the Redemption Agreements were negotiated while plaintiffs were still members of the Company. The court held that it had jurisdiction to hear the remaining claims under the clean-up doctrine because the claim for breach of the Redemption Agreements was closely intertwined with the claims for an accounting, declaratory judgment, and breach of the License Agreements and Consulting Agreements.

The Company moved to have plaintiffs' claims relating to the Redemption Agreements dismissed under Rule 12(b)(6) for failure to state a claim, arguing that the Redemption Agreements were unambiguous and by their terms did not limit plaintiffs' tax liability, but only the total dollars distributed to plaintiffs in 2011 and 2012. The court denied the Company's motion, holding that plaintiffs sufficiently alleged facts in the complaint to support a claim for a mutual mistake requiring reformation of the Redemption Agreements. Plaintiffs alleged that the parties had a mutual agreement regarding the limit on their tax liability—based on alleged conversations among the parties—that was not properly incorporated into the Redemption Agreements.

Finally, the court denied the Company's motion to dismiss for improper venue even though the License Agreements contained an exclusive forum selection provision selecting the courts of California. The Redemption Agreements, which contained a non-exclusive forum selection provision selecting the courts of Delaware, incorporated the License Agreements by reference. The claim for breach of the License Agreements arguably arose out of the Company's obligations under the Redemption Agreements, and a reasonable interpretation of the Redemption Agreements was that the Company consented to jurisdiction in the Delaware Court of Chancery. Delaware courts will only declare a forum selection clause strictly binding if the parties use express, clear language that all other courts are excluded. Because the forum selection clause in the Redemption Agreements and the License Agreements conflicted, the selection was not clear and the Company's motion to dismiss was denied.

g. *Feeley v. NHAOCG, LLC*, C.A. No. 7304-VCL (Del. Ch. Mar. 20, 2012); (Del. Ch. Oct. 12, 2012); and (Del. Ch. Nov. 28, 2012)

The Court of Chancery released three opinions in the *Feeley v. NHAOCG, LLC* matter. In the first two *Feeley* decisions, the court determined that: (1) it had jurisdiction over defendant NHA OCG, LLC ("NHA") based on LLC Act Sections 18-110(a) and 18-109(a), and (2) it would largely grant plaintiffs' motion for judgment on the pleadings based on defendants' failure to abide by the terms of the operating agreement of Oculus LLC (the "Oculus Operating Agreement").

The court found that plaintiff Feeley had entered into a business relationship with defendants A. Akel, G. Akel, Newman, Hughes, and NHA. The parties had formed two LLCs: Ak-Feel LLC (”Ak-Feel"), formed by Feeley and A. Akel, and Oculus LLC ("Oculus"), formed by Ak-Feel and NHA. Ak-Feel's Operating Agreement designated Feeley as its Managing Member; the Oculus Operating Agreement in turn designated Ak-Feel as its Managing Member. As Managing Members of the two entities, Feeley and Ak-Feel had full and exclusive authority to manage, control, administer and operate Ak-Feel and Oculus, respectively. Additionally, the Oculus Operating Agreement enumerated the only permissible ways to remove Ak-Feel as its Managing Member: unanimous member consent, termination of Feeley or Akel, or default without cure by Ak-Feel under the Oculus Operating Agreement. Feeley also entered into an employment agreement with Oculus to serve as its President and CEO.

When the business relationship between Feeley and defendants soured, defendant NHA attempted to give Feeley notice that his employment contract with Oculus would not be renewed but he would remain an Oculus officer. Later, NHA also attempted to remove Feeley as an Oculus officer. However, NHA was not Oculus's Managing Member—Ak-Feel was—and the Managing Member had exclusive authority to act on behalf of Oculus. NHA also gave notice to Ak-Feel that it was exercising its right to remove Ak-Feel as Oculus's Managing Member, replacing Ak-Feel with NHA.

Plaintiffs filed suit to determine the validity of NHA's removal of Ak-Feel as Oculus's Managing Member and Feeley as its President and CEO. Defendants moved to dismiss the complaint for lack of personal jurisdiction. Plaintiffs then moved for judgment on the pleadings.

In its first decision, the court held that Section 18-110(a) granted it *in rem* jurisdiction to determine who validly holds office as a manager of a Delaware LLC. Notice of the claims to each defendant was proper; therefore, the court found that it had constitutional authority to determine who the Managing Member of Oculus was: Ak-Feel or NHA. The court also found that, pursuant to Section 18-109(a), it could exercise personal jurisdiction over those serving as managers of an LLC for the purpose of adjudicating breach of duty claims. The court viewed NHA as a manager because NHA participated materially in Oculus's management not only by removing Ak-Feel as Managing Member, but also by purporting to remove Feeley as an employee, and later as an officer—an action that only the Managing Member of Oculus could take, pursuant to the Oculus Operating Agreement. Finally, the court stated that, since NHA was subject to personal jurisdiction under § 18-109(a), the court had jurisdiction over the other counts of the complaint, which arose out of a common nucleus of operative fact. The court deferred ruling on the individual defendants' lack of personal jurisdiction claims pending further discovery and briefing.

After determining the jurisdictional issues, the court, in its second decision, largely granted plaintiffs' motion for judgment on the pleadings and entered the following four judgments: (1) that letters sent by NHA purporting to replace AK-Feel as Oculus' Managing Member were invalid and void because the Oculus Operating Agreement stated the only grounds under which AK-Feel could be removed and none of those grounds applied; (2) that the termination letter sent by NHA attempting to terminate Feeley as President and CEO of Oculus was invalid because it was not sent by the Managing Member, AK-Feel, as required by the Oculus Operating Agreement; (3) that the attempted termination of both Feeley's employment and his position as President and CEO of Oculus was unlawful and void because the termination was not affected by Oculus' Managing Member, AK-Feel; and (4) that defendants' representations to third parties stating that AK-Feel and Feeley had been removed were incorrect.

In the court's third decision, it analyzed the five counterclaims of Oculus's non-managing member, NHA, against Oculus's managing member, Ak-Feel and Ak-Feel's managing member, Feeley.

NHA's counterclaims were largely based on Ak-Feel and Feeley's allegedly failed attempts at managing Oculus. NHA contended that Feeley did not identify a sufficient number of real estate projects for Oculus, that the projects that he did bring to Oculus "ended in disaster due to Feeley's gross negligence" and that Feeley negotiated certain real estate deals for himself rather than presenting the deals to NHA.

Count I alleged, *inter alia*, that Ak-Feel breached the Oculus Operating Agreement by engaging in self-dealing because Ak-Feel usurped opportunities that belonged to Oculus. The court rejected this allegation because Ak-Feel had no contractual obligation under the Oculus Operating Agreement to present opportunities to Oculus. Count I also alleged that Ak-Feel breached the Oculus Operating Agreement by taking action that amounted to gross negligence and willful misconduct; because Ak-Feel answered this portion of Count I, the court did not address the allegation in defendants' motion to dismiss.

Count II alleged that Feeley aided and abetted Ak-Feel's breaches of the Oculus Operating Agreement as discussed in Count I. The court denied plaintiffs' motion to dismiss these allegations, holding that Count II pled "a *Gotham Partners* claim against Feeley for aiding and abetting a breach of contract (odd as that sounds) to the same extent that a claim was pled in Count I." The court based this decision on the fact that Feeley, as the managing member of Ak-Feel, ultimately made Ak-Feel's decisions and carried out those decisions; therefore, Feeley knowingly participated in the contractual breaches of duty alleged in Count I.

Count III alleged that Ak-Feel and Feeley breached default fiduciary duties. The court determined that Ak-Feel, as Oculus's managing member, owed default fiduciaries to Oculus and that the Oculus Operating Agreement did not limit or eliminate those default fiduciary duties; therefore, the court denied plaintiffs' motion to dismiss Count III as to Ak-Feel. The court discussed the Delaware Supreme Court's decision in *Gatz* (which stated that the Court of Chancery's determination that the manager of an LLC owed default fiduciary duties was "dictum without any precedential value"), stating that "[t]he high court did not rule on whether the managers of an LLC owe default fiduciary duties." The court in this case stated that the Court of Chancery cases holding that default fiduciary duties apply to LLC managers were "appropriately viewed as *stare decisis* by this Court" and that a plain reading of LLC Act Section 18-1101(c) and its drafting history supported the existence of default fiduciary duties because "otherwise there would be nothing for the operating company agreement to expand, restrict, or eliminate." The court noted that the Supreme Court has the power to hold that no such default fiduciary duties exist, but that the Supreme Court had not yet made that determination. Then, the court looked to the Oculus Operating Agreement and found that it provided limited exculpation from monetary liability as permitted by Section 18-1101(e) but that it did not eliminate fiduciary duties under Section 18-1101(c). The court interpreted the language of the Oculus Operating

Agreement, limiting liability for Oculus's members, as an assumption in the Oculus Operating Agreement that fiduciary duties existed and could give rise to liability unless the exculpation right was triggered.

The court also determined that Count III properly alleged claims that Ak-Feel breached its duty of care and that Feeley engaged in willful misconduct because Feeley allegedly negotiated deals for himself and, as the managing member of Ak-Feel, Feeley controlled Ak-Feel, meaning that he could not "mentally segregate his decision-making" so as to properly negotiate deals for himself while somehow not acting in his capacity as the managing member of Ak-Feel.

The court held that Count IV properly stated a claim for breach of the duty of care against Ak-Feel, but not against Feeley because, in Count IV, defendants named Feeley in his capacity as the party in control of Ak-Feel, which in turn was the managing member of Oculus, and not in his capacity as actual manager of Oculus.

Finally, in Count V, defendants sought a declaratory judgment stating that NHA had the unilateral right under the Oculus Operating Agreement to force Oculus to cease its business operations; the court granted plaintiffs' motion to dismiss Count V because the Oculus Operating Agreement did not give NHA such a right.

h. *Matthew v. Laudamiel*, C.A. No. 5957-VCN (Del. Ch. Feb. 21, 2012) and (Del. Ch. June 29, 2012); *Matthew v. Fläkt Woods Grp. SA*, C.A. No. 5957-VCN (Del. Nov. 20, 2012)

Plaintiff, a member and manager of Aeosphere LLC, a Delaware limited liability company (the "Company"), brought claims relating to the dissolution of the Company against the other managers of the Company and two companies with which the Company had business dealings. Defendants raised various defenses against plaintiff's claims and brought multiple counterclaims against plaintiff.

In the first decision by the Court of Chancery, the court addressed motions to dismiss for lack of personal jurisdiction by defendants Fläkt Woods Group SA ("Fläkt Woods") and SEMCO LLC ("SEMCO"), which were companies who had engaged in various business dealings with the Company. Plaintiff claimed that Fläkt Woods and SEMCO aided and abetted breaches of fiduciary duty by the other defendants and were otherwise complicit in the other defendants' wrongful actions. Plaintiff contended that the court had personal jurisdiction over Fläkt Woods under Delaware's long-arm statute by virtue of the conspiracy theory of jurisdiction. The court rejected plaintiff's conspiracy theory of jurisdiction because, although plaintiff pled sufficient facts to allow the court to infer that a conspiracy existed, plaintiff failed to show that Fläkt Woods knew or had reason to know of an act or effect in Delaware before the completion of the conspiracy, which is a requirement of the conspiracy theory of jurisdiction.

Plaintiff asserted that the court had personal jurisdiction over SEMCO under Delaware's long-arm statute by virtue of the conspiracy theory of jurisdiction and/or by virtue of the general jurisdiction test. The court rejected the conspiracy theory, finding that sufficient facts were not alleged to support SEMCO's participation in a conspiracy against plaintiff, and rejected plaintiff's general jurisdiction argument, finding that SEMCO's minimal business in Delaware was not sufficient to constitute a "persistent course of conduct" or "regularly do[ing] or solicit[ing] business" in Delaware. Moreover, the court found that SEMCO's presence in Delaware was not sufficient to meet the "minimum contacts" required by constitutional due process.

The court also addressed plaintiff's motion to dismiss several of defendants' counterclaims. The court first addressed defendants' counterclaim for breach by plaintiff of the implied covenant of good faith and fair dealing in the Company's LLC agreement. One of defendants' claims for breach of the implied covenant was based on plaintiff's alleged refusal to accept or reject various contracts and alleged refusal to take certain actions requiring his approval under the LLC agreement. However the LLC agreement contained specific provisions dealing with "deadlocks" among the Company's board of managers and disagreements between the parties and contained a general standard governing the performance of managerial duties by the Company's managers and the officers. Other of defendants' claims for breach of the implied covenant were based on plaintiff's alleged unreasonable refusal to cooperate in the management of the Company and alleged improper allocation of Company resources among various internal projects. These claims again were squarely addressed by provisions in the LLC agreement. In addition, defendants' claimed that plaintiff's refusal to attend or otherwise participate in an emergency meeting of the board of managers meeting breached the implied covenant. Because the LLC agreement provided a "best efforts" standard to govern attendance at meetings of the board of managers, the court found this issue was also explicitly addressed by the LLC agreement. The court thus dismissed each of defendants' claims for breach of the implied covenant, holding that the implied covenant only operates where an LLC agreement does not speak to the issue directly and provide an explicit answer, and, in this case, each of defendants' bases for the implied covenant were directly addressed by the LLC agreement. The court stated the misconduct alleged by defendants was more properly addressed by defendants' counterclaims against plaintiff for breach of the LLC agreement.

In its initial decision, the court also addressed defendants' counterclaims for damages resulting from plaintiff's alleged breach of the employment agreement between the Company and plaintiff and for unjust enrichment, both of which claims were based upon plaintiff's alleged improper charging of personal expenses to the Company. The court held that these claims belonged to the Company and that defendants did not have standing to bring them in their individual capacities and thus dismissed these claims. Since a certificate of cancellation had already been filed to terminate the existence of the Company, the court stated that these claims would have to be brought in the name of the Company by a trustee or receiver appointed under LLC Act Section 18-805 or, if the Company were revived, by the revived Company or derivatively by its members after the revival of the Company.

In a subsequent decision by the Court of Chancery, the court addressed plaintiff's motions for partial summary judgment on his claim that defendants breached the Company's LLC agreement by causing the dissolution and winding of the Company without plaintiff's consent and his claim that defendants' wrongful dissolution of the Company resulted in the unlawful conversion of his units in the Company. Plaintiff argued that his vote was required to approve the dissolution and winding up of the Company under Section 5.2.6(b) of the LLC agreement. The court held that that the plain language of Section 5.2.6(b) of the LLC agreement did not require plaintiff's vote to dissolve the Company but may have required plaintiff's vote to wind up the Company. Plaintiff argued that the apparent discrepancy in the LLC agreement between the vote required for dissolution and the vote required for winding up must be the result of a scrivener's error. The court rejected plaintiff's argument to reform the LLC agreement to correct the scrivener's error because plaintiff did not satisfy either of the standards for reformation, namely that there was a mutual mistake of the parties or a unilateral mistake by plaintiff of which defendants were aware but remained silent.

Plaintiff argued in the alternative that the voting provision in Section 5.6.2(a) of the LLC agreement required his vote for the dissolution of the Company, and therefore the vote to dissolve the Company without his approval breached the Company Agreement. Defendants' argued that, if such voting provision applied, plaintiff's refusal to attend the board meeting at which the vote was taken created a deadlock which would have allowed defendants to dissolve the Company without plaintiff's approval. The court denied plaintiff's motion for summary judgment on this issue, holding that the matter must be resolved on a more robust factual record.

With respect to plaintiff's claim that defendants' breached the LLC agreement by winding up of the Company without his approval, the court held that, unless defendants' prevailed on an affirmative defense, they would be liable for breach of the LLC agreement because the voting provision of the LLC agreement expressly required the unanimous approval of the board of managers to wind up the Company. The court rejected defendants' argument that "unanimous approval of the Board" meant unanimous approval of the managers present at a meeting, which interpretation would have resulted in actions requiring "unanimous approval of the Board" under the LLC agreement requiring a lesser vote than typical Board actions.

As an affirmative defense, defendants alleged that even if their approval of the decision to wind up the Company breached the LLC agreement, the breach was excused by plaintiff's prior material breaches of the LLC agreement, such as plaintiff's alleged refusal to approve or disapprove contracts requiring his approval and his alleged improper approval of contracts that also required another manager's approval. The court, noting that only a material breach, and not a nonmaterial or *de minimis* breach, will excuse another party from performing under a contract, stated that the issue of materiality is principally a question of fact and is not generally suited for disposition by summary judgment. The court held that defendants' allegations of plaintiff's breaches were not so severe or so insignificant as to allow the court to assess their materiality on the facts presented and without further development of the record. Since these allegations raised contested issues of fact, the court was unable to grant plaintiff's motion for partial summary judgment on plaintiff's breach claim with respect to the winding up of the Company.

The court also denied plaintiff's motion for partial summary judgment on his conversion claim. Since plaintiff was not granted summary judgment on his breach claims, which were the foundation for his conversion claim, he similarly could not be granted summary judgment on his conversion claim.

In a further proceeding in this case, the Supreme Court of Delaware reversed the Court of Chancery's earlier decision that the court lacked personal jurisdiction over Fläkt Woods. The court found that Delaware's long arm statute reached the alleged conduct. The Court of Chancery had held that plaintiff failed to show that Fläkt Woods knew or had reason to know of an act or effect in Delaware before the completion of the conspiracy. The Supreme Court disagreed with the Court of Chancery's holding, finding, among other things, that Fläkt Woods, a sophisticated company with global activities, would have done some minimal due diligence before entering into a long-term agreement with the Company, which would have revealed to Fläkt Woods that the Company was a Delaware LLC long before the Company was dissolved. Because Fläkt Woods' alleged co-conspirators filed a certificate of cancellation for the Company in Delaware, which constituted the transaction of business in Delaware for purposes of the long-arm statute, the Supreme Court held that Fläkt Woods was subject to personal jurisdiction under the long arm statute.

i. *Phillips v. Hove*, C.A. No. 3644-VCL (Del. Ch. Sept. 22, 2011)

The dispute arose out of a start-up business conducted through a Delaware LLC. In an earlier decision in which the court denied a motion to dismiss (*see Phillips v. Schifino*, C.A. No. 3644-VCL (Del. Ch. Dec. 18, 2009)), the court found that the transaction agreements involved were so ambiguous that it was unclear whether the central document, a four-page term sheet, was sufficient to constitute a limited liability company agreement. In this post-trial opinion, the court determined, among other issues, the identity of the voting members of the LLC. Noting that it had previously deemed the ownership provision in the term sheet to be ambiguous in denying a motion for summary judgment, the court now determined that the term sheet provided for an LLC composed of two members. One of the issues faced by the court was whether one of the members owned its membership interest in his individual capacity or through an investment entity. The term sheet referred both to the investment entity and to the individual as a member of the LLC and was executed by the individual in his individual capacity. Other agreements drafted in connection with the formation of the LLC, however, referred to the investment entity as a member of the LLC. The court noted that discussions between the parties indicated that the other member, who clearly owned his membership interest in his individual capacity, was aware that the investment entity, not the individual with whom the other member had negotiated, was intended to own the membership interest at issue. Based on the totality of the evidence, the court concluded that the membership interest was owned by the investment entity rather than the individual.

The court next considered whether it could exercise personal jurisdiction over an individual who was neither a member nor a manager of the LLC, but ran the day-to-day operations of the business and had filed a bankruptcy petition on behalf of the LLC. Noting that Section 18-109(a) of the LLC Act extends not only to formally designated managers but also to persons who "participate materially in the management" of an LLC, the court concluded that it could exercise jurisdiction in this case because an individual who manages the day-to-day operations of a business and files a bankruptcy petition on behalf of a business participates materially in the management of an LLC.

With the jurisdiction issue resolved, the court turned to a claim that the same individual breached his fiduciary duties. According to the court, an individual who asserts control over the operations of an LLC owes fiduciary duties to the LLC and its members even though such individual is not a member or manager. In making this determination, the court relied on past Delaware cases stating that one who controls property of another owes fiduciary duties when exerting such control over such property. The individual at issue had sold the LLC's inventory through a competing retailer, and the court concluded that this action constituted a breach of the duty of loyalty.

Finally, the court addressed an application for judicial dissolution of the LLC pursuant to LLC Act Section 18-802. Based on the history of animosity between the parties, the court concluded a deadlock existed. The court stated that the fact that the LLC had continued to operate marginally was irrelevant to whether a deadlock existed because the LLC never operated in conformity with the members' agreement. Although the term sheet provided for a mechanism to resolve disputes between the members, the court concluded judicial dissolution was appropriate because it was a more reasonable and equitable alternative than the contractual mechanism. Specifically, the term sheet called for resolution of member disputes by a five-member board. Each board member's appointment, however, had to be approved by both members of the LLC, which the court found to be unlikely given the state of relations between the members. In light of the members' history of disputes, the court also found it unlikely that the LLC would be wound down in an orderly and timely manner and therefore appointed a liquidating trustee pursuant to LLC Act Section 18-303(a).

j. *Hartsel v. The Vanguard Grp., Inc.*, C.A. No. 5394-VCP (Del. Ch. June 15, 2011)

This case was brought by stockholders of certain series (the "Funds") of two Vanguard Delaware statutory trusts (the "Trusts") that purchased shares of allegedly illegal foreign online gambling businesses. Defendants included, among others, the boards of trustees of the Trusts, which were composed of the same individuals, various financial advisory firms to the Funds and certain employees of these firms. Acadian Asset Management, LLC, a Delaware limited liability company ("Acadian"), was one such financial advisory firm and it exercised managerial and operational oversight over the investment strategy of one of the Funds. Plaintiffs argued that all defendants, as fiduciaries for managing and advising the Funds, breached their fiduciary duties by causing the Funds to purchase shares in the illegal businesses. The damages were related to precipitous drops in the share prices of these businesses after the United States heightened its law enforcement focus on internet gambling, which caused a decrease in the value of the assets held by the Funds.

The individual defendants that were employees of Acadian moved to dismiss the action as against them arguing that there was no basis for the court to exercise *in personam* jurisdiction over them. Plaintiffs claimed that these defendants were subject to the court's jurisdiction under Section 18-109(a) of the LLC Act—the implied consent statute—because each such defendant was an officer of Acadian, a Delaware limited liability company. Plaintiffs contended that because these defendants shared responsibility for implementing the challenged investments and such investments "involve or relate to" Acadian's business, they qualified as managers of Acadian and, therefore, have consented to the court's jurisdiction. Plaintiffs interpreted Section 18-109(a) of the LLC Act in the disjunctive so that it applied in two distinct situations: (i) in actions involving or relating to the business of an LLC or (ii) in actions claiming a violation by a manager of a duty to the LLC he manages. The court indicated that a literal reading of the LLC Act provided support for this position but noted that broadly reading the "involving or relating to" language could lead to the assertion of personal jurisdiction in circumstances that did not meet the minimum requirements of the Due Process Clause. Citing to the cases of *Assist Stock Mgmt. L.L.C. v. Rosheim* and *Vichi v. Koninklijke Philips Electronics N.V.*, to protect against an unconstitutionally broad application of Section 18-109(a) of the LLC Act, the court held that to invoke the "involving or relating to" clause, plaintiffs must establish that the exercise of personal jurisdiction over the subject defendants would not offend traditional notions of fair play and substantial justice, which would be found if plaintiffs could show that (1) the allegations against the defendant-manager focused centrally on his rights, duties and obligations as a manager of a Delaware LLC, (2) the resolution of the matter was inextricably bound up in Delaware law and (3) Delaware had a strong interest in providing a forum for the resolution of the dispute relating to the manager's ability to discharge his managerial functions. Further, the court found that the "rights, duties and obligations" language of this test referred to the LLC the defendant managed. In this case, plaintiffs claimed that the alleged managers of Acadia breached duties owed to plaintiffs and the Trusts. The court held that these claims did not involve or relate to Acadian's business in the "sense of its internal business" as required by the LLC Act and the Due Process Clause and, thus, Section 18-109(a) of the LLC Act did not provide a basis for personal jurisdiction. The court also denied plaintiffs other claims to assert jurisdiction under a conspiracy theory and the Delaware long-arm statute. The court noted in dicta that in addition to demonstrating a statutory basis for personal jurisdiction as to each defendant, plaintiffs must have also shown, to satisfy due process, that the court's exercise of jurisdiction over them met the so-called minimum contacts analysis. With respect to the employees of Acadian, the court found that although they worked for a Delaware LLC, they lived and worked outside of Delaware and did not own real property or any other assets in Delaware. On this basis, the court found that plaintiffs had not shown that these defendants had the requisite minimum contacts with Delaware to justify subjecting them to personal jurisdiction in Delaware.

The court next discussed the motion by defendants to dismiss plaintiffs' direct claims, arguing that they were derivative in nature, and also moving to dismiss plaintiffs' derivative claims, arguing that plaintiffs failed to satisfy the applicable demand requirements. Plaintiffs argued that they properly stated certain direct claims and that with respect to the derivative claims, making a demand on the Boards of Trustees of the Trusts would have been futile and therefore was excused. The court found that under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, it must examine (i) whether a stockholder's claimed direct injury is independent of any alleged injury to the company and (ii) whether a stockholder would receive the benefit of any remedy. Plaintiffs argued that each day there was a decline in the market value of the shares in the allegedly illegal businesses, they suffered actual injury by a reduction in the value of their shares in the Funds even though the Funds had not necessarily realized any loss and would not until the shares in the allegedly illegal businesses were sold. The court granted defendants' motion to dismiss these direct claims, finding that the unlawful conduct in purchasing shares in allegedly illegal businesses involved trustee mismanagement and under Delaware law, trustee mismanagement was generally considered derivative in nature. Plaintiffs further argued that with the unique structure of a series Trust, plaintiffs were essentially minority shareholders of the Trusts with no common interests with the investors in the other series of such Trusts. In addressing this, the court indicated that it was more appropriate to assess the injury suffered by the Funds and not the Trusts because each Fund acted as a segregated fund in the business of investing in securities. The court further noted that besides each Fund being a discrete economic unit, each Fund is often treated as a separate investment company under the Investment Company Act of 1940 (the "ICA") even though it may not have a separate legal form and may be covered under the umbrella of a single trust entity. The court cited to non-Delaware cases for the notion that an investor that invests in a series within a single trust does not necessarily have standing to assert claims for purported wrongdoing on behalf of all of the series within that trust. The court also noted that finding these claims to be derivative would comport with the Delaware Statutory Trust Act ("DTA"), which permits a statutory trust, through its governing instrument, to treat different series as distinct economic entities. Thus, any injury to plaintiffs would be derivative to the alleged injury suffered by the Funds themselves. As to the second prong of *Tooley*, the court observed that the benefit may flow only to the Funds and not the other series of the Trusts, but consistent with the DTA, there was no reason that this would have caused the claims to be direct and not derivative. Finally, the court denied plaintiffs' claims that the fiduciary duty and negligence claims could be both direct and derivative under *Gentile v. Rossette*, finding that this has only been permitted in limited circumstances involving controlling stockholders, which was not the case here.

The court next addressed whether demand was excused. In making this determination, the court referred to both the *Aronson* test and the *Rales* test. The court indicated that the *Aronson* test applied to claims involving contested board action with respect to a specific transaction or decision, and this provided that demand would be excused if the complaint contained particularized factual allegations that raised a reasonable doubt that either: (1) the board of directors was disinterested and independent or (2) the challenged transaction or conduct was otherwise the product of a valid exercise of business judgment. On the other hand, the *Rales* test would apply when the subject of the suit was the board's inaction leading to a violation of its oversight duties. Under *Rales*, demand would be excused if the court found that there was "a reasonable doubt that a majority of the Board would be disinterested or independent in making a decision on demand." The court did not determine which test would apply because it found that the complaint did not allege particularized facts sufficient to cast reasonable doubt on the independence or disinterestedness of the Trustee defendants under either test. The court observed that the DTA permitted a statutory trust to delineate in its governing instrument requirements to bring a derivative claim in addition to those set forth in the DTA. The governing instrument of each Trust contained a provision that demand would be excused only if a majority of the Board of Trustees were not "independent trustees." Under the DTA, an independent trustee is defined as a trustee who is not an "interested person" under the ICA, and the court found that the trustee defendants to whom plaintiffs would have needed to make their demand were not "interested persons" under the ICA. Plaintiffs also argued that the Trustee defendants were not independent under the ICA because they served on boards of other series of the Trusts and on the board of the trust advisor. The court pointed to Section 3801(d) of the DTA, which provided that service as an independent trustee of more than one investment company shall not affect the status of a trustee as an independent trustee, in support of its finding that service on multiple boards alone is insufficient to cast reasonable doubt as to independence of a Trustee defendant. With respect to the specific claim by plaintiffs that demand was excused because the Trustee defendants served on the board of the advisor to the Trusts, the court noted that under the ICA, the trust advisor here did not constitute an "investment advisor" because it provided its services to the Funds at cost. The court also noted that although plaintiffs could successfully argue that demand was excused if they could demonstrated that the Funds exercised control over the trust advisor, plaintiffs failed to plead particularized facts from which the court could reasonably infer that the Funds had sufficient net assets in relation to the other Trusts within the Vanguard mutual fund complex to be able to exercise a controlling influence over Vanguard's management or policies. The court found that as a general matter, plaintiffs failed to allege any particularized facts to cast a reasonable doubt on the Trustee defendants' disinterestedness or independence. "Disinterested" generally means "that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." "Independence" generally means "that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."

With respect to plaintiffs' further basis for claiming that demand was excused under the second prong of *Aronson*, the court noted that to satisfy this second prong, plaintiffs must have alleged particularized facts sufficient to raise "(1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision." The court also noted that under *Rales*, directors who face a "substantial likelihood of personal liability are deemed to be interested" but demand is only excused where director conduct is "so egregious on its face that board approval cannot meet the test of business judgment." Plaintiffs argued these tests were met because defendants invested in illegal businesses. However, the court found that there was no evidence that the laws governing these illegal businesses applied to passive public stockholders and plaintiffs failed to allege that it would apply to the Funds. Thus, the court held that demand was not excused under either the second prong of *Aronson* or under *Rales*.

k. *Ross Holding and Mgmt. Co. v. Advance Realty Grp., LLC*, C.A. No. 4113-VCN (Del. Ch. Apr. 28, 2010)

The court was presented with a motion by a defendant foreign corporation to dismiss a complaint for lack of personal jurisdiction. The plaintiffs were unit holders of the Delaware limited liability company at the center of the dispute and alleged that the defendant breached certain fiduciary duties owed to them. The defendant invested in the LLC through a separate entity (the "Investment Fund") pursuant to a credit agreement and a promissory note which was convertible to equity and which permitted the Investment Fund to select two of the four members of the board of the LLC. The plaintiffs asserted that the defendant, through the two board members it indirectly controlled, controlled the LLC to its benefit and to their detriment. The defendant allegedly had no physical presence in Delaware. The plaintiffs sought jurisdiction under Section 18-109 of the LLC Act. The defendant argued that it did not fall within the definition of "manager" under Section 18-109 of the LLC Act because (i) the LLC was managed by a board (and it was not directly a board member), (ii) the Investment Fund, and not the defendant, had the right to designate board members and (iii) the mere act of selecting management is insufficient to constitute management. The court observed that what constitutes material participation in the management of an LLC is an open question, that the LLC Act does not provide much guidance and that Delaware case law is only marginally more helpful. The court noted that simply conferring with members of management on occasion and being involved in a single issue has been found not to constitute material participation in management. However, the court concluded that additional discovery would be necessary to decide this issue because of the uncertainty of the defendant's role in the management of the LLC.

l. *PT China LLC v. PT Korea LLC*, C.A. No. 4456-VCN (Del. Ch. Feb. 26, 2010)

In this case, the court considered whether Harrison Wang ("Wang"), a Singapore resident, was subject to personal jurisdiction under Section 18-109 of the LLC Act for breach of fiduciary duty claims and breach of contract claims. Wang was one of two "Principals" of Pine Tree Holdings I LLC, a Delaware LLC ("PT Holdings"), and one of three members of the management committee of PT Holdings. PT Holdings, in turn, was the managing member and minority interest holder of Pine Tree Equity LLC ("PT Equity"), also a Delaware LLC. PT Equity was governed by an LLC agreement, to which Wang was not a party, and a joint venture agreement (the "JV Agreement"), to which Wang was a party.

Wang was sued for breach of fiduciary duty and breach of contract based, among other things, on his alleged usurpation of corporate opportunities and disclosure of confidential information. This decision addressed a motion by Wang to dismiss the claims. While Wang did not contest his status as a manager of PT Holdings under Section 18-109, Wang maintained that the fiduciary duty claims were both factually unsupported and precluded by the contract claims, and therefore failed as a matter of law. Additionally, Wang asserted that he lacked sufficient contact with Delaware to merit personal jurisdiction with respect to the breach of contract claims.

The Court of Chancery began the analysis of Wang's claims by stating that Court of Chancery Rule 12(b)(2) requires the plaintiff to bear the burden of demonstrating a basis for the court's jurisdiction over a nonresident defendant. The court looked to Section 18-109 of the LLC Act for a statutory basis for personal jurisdiction over Wang. Section 18-109 provides that a manager of a limited liability company is deemed to consent to the personal jurisdiction of Delaware courts for any suit "involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company . . . ." A "manager" is defined for purposes of Section 18-109 to include any person who "participates materially in the management of the limited liability company." The court noted that even if a person is served pursuant to Section 18-109, personal jurisdiction must still be consistent with due process.

With respect to the breach of fiduciary duty claims, the court cited to well-settled Delaware case law in the LLC and corporate context for the proposition that service under Section 18-109 is consistent with due process where an action relates to a manager's fiduciary duties. Wang did not contest this point but argued instead that the fiduciary duty claims were not supported by the alleged facts and were otherwise duplicative of the breach of contract claims and thus should be dismissed. The court found that sufficient facts had been pled to support their fiduciary duty claims. As to Wang's contention that the fiduciary duty claims were duplicative of the breach of contract claims, the court stated that under Delaware law "a contractual claim will preclude a fiduciary duty claim, so long 'as the duty sought to be enforced arises from the parties' contractual relationship.'" The court thus had to determine whether an independent basis for the fiduciary duty claim existed apart from the contractual claim, even if both were related to the same or similar conduct. The court, citing to *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842 (Del. Ch. June 13, 2008), permitted the fiduciary duty claims to stand because the fiduciary duty claims were considered distinct in scope from the contract claims. Specifically, the court found that the fiduciary duty claims against Wang arose from Wang's fiduciary duties under the PT Holdings' LLC agreement, not the JV Agreement which he is alleged to have breached.

With respect to the breach of contract claims, while Wang did not contest that Section 18-109 encompasses service on managers for matters that involve or relate to the LLC, Wang claimed that the exercise of personal jurisdiction over him pursuant to Section 18-109 would not comport with due process. The court, citing to the *Assist Stock Mgmt. L.L.C. v. Rosheim*, 753 A.2d 974 (Del. Ch. 2000), stated that the exercise of personal jurisdiction under Section 18-109 would be consistent with due process in this circumstance if "(1) the allegations focused on the defendant's rights, duties, and obligations as the manager of a limited liability company; (2) the matter was inextricably bound up in Delaware law; and (3) Delaware has a strong interest in providing a forum for disputes relating to the actions of managers of a limited liability company formed under its law in discharging their managerial functions." Wang argued that the breach of contract claims did not implicate his rights, duties and obligations as manager of PT Holdings and, because the JV Agreement was not governed by Delaware law, are not inextricably bound up in Delaware law. The court disagreed, finding that the contract claims did involve Wang's management of both PT Holdings and PT Equity and that, under the totality of the circumstances—including the fact that the breach of contract claims were intertwined with Wang's management of Delaware LLCs, the potential usefulness of his involvement in the suit and Delaware's interest in adjudicating disputes involving the management of its LLCs—the court had personal jurisdiction over Wang to hear the breach of contract claims. Wang's motion was thus denied.

m. *Vichi v. Koninklijke Philips Electronics N.V.*, C.A. No. 2578-VCP (Del. Ch. Dec. 1, 2009)

This case involved an individual ("Vichi") who loaned a substantial amount of money to a Delaware LLC ("Finance"), a subsidiary of a joint venture ("LPD") between a Netherlands holding company ("Philips") and South Korean Company ("LGE"). Philips, LGE, LPD, Kiam-Kong Ho ("Ho"), and Peter Warmerdam ("Warmerdam") were defendants. Ho was an employee of LPD and another LPD subsidiary ("International," which was the sole member and manager of Finance). Warmerdam was an employee of Philips. LPD and Finance went bankrupt and defaulted on the loan to Vichi. Vichi then sued the defendants, claiming that he entered the transaction with the belief that the loan was done on behalf of, and would be backed directly by, Philips.

Among other claims, Vichi had brought breach of fiduciary duty claims against Ho. Ho successfully moved to have the court dismiss the claims against him for lack of personal jurisdiction. However, the court stated that even if it had not dismissed the claims against Ho for lack of personal jurisdiction, it would have dismissed Vichi's breach of fiduciary duty claims against Ho for failure to state a claim because Vichi failed to demonstrate that his fiduciary claims were cognizable under Delaware law.

The court cited *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007), for the proposition that creditors of a Delaware corporation that is either insolvent or in the zone of insolvency may have standing to bring derivative claims but have no right to assert direct breach of fiduciary claims and relied on *VGS, Inc. v. Castiel*, 2003 WL 723285 (Del. Ch. Feb. 28, 2003), to apply the same rule to creditors of LLCs. The court then turned to *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), in order to determine whether Vichi's fiduciary claim was direct or derivative. The *Tooley* test directed the court to consider solely (1) who suffered the alleged harm, and (2) who would receive the benefit of recovery. The court found that, in his complaint, Vichi alleged that Ho breached his fiduciary duty to Vichi as a creditor and that Vichi had personally suffered damages. Moreover, Vichi's prayer for relief demanded that he personally receive recompense for the value of the notes, among other damages. The court therefore found that (1) under *Tooley*, Vichi's breach of fiduciary duty claims were direct, and (2) applying *Gheewalla*, Vichi, as a creditor of a Delaware LLC, could not bring a direct claim for breach of fiduciary duty. Thus, the court concluded that Vichi had failed to state a claim for which relief could be granted under Delaware law with respect to his fiduciary duty claims against Ho.

n. *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park Dr. BNK Inv'rs, L.L.C.*, C.A. No. 4353-VCP (Del. Ch. Oct. 15, 2009)

Plaintiff, Choice Hotels International, Inc. ("Choice"), sought a determination under Section 18-110 of the LLC Act that it validly removed Sam Klein as the sole manager of Columbus-Hunt Park Dr. BNK Investors, L.L.C, a Delaware LLC ("Columbus"), and that Choice was instead the manager of Columbus. In separate suits, Choice, on the one hand, and Columbus and Klein, on the other hand, sued each other in Maryland. Each of these suits related to loans from Choice to Klein pursuant to which Klein pledged his interest in Columbus as security for such loans. Klein allegedly defaulted on these loans and Choice purported to foreclose on Klein's membership interest in Columbus, remove Klein as the manager of Columbus and insert itself as the replacement manager.

In support of Choice's argument against a stay in favor of the Maryland action, Choice contended that the statutory policy behind a summary action under Section 18-110 of the LLC Act superseded application of the conventional *McWane* analysis. In this regard, Choice claimed that Section 18-110 of the LLC Act required the court to give precedence to the summary Delaware action. Section 18-110 provides in relevant part that the Court of Chancery "may hear and determine the validity of any admission, election, appointment, removal or resignation of a manager of a limited liability company, and . . . may determine the person or persons entitled to serve as managers . . . ." The court noted that the purpose of Section 18-110 is "to expeditiously resolve uncertainty" within an LLC. Consequently, the court continued, where rapid resolution of a corporate governance dispute is needed and a non-Delaware court is not in a position to provide expedited adjudication and prompt justice, the Court of Chancery typically will deny a motion to stay a Section 18-110 action. However, citing Delaware precedent, the court acknowledged that when faced with a request to stay a summary action, the court balances the *McWane* policies of comity and promoting the efficient administration of justice against the policies underlying the summary nature of the Delaware action. Under the *McWane* doctrine, an action will be stayed if the following three questions are answered in the affirmative: (1) whether there is a prior action pending elsewhere related to the action in Delaware; (2) whether such other suit involves the same parties and issues; and (3) whether the foreign court is capable of doing prompt and complete justice.

The court answered each of these three questions in the affirmative, and further, the court found that there was a significant risk that proceeding with the Delaware action would unnecessarily waste time, effort, and expense or result in inconsistent and conflicting rulings. Consequently, the court held that the *McWane* policies of comity and the orderly and efficient administration of justice supported granting a stay of the Delaware action. The court then turned to an analysis of balancing the *McWane* doctrine with the policies underlying the summary nature of the Delaware action. The court cited Delaware precedent where the court gave precedence to Delaware actions, particularly in circumstances in which it was necessary for the subject companies to conduct their business. The court observed that Columbus only had a single asset, a piece of property. Because of this, the court concluded that Columbus would not suffer sufficient harm if the action was stayed in that Columbus could be expected to maintain its business as usual during the Maryland action. Thus, the court concluded that in these circumstances, the first-filed rule applied and principles of comity and promoting the efficient administration of justice required that the Delaware action be stayed, but not dismissed.

o. *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, C.A. No. 3184-VCP (Del. Ch. Sept. 2, 2008)

Plaintiff, a Delaware LLC, sued Vredezich's Gravenhage 109 B.V. ("VG 109"), a Dutch private limited liability company, and its parent, NIBC Bank N.V. ("NIBC"), also a Dutch entity, for breach of VG 109's obligation under the LLC Agreement to reimburse the LLC for payments relating to withholding tax the LLC made on VG 109's behalf. In this decision, the Chancery Court addressed NIBC's motion to dismiss for lack of personal jurisdiction over NIBC.

The LLC was formed in a restructuring transaction in which a lending group, which included NIBC, swapped its debt in an entity for equity in the LLC. NIBC designated VG 109 as the entity to acquire its portion of the equity in the LLC. VG 109 was a wholly owned subsidiary of NIBC, with the same business address as NIBC, with no employees or officers of its own, and without letterhead or envelopes of its own. NIBC was the managing director of VG 109 and NIBC's employees signed documents on behalf of VG 109. VG 109 signed the original LLC Agreement of the LLC as a member. The LLC Agreement identified NIBC as a "Designating Lender" affiliated with VG 109 but NIBC did not sign the LLC Agreement and was not a member of the LLC.

The LLC first argued that NIBC was subject to the Chancery Court's jurisdiction directly, via Delaware's long arm statute, arguing that by participating in the formation of the LLC, it had thereby transacted business or performed work within Delaware. Plaintiff cited to case law providing that the incorporation and operation of a Delaware subsidiary constitutes the transaction of business in Delaware. The court rejected this argument as too attenuated, especially because the LLC had failed to demonstrate that it was a subsidiary of either defendant. In fact, VG 109 held only a minority interest in the LLC and did not control the LLC. In addition, the court found the act of formation of the LLC was not fundamental to the underlying dispute.

The LLC also argued that NIBC had consented to jurisdiction in Delaware pursuant to a clause in the LLC Agreement under which the parties to the LLC Agreement consented to the personal jurisdiction of the Delaware courts. While agreeing that parties may consent to personal jurisdiction via contract, the court rejected this argument because NIBC was not a signatory to the agreements.

Finally, the LLC claimed that the court had personal jurisdiction over NIBC indirectly through VG 109, which had consented to personal jurisdiction in Delaware, under the agency theory and the alter ego theory. The court refused to impute the contractual consent to jurisdiction by VG 109 to NIBC, stating that because the LLC Agreement was negotiated by sophisticated parties and included a consent to jurisdiction by the parties, but not their affiliates, the court would not accept the LLC's attempt to circumvent the parties' intention under the guise of an agency argument. The court also stated that a minority, passive investor in a Delaware LLC who allegedly breaches the LLC agreement in a manner that affects only the LLC and its members is not subject to Delaware's long-arm statute for the alleged breach without a showing that the investor in the LLC took additional action from which the asserted cause of action arose to consciously take advantage of the laws of Delaware. On this basis, the court held that, even if all of the actions of VG 109 in this case were imputed to NIBC, those actions still would not provide a sufficient basis for subjecting NIBC to personal jurisdiction in Delaware. The court thus granted NIBC's motion to dismiss for lack of personal jurisdiction.

In reaching its decision in this case the court commented that "VG 109's execution of the Amended LLC Agreement, as a fundamental governance document, conceivably could supply a basis for personal jurisdiction in this Court." The court stated that the execution and alleged breach of an LLC agreement presents interesting jurisdiction questions, since the LLC agreement itself is a "jurisdictional hybrid." It is similar to a certificate of incorporation, in that it is a foundational document controlling the entity's governance, thereby relating to the very nature of the entity, so that manipulation of the governance provisions could be a basis for jurisdiction. On the other hand, the LLC Act and the Delaware courts have emphasized that when dealing with LLC agreements, freedom of contract is paramount, which draws the conclusion that such agreements "also may contain provisions that do not implicate the fundamental attributes and workings of a Delaware entity." However, because the provision in the LLC Agreement on which this cause of action was based was a collateral provision that did not significantly affect plaintiff's operation under Delaware law, the court did not find it necessary to delve further into this issue.

p. *Fisk Ventures, LLC v. Segal*, C.A. No. 3017-CC (Del. Ch. May 7, 2008) and (Del. Ch. July 3, 2008)

Genitrix, LLC (the "Company") was formed to develop and market biomedical technology. The equity in the Company was divided into three classes, a Class A membership interest primarily owned by Dr. Andrew Segal ("Segal"), a Class B membership interest primarily owned by Dr. H. Fisk Johnson ("Johnson"), Fisk Ventures, LLC ("Fisk") and affiliates of Fisk and Class C membership interests owned by passive investors. The Company's LLC Agreement required the cooperation of the Class A and Class B members for the effective operation of the Company. However, the Class A and Class B members consistently disagreed on matters related to research and financing. The failure of the Class A and Class B members to agree left the Company virtually frozen and at the time of litigation the Company had only one employee, no office, no capital funds, no grant funds and it generated no revenue. The Class B members initiated a suit to dissolve the Company under Sections 18-801 and 18-802 of the LLC Act. In response, Segal counterclaimed against Fisk, Johnson and Stephen Rose and William Freund (who were representatives of Fisk on the board of representatives of the Company) alleging that the counterclaim/third party defendants breached the Company's LLC Agreement, breached the implied covenant of good faith and fair dealing implicit in the LLC Agreement, breached their fiduciary duties to the Company and tortiously interfered with Segal's employment agreement with the Company. Johnson moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction and the other counterclaim/third party defendants moved to dismiss the claims under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The court's opinion addressed the motions to dismiss made by the counterclaim/third party defendants.

The court first analyzed Johnson's motion for dismissal under Rule 12(b)(2) and his contention that the court did not have personal jurisdiction over him. The court agreed with Johnson that service of process was not appropriate under 10 *Del. C.* § 3104 and Section 18-109 of the LLC Act. Under Section 3104, Delaware's long arm statute, the court concluded that although Johnson did have limited contacts with Delaware, the claims asserted by Segal did not arise from and had no nexus with those limited contacts and therefore service of process under Section 3104 was improper.

Under Section 18-109 of the LLC Act, service of process is appropriate only as to named managers of an LLC or those who participate materially in the management of an LLC. The statute makes clear that the power to appoint a manager does not constitute participation in the management of the LLC. Segal argued that Johnson participated materially in the management of the Company because (i) he "controlled" the actions of the persons he appointed to the board and (ii) the LLC Agreement provided him with broad management rights. The court rejected the assertion that Johnson controlled his appointees as conclusory and held that the mere fact that Johnson had the right to affect the activities of the Company through his representative did not mean that he participated materially in the management of the Company. Thus, the court granted Johnson's motion to dismiss.

q. *Christ v. Cormick*, C.A. No. 06-275-GMS (D. Del. July 10, 2007)

Plaintiff brought suit in the District Court of Delaware against a Delaware limited liability company (the "Company"), its promoter and affiliates of the promoter alleging various causes of action arising from plaintiff's investment with the promoter in the Company and a South African corporation. All of the non-resident defendants sought to dismiss the suit under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. Only the jurisdictional issues with respect to the promoter raised issues under the LLC Act. As to the promoter, a citizen of Australia and a resident of the United Kingdom and the Republic of Zimbabwe, plaintiff alleged that he was subject to personal jurisdiction in Delaware pursuant to Section 18-109(a) of the LLC Act because he was a person who participated materially in the management of the Company. The court noted that under Section 18-109(a), a manager of a limited liability company may be served with process 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 . . . of a duty to the limited liability company." The court also noted that for purposes of Section 18-109(a), the term "manager" refers to any person who participates materially in the management of the limited liability company whether or not such person is a member of the limited liability company or officially designated as a manager of the limited liability company. The court found that under the facts alleged, the promoter met the definition of manager set forth in Section 18-109(a) and was therefore subject to personal jurisdiction under that statute because the requirement that the action or proceeding involve or relate to the business of the limited liability company was satisfied. The plaintiff also alleged that the promoter "purposefully availed [himself] of the privilege of conducting activities" within the State of Delaware and the court observed that under its precedent, "[a] single act of incorporation in Delaware will suffice to confer personal jurisdiction over a non-resident defendant if such purposeful activity in Delaware is an integral component of the total transaction to which plaintiff's cause of action relates." Here the court noted that the promoter's single contact with Delaware was directly related to the cause of action before the court because plaintiff had alleged that the formation of the Company was part of a scheme to defraud him, and the court found that one aspect of the case would "fall upon the rights, duties and obligations of [the promoter] as sole founder and manager" of the Company. Finally, the court recognized that the State of Delaware had a strong interest in providing a forum for the resolution of disputes relating to the use of the laws of formation of a limited liability company and that, because plaintiff's allegations related to the promoter's act of founding the LLC under the LLC Act, the maintenance of the suit would not offend traditional notions of fair play and substantial justice. Thus, the court denied the promoter's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.

r. *Shamrock Holdings of Cal., Inc. v. Arenson*, C.A. No. 04-1339-SLR (D. Del. Mar. 14, 2006)

The parties to this action were either members, investors or class representatives on the Supervisory Board of ALH Holdings, LLC ("ALH"), a Delaware limited liability company. Of the six named defendants, three were Delaware entities. In December 1998, members of ALH's Supervisory Board formed a Delaware corporate subsidiary, ALH II, Inc. ("ALH II") to serve as the parent company of all of ALH's operating subsidiaries. In 2004, plaintiffs filed a declaratory judgment action against defendants. Defendants sought to dismiss plaintiffs' declaratory judgment action asserting that the United States District Court for the District of Delaware lacked personal jurisdiction over defendants. Additionally, Abraham Arenson ("Arenson"), a class B representative on ALH's Supervisory Board, sought to dismiss plaintiffs' declaratory judgment against him for failing to allege "that a case or controversy of sufficient immediacy exist[ed] between Arenson and plaintiffs."

The court first addressed defendants' motion to dismiss for lack of personal jurisdiction. In such a motion, the court stated that "once a jurisdictional defense has been raised, the plaintiff bears the burden of establishing with reasonable particularity that sufficient minimum contacts have occurred between the defendant and the forum state to support jurisdiction." The plaintiff must allege facts to satisfy the forum state's long arm statute as well as the constitutional requirements for jurisdiction. Delaware's long-arm statute provides that a Delaware court may "exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent transacts any business or performs any character of work or services in the State [of Delaware]." Citing the Delaware Chancery Court in *Cairns v. Gelmon*, the court stated that "a single act of incorporation in Delaware will suffice to confer personal jurisdiction over a nonresident defendant if such purposeful activity in Delaware is an integral component of the total transaction to which plaintiff's cause of action relates."

The court found that the causes of action in the suit brought by plaintiffs related to the formation and incorporation of ALH and ALH II, respectively, and that the defendants' involvement in the formation and incorporation of these Delaware entities satisfied the requirements for jurisdiction under Delaware's long-arm statute. The court went on to state that defendants along with other ALH members created ALH II in order to obtain debt financing and hold stock in ALH's subsidiaries, thus "purposely avail[ing] themselves of the privilege of conducting activities in Delaware." Based on the foregoing reasons, the court denied defendants' motion to dismiss based on lack of personal jurisdiction.

The court next addressed Arenson's motion to dismiss. In a declaratory judgment action, "a plaintiff must demonstrate the existence of an actual controversy in which the parties have adverse legal interests, and which is of sufficient immediacy to warrant a declaration of rights." The court dismissed plaintiffs' arguments that Arenson might assert that he was "wrongfully deprived of a meaningful role in the ALH Supervisory Board's decision-making process" (finding that the class B members, not Arenson, would suffer a harm if Arenson could not participate in the ALH Supervisory Board) and that Arenson's interests were adverse to plaintiffs because he was an indirect holder of class B equity interests (holding that plaintiffs had no foundation for "the position that a financial interest in a company is enough to require a party to defend a declaratory judgment action")—but the court accepted plaintiffs' argument that Arenson had the authority as a class B representative on ALH's Supervisory Board to advance plaintiffs' legal fees and expenses and had tried to interfere with the indemnification and advancement rights of plaintiffs finding that there was a factual issue with regard to Arenson's "role in the Supervisory Board decision-making process" and thus denied Arenson's motion to dismiss.

s. *In re Silver Leaf, L.L.C.*, C.A. No. 20611 (Del. Ch. June 29, 2004)

This action arose out of a dispute among three members of a Delaware LLC formed for the purpose of acquiring a license to sell, market, sublease and distribute vending machines. Due to a dispute with the vending company, the license was never obtained, and two of the members and the manager of the LLC filed an action in New Jersey (the "New Jersey Action") against the third member (the "Corporate Member") and its sole shareholder (the "Sole Shareholder"), asserting claims for breach of contract, breach of fiduciary duty and tortuous interference. Subsequently, the Corporate Member filed a petition in the Court of Chancery for dissolution of the LLC, and the Corporate Member and Sole Shareholder moved to dismiss the New Jersey Action, arguing that the entire dispute could and should be heard in Delaware. The New Jersey court granted the motion to dismiss, and the plaintiffs in the New Jersey Action brought a counterclaim against the Corporate Member and the Sole Shareholder in the Court of Chancery.

In response, the Sole Shareholder filed a motion to dismiss for lack of personal jurisdiction. Although the court stated that it did not need to address the merits of the motion to dismiss and based its decision on the doctrine of judicial estoppel, the court noted that the exercise of personal jurisdiction over the Sole Shareholder was consistent with the due process requirements of fairness and justice in the circumstances presented, More specifically, the court noted that the Sole Shareholder undoubtedly authorized the filing of the petition in Delaware, and that therefore his own conduct made it necessary and appropriate to exercise jurisdiction over him in Delaware. The court further noted that since the counterclaims in Delaware focused on the Sole Shareholder's actions with respect to the LLC, and given Delaware's strong interest in resolving disputes regarding the internal affairs of Delaware LLCs, Delaware was the appropriate forum to resolve the counterclaims.

t. *Cornerstone Tech., LLC v. Conrad*, C.A. No. 19712-NC (Del. Ch. Mar. 31, 2003)

A dispute arose among the members of two Delaware LLCs, Cornerstone Technologies, LLC ("Cornerstone") and Arastra, LLC ("Arastra"). The plaintiffs, two members of the LLCs, brought suit (i) seeking a judicial declaration that Bruce Conrad, one of the founding members ("Conrad"), owned a 20% interest in each of the LLCs and that Thomas Unger ("Unger") had no ownership stake in either LLC (the "Ownership Claim"), (ii) claiming that Conrad violated a provision of the operating agreement of each LLC that required a member to first offer his interest in the LLC to the other members and if the members declined, to offer his interest to the LLC itself prior to offering to transfer such interest to any third person (the "Buy-Out Claim"), and (iii) seeking judicial confirmation of Conrad's removal as a manager and officer of each LLC (the "Removal Claim"). Conrad and Unger filed motions to dismiss the complaint for lack of personal jurisdiction. The court stated that in order to determine whether it may exercise personal jurisdiction over a nonresident defendant, the court must first determine whether a Delaware statute authorizes the exercise of personal jurisdiction and, if so, whether the exercise of personal jurisdiction pursuant to that statute would comply with the requirements of the to the United States Constitution that a nonresident defendant have certain "minimum contacts" with the forum jurisdiction "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

The plaintiffs claimed that the exercise of personal jurisdiction over Conrad was appropriate under Sections 18-110(a) and 18-109 of the LLC Act and under Delaware's long-arm statute (10 *Del. C.* § 3104(c)(1)). Section 18-109 of the LLC Act provides personal jurisdiction over a manager "in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of a limited liability company or a violation by the manager . . . of a duty to the limited liability company, or any member of the limited liability company." The court held that the Removal Claim, the Ownership Claim and the Buy-Out Claim related to the business of the LLCs and fell within the terms of Section 18-109. The court noted that its holding was consistent with the holding of the court in *Assist Stock Mgmt. L.L.C. v. Rosheim.* In *Assist*, the court concluded that Section 18-109 of the LLC Act was intended to have broad application and that protection against any unconstitutional application of Section 18-109 would be provided by the "minimum contacts" analysis. The court stated that the test for determining whether there are sufficient minimum contacts is: first, whether "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hauled into court there;" and second, once it has been determined that a defendant should reasonably anticipate being sued in the forum state, whether there are any issues concerning fairness and justice. In the instant case, the court noted that Conrad and the other members of the LLCs, although located in Pennsylvania, purposely chose to avail themselves of the benefits and protections of Delaware law by forming the LLCs in Delaware and that Conrad took on the position of manager, CEO and president of the Delaware LLCs knowing that as a manager he would be subject to jurisdiction in Delaware for disputes relating to the business of the LLCs. Based on these facts, the court concluded that Conrad should not be surprised to face a lawsuit in Delaware. Having determined that Conrad's conduct in connection with Delaware was such that he should reasonably anticipate being sued in Delaware, the court looked to issues of fairness and justice. Noting that Conrad was a resident of Pennsylvania, the court found that there was nothing unfair or unjust about exercising personal jurisdiction over Conrad as he would only face a slight inconvenience by being sued in Delaware.

The plaintiffs also argued there was personal jurisdiction over Conrad on the Removal Claim under Section 18-110 of the LLC Act. Section 18-110(a) allows the Delaware Court of Chancery upon the application of a member or manager of an LLC to "determine the validity of any admission, election, appointment, removal or resignation of a manager…and the right of any person to become or continue to be a manager . . . and, in case the right to serve as a manager is claimed by more than more one person, [to] determine the person or persons entitled to serve as managers." Based on the express language of Section 18-110 and the plaintiffs' ability to produce sufficient evidence to meet their prima facie burden to show that Conrad was a manager, the court concluded that Section 18-110 was sufficient to allow the plaintiffs to exercise personal jurisdiction over Conrad on the Removal Claim. The court further noted that Section 18-110(a) may cover the Buy-Out Claim and the Ownership Claim as Section 18-110(a) should be read "to sweep in sufficiently related claims against an LLC manager so long as their [*sic*]would be no constitutional offense." The court stated, however, that if there was any question with respect to whether Section 18-110 was a sufficient basis for the exercise of personal jurisdiction on the Buy-Out Claim and Ownership Claim, Section 18-109 clearly provided a basis for the court's exercise of personal jurisdiction over Conrad on all counts.

With respect to Unger's motion to dismiss for lack of personal jurisdiction, the court noted that Unger was not a founding member of either of the LLCs and was only alleged to have become a member after the formation of the LLCs. The plaintiffs argued that Delaware's long-arm statute provided the basis for personal jurisdiction over Unger. Delaware's long-arm statute provides personal jurisdiction over a person who "transacts any business or performs any character of work or service in the State." The court noted that the only potential transaction of business in Delaware had been the filing of the certificates of formation to form the LLCs. The plaintiffs argued that even though Unger allegedly became a member after the formation of the LLCs, he should be treated for jurisdictional purposes as if he had earlier authorized the acts involved in the formation of the LLCs. The court held that the plaintiffs had not met their burden under Delaware's long-arm statute to show that Unger transacted business in Delaware and granted Unger's motion to dismiss for lack of personal jurisdiction.

u. *Palmer v. Moffat*, C.A. No. 01C-03-114 (Del. Super. Ct. Oct. 10, 2001)

Plaintiff, a former member of a Delaware LLC, filed suit in Superior Court alleging that the managers and other members of the LLC conspired to defraud him of the value of his equity interest by failing to make mandatory capital contributions that resulted in the forced sale of the LLC following its default on certain financing obligations. This decision addresses the motion of four of the defendants to dismiss the suit against them for lack of personal jurisdiction. Three of the defendants (the "Spencer Defendants") argued that dismissal was appropriate as to them because Section 18-109 of the LLC Act, the implied consent statute for service of process in a Delaware LLC case, applies only to managers and they were not managers of the LLC for purposes of Section 18-109.

Section 18-109(a) of the LLC Act establishes jurisdiction over a manager of an LLC and provides that "the term 'manager' refers (i) to a person who is a manager as defined in § 18-101(10) of [the LLC Act] and (ii) to a person, whether or not a member of a limited liability company, who, although not a manager as defined in § 18-101(10) of [the LLC Act], participates materially in the management of the limited liability company . . . ." Plaintiff conceded that the Spencer Defendants did not participate materially in the management of the LLC but contended that the Spencer Defendants were managers under Section 18-101(10) of the LLC Act, which defines a manager as "a person who is named as a manager of a limited liability company in, or designated as a manager of a limited liability company pursuant to, a limited liability company agreement . . . ." The Operating Agreement of the LLC provided that "[t]he Members shall have full, exclusive and complete discretion, power and authority, subject in all cases to the provisions of this Agreement and the requirements of applicable law, to manage, control, administer and operate the business and affairs of the company for the purposes herein stated, to make all decisions affecting such business and affairs . . . ." However, in a subsequent section, the Operating Agreement provided that "[t]he operations of the Company shall be conducted by the Management Committee. Except as otherwise provided in this Agreement, all Company decisions shall require the affirmative vote of the majority of the members of the Management Committee." Specific duties of the Management Committee under the Operating Agreement included, among other things, borrowing money, pledging or encumbering assets, appointing officers, issuing new classes of units and approving capital items.

The court concluded that actual authority to manage the LLC was vested in the Management Committee rather than the members and held that because none of the Spencer Defendants ever served on the Management Committee and did not participate materially in the management of the LLC, they were not managers for purposes of Section 18-109 and therefore were not subject to service of process under Section 18-109.

The fourth defendant ("Kranjac") argued that he was not a manager at the time the complaint was filed and that he was therefore not subject to Section 18-109. Under Section 18-109(a), a manager may be served with process "whether or not the manager . . . is a manager . . . at the time the suit is commenced." Since Kranjac was a member of the Management Committee when many of the disputed events occurred, the court held Kranjac to be subject to service of process pursuant to Section 18-109. The court then examined whether the exercise of personal jurisdiction over Kranjac pursuant to Section 18-109 offended due process. The court found, based on Kranjac's participation on the Management Committee when many of the disputed events took place, that Kranjac could reasonably have anticipated being subject to personal jurisdiction in Delaware to answer for his actions as a manager and that the exercise of such jurisdiction did not offend traditional notions of fair play and substantial justice.

v. *Assist Stock Mgmt. L.L.C. v. Rosheim*, C.A. No. 17610 (Del. Ch. Feb. 3, 2000)

In a case of first impression, the Court of Chancery considered the constitutionality and scope of Delaware's implied consent statute for obtaining in personam jurisdiction over managers of Delaware LLCs (6 *Del. C.* § 18-109). The action at issue was for declaratory judgment relating to the ownership interest and management rights in two Delaware limited liability companies, one being a subsidiary of the other. Plaintiffs were the subsidiary LLC and a member of the parent LLC. Defendant was a member of the parent LLC and one of the two members of its board of managers. After defendant filed a motion to dismiss on the basis of, among other matters, lack of personal jurisdiction, the plaintiffs amended their complaint principally to add or better articulate breach of fiduciary duty claims. The court noted that in light of the dearth of cases construing Section 18-109, it would look to cases construing Section 3114 of the Delaware General Corporation Law which provides for implied consent to jurisdiction for directors of Delaware corporations, although the court recognized that the different choice of words in Section 18-109 could warrant a different analysis. Regarding the scope of Section 18-109, the court noted that by its terms that section subjected a manager to jurisdiction in Delaware 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 the limited liability company, or any member of the limited liability company." Given the breadth of that language, the court noted that it could be "susceptible to too broad an application." However, the court concluded that the protection against unconstitutional application of the statute could be provided on a case-by-case basis by applying the minimum-contacts analysis mandated by due process. In applying this analysis to Section 18-109, the court noted that if the complaint were to be read as validly alleging a breach of fiduciary duty against defendant in his capacity as a manager of the LLC, "there is little doubt that § 18-109 will subject him to the jurisdiction of this court for the purpose of litigating that claim." However, the court did not limit the scope of Section 18-109 solely to breach of fiduciary duty claims. Rather, the court held that it could properly exercise *in personam* jurisdiction over defendant because: "(1) the allegations against [defendant] focus essentially on his 'rights, duties and obligations' as a manager of a Delaware LLC; (2) the resolution of this matter is 'inextricably bound up in Delaware law;' and (3) Delaware has a strong interest in providing a forum for disputes relating to the ability of managers of an LLC formed under its law to properly discharge their respective managerial functions." (Citations omitted.) Defendant had also moved to dismiss the action on the basis of *forum non conveniens* grounds. After reviewing the factors in such an analysis, the court concluded that defendant had not carried his difficult burden of showing that dismissal on that basis was warranted. However, although the court found jurisdiction to exist, it also found a technical defect in the original service of process and therefore quashed the original service but instructed plaintiff to re-serve defendant in accordance with the requirements of Section 18-109(b).

4. Bangor Punta Doctrine Barring Claims

   a. *Midland Food Servs., LLC v. Castle Hill Holdings V, LLC*, C.A. No. 16779 (Del. Ch. July 16, 1999), *aff'd*, 782 A.2d 265 (Del. 2001)

This case involved an action by plaintiff limited liability companies to recover damages and obtain other relief from their prior owner-operator and certain affiliated entities. At the time of the actions complained of, defendant Ronald Saverin owned both the plaintiff limited liability companies and the defendant limited liability companies and structured various financial arrangements among these companies including leases pursuant to which the plaintiff companies were required to make payments to the defendant companies. After these arrangements were put into place by defendant Saverin, the plaintiff companies were unable to pay their debts and fell into default with their lenders and other parties. In the course of an ensuing workout, certain creditors of the plaintiff companies received all of defendant Saverin's equity interest in the plaintiff companies in connection with a general settlement of outstanding claims. Defendant Saverin retained his ownership and management positions with the defendant companies and many of the financial arrangements between the plaintiff companies and the defendant companies remained in place. The financial situation of the plaintiff companies did not, however, improve and sometime after the separation of the ownership of the plaintiff companies from the defendant companies, the plaintiff companies brought suit against defendant Saverin and the defendant companies alleging, in essence, that defendant Saverin had breached his fiduciary duties of care and loyalty by causing the plaintiff companies to enter into commercially unreasonable agreements with the defendant companies or otherwise wrongfully benefited himself and his family at the expense of the plaintiff companies thereby committing a breach of his legal obligations to the plaintiff companies during his tenure as their owner-operator. The court held that the timing of the alleged wrongs and the question of ownership of the plaintiff companies at the time of the alleged wrongs was the critical issue in the case and it concluded that because the current owner of the plaintiff companies had acquired its interest from corporations that acquired their interest in the companies directly from defendant Saverin after his alleged wrongdoing occurred, the plaintiff companies' claims were barred by the doctrine articulated by the United States Supreme Court in *Bangor Punta Operations, Inc. v. Bangor & Aroostok R.R. Co.*, 417 U.S. 703 (1974), which was adopted by the Court of Chancery in *Courtland Manor, Inc. v. Leeds*, 347 A.2d 144 (Del. Ch. 1975). The Court noted that the situation in the *Courtland Manor* case was very similar to that at issue and held that the policy underlying the application of the doctrine in *Courtland Manor* applied equally in the present case--namely, the presumption that the purchasers of the interest in the plaintiff limited liability companies were deemed to have purchased that interest at a fair price which reflected a reasonable discount for any prior wrongs and to allow them or their successors separately to make claims for those prior wrongs would constitute a windfall to which they had no just claim and would deprive the other party of its bargained for consideration. The court noted, however, that although the *Bangor Punta* doctrine prohibited attempts at re-trading commercial transactions through litigation, it did not prohibit purchasers from making claims if they believed that they or their predecessors had been misled or otherwise defrauded in an acquisition.

5. Service of Process

a. *Hovde Acquisition, LLC v. Thomas*, C.A. No. 19032 (Del. Ch. June 5, 2002)

Hovde Acquisition, LLC ("Hovde") acquired a membership interest in B&I Lending, LLC, a Delaware LLC ("B&I"), pursuant to a purchase agreement among Hovde, Mortgage Management, LP, the member of B&I selling its membership interest to Hovde, and The Bank Network, Inc. ("TBN"), the only other member of B&I. After a few years of disappointing performance by B&I, Hovde brought an action on its own behalf and on behalf of B&I against TBN and Michael R. Thomas ("Thomas"), a manager and the chairman, president and chief executive officer of B&I. The action alleged breach of the purchase agreement by TBN and breach of the purchase agreement and breach of fiduciary duty against Thomas. The court's opinion focused on procedural issues relating to service of process on TBN and Thomas. (Since the claims against TBN were based solely on breach of contract, they are not discussed in this summary.)

The purchase agreement included a consent to jurisdiction in Delaware but did not include a consent to service of process issued by Delaware courts and did not prescribe a mechanism for service of process. Plaintiffs initially served Thomas pursuant to Section 18-105 of the LLC Act, Delaware's service of process statute for domestic limited liability companies. After realizing their error, plaintiffs re-served Thomas pursuant to Section 18-109 of the LLC Act, Delaware's implied consent statute for service of process on managers of Delaware LLCs. However, the re-service on Thomas occurred nearly seven months after he was originally served, during which interval the statute of limitations had expired. Thomas moved to dismiss the action for, among other things, ineffective service of process and expiration of the statute of limitations.

With respect to Thomas' claim of ineffective service of process, the court held that service of process was properly effected on Thomas pursuant to Section 18-109 for the breach of fiduciary duty claims and, because the contractual claims arose out of the same nucleus of operative facts underlying the fiduciary duty claims against Thomas, that service of process under Section 18-109 was adequate to obtain personal jurisdiction over Thomas with respect to the breach of contract claims. With respect to Thomas' statute of limitations defense, the court held that service of process on Thomas related back in time to the time that the complaint was filed based on the court's finding that plaintiffs' dilatory conduct in serving process on Thomas was outweighed by the fact that Thomas had actual notice of the proceeding prior to being re-served and had not been prejudiced by the delayed service of process.

6. Failure to Join Necessary and Indispensable Parties

a. *NAMA Holdings, LLC v. Related World Market Ctr., LLC,* C.A. No. 2755-VCL (Del. Ch. Apr. 27, 2007) and *NAMA Holdings, LLC v. World Market Ctr. Venture, LLC,* C.A. No. 2756-VCL (Del. Ch. Apr. 27, 2007)

In two related cases, plaintiff, a Nevada limited liability company and indirect owner of one of the defendant Delaware limited liability companies, sought to enforce certain provisions in the operating agreement of that LLC with respect to which plaintiff was an intended third party beneficiary. Plaintiff's claims involved a demand for books and records and an action for specific performance limiting distributions and segregating the disputed funds. Defendants asserted that all of plaintiff's claims were subject to mandatory arbitration, that the inspection claim was moot because defendants had already voluntarily provided access to the requested documents and that plaintiff's claim for a specific performance should be dismissed because of failure to join indispensable parties and because plaintiff had an adequate remedy at law. The court rejected defendants' arguments on all grounds. First, it found that the disputes at issue did not come within the ambit of the arbitration language inasmuch as under the arbitration clause neither of the parties to that contract could compel arbitration and, therefore, it would be inequitable to allow them to compel arbitration with a third party beneficiary. The court also ruled that plaintiff had not been provided the requested information and with respect to the claim of indispensable parties held that "merely because a non-joined party may have a claim to a disputed amount does not inevitably deprive a court of the ability to render complete relief to the parties before it." Finally, with regard to defendant's claim that plaintiff could be adequately compensated with money damages and therefore had no right to specific performance, the court held "a remedy at law, i.e. money damages, will foreclose the equitable remedy of specific performance when that remedy is 'complete, practical and as efficient to the end of justice as the remedy in equity, and is obtainable as [a matter] of right.'" Under this standard, the court rejected defendants' argument. Under the LLC agreement, the duties of one of the defendants were stated to be purely ministerial in nature and that such defendant would incur no liability for any action taken or omitted under the relevant section except for willful misconduct, gross negligence or bad faith so long as such defendant acted in good faith. Under the standard, the court found that even if plaintiff proved noncompliance by such defendant with the relevant section, such defendant would have no liability if its noncompliance occurred only negligently and in good faith, therefore, plaintiff would be left without a legal remedy against such defendant. Moreover, the court also found that money damages, even if not barred by that section, would fail to provide a complete and efficient remedy to plaintiff. It held that a contractual covenant allowing a party to restrict distributions to others necessarily involved a bargained-for-benefit that money could not adequately compensate. The court held that the "leverage that type of covenant creates provides a 'material commercial advantage' to the party that can invoke it, and for a court to hold that money damages are an appropriate substitute for specific performance in a dispute like this one 'would essentially involve the judicial nullification of the leverage-conferring aspects of such a provision.'"

b. *Kennett v. The Carlyle Johnson Mach. Co.*, C.A. No. 18690-NC (Del. Ch. June 17, 2002)

Plaintiff, a founder and manager and the vice president of a Delaware LLC, brought suit in the Delaware Court of Chancery challenging certain actions of Michael Gamache ("Gamache"), who was the president and the other founder and manager of the LLC. Prior to the challenged actions, plaintiff and Gamache each held 50% of the Class A voting interests in the LLC.

Plaintiff asserted that Gamache unilaterally transferred 15% of the voting interests of the LLC to his brother and another person without the necessary approval under the LLC's operating agreement; that Gamache's reallocation of certain of plaintiff's job responsibilities to another employee and Gamache's decision to terminate plaintiff's employment with the LLC violated the employment agreement between plaintiff and the LLC; and that a capital call by Gamache lacked the necessary approval of a majority interest of the members of the LLC. Plaintiff also sought injunctive relief against any effort to remove him as a member or manager of the LLC which plaintiff speculated was the ultimate purpose of Gamache and his allies.

Defendants moved to dismiss for plaintiff's failure to join the purported transferees as necessary and indispensable parties; for lack of subject matter jurisdiction over the claim that the modification and termination of the employment agreement constituted violations of the employment agreement; for failure to state a claim upon which relief could be granted as to the claim that the modification and termination of the employment agreement constituted violations of the operating agreement; and for failure of plaintiff's claim regarding defendants' alleged effort to remove him as a member or manager of the LLC to set forth a claim ripe for judicial review.

The court first held that the purported transferees were not subject to the personal jurisdiction of the court but found that they were necessary and indispensable parties with respect to the claims relating to the validity of the transfer of the membership interests and plaintiff's other claims that turned on whether the approval of a majority interest of the members had been obtained and thus dismissed those claims. As to the claim regarding the termination of the employment agreement, the court found that plaintiff had an adequate remedy at law and no equitable remedy and, therefore, held that the court lacked subject matter jurisdiction over any claims based on the allegedly improper termination of the employment agreement. Finally, the court found that plaintiff's allegations regarding a general scheme to remove plaintiff from the LLC were largely speculative and thus held that claim was not yet ripe for judicial review.

7. Damages

a. *Palmer v. Moffat,* C.A. No. 01C-03-114 (Del. Super. Ct. Feb. 27, 2004)

Plaintiff, a former member of a Delaware LLC, filed suit in Delaware Superior Court alleging that the managers and other members of the LLC conspired to defraud him of the value of his equity interest by failing to distribute to him a portion of the proceeds from the sale of a major subsidiary of the LLC. The LLC ultimately declared bankruptcy. In an earlier decision in this case, the Court of Chancery granted a motion to dismiss filed by three of the defendants who were members but not managers. Here, three other defendants moved for summary judgment based on the assertion that plaintiff suffered no damages. The court found that, because the LLC had declared bankruptcy, no one but the creditors of the LLC could have received the proceeds of the sale of the subsidiary. Accordingly, plaintiff could not prove damages, and the court granted defendants' motion for summary judgment.

8. Judicial Estoppel

a. *In re Silver Leaf, L.L.C.*, C.A. No. 20611 (Del. Ch. June 29, 2004)

This action arose out of a dispute among three members of a Delaware LLC formed for the purpose of acquiring a license to sell, market, sublease and distribute vending machines. Due to a dispute with the vending company, the license was never obtained, and two of the members and the manager of the LLC filed an action in New Jersey (the "New Jersey Action") against the third member (the "Corporate Member") and its sole shareholder (the "Sole Shareholder"), asserting claims for breach of contract, breach of fiduciary duty and tortuous interference. Subsequently, the Corporate Member filed a petition in the Court of Chancery for dissolution of the LLC, and the Corporate Member and Sole Shareholder moved to dismiss the New Jersey Action, arguing that the entire dispute could and should be heard in Delaware. The New Jersey court granted the motion to dismiss, and the plaintiffs in the New Jersey Action brought a counterclaim against the Corporate Member and the Sole Shareholder in the Court of Chancery.

In response, the Sole Shareholder filed a motion to dismiss for lack of personal jurisdiction. The court, noting that it did not need to address the merits of the motion to dismiss, stated that, as a threshold matter, the Sole Shareholder was barred by the doctrine of judicial estoppel from asserting that the court lacked personal jurisdiction. Judicial estoppel prevents a litigant from advancing an argument that contradicts a position previously taken by that litigant where a court accepted the particular argument and such argument formed the basis of the court's ruling. Here, having persuaded the New Jersey court that the entire dispute could and should be heard in Delaware, the Sole Shareholder was judicially estopped from arguing before the Court of Chancery that it lacked personal jurisdiction, and therefore could not hear the dispute.

9. Intervention

a. *The Follieri Grp., LLC v. Follieri/Yucaipa Invs., LLC*, No. Civ. A. 3015-VCL (Aug. 23, 2007)

A member of a Delaware limited liability company (the "Company") sought judicial dissolution of the Company under Section 18-802 of the LLC Act. A putative creditor of the Company sought to intervene under either Court of Chancery Rule 24(a) (intervention of right) or Court of Chancery Rule 24(b) (permissive intervention). The creditor argued that the litigation seeking dissolution of the Company, if allowed to proceed without the creditor intervening, would adversely affect its ability to collect its debt from the Company. The court denied the creditor's motion. With respect to Rule 24(a), the court found that the creditor failed to meet the requirements of that Rule because there was "no statute that conferred on it an unconditional right to intervene" and it had "no interest in 'the property or transaction that [was] the subject of [the] action'" which centered on whether it was reasonably practicable to carry on the business of the Company in conformity with its LLC agreement. The court noted that even if the Company were dissolved, under Sections 18-803 and 18-804 of the LLC Act governing winding up and distribution of assets, respectively, the interests of creditors are fully protected. With respect to Rule 24(b), the court found that there was no statute that conferred even a conditional right to intervene and that the creditor failed to satisfy the only additional basis of this Rule which was "that its 'claim or defense' (i.e. its claim for payment) and the dissolution action 'have a question of law or fact in common.'" Finally, the court found that the cases cited by the creditor relating to motions by judgment creditors to intervene in foreclosure actions or sheriff's sales provided no support for the proposition that a putative creditor should be permitted to intervene in a statutory dissolution action.

10. Improper Venue

a. *VTB Bank v. Navitron Projects Corp.*, C.A. No. 8514-VCN (Del. Ch. Apr. 28, 2014)

Plaintiff, VTB Bank, a Ukrainian company, provided loans in 2008 to two Ukrainian entities that were part of a corporate family (the "AIS Group") owned and controlled by defendants, Development Max, LLC, a Delaware limited liability company ("Development Max"), and its managing member, Navitron Projects Corp., a Panamanian corporation ("Navitron"). The AIS Group's principal business was selling cars in Ukraine and under the loan terms it pledged to plaintiff real and personal property held in Ukraine. Plaintiff alleged that the AIS Group fraudulently transferred cars it purchased with proceeds of the loans to shell companies with the sale proceeds going to defendants. The AIS Group eventually defaulted on the loans and plaintiff initiated litigation in Ukraine to foreclose on the loan collateral. The litigation in Ukraine was purportedly delayed by the AIS Group, during which time defendants allegedly facilitated the fraudulent transfer of the collateral to defendants. In its complaint, plaintiff made claims of fraudulent transfer and unjust enrichment and sought the remedy of constructive trust and equitable appointment of a receiver.

Navitron moved to dismiss plaintiff's claims for lack of personal jurisdiction. Plaintiff asserted that the court had personal jurisdiction over Navitron by virtue of the Delaware Long-Arm Statute, 10 Del. C. § 3104, and Section 18-109 of the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq. (the "LLC Act"). The court deemed plaintiff to have waived the Long-Arm Statute argument for failing to brief or argue it to the court. The court then decided whether Section 18-109 LLC Act provided it with personal jurisdiction over Navitron.

Section 18-109 authorizes service of process on managers of Delaware limited liability companies in actions "involving or relating to the business of the limited liability company or a violation of the manager . . . of a duty to the limited liability company or any member of the limited liability company." The court read this implied consent provision in a manner consistent with constitutional due process and Delaware precedent, stating, "[the] implied consent provision does not establish a statutory basis for personal jurisdiction over a manager where claims do not relate to the 'rights, duties and responsibilities' that the manager owes to the company or to the manager's involvement in the company's 'internal business affairs' or 'day-to-day operations.'"

Plaintiff argued that the court may exercise personal jurisdiction over Navitron because a party subjects itself to the court's jurisdiction generally when it becomes the managing member of a Delaware limited liability company. The court disagreed and granted the motion to dismiss because plaintiff's complaint asserted that plaintiff was harmed by defendants' conduct independent of their corporate structure, and therefore the claim was not related to Navitron's rights, duties, or responsibilities as a managing member of Development Max.

Development Max moved to dismiss the complaint on forum non conveniens grounds, asserting it would face an overwhelming hardship in defending itself in Delaware. The court applied the forum non conveniens analysis wherein the court must weigh the *Cryo-Maid* factors in order to determine whether an overwhelming hardship would result. Although the court found (i) that most of the evidence and witnesses were based in Ukraine, (ii) the matter involved Ukrainian law, (iii) the parties had pending litigation on this matter in Ukraine, and (iv) there were significant practical difficulties in maintaining this litigation in Delaware, the court denied the motion to dismiss. In so holding, the court emphasized that the primary remedy sought by plaintiff—equitable appointment of a receiver—implicated the court's fundamental and immutable responsibility to supervise Delaware entities and, in light of the allegation of systemic and systematic fraudulent conduct, the court concluded this responsibility outweighed any hardship on the defendant in litigating in Delaware.

b. *RWI Acquisition LLC v. Ronny Dee Todd*, Civil Action No. 6902-VCP (Del. Ch. May 30, 2012)

In this case, the court considered claims related to (1) a repurchase option under the limited liability company agreement of plaintiff, a Delaware limited liability company (the "Company Agreement"), for defendant's subscription units, and (2) a call right under defendant's employment agreement that provided that defendant's restricted units would be forfeited and transferred back to the plaintiff upon defendant's termination for cause under the employment agreement. The employment agreement contained a choice of law and forum selection provision selecting the laws and courts of New Mexico, and, therefore, the court was an improper forum to determine plaintiff's claim under the employment agreement. With respect to the claim under the Company Agreement, the court declined to bifurcate the case and stayed the action in favor of the related litigation pending in New Mexico even though the claim arguably involved issues concerning the internal affairs of a Delaware business entity. The dispute was essentially over the alleged exercise of an equity option, which, although important to the capital structure and control of closely-held Delaware limited liability companies, "does not automatically preclude [the court] from considering obvious inefficiencies and common sense reasons" for permitting another competent court to hear the claim.

11. Appraisal

a. *Smashburger Master LLC v. Prokupek*, C.A. No. 9898-VCN (Del. Ch. March 27, 2015)

Defendant, former Chairman and CEO of plaintiff Smashburger Master LLC ("Smashburger"), was granted restricted equity of Smashburger as a term of employment, most of which would not vest unless Smashburger met certain "performance hurdles." Plaintiff terminated him and redeemed his vested units pursuant to its LLC Agreement (the "Agreement"). The parties disagreed about plaintiff's valuation of defendant's units, disputing whether Smashburger achieved the performance hurdles and whether defendant's units were subject to a minority discount. They agreed that an independent firm would value the units and selected a Special Master to assist with the valuation. Plaintiff then moved to stay discovery and moved to dismiss defendant's counterclaims or, alternatively, to stay or bifurcate the counterclaims. In essence, plaintiff's motions sought a determination of the procedures to be employed to decide the parties' disputes relating to the valuation.

The court stayed its consideration of defendant's counterclaims, and thus its motion to dismiss, deferring to the independent firm to resolve in the first instance issues connected with the valuation. The court also stayed consideration of the motion to stay discovery, finding that the independent firm should first determine what information was necessary or helpful for its valuation work. Although the court acknowledged the potential inefficiency of having the independent firm make detailed findings regarding valuation, only to have those findings modified or overturned by judicial review, it emphasized the importance of not interfering with the valuation process chosen by the parties in the Agreement. It also found that the independent firm should consult the Special Master first, rather than the court, if it had difficulty resolving any of the legal or accounting issues related to the valuation.

L. General Construction and Application of Limited Liability Company Agreements

1. *PECO Logistics, LLC v. Walnut Inv. Partners, L.P.*, C.A. No. 9978-CB (Del. Ch. Dec. 30, 2015)

Plaintiff, PECO Logistics, LLC, a Delaware limited liability company, had an LLC agreement that afforded its preferred unitholders, including the defendants in this case, the right to require plaintiff to purchase all of their preferred units during a specified time period. If the put right was exercised, the LLC agreement required plaintiff to engage at its cost a nationally recognized valuation firm to determine the fair market value of the preferred units and to then purchase those preferred units at the price set by the valuation firm. Prior to exercising their put right, defendants had expressed disagreement with plaintiff regarding plaintiff's internal valuation of the preferred units. Despite this disagreement, defendants exercised the put right in a letter which provided that defendants reserved all rights with respect to the determination of the fair market value of their preferred units, including the right to participate in and object to the valuation determination.

In accordance with its LLC agreement, plaintiff's board of managers met to discuss the put and potential valuation firms. The board of managers unanimously agreed to retain Duff & Phelps after eliminating two other potential firms based on conflicts, timing and economics of each firm's proposal. Notably, defendants' representative on the board of managers participated in the selection process, but he abstained from the final selection vote. After Duff & Phelps presented their valuation report, defendants refused to tender their preferred units.

Plaintiff filed suit against defendants seeking a declaratory judgment that plaintiff complied with its LLC agreement in valuing defendants' preferred units and that defendants were bound by the agreement to tender those units at that price. Defendants counterclaimed that (i) plaintiff's pleadings raised material issues of fact because (A) the parties agreed, by virtue of defendants' reservation of rights in their put notice, to modify the LLC agreement to afford defendants the right to participate in the valuation process and object thereto and (B) the terms of the LLC agreement regarding valuation methodology were ambiguous; and (ii) that plaintiff breached the implied contractual covenant of good faith and fair dealing because (A) Duff & Phelps valued defendants' units as of a month after the put was exercised and (B) plaintiff incurred debt prior to the exercise of defendants' put right.

The court ruled against defendants on each of their counterclaims. First, the LLC agreement could only be modified with written consent of the board of managers, which consent was never given. Also, defendants' assertion that the reservation of rights contained in their put notice acted as a modification by course of conduct failed because there was no consideration for the asserted modification. Plaintiff was already obligated to engage a valuation firm to effectuate the purchase of defendants' preferred units and defendants gave nothing to plaintiff in return for the additional rights they claimed were contained in the put notice. Second, the alleged ambiguities in the valuation provisions of the LLC agreement lacked specificity, but were not ambiguous, and such provisions unambiguously vested the valuation firm with the discretion to use its judgment in setting the unit value, which was exercised reasonably. The court noted that the LLC agreement provided that the parties were bound by the decisions of the valuation firm and therefore agreed to forego any form of judicial review of that determination, which the court would respect unless bad faith was shown. Third, the valuation firm's decision to value defendants' preferred units as of a month after the put was exercised instead of another date was not precluded by the LLC agreement, nor was it an arbitrary or unreasonable decision rising to a breach of the implied contractual covenant of good faith and fair dealing. Finally, defendants failed to plead any facts that would support the inference that the debt incurred by plaintiff prior to the exercise of the put right was done in bad faith or was anything but debt incurred in the ordinary course of business. Based on the foregoing, the court dismissed defendants' counterclaims and granted plaintiff's motion for judgment on the pleadings.

2. *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, C.A. No. 9742-VCL (Del. Ch. Oct. 26, 2015)

This case involved whether a special purpose entity's operating agreement superseded prior agreements between the parties. Zubin Mehta ("Mehta") and Gregory Shalov ("Shalov") created an asset management firm in 2003 called Finger Lakes Capital Partners, LLC ("Finger Lakes"). Finger Lakes' main capital provider was Lyrical Partners, L.P. ("Lyrical") through defendant Lyrical Opportunity Partners, L.P. After Finger Lake's portfolio companies performed poorly, Lyrical exercised its contractual rights to take control of the portfolio companies. Subsequently, one of the portfolio companies, Revolabs, Inc. ("Revolabs"), was successfully sold. Finger Lakes and Lyrical bickered over how to distribute the proceeds. As a result of this dispute, Finger Lakes filed this action to compel Lyrical to distribute the Revolabs sale proceeds in accordance with Revolabs' Operating Agreement (the "Operating Agreement").

In addition to the Operating Agreement, Finger Lakes' and Lyrical's relationship was also governed by a term sheet between the principal of Lyrical, Jeffrey Keswin, Mehta and Shalov (the "Term Sheet") and a clawback agreement between Lyrical and Finger Lakes (the "Clawback Agreement"). The Term Sheet provided that Lyrical had a 25% interest in Finger Lakes and a right to a portion of the management fees earned by Finger Lakes. The Clawback Agreement provided that Lyrical would recoup any losses from its investments in Finger Lakes' portfolio companies before Mehta and Shalov received their appropriate distribution. The main issue in this case was whether the Operating Agreement superseded the Term Sheet and the Clawback Agreement. Finger Lakes argued that as a result of the Operating Agreement's integration clause, the Operating Agreement superseded the Term Sheet and the Clawback Agreement—thus Finger Lakes was not bound by the Term Sheet and the Clawback Agreement. The integration clause stated that the agreement superseded all prior agreements "with respect to the subject matter hereof." The court held that the "subject matter hereof" was the investment in Revolabs and that "[a]s with all of the special purpose vehicles, the scope of the governing agreement did not extend to the ongoing business relationship between Finger Lakes and Lyrical." With respect to the Term Sheet, the court noted that Mehta and Shalov abided by the Term Sheet in their interactions with Lyrical. In addition, the court stated that it was never the intent of Mehta and Shalov to supersede the Term Sheet because Finger Lakes obtained its capital from Lyrical through the Term Sheet and superseding the Term Sheet would have gone against their own interest. In regard to the Clawback Agreement, the court noted that the Operating Agreement only discussed how to distribute proceeds to the members of Revolabs. Therefore, the court held that the Operating Agreement did not supersede the Term Sheet and the Clawback Agreement.

As a secondary issue, Finger Lakes attempted to recover all fees and expenses incurred in litigating this matter before the proceeds of the sale were distributed. Pursuant to the Operating Agreement, Revolabs would indemnify Finger Lakes for all fees and expenses incurred in matters it became involved in because it was a member of Revolabs. First, the court noted that Finger Lakes was entitled to indemnification even though it is a plaintiff because there was no restriction in the Operating Agreement limiting indemnification to defendants. However, the court restricted the amount that Finger Lakes received to the legal fees and expenses incurred for the "portion of the action [that] involved Finger Lakes' status as a member and its efforts to compel a distribution in that capacity." For the part of the case that pertained to the "implications of the Term Sheet and the Clawback Agreement," the court denied Finger Lakes request for indemnification because "[t]hose agreements did not govern Finger Lakes' rights as a member of Revolabs."

3. *Intrepid Invs., LLC v. Selling Source, LLC*, C.A. No. 8261-VCN (Del. Ch. Oct. 20, 2015)

In this case, the court resolved defendant's motion for summary judgment on plaintiff's complaint. Plaintiff was a Delaware limited liability company that sold some of its business assets pursuant to a Transaction and Purchase Agreement (the "Purchase Agreement") to defendant, also a Delaware limited liability company. In exchange for the business assets, defendant issued Class B units to plaintiff, which became the sole holder thereof. The Class B units initially represented a 15% equity interest in defendant, which was contingent upon an earn-out consideration. Upon the completion of the earn-out period, an "Earn-out Adjustment" would cause defendant to allocate its Class A and Class B units based on a ratio, which was determined by the relative earnings of the business assets as compared to those of defendant's pre-sale assets during the earn-out period. Although plaintiff was generally treated as though it held a 15% equity interest, defendant allocated 30% of its tax liability distributions to plaintiff for some portion of the earn-out period. Upon receiving unfavorable calculations and related financial information regarding the Earn-out Adjustment from defendant, plaintiff initiated arbitration in New York. The initial arbitration resulted in a ruling that plaintiff owned a 1.6% interest in defendant, which was judicially confirmed in New York.

Plaintiff then filed suit in Delaware, alleging in its complaint that defendant had breached its LLC Agreement by failing to make various tax liability distributions and cash distributions to plaintiff during the earn-out period. Defendant moved for summary judgment on plaintiff's complaint. The Court of Chancery granted summary judgment in favor of defendant, with one limited exception.

In addressing plaintiff's claim for entitlement to certain tax liability distributions from defendant, the court found that plaintiff's complaint did not seek to show that defendant improperly calculated plaintiff's tax liability. As such, the court reasoned that it merely needed to determine whether the LLC Agreement entitled plaintiff to 30% of defendant's tax liability distributions made before the Earn-out Adjustment. Finding that plaintiff failed to show how the 30% figure relating to the tax liability distributions was obtained, and that the LLC Agreement tended to support the conclusion that the parties did not intend a 30% figure based on the complexity of the provisions cited by plaintiff, the court ruled in favor of defendant's motion for summary judgment as to that aspect of plaintiff's complaint.

However, in addressing plaintiff's claim for entitlement to certain cash distributions from defendant, the court found that plaintiff's complaint might be fairly read to create a disputed fact as to whether cash distributions were ever made. The court also found that the LLC Agreement expressly entitled plaintiff to 30% of such distributions. Thus, the court denied defendant's motion for summary judgment as to the cash distribution issue, and permitted discovery to go forward on the question of whether cash distributions were made during the earn-out period.

4. *2009 Caiola Family Trust v. PWA, LLC*, C.A. No. 8028-VCP (Del. Ch. Oct. 14, 2015)

Plaintiff, 2009 Caiola Family Trust, a Florida trust ("CFT"), owned 90% of the membership interests of Dunes Point West Associates, LLC, a Delaware limited liability company and the owner of an apartment complex in Kansas (the "Company"). Defendant, PWA, LLC, a Kansas limited liability company ("PWA"), owned 10% of the membership interests of the Company and was its managing member. PWA itself was managed by additional defendant Ward Katz ("Katz"), who owned 10% of the membership interests of PWA and was the CEO of the Company's property manager, Dunes Residential Services, Inc. ("DRS").

Plaintiffs, CFT and its trustee, suspected PWA had caused the Company to make distributions to members that were returns of member capital rather than returns on investment, misstated the Company's finances, paid asset management fees in violation of the limited liability company agreement of the Company and caused the Company to incur unreasonable expenses. Plaintiffs contended that in addition to the foregoing, defendants failed to participate in capital calls and committed other acts which, under the limited liability company agreement, permitted the removal of PWA as managing member and the recovery of damages. Defendants disputed these allegations and claimed that plaintiffs' claims were barred by laches. Based on these claims, plaintiffs asked the court to rule on the following: (1) whether plaintiffs could remove PWA as the managing member under the limited liability company agreement; (2) whether the alleged breaches of the limited liability company agreement by PWA established a basis to award money damages to the Company; (3) whether those same facts showed a breach of Katz's fiduciary duties owed to the Company; and (4) whether either party was entitled to attorney's fees from the other party. After trial, the court made the following ruling.

First, the court agreed that PWA could be removed as managing member because Katz ceased to be actively involved with the property manager's business when the Company replaced DRS with a new property manager, which was a violation of a provision in the limited liability company agreement of the Company that required Katz to remain actively involved with the property management and granted the removal of PWA as managing member.

Second, with respect to PWA's alleged breaches of the limited liability company agreement of the Company, the court held that plaintiffs proved that PWA materially breached the provisions that only permitted payment of asset management fees when the Company had sufficient net cash flow.

The other claims either were not material or were barred by laches because the financial statements provided to plaintiffs put them on inquiry notice that the Company may not have had sufficient net cash flow to warrant payment of asset management fees at the time they were made.

Third, the court held that plaintiffs failed to meet their burden to prove that Katz breached his fiduciary duty to the Company or plaintiffs as a result of the asset management fees paid by the Company to the asset manager. The court concluded that under the *In re USACafes, L.P.* line of cases, Katz, as the managing member of PWA, would owe a duty of loyalty to the Company; however, plaintiffs' allegation that Katz caused the Company to pay the asset management fees in order to benefit his relationship with the asset manager was not supported by the facts. Plaintiffs failed to prove Katz's relationship to the asset manager was material to Katz and the asset management fees would have accrued regardless of whether they were paid out at the time they were.

Finally, the court decided to award plaintiffs only 50% of their attorneys' fees because they prevailed on their principal issue, removing the managing member, but only recovered a fraction of the money damages they sought due to laches.

5. *Utilisave, LLC v. Miele,* C.A. No. 10729-VCP (Del. Ch. Sept. 17, 2015)

Plaintiff Utilisave, LLC ("Utilisave") was a Delaware limited liability company that audited utility bills to help customers find savings. Defendant Donna Miele was a former employee and member of Utilisave. Her membership in Utilisave terminated in July 2012 by court order and she executed an Assignment and Termination of Membership Interest (the "Assignment Agreement"), but she continued as a Utilisave employee until she resigned in October 2014. After her resignation, Miele allegedly began to compete with Utilisave, and Utilisave filed suit against her for breach of a confidentiality provision in Utilisave's operating agreement (the "LLC Agreement"). Before the court was defendant's motion to dismiss plaintiff's claim for specific enforcement of the confidentiality provision and its motion to dismiss plaintiff's claim for monetary damages. The court denied the former motion and granted the latter.

The confidentiality provision in the LLC Agreement provided that, for as long as Utilisave was engaged in the "Utilisave Business" (as defined in the LLC Agreement), a member would not disclose any confidential information, subject to certain qualifications. The provision was to survive the termination of Utilisave and continue to be binding on a member following the termination of the member's interest in Utilisave. Utilisave alleged Miele breached this provision by contacting one of Utilisave's longstanding clients shortly after her resignation. Miele moved to dismiss this claim, arguing that the confidentiality provision was unenforceable because the assignment of her membership interest under the Assignment Agreement terminated the confidentiality provision or, alternatively, that if the confidentiality provision survived the assignment, it was unenforceable because it was overbroad and unreasonable.

In response to Miele's motion to dismiss, Utilisave contended that the confidentiality provisions explicitly states that it will "survive the termination of [Utilisave] and…continue to be binding on a Member following the termination of [her] interest in [Utilisave]." In addition, Utilisave denied Miele's assertion that the confidentiality provision is a de facto non-compete or non-solicitation covenant, and that in any event such a fact-intensive issue could not be resolved on a motion to dismiss.

The court first addressed Miele's contention that the Assignment Agreement terminated the confidentiality provision. It found that Miele's argument was reasonable, since the Assignment Agreement provided that upon the assignment, her membership interest would automatically terminate and Utilisave's records should be updated to reflect her membership interest as having been liquidated, terminated, and retired for all purposes. Additionally, the Assignment Agreement did not preserve or carve out the confidentiality provision in any fashion. Miele's argument was further supported by the fact that the Assignment Agreement defined her membership interest to include all obligations under the Assignment Agreement, including the confidentiality provision. However, the court also found Utilisave's interpretation that the confidentiality provision survived termination to be reasonable based on a plain language reading of the confidentiality provision. The confidentiality provision stated that it survived termination and the Assignment Agreement stated that it terminated the LLC Agreement without clarifying whether that included the confidentiality provision. As movant, Miele had the burden of showing that her interpretation of the Assignment

Agreement was the only reasonable one, and since she failed to meet this burden, the court rejected this prong of her motion to dismiss.

The court then considered Miele's argument that the confidentiality provision was overbroad and unreasonable. Because the provision contained terms that appeared to be aimed at preserving Miele's ability to compete reasonably, the alleged breach occurred relatively soon after the termination of her membership interest, and Utilisave could reasonably show that enforcing the confidentiality provision would protect its legitimate economic interests and did not unduly burden Miele, the court found that the confidentiality provision was not overbroad or unreasonable with respect to Miele's alleged breach through the use of Utilisave's confidential client contact information. The court also rejected Miele's argument that the provision was unenforceable as a matter of law because the nature of some of Utilisave's confidential information was such that Miele could not compete with Utilisave without breaching the provision.

The court then determined that it was reasonable to infer from the complaint that Miele used Utilisave's confidential information for her own account, and therefore found that Utilisave pled sufficient facts to support its claim for specific performance. Since plaintiff pled the existence of an agreement – the LLC Agreement – that provided that breach of the confidentiality provision would cause irreparable injury justifying specific performance, the court found it reasonably conceivable that Utilisave would prove its entitlement to this remedy, and thus dismissed defendant's motion to dismiss on this issue. However, because Utilisave failed to plead facts supporting a reasonable inference that Miele's breached caused it economic harm, the court dismissed Utilisave's claim for damages.

6. *NewYork.com Internet Holdings, Inc. v. Entm't Benefits Grp., LLC*, C.A. No. 10206-VCP (Del. Ch. July 8, 2015)

NewYork.com Entertainment Group, LLC (the "Company") was formed by its members to hold all rights and title to the internet domain name NewYork.com. The members of the Company, NewYork.com Internet Holdings, Inc. ("NYIH") and Entertainment Benefits Group, LLC ("EBG"), each owned fifty percent of the membership interests in the Company and each appointed a representative to the two-member board of directors—NYIH's board member was Tom Stafford ("Stafford") and EBG's board member was Brett Reizen ("Reizen"). Under the limited liability company agreement of the Company (the "LLC Agreement"), EBG was granted exclusive authority to manage the day-to-day operations of the Company. The LLC Agreement also provided for certain events that would cause NYIH to offer its fifty-percent membership interest to EBG at a specified price (the "Triggering Events"). The relevant Triggering Events were (i) if NYIH engaged in any conduct which in EBG's reasonable opinion reflected unfavorably on the good name, goodwill or reputation of the Company or EBG, or their respective affiliates and (ii) if NYIH beached any of its obligations under the LLC Agreement.

In this case, the court addressed whether EBG's claims that Triggering Events occurred could survive a motion to dismiss. First, EBG averred that NYIH and Stafford acted in a manner that reflected negatively on the good name, goodwill and reputation of the Company and EBG because (i) Stafford acted abusively to the Company's information technology provider, (ii) Stafford acted abusively toward Reizen at a board meeting, (iii) Stafford disclosed the dispute between NYIH and EBG to a former Company employee and (iv) NYIH attempted to obtain Company books and records though an individual unaffiliated with NYIH. Second, EBG alleged that NYIH breached the LLC Agreement by failing to recognize EBG's exclusive management authority, NYIH's disclosure of confidential information to a third party and NYIH's failure to provide timely notice of the alleged triggering events, as provided in the LLC Agreement.

The court ruled that EBG sufficiently pleaded that Triggering Events occurred that would force NYIH to sell its interests in the Company to EBG. Although the court was not confident these claims would survive, the facts alleged required that the motion to dismiss be denied.

7. *CSH Theatres, LLC v. Nederlander of San Francisco Associates*, C.A. No. 9380-VCP (Del. Ch. Apr. 21, 2015)

This case involved claims arising from an oral agreement to renew a long-running lease of a theater to a Delaware limited liability company, Shorenstein Hays-Nederlander Theatres LLC (the "Company"). The Company was in the business of providing venues for live performances and was equally owned by its two members, Nederlander of San Francisco Associates ("Nederlander") and

CSH Theatres, LLC ("CSH"). A dispute between the members arose when a theater (the "Curran") operated by the Company was offered for sale. The indirect owner of CSH ("Hays") formed an entity to purchase the Curran, but Nederlander would only consent to the purchase if the Company was granted a long-term lease on the same terms and conditions as the Company's existing lease. The parties allegedly orally agreed to lease terms for the Curran, however, were unable to reduce the terms of this agreement to a written contract and Hays eventually refused to honor the terms of the oral lease agreement unless CSH and its board representatives were given control of the Company. Nederlander accused CSH of breaching the limited liability company agreement of the Company (the "LLC Agreement") as a result of CSH (and its members) directly competing with the Company, misappropriating confidential Company information and using the Curran as a means of seizing control of the Company. Plaintiff argued that the actions of defendant violated certain non-compete, corporate opportunity and conflict of interest provisions of the LLC Agreement. Defendant filed a motion to dismiss, which the court denied because the terms of the relevant provisions of the LLC Agreement were arguably ambiguous.

In reaching its holding, the court focused its attention on the defined terms used in those non-compete, corporate opportunity and conflict of interest provisions of the LLC Agreement. The definition of "Member" included Nederlander and CSH and their "Permitted Transferees," which included any "Affiliate" of Nederlander or CSH. "Affiliate" included any direct or indirect controller of Nederlander or CSH. Plaintiff argued that any time Nederlander or CSH was used in the LLC Agreement, it included such member's affiliates, which in this case would mean that Hays, as indirect controller of CSH, was subject to the provisions of the LLC Agreement. Defendants countered that the definition of "Member" only included "Permitted Transferees" to indicate that future transferees of a member's interest in the Company would be subject to the LLC Agreement and was therefore intended to mean the "Member or Permitted Transferee," not both. Defendants also pointed to provisions in the LLC Agreement that included "any Affiliate thereof" after Nederlander or CSH as proof that references to Nederlander and CSH should not be given the expansive definition sought by plaintiffs.

At the motion to dismiss stage, any ambiguity in a contract must be resolved in favor of the nonmoving party. The court therefore concluded that because the LLC Agreement, read literally, defined Nederlander and CSH to include their affiliates, Hays could arguably be subject to the terms of the LLC Agreement and may therefore have breached the LLC Agreement. The motion to dismiss was denied with respect to these claims.

8. *Yucaipa Am. Alliance Fund I, LP v. SBDRE LLC*, C.A. No. 9151-VCP (Oct. 31, 2014)

In this case, the court resolved defendants' motion to dismiss or stay plaintiffs' complaint. Plaintiffs were investment funds that held a majority equity interest in a car-hauling and delivery business when the business entered bankruptcy; at the time of this decision, the bankruptcy case was still ongoing. Plaintiffs had purchased a majority of the business's debt, but defendants also owned a significant portion of that debt (collectively, the "Debt") and had formed an LLC (the "LLC") to realize upon assets acquired from the business's estate following a successful credit bid approved by the bankruptcy court. Relevant here is the relationship between the LLC's LLC Agreement and the credit agreement that governed the Debt.

In their complaint, among other things, plaintiffs sought a declaratory judgment that plaintiff elected itself managing member of the LLC and alleged that the LLC's LLC Agreement impermissibly modified certain lenders rights under the Credit Agreement and that one of the defendants (a lender) owed the other lenders fiduciary duties and breached those duties by granting itself extra powers in the LLC's LLC Agreement. Unfortunately for plaintiffs, they had bound themselves to a covenant in the credit agreement not to sue for certain claims. The court found that the covenant, by its terms, technically covered all of plaintiffs' claims. However, the court was persuaded by plaintiffs' argument that interpreting the covenant in such a broad manner would violate public policy, which "does not permit an intentional prospective waiver" of claims like plaintiffs' because the result would be that defendants could declare all of plaintiffs' portion of the debt void at any time and plaintiffs would have no recourse. The court found that, at the motion to dismiss stage, it was conceivable that plaintiffs could show the outer boundaries of the covenant ambiguous and that public policy would prevent a wholesale application of the covenant not to sue that the defendants advanced.

The court dismissed all of the claims mentioned above except for the claims related to the declaratory judgment, which it found could be outside the bounds of the covenant for the reasons discussed above. However, the court stayed resolutions of those claims pending resolution of the business's bankruptcy case.

9. *Durham v. Grapetree, LLC*, C.A. No. 7325-VCG (May 16, 2014) and (July 21, 2014)

Plaintiff, a member of defendant Grapetree, LLC, sued defendant for reimbursement for expenses that he incurred for the alleged benefit of defendant. Plaintiff was one of five siblings who owned an equal interest in defendant. Defendant operated two vacation rental properties and plaintiff incurred expenses while maintaining the landscaping of the properties. Plaintiff and defendant disagreed on whether plaintiff was entitled to reimbursement for some of the expenses. Both parties contended that the language of defendant's LLC Agreement governed their dispute.

The court looked to the language of the LLC Agreement and determined that the language, which stated that "[f]or all routine operational issues[,] the majority vote of (3/5) [sic] of the managing members may make all decisions," was ambiguous when applied to plaintiff's claim for reimbursement. Therefore, the court looked to the course of dealing among the parties to determine their intent. Because some of the expenditures made by plaintiff were routinely made by other members and reimbursed by defendant without any vote of the managing members, the court found that plaintiff was entitled to seek reimbursement for those types of expenses. The court also addressed defendant's motion for sanctions against plaintiff, noting that sanctions were appropriate given the type of communication used by plaintiff during the course of litigation.

In its subsequent decision, the court addressed plaintiff's attempt to authenticate documentation relating to the various expenditures that the court found plaintiff was entitled to seek reimbursement for. Plaintiff failed to substantiate the expenditures or explain how such expenditures benefitted Grapetree, LLC. The court refused to accept plaintiff's argument that the LLC Agreement did not require plaintiff to substantiate his expenditures, noting that plaintiff had the burden of proof to submit substantiation and failed to do so. Therefore, the court declined to award plaintiff anything other than the moneys that Grapetree, LLC conceded it owed plaintiff at trial. The court also denied plaintiff's second request to file a motion for sanctions and refused to allow plaintiff to reargue issues decided in the court's previous opinion.

10. *2009 Caiola Family Trust v. PWA, LLC*, C.A. No. 8028-VCP (Del. Ch. Apr. 30, 2014)

This case involved an LLC that owned and operated an apartment complex. The parties cross-moved for summary judgment for a determination as to whether a provision in the LLC agreement gave the non-managing members of the LLC the unilateral right to terminate and replace a property manager previously engaged by the LLC. The applicable provision in the LLC agreement provided that the "prior written approval" of a majority of the non-managing members was required for the LLC to terminate or retain a property manager, among other enumerated actions, and that the managing member of the LLC was required to "use all commercially reasonable efforts to carry out and implement" any such decisions so approved. The non-managing members argued that the duty of the managing member to carry out and implement decisions approved by the non-managing members under this provision provided the non-managing members with the right to vote for the LLC to take such actions and obligated the managing member to implement the outcome of that vote. In applying well-settled Delaware contract interpretation principles, the court found that, to the contrary, this provision gave the non-managing members only a veto right over such actions. The court found that nothing in this provision could reasonably be read to give the non-managing members affirmative authority to mandate unilaterally that any of such actions be taken by the LLC. The court also looked to other provisions of the LLC agreement for support of this interpretation that gave broad authority to the managing member of the LLC to manage the LLC.

The court then turned to a provision in the LLC agreement that provided that, to the extent any provision of the LLC agreement would create any exposure to liability with respect to a non-managing member, such provision shall be stricken from the LLC Agreement. The court noted that if the non-managing members interpretation of the above-referenced voting provision were correct and that therefore the non-managing members had the ability to unilaterally dictate that the LLC take certain actions, then such provision would likely have to be deemed stricken because this interpretation could create liability for the non-managing members under Section 18-109 of the Delaware LLC Act by giving the non-managing members the right to participate materially in the management of the LLC.

11. *Huatuco v. Satellite Healthcare*, C.A. No. 8465-VCG (Del. Ch. Dec. 9, 2013)

Plaintiff, a member of Satellite Dialysis of Tracy LLC, a Delaware LLC (the "Company"), filed a complaint against the Company and its other member, Satellite Health Care ("Satellite"), seeking judicial dissolution of the Company on the basis of a deadlock between plaintiff and Satellite (each owning 50% of the Company member interests). In response, defendants moved to dismiss for failure to state a claim. Although the complaint alleged that defendants breached the Company's LLC agreement (the "Agreement"), the court found that the parties had agreed that the motion to dismiss was not reliant on the underlying facts alleged in the complaint, but rather on whether plaintiff would be entitled to judicial dissolution based on the interplay of LLC Act Section 18-802 and certain provisions of the Agreement.

The court held that the terms of the Agreement precluded plaintiff from seeking judicial dissolution. Citing *R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008), and the broad policy of freedom of contract underlying the LLC Act, the court held that judicial dissolution is a default rule which may be displaced by contract. Here, the Agreement included the following provision: "Except as otherwise required by applicable law, the Members shall only have the power to exercise any and all rights expressly granted to the Members pursuant to the terms of this Agreement." The court found that this applied to member rights generally—which included the right to seek judicial dissolution.

As the Agreement did not expressly provide any right to judicial dissolution and because judicial dissolution was a default rule, and so not included by virtue of the clause "as required by applicable law," the court concluded that judicial dissolution was intentionally excluded and was not available to plaintiff.

12. *Barton v. Club Ventures Invs. LLC*, C.A. No. 8864-VCN (Del. Ch. Nov. 19, 2013)

Plaintiff, David Barton ("Barton"), was a member and former employee of defendant, Club Ventures Investments LLC ("CVI"), a Delaware LLC. Barton entered into a Confidentiality, Non-Competition and Intellectual Property Agreement (the "Non-Compete Agreement") with CVI in 2005. CVI, Barton and certain other members then entered into an amended and restated limited liability company agreement (the "LLC Agreement") in 2011 that CVI executed as the "Company" and Barton and other members executed as "members." The LLC Agreement contained a covenant restricting Barton from opening or operating "any new fitness facility (or otherwise license the name 'David Barton Gym' or any variation thereof) without the written consent of [certain other Members]."

Barton eventually left CVI and filed this lawsuit seeking a declaratory judgment that he was not subject to any non-compete agreement with CVI. In response, CVI agreed not to enforce the restrictive covenant in the LLC Agreement to the extent it would be construed as a non-compete, but CVI claimed the Non-Compete Agreement was still effective. Barton moved for partial summary judgment on the question of whether the LLC Agreement superseded the Non-Compete Agreement by way of the LLC Agreement's merger and integration clause (the "Integration Clause"), the last sentence of which read: "All prior agreements among the Members are superseded by this Agreement, which integrates all promises, agreements, conditions, and understandings among the Members with respect to the Company and its property."

Barton asserted that the Integration Clause unambiguously rendered any prior agreement, e.g., the Non-Compete Agreement, inoperative and non-binding. In response, CVI contended that (i) since it did not sign the LLC Agreement as a "Member" and Barton did not sign the Non-Compete Agreement as a "Member," the Non-Compete Agreement was not an agreement among Members as contemplated in the Integration Clause and (ii) the Integration Clause did not apply because the Non-Compete Agreement covered a different subject matter than the LLC Agreement. The court held, inter alia, that the Integration Clause clearly and unambiguously provided that it superseded prior agreements among "Members" as such term was defined in the LLC Agreement and since the Non-Compete Agreement was between a Member, Barton, and a non-Member, CVI, the LLC Agreement did not supersede the Non-Compete Agreement.

13. *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, C.A. No. 5843-VCL (Del. Ch. May 16, 2012); *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC,* 50 A.3d 434 (Del. Ch. 2012), *reversed*, *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. Ch. 2013), *remanded to ASB Allegiance*

Real Estate Fund v. Scion Breckenridge Managing Member, LLC, C.A. No. 5843-VCL (Del. Ch. Sept. 16, 2013)

Plaintiffs, which are pension funds advised by ASB Capital Management, LLC ("ASB"), entered into five joint ventures for the ownership, operation and development of student housing with defendants, special purpose entities wholly owned by The Scion Group, LLC ("Scion"). Plaintiffs provided at least 99% of the capital for each joint venture and defendants were the sponsor and invested no more than 1%. After an initial joint venture containing a standard capital-event waterfall provision with a promote provision, the parties agreed to a two tier promote going forward, which was memorialized in an email (the "Email") and agreed to by both parties.

The first joint venture agreement that contained the two tier promote provision placed the first promote after the first preferred return but before the return of capital, meaning defendants would begin to earn the promote before plaintiffs and defendants received back their capital. The parties executed several more joint venture agreements based on this form. When the mistake was discovered, plaintiffs sought to reform all of the agreements to conform to the two tier promote provision to what was agreed to in the Email. The Court of Chancery reformed the agreements under the doctrine of unilateral mistake, which allows for reformation when the party asserting the doctrine shows that it was mistaken "and that the other party knew of the mistake but remained silent" quoting *Cerberus Int'l Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002)). To prevail on a claim for reformation, the party must prove "by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement." The prior understanding tells the court exactly what the terms of the contract should be.

The court held that the prior Email constituted a "specific prior contractual understanding that provided the necessary foundation for reformation."

The court held that a "promote" is a term of art and contemplates the return of invested capital in the context of a capital event. Defendants' expert admitted that he had never heard of a real estate deal in which the promote was paid before the return of capital in a capital-event waterfall provision. The parties' understanding of the meaning of a "promote" was reflected in the two most heavily negotiated agreements—the initial agreement and a later agreement in which the parties attempted to mimic the two tier promote provision but did not use the prior forms, in that case drafting the return of capital to precede the first promote. Plaintiffs were unaware of the mistake in the agreements, and Eric, Scion's Executive Vice President and General Counsel admitted that he noticed the unusual placement of the first promote as well as the favorable implications for defendants, but remained silent. The court, noting that the basic principle of agency law—"knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal"—applies to limited liability companies, imputed Eric's knowing silence to Scion.

The court rejected defendant's defense that a senior individual at ASB failed to read the agreements, noting that, unlike with avoidance, reformation is not precluded by a party's failure to read the writing at issue. Because reformation requires a prior agreement that reflects the actual agreement by the parties but which was not properly memorialized in the writing, reformation does not turn on whether the agreement was read. Defendants' ratification defense also failed because in the context of reformation, imputed or constructive knowledge is not sufficient; rather to ratify a contract subject to reformation there must be actual knowledge of the error. Because the plaintiffs did not know of the error and believed the agreements accurately reflected the two tier promote that was previously agreed upon, plaintiffs did not have actual knowledge of the error and did not ratify the agreements.

In a subsequent decision, the court addressed the fee-shifting provisions contained in the LLC agreements at issue in the prior decision. The LLC agreements contained fee-shifting provisions which entitled ASB, as the prevailing party, to fees and costs. The fee-shifting provisions provided that in any action by a party to the agreement to enforce the provisions of the agreement, the non-prevailing party must reimburse the prevailing party for all reasonable fees and costs, including reasonable attorneys' fees.

When interpreting fee-shifting provisions, the court focuses on enforcing the agreement and making the prevailing party whole. Unless the agreement provides for partial or claim-by-claim awarding of fees, the fees are usually applied "in an all-or-nothing manner."

The court held that defendants' counterclaims for breach of fiduciary duties and violation of the implied covenant of good faith and fair dealing were contract claims brought to enforce one of the LLC agreements and therefore were subject to the fee-shifting provision. The fiduciary duty claims were brought pursuant to a specific provision in the LLC agreement regarding fiduciary duties. The court held that the implied covenant claim was also a contract claim because it was based on the terms the parties would have agreed to had they thought to negotiate the issue. The court emphasized the temporal focus of the implied covenant claim—what the parties would have done *at the time of negotiating* rather than what the parties would have done at the time of the wrong, as would be the case for a tort claim.

The court also considered Delaware case law where the implied covenant turned on a culpable mental state such as that required for a claim of fraud, which suggests that the claim is not contractual. Typically a party would not contractually agree to the other party committing fraud. Therefore, the court held that this aspect of fraud in prior cases does not mean that a claim for breach of the implied covenant requires fraud, but rather that fraud is a way of establishing a breach of the implied covenant because "no fraud" is an implied contractual term. Because all of the claims at issue related to the LLC agreement, the court held that the fees and costs incurred by plaintiff, as the prevailing party, qualified for reimbursement under the fee-shifting provision.

On appeal, the Delaware Supreme Court reversed the contractual award of fees and expenses because ASB's counsel represented ASB for free to avoid a malpractice action. Noting that ASB has not paid its counsel anything, the Supreme Court held that ASB had not "incurred" fees or expenses for purposes of the contractual fee-shifting provisions. The Supreme Court remanded the case to the Court of Chancery to determine whether fees and expense should be awarded on equitable grounds. The Court of Chancery then held that ASB was entitled under equitable fee-shifting principles to a portion of the fees and expenses it counsel incurred based on the bad faith conduct of Scion and its expert in the litigation.

14. *Grosvenor Orlando Assocs. v. HCP Grosvenor Orlando LLC*, C.A. No. 7246-VCG (Del. Ch. June 26, 2013)

In this motion for judgment on the pleadings, the court was asked to determine whether an LLC agreement required the payment of an annual asset management fee or, alternatively, provided a prospective waiver of a potential conflict of interest if an asset management fee was ultimately agreed to. The LLC agreement provided in one section that the "Operating Member hereby Approves the payment to Grosvenor Properties, Ltd. by the Company or Owner of an annual asset management fee in an amount equal to one percent (1.0%) of Gross Receipts, which . . . shall be payable monthly . . . ." In another section, the LLC agreement provided that the "Operating Member" could amend asset management and similar agreements without the consent of the other party to the LLC agreement "except . . . with respect to the payment of the asset management fee to Grosvenor Properties, Ltd." Plaintiffs argued that these sections required a payment of the asset management fee whereas defendants argued that they imposed no such obligation, but simply waived potential conflicts-of-interest because the parties contemplated that a separate agreement concerning management fees would be entered into in the future. The court applied well-settled Delaware contract interpretation principles and found that these provisions created an ambiguity and thus denied the motions for judgment on the pleadings.

15. *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, C.A. No. 4586-CS (Del. Ch. May 13, 2013)

This post-trial opinion involved a fund (the "Fund") formed as a Delaware LLC to invest in retirement homes. Two of the plaintiffs, the former manager of the Fund (the "Manager") and its affiliate, held a 5% ownership interest in the Fund and the main defendant, the California Public Employees' Retirement System ("CalPERS"), held the remaining 95% ownership interest in the Fund. Plaintiffs sued CalPERS claiming that CalPERS was required to pay them under the LLC agreement of the Fund (i) an incentive distribution, (ii) the value of their membership interests upon their withdrawal as members of the Fund and (iii) certain asset management fees. CalPERS had not made these payments because it challenged appraisals that were performed to value assets of the Fund that were used as part of the calculation of each of these payments and essentially asked the court to perform its own appraisal.

The court first addressed the threshold issue of which judicial standard of review is appropriate when a party seeks to dispute a value determined by a contractually designated appraiser. The court noted that the provisions of the LLC agreement governing the appraisal process were based on form contracts CalPERS used with various investment managers and gave them unilateral authority over the process, including the selection of the appraisers. The Manager argued that the appraisal process was governed by the LLC agreement and that the court had no ability at all to review the appraisals for any reason. CalPERS, on the other hand, argued that the court must independently review the appraisals because there was no dispute resolution process in the appraisal process. The LLC agreement did not provide a dispute resolution mechanism for appraisals unless they were made at the end of a specified period. In highlighting that Delaware respects the freedom of contract, the court held that a court may not second-guess appraised values that have been committed by contract to determination by appraisers unless the contractual appraisal process has been tainted by a breach of the implied covenant of good faith and fair dealing (e.g., concerted bad faith action between the appraiser and the other party). The court observed that parties could agree in their LLC agreement to provide for whatever level of judicial review they desire, but the parties in this case did not provide for any such judicial review.

The court then addressed whether there was a breach by the Manager of the implied covenant in connection with the appraisal process. In this regard, CalPERS claimed that the Manager misled an appraiser by giving the appraiser bullish projections of the assets of the Fund's future performance. However, the court found that the evidence indicated that the appraiser made its own independent projections and, therefore, there was no breach of the implied covenant.

The incentive distribution was based on "distributions" made to CalPERS and CalPERS argued that the calculation of "distributions" was incorrect because the Manager included distributions in its calculation but had failed to transfer cash to CalPERS in accordance with the LLC agreement. A "distribution" was defined in the LLC agreement to mean any "cash payment . . . distributed by the Company to [a] Member . . . ." The LLC agreement also provided that cash would be swept into a bank account daily and that on a monthly basis the Manager would instruct the bank to remit to CalPERS its respective portion of cash. However, the LLC agreement also provided in the same section that the Manager was to manage cash in accordance with cash management policies established by CalPERS and these policies defined distributions as "deposits made by the partners into the collection account for ordinary income." The court found that this created an ambiguity in how distributions were to be made and looked to the parties' course of dealing as evidence of how the parties intended the contract to be interpreted. The court found that the parties, through their course of performance of the contract, understood that distributions could be made to CalPERS through the cash management system (i.e., by being swept into the collection account and not when distributed out of that account). For example, the court mentioned that the Manager made clear in its quarterly management reports that it was accounting for payments of cash to CalPERS through the cash management system as "distributions" and contained a specific line item for the incentive distribution and CalPERS never objected.

With respect to payment to the Manager and its affiliate for their membership interests, the LLC agreement required CalPERS to purchase their membership interests when they withdrew from the Fund. Under the LLC agreement, for purposes of valuing the membership interests, CalPERS was required to have the assets of the Fund appraised 120 days after the Manager gave notice of its intent to resign. CalPERS had an appraisal done on the 120th day. The court found as a factual matter that a representative of CalPERS spoke with the appraiser and persuaded them to reduce the value of the assets by increasing the discount rate and by taking into account a "hypothetical condition." The court found that the pressure that CalPERS applied was a violation of the implied covenant of good faith and fair dealing. The parties also disagreed on the date on which the payment for the membership interests would be calculated. The LLC agreement provided that upon a withdrawal, the date of "valuation" would be 120 days after the date of receipt of an intent to withdrawal. CalPERS argued that this referred only to the appraisal, which was only a part of the total calculation. The court found that the term "valuation" was used broadly to cover the entire value of the interest and that if the parties desired that this only refer to the appraisal, they could have stated this in the LLC agreement.

With regard to asset management fees, CalPERS claimed that the Manager erroneously included leasehold interests in its calculation of these fees. The court noted that the LLC agreement was silent on whether leasehold interests would be included. Therefore, the court looked to extrinsic evidence to determine the parties' intent and noted that the best extrinsic evidence was what the parties actually did. For five years, the asset management fee included the leasehold interest and

CalPERS approved these fees during that period. Thus, the court indicated that it would not deviate from this established course of dealing between the parties.

Finally, the court addressed certain fiduciary claims asserted by the Manager but quickly ruled against the Manager because, citing to Delaware Supreme Court precedent, such claims arose out of the same facts as the alleged breach of contract claims and where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim and any fiduciary claims arising out of the same facts that underlie the contract obligations are foreclosed as superfluous.

16. *Matthew v. Laudamiel*, C.A. No. 5957-VCN (Del. Ch. Feb. 21, 2012) and (Del. Ch. June 29, 2012); *Matthew v. Fläkt Woods Grp. SA*, C.A. No. 5957-VCN (Del. Nov. 20, 2012)

Plaintiff, a member and manager of Aeosphere LLC, a Delaware limited liability company (the "Company"), brought claims relating to the dissolution of the Company against the other managers of the Company and two companies with which the Company had business dealings. Defendants raised various defenses against plaintiff's claims and brought multiple counterclaims against plaintiff.

In the first decision by the Court of Chancery, the court addressed motions to dismiss for lack of personal jurisdiction by defendants Fläkt Woods Group SA ("Fläkt Woods") and SEMCO LLC ("SEMCO"), which were companies who had engaged in various business dealings with the Company. Plaintiff claimed that Fläkt Woods and SEMCO aided and abetted breaches of fiduciary duty by the other defendants and were otherwise complicit in the other defendants' wrongful actions. Plaintiff contended that the court had personal jurisdiction over Fläkt Woods under Delaware's long-arm statute by virtue of the conspiracy theory of jurisdiction. The court rejected plaintiff's conspiracy theory of jurisdiction because, although plaintiff pled sufficient facts to allow the court to infer that a conspiracy existed, plaintiff failed to show that Fläkt Woods knew or had reason to know of an act or effect in Delaware before the completion of the conspiracy, which is a requirement of the conspiracy theory of jurisdiction.

Plaintiff asserted that the court had personal jurisdiction over SEMCO under Delaware's long-arm statute by virtue of the conspiracy theory of jurisdiction and/or by virtue of the general jurisdiction test. The court rejected the conspiracy theory, finding that sufficient facts were not alleged to support SEMCO's participation in a conspiracy against plaintiff, and rejected plaintiff's general jurisdiction argument, finding that SEMCO's minimal business in Delaware was not sufficient to constitute a "persistent course of conduct" or "regularly do[ing] or solicit[ing] business" in Delaware. Moreover, the court found that SEMCO's presence in Delaware was not sufficient to meet the "minimum contacts" required by constitutional due process.

The court also addressed plaintiff's motion to dismiss several of defendants' counterclaims. The court first addressed defendants' counterclaim for breach by plaintiff of the implied covenant of good faith and fair dealing in the Company's LLC agreement. One of defendants' claims for breach of the implied covenant was based on plaintiff's alleged refusal to accept or reject various contracts and alleged refusal to take certain actions requiring his approval under the LLC agreement. However the LLC agreement contained specific provisions dealing with "deadlocks" among the Company's board of managers and disagreements between the parties and contained a general standard governing the performance of managerial duties by the Company's managers and the officers. Other of defendants' claims for breach of the implied covenant were based on plaintiff's alleged unreasonable refusal to cooperate in the management of the Company and alleged improper allocation of Company resources among various internal projects. These claims again were squarely addressed by provisions in the LLC agreement. In addition, defendants' claimed that plaintiff's refusal to attend or otherwise participate in an emergency meeting of the board of managers meeting breached the implied covenant. Because the LLC agreement provided a "best efforts" standard to govern attendance at meetings of the board of managers, the court found this issue was also explicitly addressed by the LLC agreement. The court thus dismissed each of defendants' claims for breach of the implied covenant, holding that the implied covenant only operates where an LLC agreement does not speak to the issue directly and provide an explicit answer, and, in this case, each of defendants' bases for the implied covenant were directly addressed by the LLC agreement. The court stated the misconduct alleged by defendants was more properly addressed by defendants' counterclaims against plaintiff for breach of the LLC agreement.

In its initial decision, the court also addressed defendants' counterclaims for damages resulting from plaintiff's alleged breach of the employment agreement between the Company and plaintiff and for unjust enrichment, both of which claims were based upon plaintiff's alleged improper charging of personal expenses to the Company. The court held that these claims belonged to the Company and that defendants did not have standing to bring them in their individual capacities and thus dismissed these claims. Since a certificate of cancellation had already been filed to terminate the existence of the Company, the court stated that these claims would have to be brought in the name of the Company by a trustee or receiver appointed under LLC Act Section 18-805 or, if the Company were revived, by the revived Company or derivatively by its members after the revival of the Company.

In a subsequent decision by the Court of Chancery, the court addressed plaintiff's motions for partial summary judgment on his claim that defendants breached the Company's LLC agreement by causing the dissolution and winding of the Company without plaintiff's consent and his claim that defendants' wrongful dissolution of the Company resulted in the unlawful conversion of his units in the Company. Plaintiff argued that his vote was required to approve the dissolution and winding up of the Company under Section 5.2.6(b) of the LLC agreement. The court held that that the plain language of Section 5.2.6(b) of the LLC agreement did not require plaintiff's vote to dissolve the Company but may have required plaintiff's vote to wind up the Company. Plaintiff argued that the apparent discrepancy in the LLC agreement between the vote required for dissolution and the vote required for winding up must be the result of a scrivener's error. The court rejected plaintiff's argument to reform the LLC agreement to correct the scrivener's error because plaintiff did not satisfy either of the standards for reformation, namely that there was a mutual mistake of the parties or a unilateral mistake by plaintiff of which defendants were aware but remained silent.

Plaintiff argued in the alternative that the voting provision in Section 5.6.2(a) of the LLC agreement required his vote for the dissolution of the Company, and therefore the vote to dissolve the Company without his approval breached the Company Agreement. Defendants' argued that, if such voting provision applied, plaintiff's refusal to attend the board meeting at which the vote was taken created a deadlock which would have allowed defendants to dissolve the Company without plaintiff's approval. The court denied plaintiff's motion for summary judgment on this issue, holding that the matter must be resolved on a more robust factual record.

With respect to plaintiff's claim that defendants' breached the LLC agreement by winding up of the Company without his approval, the court held that, unless defendants' prevailed on an affirmative defense, they would be liable for breach of the LLC agreement because the voting provision of the LLC agreement expressly required the unanimous approval of the board of managers to wind up the Company. The court rejected defendants' argument that "unanimous approval of the Board" meant unanimous approval of the managers present at a meeting, which interpretation would have resulted in actions requiring "unanimous approval of the Board" under the LLC agreement requiring a lesser vote than typical Board actions.

As an affirmative defense, defendants alleged that even if their approval of the decision to wind up the Company breached the LLC agreement, the breach was excused by plaintiff's prior material breaches of the LLC agreement, such as plaintiff's alleged refusal to approve or disapprove contracts requiring his approval and his alleged improper approval of contracts that also required another manager's approval. The court, noting that only a material breach, and not a nonmaterial or *de minimis* breach, will excuse another party from performing under a contract, stated that the issue of materiality is principally a question of fact and is not generally suited for disposition by summary judgment. The court held that defendants' allegations of plaintiff's breaches were not so severe or so insignificant as to allow the court to assess their materiality on the facts presented and without further development of the record. Since these allegations raised contested issues of fact, the court was unable to grant plaintiff's motion for partial summary judgment on plaintiff's breach claim with respect to the winding up of the Company.

The court also denied plaintiff's motion for partial summary judgment on his conversion claim. Since plaintiff was not granted summary judgment on his breach claims, which were the foundation for his conversion claim, he similarly could not be granted summary judgment on his conversion claim.

In a further proceeding in this case, the Supreme Court of Delaware reversed the Court of Chancery's earlier decision that the court lacked personal jurisdiction over Fläkt Woods. The court found that Delaware's long arm statute reached the alleged conduct. The Court of Chancery had held that plaintiff failed to show that Fläkt Woods knew or had reason to know of an act or effect in Delaware before the completion of the conspiracy. The Supreme Court disagreed with the Court of Chancery's holding, finding, among other things, that Fläkt Woods, a sophisticated company with global activities, would have done some minimal due diligence before entering into a long-term agreement with the Company, which would have revealed to Fläkt Woods that the Company was a Delaware LLC long before the Company was dissolved. Because Fläkt Woods' alleged co-conspirators filed a certificate of cancellation for the Company in Delaware, which constituted the transaction of business in Delaware for purposes of the long-arm statute, the Supreme Court held that Fläkt Woods was subject to personal jurisdiction under the long arm statute.

17. *Paul v. Delaware Coastal Anesthesia, LLC*, C.A. No. 7084-VCG (Del. Ch. May 29, 2012)

Plaintiff was a member of a Delaware LLC and challenged an action taken by the other members of such LLC by written consent that terminated plaintiff's membership interest. The LLC agreement provided that a member of the LLC could be terminated by vote of seventy-five percent of the holders of the LLC's membership interests. Plaintiff argued members could only vote their interests at a member meeting because certain provisions of the LLC agreement provided a procedure by which meetings would be held. The court, in reading the LLC agreement as a whole, held that the LLC agreement did not dictate the method by which votes terminating membership must be taken and certainly did not specifically disallow votes by written consent. Thus, the court held that the LLC agreement did not "otherwise provide" so as to preempt actions by written consent as permitted by Section 18-302 of the LLC Act.

18. *Great-West Inv'rs LP v. Thomas H. Lee Partners, L.P.*, C.A. No. 5508-VCN (Del. Ch. Jan. 14, 2011), (Del. Ch. Jan. 4, 2012)

This case was before the court on defendant's motion to dismiss. The parties disputed the meaning of a provision in a limited partnership agreement that was designed to provide a default calculation for determining the amount of a certain fee owed to the general partner. The provision stated that if, by good faith negotiation, the parties could not come to an agreement, the fee would "increase . . . by an amount equal to the product of 1.05 multiplied by the Expense Assumption in effect during the preceding year."

Plaintiff requested, among other things, two declarations from the court. First, plaintiff asked for a declaration that the provision required defendant to negotiate in good faith before the default calculation became effective. Second, plaintiff requested a declaration that the contract provided for an annual 5% increase in the amount owed to the general partner. In relation to the first request, defendant argued that its attempts at negotiating with plaintiff were in good faith, but did not offer a different interpretation of the language. The court decided that plaintiff's interpretation of the provision was at least a reasonable reading, and based on the facts alleged by plaintiff denied defendant's motion to dismiss.

With respect to the second request for declaratory relief, defendant argued that plaintiff's claim should be dismissed because the language unambiguously provided for a yearly 105% increase over the amount from the prior year. Plaintiff argued that the language was at least ambiguous and insisted that defendant's interpretation produced an unconscionable and absurd result. However, the court agreed with defendant and found that the language unambiguously provided for an annual 105% increase in the fee. The court noted that it is not to twist otherwise clear language to fit its sense of fairness, and that "parties are free to make bad bargains." The court granted defendant's motion to dismiss plaintiff's claim on this issue.

The court denied defendant's motion to dismiss plaintiff's claim for specific performance of defendant's obligation to negotiate in good faith, including defendant's duty to provide certain financial information and defendant's motion to dismiss plaintiff's breach of contract claim. Further, the court denied defendant's motion to dismiss plaintiff's claims for reformation under the theories of mutual mistake, unilateral mistake and fraud (although the court noted that reformation based on fraud was a close call).

Finally, the court granted defendant's motion with respect to plaintiff's claims for breach of fiduciary duty (determining that such claims were superfluous because they were based on the same actions as the breach of contract claims). The court also granted defendant's motion on plaintiff's breach of the implied covenant of good faith and fair dealing. The court briefly mentioned that the implied covenant only applies where a contract lacks specific language governing an issue. Since the dispute was based on the language of the contract, the implied covenant did not apply.

In a subsequent opinion, the court addressed motions for summary judgment by plaintiff and defendant. Plaintiff sought a declaration that the language of the partnership agreement required defendant to negotiate in good faith before the fee could be increased. The court granted plaintiff summary judgment on that count, stating that it was a "pure question of law; an issue ripe for summary judgment." The court then denied plaintiff's motion with respect to three breach of contract claims, namely, that defendant breached the partnership agreement by: (a) failing to negotiate in good faith (denied because defendant proffered evidence that it did negotiate in good faith), (b) failing to provide plaintiff with certain specific financial records (denied because the partnership agreement did not list specific financial records that defendant was to provide to plaintiff) and (c) increasing the fee and offsetting the amounts due to plaintiff against the increased fee (denied because if defendant did in fact negotiate in good faith, then it was possible that no breach occurred when the fee was increased). Next, the court dismissed plaintiff's request for specific performance, that (1) defendant be required to provide plaintiff with specific financial documents (denied because it was not clear that plaintiff was entitled to additional documents), (2) defendant be required to negotiate in good faith (denied because it was not clear that defendant had not already negotiated in good faith) and (3) any increase in the fee be barred until good faith negotiations occurred (denied because the court could not determine that plaintiff would be entitled to a certain remedy if good faith negotiations had not taken place).

The court next addressed defendant's motion for summary judgment on certain counts to the extent that such counts were based on fraud or mistake. First, defendant sought summary judgment on plaintiff's requests for reformation of the partnership agreement based on mutual mistake and unilateral mistake. The court determined that plaintiff became a limited partner by a novation and therefore was required to show that it and defendant came to a "materially different understanding." However, plaintiff had admitted that the provision at issue was ambiguous, so the court granted defendant's motion, noting that plaintiff "cannot show by clear and convincing evidence that it reached a definitive agreement as to the meaning of a sentence when it admits that it knew the sentence was ambiguous." Defendant next sought summary judgment on plaintiff's request for reformation based on fraud. Plaintiff failed to proffer any evidence that tended to show defendant had an intent to induce plaintiff to act (which is an element of fraud). Therefore, the court granted defendant's motion for summary judgment on the fraud count. Finally, the court denied defendant's motion for summary judgment on the other counts because defendant did not make any arguments or show which claims were based on fraud or mistake.

19. *QVT Fund LP v. Eurohypo Capital Funding LLC I*, C.A. No. 5881-VCP (Del. Ch. July 8, 2011)

A German stock corporation operating as an international bank issued trust preferred securities to United States buyers, including plaintiffs, through affiliated Delaware statutory trusts. The Delaware statutory trusts used the capital from the sale of the trust preferred securities to purchase Class B shares of two Delaware LLCs affiliated with the bank. The Delaware LLCs, in turn, used the capital from the sale of the Class B shares to purchase subordinated debt from the bank. Shortly thereafter, the bank entered into a "domination and profit surrender agreement" under German law whereby it agreed to transfer all of its annual profits to subsidiary of the bank's ultimate parent and granted such subsidiary the power to direct the management of the bank, which plaintiffs' alleged could result in the bank ceasing to be a profit-seeking entity if that would benefit the bank's ultimate parent. This decision was issued with respect to defendants' motion to dismiss.

The LLC agreements governing each Delaware LLC contained "pusher provisions" providing that if the bank made any payment, redemption or other distribution on any "Parity" or "Junior" securities, the LLCs were required to make a corresponding payment on the Class B shares held by the Delaware statutory trusts, with such trusts being required to make a corresponding payment to the holders of the trust preferred securities. The LLC agreements defined both "Parity" and "Junior" securities as types of "preference shares," a term not defined in the LLC agreements.

Among the various claims raised by plaintiffs were the following: first, plaintiffs claimed that certain dividend payments made by the bank to holders of the bank's participation certificates triggered the "pusher provisions" under the LLC agreements, which obligated the bank to make distributions to the LLCs; and, second, plaintiffs argued that the bank violated the implied covenant of good faith and fair dealing by entering into the domination and profit surrender agreement and failing to protect the interests of the Delaware trusts in the bank continuing to be a profit-seeking entity.

The court's analysis began with a threshold issue: what law governs the determination of whether the bank's participation certificates constitute "preference shares" and, consequently, "Parity" or "Junior" securities? Relying on the internal affairs doctrine, defendants argued that German law should govern because the analysis required the court to determine where the participation certificates ranked within the capital structure of the bank, a matter of German corporate law and an issue integral and peculiar to the internal affairs of the bank. The court disagreed, concluding that German law was applicable for the limited purpose of discerning the attributes of the participation certificates for purposes of comparing those attributes to the definition of "preference shares," an undefined term used in LLC agreements executed under and governed by Delaware law and therefore to be interpreted in accordance with Delaware law. The court noted that its conclusion was consistent with investor expectations, especially in light of the fact that the LLC agreements contained choice of law provisions selecting Delaware law. Moreover, certain specific provisions of the LLC agreements provided for the application of German law, which indicated that where the parties to the LLC agreements intended the laws of another jurisdiction to apply, they expressed such intention explicitly. The court also noted that its determination of whether the participation certificates were "preference shares" under Delaware law would not affect the rights of holders of such certificates as a matter of German law, nor did it implicate a matter peculiar to the bank or the relationships among its directors, officers or stockholders. Having concluded Delaware law applied, the court turned to whether the participation certificates constituted "Parity" or "Junior" securities under Delaware law. Rejecting defendants' reliance on offering circulars for the trust preferred securities that characterized the participation certificates as debt securities, the court noted that Delaware law classifies securities not merely by the label attached to such securities, but through an analysis of their functional characteristics. The court found that the participation certificates had a number of characteristics that could qualify them as "preference shares" and, as a result, concluded that defendants' proffered interpretation was not the only reasonable interpretation. The court therefore denied this aspect of the motion to dismiss.

The court then turned to the implied covenant claim. Plaintiffs argued that defendants violated the implied covenant by refusing to make required payments on the Class B shares following the bank's entry into the domination and profit surrender agreement. Defendants countered that the LLC agreements expressly addressed the subject at issue, providing for mandatory payments only where the bank made a profit and under certain other circumstances. The court concluded that plaintiffs alleged sufficient facts with respect to the implied covenant claim to survive defendants' motion to dismiss. Specifically, the court stated that it understood plaintiffs to contend that an implied obligation arose out of the provision of the LLC agreement mandating payment on the Class B shares if the bank made a profit. According to the court, one plausible inference was that the bank did not make sufficient profits to trigger its payment obligation because the entity controlling the bank pursuant to the domination and profit surrender agreement took actions to limit or eliminate its profitability. Because the LLC agreements did not address whether the bank was required to remain a profit-seeking entity, the court found that an implied obligation may exist and therefore denied this aspect of defendants' motion to dismiss.

20. *Hughes v. Kelly*, C.A. No. 4814-VCN (Del. Ch. June 30, 2010)

In this decision, the Court of Chancery addressed plaintiffs' motion to dismiss defendants' counterclaims in which defendants' sought to enforce indemnification, non-disparagement and release provisions in the LLC Agreement of Fund Administration Holdings, LLC, a Delaware limited liability company ("FAH"). In July 2002, FAH, a holding company that controlled International Fund Services (N.A.), LLC ("IFS"), sold IFS to State Street Bank and Trust Company ("State Street") in an asset sale transaction. One month prior to the sale, FAH's LLC Agreement had been amended to make defendant Kelly the managing member of FAH, thereby tasking Kelly with responsibility to distribute to FAH's members the proceeds of the sale. The sale agreement provided that part of the sale price was to be paid to FAH in a lump sum at closing, with the balance determined according to IFS's financial performance over the three year period following the sale. Under the sale agreement, Kelly was obligated to serve as CEO of IFS during the three year post-closing period and not to compete with IFS for two years after termination of his employment with IFS. Each plaintiff was an FAH member, a senior IFS executive before the sale, and a State Street employee after the sale.

In 2005, Kelly made distributions to FAH members, setting aside approximately $5.5 million to cover potential tax or legal liabilities and other costs. Kelly resigned from IFS in August 2005 and started a competing business in 2007. In May 2008, State Street filed suit in New York alleging, inter alia, breach of the sale agreement's non-competition provision. After settling with State Street in June 2009, Kelly subsequently made a distribution to all FAH members other than plaintiffs, claiming he was entitled to the withheld amount as indemnification pursuant to the indemnification provision of FAH's LLC Agreement and that he could choose from which members to seek such indemnification. Plaintiffs filed this suit and Kelly counterclaimed, seeking a declaration that plaintiffs were responsible under the indemnification provision for costs associated with the New York action and this action, claiming breach of a non-disparagement provision in FAH's LLC Agreement based on plaintiffs' alleged role in inducing State Street to bring the New York action against Kelly, and seeking either a declaration that plaintiffs' claims fell within the release provision in FAH's LLC Agreement or specific performance of the release in the alternative.

FAH's LLC Agreement indemnified Kelly against claims "relating to or arising out of the activities of [FAH], or activities undertaken in connection with [FAH], or otherwise relating to or arising out of" the LLC Agreement except for "bad faith" acts. Plaintiffs argued that the indemnification provision was limited to Kelly's role as the managing member of FAH and did not apply to the conduct at issue in the New York action—namely, wrongful acts as CEO of IFS and immediately thereafter. Defendants argued that Kelly's position as CEO of IFS allowed him to maximize distributions to FAH members and therefore was inextricably intertwined with his role as managing member of FAH. The court framed the issue as "whether an indemnification clause that facially limits itself to one role of many held by an executive can be expanded to include actions taken in other roles that have some relation to that role subject to indemnification." Although the court was "skeptical" of defendants' "expansive reading" of the clause, it held that the indemnity clause was susceptible to two opposing, yet reasonable, interpretations and, as a result, it refused to grant plaintiffs' motion to dismiss under the applicable standard requiring that all reasonable inferences be drawn in favor of the non-moving party. The court likewise found that the ambiguities as to the scope of the indemnification clause also precluded dismissal of defendants' counterclaim for indemnification with respect to this action. Moreover, the court noted, assuming indemnification was not granted for the New York action, questions of fact might remain as to whether Kelly's reliance on a broad interpretation of the indemnification clause in withholding funds from plaintiffs constituted bad faith.

Under FAH's LLC Agreement, each member agreed, for a period of one year following the member's "Effective Termination Date," not to "engage in any conduct or make any statement disparaging or criticizing, or that could reasonably be expected to impair the reputation or goodwill of [FAH,] the Managing Member, . . . any of their respective Affiliates, or any products or services of these, in each case except to the extent required by law or legal process." Plaintiffs argued defendants' claim that they breached this provision should be dismissed on a number of grounds. First, plaintiffs contended that criticism of Kelly in his capacity as CEO of IFS fell outside the scope of the provision. Because the LLC Agreement defined "Managing Member" as "James P. Kelly" but did not facially restrict the non-disparagement provision to his role as the FAH's managing member, the court found the clause to be ambiguous and therefore declined to dismiss defendants' counterclaim on this basis. Next, plaintiffs argued that the time period prescribed in the non-disparagement provision expired by the time of the New York action. The court rejected this argument, noting that because plaintiffs were still FAH members and IFS employees, their respective "Effective Termination Dates" had not yet occurred. Finally, plaintiffs contended that their disclosures were exempt under the provision's "legal process" exception. Plaintiffs argued that, under agency law principles, they were fiduciaries of State Street and therefore obligated to disclose relevant information that could affect the decisions of their principal. The court, however, concluded that plaintiffs failed to meet their burden of establishing that "legal process" should be read that expansively. The court also noted that inclusion of the word "required" suggested "mandated disclosure." Plaintiffs also attempted to take advantage of the absolute privilege afforded to trial witnesses, but the court declined to recognize such a privilege at this point in the litigation, noting that many factual questions were relevant to application of the privilege.

The release provision in FAH's LLC Agreement provided that each member released Kelly from all claims "relating to or arising out of the activities of [FAH], or activities undertaken in connection with [FAH], or otherwise relating to or arising out of" the LLC Agreement except for "bad faith" acts. Defendants argued that this clause required plaintiffs first to obtain a declaratory judgment that

Kelly had acted in bad faith before plaintiffs could argue that the release clause did not apply to that conduct. The court, reading the LLC Agreement as a whole, declined to accept such a "hypertechnical approach" requiring a "two-stage litigation process in order to induce Kelly to carry out his primary obligations under the Agreement." The court therefore granted plaintiffs' motion to dismiss defendants' counterclaim based upon the release clause of the FAH LLC Agreement.

21. *Minnesota Invco of RSA #7, Inc. v. Midwest Wireless Holdings LLC*, C.A. No. 1887-N (Del. Ch. June 7, 2006)

The plaintiffs, minority interest holders in Midwest Wireless Communications LLC, a Delaware limited liability company ("Communications"), sought specific performance of a right of first refusal under Communications' operating agreement (the "1995 LLC Agreement") to prohibit the sale of Midwest Wireless Holdings LLC ("Holdings"), the majority interest holder in Communications, without first offering plaintiffs the right to purchase Holdings' interest in Communications.

In 1999, Communications and plaintiffs entered into a restructuring whereby Holdings was formed to purchase certain assets in Iowa and Wisconsin. To facilitate the restructuring, plaintiffs, Communications and Holdings executed an agreement (the "1999 Agreement") which provided that if there were a proposed sale of all or substantially all of the assets of Holdings, plaintiffs had a right to "tag along" by exchanging their interests in Communications for interests in Holdings. The 1999 Agreement further provided that if the plaintiffs failed to exercise their "tag along rights," Holdings could compel plaintiffs to transfer their interests in Communications by exercising its "drag along rights." As a result of the restructuring, Holdings owned an 86% interest in Communications. The 1999 Agreement did not refer to plaintiffs' right of first refusal under the 1995 LLC Agreement and contained a broad integration clause as well as a conflict provision stating that the terms of the 1999 Agreement would govern in the event of a conflict with the 1995 LLC Agreement.

In 2005, Holdings sought potential bidders to purchase the company. The plaintiffs did not initially assert that a sale of Holdings would trigger their right of first refusal. In order to receive the highest price from bidders, the boards of managers of Holdings and Communications amended their respective LLC agreements on November 11, 2005 to eliminate all members' rights of first refusal. Plaintiffs were notified of the amendments and did not object. On November 17, 2005, Holdings announced its agreement with Alltel Corporation ("Alltel") pursuant to which Alltel would acquire all of Holdings by merger (the "Alltel Transaction"). Plaintiffs met with Holdings on December 14, 2005 to discuss their rights regarding the Alltel Transaction and asserted its right of first refusal for the first time. Holdings then requested plaintiffs to exercise its tag along rights, indicating otherwise Holdings would exercise its drag along rights.

The court first addressed whether plaintiffs had a right of first refusal with respect to the units of Communications in the Alltel Transaction. The court found that the 1999 Agreement clearly governed the Alltel Transaction based on its tag-along and drag-along provisions in the event of a proposed sale of all or substantially all of Holdings' assets and its broad integration clause. Since the 1999 Agreement was fully integrated and failed to provide for any right of first refusal, the court stated that a plain reading of the integration clause indicated that there was no right of first refusal in connection with the Alltel Transaction. Additionally, the court found that Holdings' drag along rights were in direct conflict with the plaintiffs' right of first refusal since plaintiffs' ability to exercise a right of first refusal would eliminate Holdings' drag along rights. Since the 1999 Agreement expressly stated that its terms would govern in the event of a conflict with the 1995 LLC Agreement, Holdings' drag along rights prevailed over plaintiffs' right of first refusal.

The plaintiffs also argued that the November 2005 amendment in which Holdings voted its 86% interest in favor of eliminating the members' right of first refusal was invalid since the 1995 LLC Agreement contained an "acquiring person" provision which prevented any member owning more than a 30% interest in Communications from exercising majority voting power. The court rejected plaintiffs' argument stating that "treating Holdings as an 'acquiring person'…runs counter to the very structure and purpose of the 1999 transaction to act as the parent of Communications." Additionally, Holdings had previously exercised its majority voting power without objection in all other Communications matters.

Finally, the court also rejected plaintiff's argument that the Communications board members breached their fiduciary duty of care when they approved the amendment to the 1995 LLC Agreement. The court found that the board members were fully informed and approved the amendments based on the advice of counsel and Bear Stearns and in the good faith belief that the amendments would maximize the sale price of Holdings and get the best possible value for its unit holders and for plaintiffs. Based on the foregoing, the court held that the plaintiffs did not have a right of first refusal with respect to the Alltel Transaction and Holdings could assert its drag along rights.

22. *Kronenberg v. Katz*, C.A. No. 19964 (Del. Ch. May 19, 2004)

In this case, the Court of Chancery examined the parameters of integration and confidentiality clauses in the LLC agreement of a Delaware LLC and concluded that (i) an integration clause cannot be read as barring a party from making a fraud claim unless it contains an express “anti-reliance” clause and (ii) an overly broad confidentiality clause that attempts to bar information that normally is available to the public through the court’s tradition of open proceedings is contrary to public policy and should not be strictly enforced.

Katz had contacted Kronenberg to consider a potential business venture to develop community sports facilities using tax-exempt bond financing provided by local governments. Kronenberg and the other plaintiffs agreed, and the resulting business, Community Sports Partners, LLC (“CSP”), was formed with the expectation that it would earn profits from management fees. Crucial to securing the financial support of Kronenberg and the other plaintiffs was the use of feasibility studies purportedly prepared by an experienced third party. These studies would then be given to local governments to show that CSP’s facilities could be successful. Katz misrepresented to Kronenberg that the studies were the work of a specialist in these types of sports facilities. In actuality, the studies were prepared by Katz himself and a less than reputable businessman named Mark Robins. Furthermore, Katz made very misleading claims about Robins, who was designated as the Chief Operating Officer of CSP. The court found that far from being a capable, experienced and trusted executive, Robins was a five-time convicted criminal who twice filed for personal bankruptcy. When the relationship of the CSP members inevitably went sour, the plaintiffs went to court seeking to rescind the contract.

The plaintiffs claimed that, because of Katz’s misrepresentations, they were fraudulently induced into entering the LLC agreement. The issue the court faced was whether the integration clause in the LLC agreement barred a claim of fraud against Katz. The parties used a standard integration clause that stated “[t]his Agreement … constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements, understandings, inducements, or conditions, oral or written, express or implied.” The defendant claimed that the clause precluded the plaintiffs from relying on any statement of fact made by Katz that was not contained within the four corners of the agreement. In other words, since the agreement did not mention the feasibility studies or Robins’ background, the plaintiffs should be barred from raising those issues in court as a basis for a fraud action. The plaintiffs contended that since the integration clause was not an express “anti-reliance” clause (i.e., because the clause did not expressly provide that the parties were not relying upon any representation or statement of fact not contained within the LLC agreement), it could not be read as barring them from making a fraud claim. The court sided with the plaintiffs, stressing that Delaware has a strong interest in combating fraud, and thus, any clause that would bar a fraud claim must be very clear in its purpose. Balancing contractual freedom and efficiency concerns with public policy interests, the court arrived at the following rule for the construction of an integration clause as it relates to a fraud claim:

For a contract to bar a fraud in the inducement claim, the contract must contain language that, when read together, can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract’s four corners in deciding to sign the contract.

The integration clause at issue, because it did not clearly state that the parties were not relying on information outside of the LLC agreement, did not bar a fraud claim.

Separately, Katz argued that Kronenberg, by bringing the case to trial publicly and not attempting to file it under seal, violated a confidentiality provision in the LLC agreement. The provision dictated that “[t]he Company and each of its Members, Managers, and officers at all times … shall use all reasonable effort to cause all Sensitive Information to be maintained in strict confidence, protected and safeguarded and shall not directly or indirectly disclose, reveal or make available to any third party any Sensitive Information or use or exploit any Sensitive Information for any purpose whatsoever.” A dispute that devolved into a lawsuit was exempted from these disclosure restrictions "provided that the Person proposing to disclose or use Sensitive Information in connection with any suit … afford any other affected party the opportunity to seek an order to hold the contents of all pleadings and other documents containing Sensitive Information under seal or other reliable assurance that confidential treatment will be accorded to the Sensitive Information." The key term, "Sensitive Information," was defined broadly in another section of the LLC agreement to mean "all information relating to the existence of or any claim made in connection with any dispute or controversy arising under this Agreement or relating to the Company."

The court rejected Katz's claim on a number of bases, including that Katz was not a signatory to the LLC agreement and thus the protections it afforded were not available to him personally, that he had made no immediate attempt, after the case was filed, to move to place the complaint under seal and that the type of information ultimately sought to be placed under seal by Katz was not of the type usually subject to such confidentiality agreements. Moreover, the court found the confidentiality provision to be "facially absurd" because although it recognized that the parties were free to litigate in courts of public record, the provision simultaneously made the existence of a dispute of any nature "Sensitive Information" that the parties had to conceal from the public. The court determined that it was unrealistic to read the confidentiality provision as barring information that normally is open to the public through the court's tradition of open proceedings and would be inconsistent with strict limits placed by the Court of Chancery on parties' ability to maintain filings under seal.

23. *Lusk v. Elliott*, C.A. No. 16326 (Del. Ch. Aug. 13, 1999)

This case involved a dispute over who constituted the lawful members of a Delaware limited liability company. Plaintiff was trustee of Citation Realty Trust ("CRT"), which was a 1% owner of the LLC. Plaintiff claimed, however, that CRT was the sole member of the LLC because the managing member who owned the remaining 99% membership interest had, shortly before he died, assigned his interest to a trust for the benefit of his family and, plaintiff argued, that assignment conveyed only the former member's economic interest but did not entitle the trust to any other rights or to be admitted as a successor member. Prior to the assignment, all members of the LLC had executed a written consent consenting to the assignment of the "entire undivided membership interest" by the 99% member to the trust. On the same day that the consent was executed, the 99% member's wife, acting as his attorney-in-fact, had executed an assignment of all of the "membership interest" in the LLC to the trust. Both parties agreed that the consent effectively amended the LLC Agreement which had prohibited any assignments, but the parties differed on the extent of the interest assigned. Plaintiff argued that he had consented to an assignment of the economic interest only and not the entire "membership interest." In support of this position he argued that because the LLC Agreement had no provision governing "assignment" the court should look to the LLC Act. Under the Act, plaintiff argued, an assignment conveyed only a member's economic interest not his entire membership rights and did not entitle the assignee to be admitted as a member. The court rejected plaintiff's argument. It declined to look to the LLC Act to determine the effect of the assignment because it found that the consent executed by the members of the LLC and the subsequent assignment document unambiguously showed that the "entire undivided membership interest" was assigned to the trust, and the court concluded that as a result of that assignment the trust succeeded to the entire interest of the assignor and became the successor managing member. In so holding, the court did not require specific language relating to the admission of the trust as a member.

24. *Clark v. Kelly*, C.A. No. 16780 (Del. Ch. June 24, 1999)

Plaintiffs brought suit under Section 18-110 of the LLC Act to determine the lawful managers of a Delaware limited liability company. The limited liability company agreement of the LLC essentially provided that any direct or indirect transfers of an interest in the LLC made without obtaining the non-transferring member's consent resulted in the transfer of economic rights only without any right to participate in the management of the business and affairs of the LLC. The stock of a California corporation, which was one of the two members of the LLC, was transferred to a trust of which the husband and wife were both the trustors and the co-trustees. Prior to the transfer, the husband had been the sole holder of record of the stock. Plaintiffs argued that the transfer of the stock of the California corporation without the consent of the other member was a restricted transfer under the limited liability company agreement resulting in a loss of management rights for the California corporate member. The court first held that the dispute turned on two issues of California law (i) whether a 100% stock interest in the California corporation was "community property" in which the non-record owner spouse had a property right when the California corporation became a member of the LLC and (ii) if so, whether the non-record owner spouse was thereby an "equity owner" of the shares of the California corporation at the time of the purported transfer. The court then concluded both that the shares of stock in the California corporation were community property and that the non-record owner spouse was thereby an equity owner of those shares with the consequence that no "transfer" had occurred within the meaning of the limited liability company agreement of the LLC and, therefore, the California corporation retained its voting interest in the LLC and its right to designate one of the co-managers.

M. Mergers and Consolidations

1. *Corwin v. KKR Fin. Holdings LLC*, No. 629, 2014 (Del. Oct. 2, 2015)

Plaintiffs below appealed the Court of Chancery's dismissal of plaintiffs' complaint, which challenged the stock-for-stock acquisition of KKR Financial Holdings LLC ("Financial Holdings") by defendant KKR & Co. L.P. ("KKR"). Stockholder plaintiffs argued below that the acquisition was presumptively subject to the entire fairness standard of review because KKR was a controlling stockholder of Financial Holdings. In its opinion, the Court of Chancery granted defendants' motion to dismiss, finding that plaintiffs failed to plead facts supporting an inference that KKR was Financial Holdings' controlling stockholder. The Court of Chancery failed to find a combination of potent voting power and management control such that KKR could be deemed to have effective control of the board without actually owning a majority of stock. The Court of Chancery reasoned that plaintiffs were, at bottom, asking the Court of Chancery to impose fiduciary obligations on KKR, which owned less than 1% of Financial Holding's stock, because a preexisting contractual management agreement between a KKR affiliate and Financial Holdings constrained Financial Holdings' business and strategic options. Declining to create such a rule, the Court of Chancery held that KKR was not a controlling stockholder, and thus the business judgment rule standard of review applied to the acquisition.

On appeal, plaintiffs reiterated their controlling stockholder argument and also argued that even if KKR was not a controlling stockholder and the entire fairness standard of review was inapplicable, *Revlon* applied. Defendants argued that plaintiffs failed to fairly present their *Revlon* argument below, and, regardless, the transaction was approved by a fully informed, uncoerced stockholder vote, thus subjecting it to the business judgment rule standard of review. As to the controlling stockholder argument, the Delaware Supreme Court held that the Court of Chancery correctly applied the law and declined to repeat the Court of Chancery's analysis in its opinion. As to plaintiffs' *Revlon* argument, the Delaware Supreme Court agreed with defendants that the effect of the fully informed, uncoerced stockholder vote was outcome-determinative, even if *Revlon* applied. The court first reasoned that *Unocal* and *Revlon* were designed for pre-closing injunctive relief, rather than post-closing money damages claims as was the case here. Second, the court noted that the business judgment rule applied in these circumstances only when there was a fully informed, uncoerced stockholder vote, as opposed to a situation where "troubling facts regarding director behavior" were not disclosed to the stockholders. Finally, the court cited Delaware's long-standing policy of avoiding the "uncertainties and costs of judicial second-guessing" in circumstances where there is a fully informed, uncoerced stockholder vote.

The court also noted that although the parties "[had] acted as if this case was no different from one between two corporations whose internal affairs are governed by the [DGCL] and related case law . . . [and that the court] respected the parties' approach," but the court recognized that the case involved alternative entities and that in such cases, "distinctive arguments often arise due to the greater contractual flexibility given to those entities under our statutory law."

2. *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, C.A. No. 5589-VCP (Del. Ch. Mar. 8, 2013)

Plaintiffs, Meso Scale Diagnostics, LLC ("MSD") and Meso Scale Technologies LLC ("MST"), two Delaware LLCs with disputed springing rights to certain patented technology (the "ECL Technology"), asserted that defendants breached their contractual duties because: (i) defendants' acquisition of certain intellectual property rights through a reverse triangular merger was an assignment by operation of law that required their consent, which defendants did not seek, and (ii) defendants made sales outside the licensed field of use in violation of the Roche License (defined below). Defendants moved for summary judgment, which the court granted as to the first assertion and denied as to the second.

Defendants in this case were Roche Holding Ltd. and its subsidiaries ("Roche"). In 1992, IGEN International, Inc. ("IGEN") granted a license to use the ECL Technology to a company ultimately acquired by Roche (the "1992 License"). In 1995, IGEN and MST formed MSD and granted MSD a license to use IGEN's technology, which included the ECL Technology ("MSD License"). In 1997, IGEN sued Roche for breach of contract and Roche was concerned that IGEN might terminate its 1992 License; in fact, IGEN sent Roche a notice purporting to terminate the 1992 License. Roche then purchased IGEN in 2003 and, as part of a restructuring in connection therewith (the "2003 Transaction"), (i) IGEN granted IGEN LS LLC, IGEN's wholly-owned subsidiary, a non-exclusive license to use the ECL Technology (the "Roche License") and (ii) IGEN's intellectual property rights were spun off into a subsidiary that eventually became BioVeris Corporation ("BioVeris"). In connection with the 2003 Transaction, MSD and MST signed a Global Consent preventing the assignment of rights of BioVeris "by operation of law or otherwise" without the prior written consent of the other parties. After the 2003 Transaction, BioVeris alleged that Roche was selling ECL Technology-related products outside the field permitted by the Roche License. To acquire BioVeris's intellectual property rights, Roche acquired BioVeris in a reverse triangular merger in 2007. Plaintiffs then filed a complaint against Roche for breach of contract as to the Global Consent ("Count I") and the Roche License ("Count II"). At issue in this decision is plaintiffs' motion for summary judgment.

After determining that Count I was not barred by laches, the Court of Chancery determined that a reasonable interpretation of the Global Consent was that the rights, interests and obligations regarding BioVeris's intellectual property were subject to the consent provision of the Global Consent. Then the court addressed the issue of whether the reverse triangular merger whereby Roche acquired BioVeris was an assignment "by operation of law" that would trigger the consent provision of the Global Consent. Defendants asserted that a reverse triangular merger could not be an assignment by operation of law. The court agreed, noting, "Generally, mergers do not result in an assignment by operation of law of assets that began as property of the surviving entity and continued to be such after the merger." Furthermore, the court stated that other Delaware courts have held that, in a merger context, the non-surviving entity's rights and obligations are transferred to the surviving corporation by operation of law. Finally, the court noted that its stance was consistent with the reasonable expectation of the parties, as the vast majority of commentary indicated that a reverse triangular merger does not result in an assignment by operation of law as to the surviving entity. The court rejected plaintiffs argument that Roche's acquisition of BioVeris was merely an assignment of BioVeris's intellectual property rights based on the doctrine of independent legal significance. The court also rejected plaintiffs' reliance on forward triangular merger cases, stating that those cases involved a target company that was the non-surviving entity, whereas in this case BioVeris, the target company, was the surviving entity. The court found that plaintiffs could have negotiated for a provision that required consent based on a change in control; however, they negotiated for a term prohibiting assignments by operation of law or otherwise without consent. Therefore, the court granted summary judgment to Roche.

The court declined to grant summary judgment as to Count II because the language of the Roche License was ambiguous, defendants did not prove that New York Law conclusively barred plaintiffs' claims and plaintiffs raised issues of material fact.

3. *Schuss v. Penfield Partners, L.P.*, C.A. No. 3132-VCP (Del. Ch. June 13, 2008)

Plaintiffs, who had withdrawn as limited partners of a hedge fund formed as a Delaware limited partnership, claimed that the non-pro rata in-kind distribution they received from the hedge fund in respect of their withdrawal violated the partnership agreement and Section 17-605 of the LP Act. This decision addressed a motion to dismiss by defendants.

As a preliminary matter, defendants argued that because the hedge fund is not a party to its own partnership agreement and is not alleged to have caused a breach of the partnership agreement, the hedge fund cannot be liable for breach of the partnership agreement. The court held that, because Section 17-606(a) of the LP Act makes it clear that it is the partnership that owes the distribution to the limited partners, the hedge fund is a proper defendant. [Note: The court presumably could have also cited to the definition of "partnership agreement" in Section 17-101(12) of the LP Act, which provides that a limited partnership is bound by its partnership agreement whether or not the limited partnership executes the partnership agreement.]

Section 17-605 of the LP Act provides in relevant part that, except as provided in a partnership agreement, a partner may not be compelled to accept a distribution in kind to the extent that that the percentage of the asset distributed exceeds a percentage of that asset which is equal to the percentage in which the partner shares in distributions from the partnership. The hedge fund's partnership agreement provided that distributions to withdrawing partners "shall be made in cash or, in the sole discretion of the General Partner, in securities selected by the General Partner or partly in cash and partly in securities selected by the General Partner." Plaintiffs acknowledged that Section 17-605 can be overridden by a partnership agreement but alleged that the language in the hedge fund's partnership agreement was not sufficient to do so. Although the partnership agreement did not explicitly permit non-pro rata in-kind distributions, the court held that the broad discretion given to the general partner to determine which, if any, securities to distribute in kind and whether to make a distribution entirely in kind, even if the fund also has cash assets, was sufficient to override the default rule of Section 17-605. The court therefore held that the hedge fund was permitted to make non-pro rata in-kind distributions and dismissed this claim.

The court also addressed the parties' dispute as to whether the withdrawing partners were entitled to a distribution of the securities specified by the general partner for distribution to the withdrawing partners at the time of withdrawal, even if those securities had declined in value between the time of withdrawal and the time when the securities were actually distributed, or, alternatively, to assets whose aggregated value at the time of distribution equaled the withdrawing partners' share of the hedge fund as of the time of withdrawal. Under the partnership agreement, the hedge fund was required to make distributions to a withdrawing partner within thirty days of its withdrawal in an amount equal in value to not less than 90% of the estimated amount of the withdrawing partner's capital account balance as of the withdrawal date. Plaintiffs argued that they are entitled to a distribution in an amount equal to the value of their capital account balance as of the withdrawal date, which becomes a fixed amount as of the withdrawal date. The court held that plaintiffs had at least a colorable claim that the plain language of the partnership agreement supported their argument and, accordingly, denied defendants' motion to dismiss this claim.

Plaintiffs also claimed the general partner breached its fiduciary duties to the withdrawing partners by taking the actions set forth above. On the basis of the court's holding that plaintiffs might succeed in proving that defendants' interpretation of the partnership agreement was incorrect with respect to determining the value of the distribution to which plaintiffs' were entitled, the court denied defendants' motion to dismiss this claim. Defendants also argued that the fiduciary duties claims should be dismissed because they were duplicative of the breach of contract claims. The court disagreed, holding that although each of the claims shared a common nucleus of operative facts, the fiduciary duty claims depended on additional facts, were broader in scope, and involved different considerations in terms of a potential remedy.

Finally, plaintiffs demanded an accounting. The court set forth several factors that are typically examined when considering a demand for an accounting, which include whether: (i) the partner was wrongfully excluded from the partnership; (ii) there is a breach of fiduciary duty; and (iii) other circumstances render an accounting just and reasonable. Based on the complexity of the allegations regarding improper distributions and the nature of the wrongs alleged, the court denied defendants' motion to dismiss plaintiffs' demand for an accounting.

4. *Acadia Brandywine Town Ctr., LLC v. New Castle County*, C.A. No. 03C-09-040 WCC (Del. Super. Ct. Sept. 10, 2004)

Following a merger of several Delaware LLCs for the sole business purpose of transferring certain real property, the parties to the merger sought a ruling from the State of Delaware Division of Revenue (the "DOR") that the merger was exempt from the Delaware Realty Transfer Tax, 30 *Del. C.* §§5401 *et seq.* (the "Transfer Tax"). The DOR concluded that the merger was subject to the Transfer Tax. The merger parties then brought this action seeking a declaratory judgment that the Transfer Tax was not applicable to the merger.

The court stated that the Transfer Tax applies to conveyances of intangible interest in an entity that can be characterized as a sale of real estate. The court held that for purposes of the Transfer Tax the merger was a conveyance of the membership interest in the constituent LLCs which constituted a conveyance of an intangible interest for purposes of the Transfer Tax and the merger should be characterized as a sale of real property because the merger was simply a means to transfer the real property, which were the only valued assets at stake. The court thus held that the merger was subject to the Transfer Tax.

N. Veil Piercing

1. *U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls, L.L.C.*, C.A. No. 112-N (Del. Ch. Mar. 30, 2005)

In this decision in the *U.S. Bank v. U.S. Timberlands Klamath Falls* case, plaintiff sought to amend its complaint to add several claims, including a veil-piercing claim with respect to three Delaware LLCs and a Delaware corporation. The court, citing corporate precedent, stated that to state a veil-piercing claim in Delaware, plaintiff must plead facts supporting an inference that defendants created a sham entity designed to defraud investors and creditors and that the factors considered by a court in a veil-piercing analysis include (i) whether the company was adequately capitalized for the undertaking, (ii) whether the company was solvent, (iii) whether corporate formalities were observed, (iv) whether the dominant shareholder siphoned corporate funds and (v) whether, in general, the company simply functioned as a façade for the dominant shareholder. Although the precedent cited in the court's discussion was all in the corporate context, the court did not distinguish between the test for piercing the veil of a corporation as opposed to that of an LLC, which implies that the corporate standard would be applied in the context of an LLC. The court stated that the fact-intensive inquiry associated with the veil-piercing claim would involve substantial discovery and denied plaintiff's request to add the veil-piercing claim because it found that, given the relatively late stage of this proceeding and the nearness of the trial, the addition of the veil-piercing claim at this time would unreasonably prejudice the defendants.

O. Change of Control Transactions

1. *Blackmore Partners, L.P. v. Link Energy LLC,* C.A. No. 454-N (Del. Ch. Oct. 14, 2005)

Following the court's denial of the defendants' motion to dismiss referred to below, the defendants moved for summary judgment at the conclusion of discovery and this opinion was the court's decision with respect to such motion.

The plaintiff first alleged that the court should apply enhanced scrutiny to the challenged transaction in which the proceeds of the sale of substantially all of the LLC's assets were used to repay the debt of the LLC and to pay holders of unsecured notes a payment for covenant waiver thus rendering the LLC's units worthless. The plaintiff claimed the board of directors of the LLC deprived the unit holders of consideration that they would have received if the board had not agreed to the demands of the note holders. The court rejected the plaintiff's reliance on the court's decision in *Orban v. Field* which held that "when a board approves a transaction that favors one corporate constituency over another, they lose, at least as an initial matter, the cloak of business judgment protection," and the board must demonstrate that it acted reasonably and in good faith. The court in the instant case distinguished *Orban* by finding that the "defendants did not act 'solely or primarily for the express purpose of depriving a shareholder of effective enjoyment of a right conferred by law.'" Importantly, the LLC's operating agreement empowered the board of directors to authorize a sale of all or substantially all of the LLC's assets without a vote of the unit holders thus precluding any need for measures by the board to prevent the unit holder's approval or vote. The court also found that even if *Orban* applied to the instant case, the defendants met the enhanced scrutiny standard since the company was insolvent and no better transaction was available.

The court next addressed the plaintiff's claim that the defendants breached their fiduciary duties to the unit holders by focusing on the creditors' interests over the interests of the unit holders. The plaintiff conceded that the company was insolvent at the time of the disputed transaction, and the court stated that "the board of directors of an insolvent company may take into account the interests of creditors at the apparent expense of stockholders if, in doing so, the board meets its fiduciary duties to all relevant constituencies."

The court then analyzed whether the directors met their fiduciary duties with respect to the unit holders. The plaintiff claimed that the board's decisions regarding the transaction were tainted by the involvement of J. Robert Chambers ("Chambers"), a director who was a managing director of Lehman Brothers, a holder of an equal percentage of notes and units of the LLC. The court referred to its decision in *Cooke v. Oolie* which involved defendants who were both shareholders and creditors of a corporation considering an acquisition proposal. The *Cooke* court held that "plaintiffs bore the burden of showing that an actual conflict existed, and that the deal chosen by the defendants offered superior terms for creditors and inferior terms for the plaintiff shareholders compared to other proposals available to the defendant corporation." Unlike the defendants in *Cooke*, the defendants in the instant case owed fiduciary duties to creditors because the company was insolvent. Even if Chambers' membership on the board created a potential conflict, there were no better alternatives for the unit holders other than the transaction approved by the board. The court also noted that even if Chambers were conflicted, the board would still receive the protections of the business judgment rule because such protections only require that a majority of the directors approving the transaction remain disinterested, and the plaintiff made no claims that other directors were interested.

The court also rejected the plaintiff's argument that the Special Committee of independent directors formed by the board to consider potential transactions was tainted by the presence of the CEO of the LLC and Chambers at the meetings of the Special Committee. Since the plaintiff failed to present evidence that the CEO or Chambers influenced the Special Committee or acted "as anything more than necessary sources of information," the court found the Special Committee operated with "sufficient independence to merit the cloak of business judgment protection."

Next, the plaintiff argued that the defendants breached their duty of care by approving the transaction without sufficient expert information and by failing to use the leverage from a potential bankruptcy filing against the note holders to negotiate a better settlement for the unit holders. The court found that the plaintiff's claims based on breach of the duty of care were precluded by the LLC's operating agreement exculpating directors for all awards of damages for violations of the duty of due care. Nonetheless, the court addressed the plaintiff's claims regarding the duty of due care finding that the directors did not violate such duty. The court stated that the defendants did not act with gross negligence since the record showed that the Special Committee met "repeatedly over months to address the issue of the company's impending insolvency and to consider alternatives." Additionally, the note holders had the ability to veto any proposed transaction thus limiting any leverage power the company had against the note holders. Moreover, the court noted that "the choices made in formulating a negotiating strategy are within the core of what is protected by the business judgment rule," and the evidence failed to support the plaintiff's claimed violation of due care.

Finally, the court rejected the plaintiff's claim that the defendants acted in bad faith in approving the transaction finding that "the fact that unit holders were left with nothing at the end, given a context in which the chief alternative substantiated by evidence was an equally barren bankruptcy proceeding, does not suffice to rebut the presumption that the directors were acting in the good faith exercise of their fiduciary duties, or to establish a claim of waste." The court granted the defendants' motion for summary judgment.

2. *Blackmore Partners, L.P. v. Link Energy LLC*, C.A. No. 454-N (Del. Ch. Nov. 10, 2004)

This case arose from the approval by the board of directors of a Delaware LLC of the sale of substantially all of the LLC's assets for $290 million. Under the terms of the LLC's operating agreement, the board of directors had the power to effectuate the transaction without a vote of the LLC's unitholders, and no vote of the unitholders was sought. Out of the $290 million, $265 million was to be used to repay debt of the LLC, including certain unsecured notes, and the remaining $25 million was to be paid to the holders of the unsecured notes in return for their agreement to waive covenants in the notes that required any purchaser of the LLC to assume the notes. No proceeds from the sale were to be distributed to the LLC's unitholders, and the sale rendered the LLC's units worthless.

Plaintiff, a unitholder of the LLC, brought a class action against the LLC and its directors for breach of fiduciary duty, alleging that the board favored the noteholders, to whom they did not owe a fiduciary duty, at the expense of the unitholders, to whom they did owe a fiduciary duty, and also that the board failed to maximize unitholder value in a sale of control transaction and, thus, violated its duty of loyalty under the principles of the corporate *Revlon* doctrine. Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted, and this opinion was the court's decision with respect to such motion.

The court stated that under the *Revlon* doctrine, "once a board of directors determines to sell the corporation in a change of control transaction, its responsibility is to endeavor to secure the highest value reasonably attainable for the stockholders." The court then applied the principles of the *Revlon* doctrine in this case involving an LLC. The court noted that the LLC's operating agreement contained a clause that exculpated the directors from liability for breach of the duty of care and stated that under *Revlon* precedent in order to survive the motion to dismiss in such a case, the complaint must allege particularized facts that support an inference of disloyalty or a lack of good faith. Defendants argued that the complaint must be dismissed because it did not allege self-interest or lack of independence by the directors. The court acknowledged that the absence of allegations of self-interest or lack of independence is often a fatal defect in a complaint for breach of the duty of loyalty, but did not find that to be true in this case. Under these circumstances, where the allegations supported an inference that the LLC's units had significant value prior to the announcement of the sale and that the LLC was neither insolvent nor on the verge of bankruptcy at such time, the court held that plaintiff's allegations raised a reasonable inference of disloyalty or intentional misconduct by the board of directors. The court went on to state that while a more complete record may show that defendants were justified in acting as they did, at this stage it was reasonable to infer that a properly motivated board would not have agreed to a transaction that wiped out the value of the LLC's units and surrendered all of that value to the LLC's creditors. The court thus denied defendants' motion to dismiss.

P. Membership

1. *Prokupek v. Consumer Capital Partners LLC*, C.A. No. 9918-VCN (Del. Ch. Dec. 30, 2014)

Plaintiff, former Chairman and CEO of defendant Smashburger Master LLC ("Smashburger"), was granted a substantial amount of restricted equity of Smashburger as a term of employment, most of which would not vest unless Smashburger met certain "performance hurdles." After Smashburger terminated him and redeemed his vested units pursuant to its LLC Agreement (the "Agreement") at a price it determined to be fair market value, Plaintiff demanded certain of Smashburger's business records under Section 18-305(a) of the Delaware Limited Liability Company Act (the "LLC Act"), with the stated purpose of evaluating Smashburger's financial performance to determine whether it manipulated its financials to make it appear that it fell short of some of the performance hurdles. After Smashburger refused his demand, plaintiff petitioned the court for inspection, arguing that he retained equity in Smashburger and concomitant inspection rights because it did not call a substantial number of his units and also because it paid him too little for his units. Alternatively, he argued that he retained inspection rights by virtue of his status as a former member of Smashburger. Smashburger moved to dismiss plaintiff's claim, asserting that it had already redeemed his units, thus terminating his membership and precluding him from exercising inspection rights.

The court first addressed the issue of whether plaintiff was a member of Smashburger at the time of his demand. It noted that the unit redemption price and the number of units redeemed were undisputed facts fit for resolution on summary judgment. Addressing the plaintiff's first argument on this issue, the court found that under the redemption provision of the Agreement, Smashburger's manager was to determine the number of vested units by certifying whether Smashburger achieved the applicable performance hurdles. Since the manager decided Smashburger did not, Smashburger complied with the Agreement and plaintiff was no longer a member. Whether the EBITDA numbers the manager used to determine compliance with the performance hurdles were unreliable was a separate factual question that could support a breach of contract action, but did not affect plaintiff's membership status.

The court next addressed plaintiff's argument that he retained equity pursuant to a dispute mechanism in the Agreement. This mechanism allowed former employees to object to Smashburger's determination of fair market value within thirty days of receiving a call notice, with the parties having an additional fifteen days to agree on the fair market value and, if no agreement was reached, the option to retain an independent firm to give a valuation within thirty days. Plaintiff contended this mechanism required Smashburger to determine a fair price for his units prior to redeeming his units. The court rejected this argument based on the plain language of the redemption provision, which provided that all redemptions shall close within sixty days of the notice of termination and contained no exception for ongoing disputes covered by the dispute mechanism. In addition, the dispute mechanism contemplated a period of up to seventy-five days from the date of Smashburger's determination of fair market value to resolve disputes, whereas the redemption provision required closing to occur within sixty days. Thus, the only way to give effect to both provisions without altering the Agreement's express terms would be to recognize that valuation disputes may continue after a member's units have been validly called. Therefore, although the plaintiff may have had damages claims related to the redemption closings, the court found he was not entitled to the restoration of an equity interest.

Lastly, the court addressed plaintiff's argument that even if he was no longer a member, he retained inspection rights. The court looked to Section 18-305(a)'s corporate analogue, 8 Del. C. § 220, for guidance. Section 220 unambiguously limits inspection rights to current stockholders and is narrowly construed by the court. In addition, Section 18-305(a) confers inspection rights only on current members and plaintiff cited no Delaware authority holding that former members retain residual inspection rights. Since the LLC Act permits LLC agreements to grant members greater inspection rights than are provided by statute, the court found no reason to expand the LLC Act's plain language when the parties could have done so themselves. Having rejected all three of plaintiff's arguments, the court granted Smashburger's motion to dismiss.

2. *Phillips v. Hove*, C.A. No. 3644-VCL (Del. Ch. Sept. 22, 2011)

The dispute arose out of a start-up business conducted through a Delaware LLC. In an earlier decision in which the court denied a motion to dismiss (*see Phillips v. Schifino*, C.A. No. 3644-VCL (Del. Ch. Dec. 18, 2009)), the court found that the transaction agreements involved were so ambiguous that it was unclear whether the central document, a four-page term sheet, was sufficient to constitute a limited liability company agreement. In this post-trial opinion, the court determined, among other issues, the identity of the voting members of the LLC. Noting that it had previously deemed the ownership provision in the term sheet to be ambiguous in denying a motion for summary judgment, the court now determined that the term sheet provided for an LLC composed of two members. One of the issues faced by the court was whether one of the members owned its membership interest in his individual capacity or through an investment entity. The term sheet referred both to the investment entity and to the individual as a member of the LLC and was executed by the individual in his individual capacity. Other agreements drafted in connection with the formation of the LLC, however, referred to the investment entity as a member of the LLC. The court noted that discussions between the parties indicated that the other member, who clearly owned his membership interest in his individual capacity, was aware that the investment entity, not the individual with whom the other member had negotiated, was intended to own the membership interest at issue. Based on the totality of the evidence, the court concluded that the membership interest was owned by the investment entity rather than the individual.

The court next considered whether it could exercise personal jurisdiction over an individual who was neither a member nor a manager of the LLC, but ran the day-to-day operations of the business and had filed a bankruptcy petition on behalf of the LLC. Noting that Section 18-109(a) of the LLC Act extends not only to formally designated managers but also to persons who "participate materially in the management" of an LLC, the court concluded that it could exercise jurisdiction in this case because an individual who manages the day-to-day operations of a business and files a bankruptcy petition on behalf of a business participates materially in the management of an LLC.

With the jurisdiction issue resolved, the court turned to a claim that the same individual breached his fiduciary duties. According to the court, an individual who asserts control over the operations of an LLC owes fiduciary duties to the LLC and its members even though such individual is not a member or manager. In making this determination, the court relied on past Delaware cases stating that one who controls property of another owes fiduciary duties when exerting such control over such property. The individual at issue had sold the LLC's inventory through a competing retailer, and the court concluded that this action constituted a breach of the duty of loyalty.

Finally, the court addressed an application for judicial dissolution of the LLC pursuant to LLC Act Section 18-802. Based on the history of animosity between the parties, the court concluded a deadlock existed. The court stated that the fact that the LLC had continued to operate marginally was irrelevant to whether a deadlock existed because the LLC never operated in conformity with the members' agreement. Although the term sheet provided for a mechanism to resolve disputes between the members, the court concluded judicial dissolution was appropriate because it was a more reasonable and equitable alternative than the contractual mechanism. Specifically, the term sheet called for resolution of member disputes by a five-member board. Each board member's appointment, however, had to be approved by both members of the LLC, which the court found to be unlikely given the state of relations between the members. In light of the members' history of disputes, the court also found it unlikely that the LLC would be wound down in an orderly and timely manner and therefore appointed a liquidating trustee pursuant to LLC Act Section 18-303(a).

3. *Achaian, Inc. v. Leemon Family LLC*, C.A. No. 6261-CS (Del. Ch. Aug. 9, 2011)

In this case, a member holding a 30% membership interest in a Delaware LLC purportedly assigned its entire interest to another existing member who had held a 20% interest. There was one remaining member who held a 50% membership interest. The transferee member then filed suit claiming a deadlock and requesting judicial dissolution pursuant to Section 18-802 of the LLC Act.

In its decision, the Court of Chancery addressed defendant's motion to dismiss for failure to state a claim. The primary issue was whether the purported assignment of the 30% membership interest conferred only economic rights or full member rights on the transferee in light of a provision of the LLC agreement requiring the affirmative consent of all members to the admission of a new member. Defendant claimed that plaintiff-assignee had no rights other than economic rights with respect to the 30% percent membership interest because plaintiff-assignee, although an existing member, was not admitted as member with respect to the assigned interest.

The court began its analysis by noting that the default rule under the LLC Act is that an assignment of a membership interest, by itself, does not entitle the assignee to become a member of the LLC. This rule, however, may be displaced by agreement, and, as a result, the court turned to the relevant provisions of the LLC agreement.

Reading the agreement as a whole, the court concluded that the LLC agreement permitted a member to assign its entire membership interest, including voting rights, to another existing member without obtaining the consent of all members. In support of its conclusion, the court noted that the LLC agreement defined "Interest" to mean a member's "entire ownership interest." The LLC agreement also provided that a member could "transfer all or any portion of its Interest." The court read these provisions to mean that a member may transfer all or any portion of its entire ownership interest, including voting rights.

Other provisions of the LLC agreement, the court noted, supported this reading. The LLC agreement, for example, provided that where a transfer of an "Interest" caused the LLC to have more than one member, it should be treated as a partnership for tax purposes. According to the court, this made clear that "Interest" as contemplated by the LLC agreement's transfer provision included every aspect of a member's interest in the LLC, not just economic rights.

Having found that a member could assign its entire interest, including voting rights, the court next addressed whether such an assignment required the consent of all members. The court concluded that the provision of the LLC agreement pertaining to admission of members, by its plain terms, applied only to assignees who were not yet admitted as members. The court noted this approach was consistent with the LLC Act, which, according to the court, contemplates a singular admission governed by the specific terms of the LLC agreement. As a result, the assignment at issue resulted in the LLC having two members, each with equal voting power.

The court then turned to plaintiff's request for judicial dissolution. Noting that the court, on prior occasions, had analogized an application for judicial dissolution of an LLC with two coequal managers to an application made under DGCL Section 273, the court concluded that plaintiff had pleaded the three prerequisites required under Section 273 to survive a motion to dismiss—(1) two 50% owners (2) engaged in a joint venture (3) who are unable to agree whether to discontinue the business or how to dispose of its assets. The court therefore denied defendant's motion to dismiss.

4. *Mickman v. Am. Int'l Processing, L.L.C.*, C.A. No. 3869-VCP (Del. Ch. Apr. 1, 2009) and (July 28, 2009)

In this case involving cross-motions for summary judgment, the court addressed the issue of what evidence would be admissible to prove standing for purposes of a books and records demand under Section 18-305 of the LLC Act. Defendant LFF, L.L.C. ("LFF") argued that plaintiff was not entitled to inspect LFF's records because, according to LFF's documents, she was neither a member nor a manager of LFF. While plaintiff conceded that she was not listed as a member in either the operating agreement or its amendments, she argued that contemporaneous documents signed by the initial two members of LFF, Richard Mickman (her ex-husband) and Howard Gleit, supported a reasonable inference that she was a member. One document, a 2001 tax return for LFF, which included a Schedule K-1 for each member, listed the members as Howard Gleit and Richard and Elaine Mickman. In a second document, signed prior to the couple's divorce, Richard Mickman signed under penalty of perjury an Offer in Compromise to the IRS in which he stated that his "only assets [were] his house . . . and stock in a number of closely held companies owned jointly by Taxpayer and his wife."

Section 18-305 of the LLC Act states that "[e]ach member of a limited liability company has the right . . . to obtain from the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the [LLC] . . . [various records of the LLC]." Relying on *Shaw v. Agri-Mark, Inc.*, 663 A.2d 464 (Del. 1995), LFF argued that the court should apply the same evidentiary standard for an LLC as it does for a corporation in considering a demand for books and records. For purposes of a request for books and records under Section 220 of the Delaware General Corporation Law, only those stockholders listed in the stock ledger are recognized as holders of record of stock. A party that supplies equity to a stock corporation, but is not a stockholder of record, has no right to inspect the corporation's books and records. As such, LFF argued that only those members listed in its operating agreement should be recognized as having a right to inspect its books and records. The court disagreed, however, stating that, due to the flexible and less formal nature of LLCs, it is reasonable for the court "to consider any evidence beyond the four corners of the operating agreement, where, as here, the plaintiff has presented admissible evidence that, notwithstanding the language of the operating agreement, suggests the parties to that agreement intended to make, and believed they had made, the plaintiff a member of the LLC."

Despite LFF's contentions that the representations in the aforementioned documents were simply mistakes, the court held that LFF's argument raised factual issues that could not be determined on a motion for summary judgment. Therefore, LFF's motion for summary judgment was denied.

In this decision, the court was presented with the question of whether or not plaintiff was entitled to photocopies of the general ledgers of LFF and another defendant, American International Processing, L.L.C. Plaintiff first claimed that defendants waived any objections to providing copies of the general ledgers because defendants had previously granted her counsel the opportunity to review and take notes on the general ledgers. The court cited Delaware case law in stating that a waiver is the "intentional relinquishment of a known right, either expressly or by conduct, which clearly indicates an intention to renounce a known privilege or power. It involves both knowledge and intent." The court found that, because defendants had taken affirmative steps to deny plaintiff's counsel from photocopying the general ledgers in connection with the prior inspection, this indicated defendants' intent to preserve, not relinquish, their objections to plaintiff obtaining photocopies. The court thus held that defendants had not waived their right to object to plaintiff obtaining photocopies.

The court then turned to plaintiff's alternative arguments—namely, that she had a legal right to photocopies of the general ledgers under defendants' operating agreements and under Section 18-305 of the LLC Act. The court observed that the respective operating agreements of defendants provided that the "Members and their designated representatives shall have access to all books and records of the Company at all reasonable times . . . ." The court further observed that such operating agreements did not define what "access to all books and records" means in terms of specific documents or rights. The court noted that "all books and records" generally denotes a grant of broad inspection rights, which would include general ledgers. Thus, whether or not plaintiff had the right to receive photocopies of the general ledgers depended on whether the right to "access" the general ledgers included the right to photocopy them. The court, noting that it often looks to Delaware corporate statutes and case law when interpreting similar provisions in an LLC agreement, stated that under Section 220(b) of the DGCL, if a shareholder is granted inspection rights, the shareholder has the right "to make copies and extracts" of the document. The court further stated that the right to make copies of documents that a shareholder is entitled to examine was recognized at common law for corporations long before Section 220(b) of the DGCL was enacted. In a similar corporate case, the court determined that a right to access and inspect included a right to make copies. Accordingly, the court thus construed the term "access" under the operating agreements as having its ordinary meaning under Delaware law, which includes the right to make photocopies. The court also denied defendants' arguments that plaintiff should not have the right to make photocopies of the general ledgers because she had not included general ledgers in her inspection demand and that she had not stated a purpose for her inspection request. The court held that the operating agreements did not include a demand requirement, only a requirement that members give at least one day written notice of a request to access documents, which plaintiff had complied with, and did not impose any proper purpose requirement. Because the court found that the operating agreements provide plaintiff with a contractual right to photocopies of the general ledgers, the count did not address her additional arguments for inspection rights under Section 18-305.

5. *In re Grupo Dos Chiles, LLC,* C.A. No. 1447-N (Del. Ch. Mar. 10, 2006)

The petitioner, Shriver, and one of the respondents, Martinez, formed a Delaware LLC. The LLC's certificate of formation ("Certificate") named Martinez's son as the "initial" member, and the one page LLC Agreement named Shriver and Martinez as the "Managing Partners." Grupo eventually lost its good standing with the State of Delaware because it did not pay its Delaware taxes. Shriver sought reformation of the LLC Agreement to reflect accurately the true membership of the LLC and also sought a finding that Martinez's unilateral payment of back taxes on behalf of the company did not return Grupo to good standing with the State of Delaware.

In its letter opinion, the court emphasized that it considered the underlying facts and course of dealing among the parties to be at least as important as formalities. The court first held that both Shriver and Martinez were members of the LLC. Significantly, the court said in this regard that the LLC Agreement superseded the Certificate, and the LLC Agreement made it clear that both Shriver and Martinez were members of the LLC. In so holding, the court indicated that it did not think it important that the LLC Agreement referred to the parties as "Managing Partners," rather than as members. Moreover, the documentary evidence (letters, loan documents, etc.) made it clear that Shriver and Martinez were members of the LLC. The court also noted that, because the LLC Act does not require that members of an LLC be set forth in a certificate of formation, there did not appear to be a continuing obligation to amend a certificate of formation every time membership in an LLC changed.

The court declined to decide whether restoring the good standing of an LLC that had had its good standing cancelled for failure to pay taxes was a "ministerial" act that any member or manager could take, or whether such action required a vote of the members. Instead, the court narrowed its holding to the facts of the case and held that if an LLC lost its good standing for nonpayment of taxes, a member who represented less than a majority of the voting power, and who knew that there is a dispute as to whether the company should continue because another co-equal member has initiated litigation to dissolve the company, could not unilaterally restore the LLC to good standing by paying the taxes due. Thus, the court voided the Delaware Secretary of State's restoration of the LLC to good standing.

Q. Management

1. *MPT of Hoboken TRS, LLC v. HUMC Holdco, LLC*, C.A. No. 8442-VCN (July 22, 2014)

Plaintiff MPT of Hoboken TRS, LLC ("MPT Hoboken") and defendant HUMC Holdco, LLC ("Holdco") are the sole members of HUMC Opco, LLC (the "Company"). The LLC Agreement provided that the "General Manger"—Holdco—was to manage the business and operations of the Company, and in the event of a "Major Default," the "Special Manager"—MPT Hoboken or its designee—could assume certain powers.

Holdco caused the Company to establish a board of directors (the "Board"), which adopted Bylaws granting the Board purported management rights over the Company, and neither action was reviewed or approved by MPT Hoboken. Holdco designees represented nine of the fourteen Board votes, and the Bylaws provided that Holdco could modify or reject any action proposed by the Board and could compel the Board to take action. The court found that the Bylaws facially conflicted with the LLC Agreement because the LLC Agreement vested exclusive management authority in Holdco as the General Manager, but the Bylaws vest certain managerial rights in the Board. The issue before the court was whether the Board structure could fall within the LLC Agreement provision permitting "advisory committees." The court found that the Board structure could fall within one meaning of the term "advisory committee" because Holdco maintained management authority through its majority voting representation on the Board and ability to veto, modify or compel Board actions. Alternatively, requiring Holdco to compel the Board to act or modify the Board's actions could also exceed a reasonable interpretation of what an "advisory committee" is. Because the pleadings and incorporated documents did not contain dispositive evidence of the parties' intent with regard to the "advisory committee" term, the court held that meaning of "advisory committee" was an issue of material fact and denied plaintiffs' motion for judgment in their favor.

Defendants claimed that through Holdco's control over the Board, Holdco still exclusively managed the Company, and that plaintiffs' claim was not ripe because plaintiffs did not allege any current or imminent harm due to the Board structure or the Bylaws. The court has authority pursuant to 6 Del. C. § 18-110(a) to hear and determine the right of a person to become or continue to be a manager of a limited liability company. Among other things, to hear a claim seeking declaratory judgment the court must find the issue is ripe for judicial determination. The court found that the dispute over the whether the Bylaws granted the Board managerial rights beyond those of an advisory committee "places a cloud over the management of the [Company]," noting that the Bylaws did not contemplate how the Company would be governed if MPT Hoboken exercised its power (under certain circumstances) to remove Holdco as General Manager. The court held that the risk of future harm to plaintiffs was sufficient to warrant a resolution, and the claim was ripe for judicial determination. However, because the meaning of "advisory committee" remained an issue of a material fact, the court denied defendants' Rule 12(c) motion to dismiss.

2. *Graven v. Lucero*, C.A. No. 8919-VCN (Del. Ch. Dec. 20, 2013)

This decision was rendered in response to a motion for summary judgment in a summary proceeding in the Court of Chancery to determine the rightful controller of a Delaware LLC. Plaintiff claimed that a vote by the LLC's founding principals removed defendant from his position as managing principal and inserted plaintiff into such position. The dispute in this case arose from a disagreement as to which members of the LLC were founding principals and thus entitled to vote on the removal and appointment of the LLC's managing principal. The LLC's operating agreement identified the founding principals, but plaintiff and defendant differed as to which version of the operating agreement was in effect at the time of the vote. The version of the operating agreement believed by defendant to be the effective operating agreement listed a different set of founding principals than the founding principals set forth in the version of the operating agreement plaintiff asserted to be in effect. The court denied summary judgment, ruling that a genuine issue of material fact existed as to which version of the operating agreement was the final executed version.

3. *B.A.S.S. Grp., LLC v. Coastal Supply Co., Inc.*, C.A. No. 3743-VCP (Del. Ch. June 19, 2009)

In this case, Burkett, a former employee of Coastal Supply Co., Inc. ("Coastal") used embezzled funds to form an LLC ("B.A.S.S.") with a friend ("Webb") and purchase a piece of property for development. When Coastal learned of the embezzlement, it fired Burkett and came to an agreement with him under which B.A.S.S. deeded the property to Coastal.

Webb and B.A.S.S. then sued Burkett for breach of fiduciary duty and sued Coastal to invalidate the transfer of the property from B.A.S.S. to Coastal. The plaintiffs claimed that Burkett did not have authority to transfer the property and that the consideration for the transfer was inadequate. Coastal, as defendant, counterclaimed for unjust enrichment and conversion, and asked the court to impose a constructive trust over the funds and the property.

The court denied Webb's motion for summary judgment to avoid the transfer of the property to Coastal. Webb made two arguments. First, he argued that Burkett did not have authority to transfer the property without Webb's consent. The court found that Burkett was an "Authorized Person" according to the LLC Agreement, and the LLC Agreement stated that each Member was bound by the actions of an Authorized Person acting in good faith. Therefore, whether or not Burkett had actual authority turned on whether he acted in good faith in transferring the property to Coastal. Since there existed disputed issues of fact surrounding Burkett's state of mind, the court could not determine whether or not Burkett had actually authority to enter the transaction on a motion for summary judgment. The court also found that the question of apparent authority was one of fact that could not be decided at summary judgment although it observed that it was debatable whether or not Burkett had apparent authority because Coastal would need to show that it relied on indicia of authority originated by the principal (B.A.S.S.).

Second, Webb argued that the $10 consideration given by Coastal was insufficient for the property. The court noted that it was required to make all inferences in favor of Coastal as the non-moving party, so it found that the consideration may have also included consideration flowing from the Restitution Agreement between Burkett (and B.A.S.S.) and Coastal. Therefore, Webb's motion for summary judgment on the basis of invalid consideration was also denied.

The court granted Coastal's motion for summary judgment on its unjust enrichment claim because (1) B.A.S.S. was enriched; (2) Coastal suffered impoverishment; (3) both the enrichment and impoverishment were a result of Burkett's wrongful actions; and (4) there was no justification for B.A.S.S.'s enrichment or Coastal's impoverishment. The court found unpersuasive Webb's argument that he and B.A.S.S. were innocent and thus should not be penalized for Burkett's actions for two reasons. First, the court held that the knowledge of an officer, director, or manager is generally imputed to the business entity and found it logical to apply the same rule to a member of an LLC who has management rights. Second, in *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999), the Delaware Supreme Court found that restitution was appropriate even if the benefitted party was not a wrongdoer.

Further, the court decided to impose a constructive trust over the funds and the property because the typical remedy for unjust enrichment was restitution and a constructive trust was a type of restitution. Moreover, the court held a constructive trust would be imposed because the embezzled funds were traced directly to the purchase of the property and B.A.S.S. was not a bona fide purchaser for value because Burkett embezzled the funds and was acting on behalf of B.A.S.S. The only remaining question, which the parties did not address in detail in the pending motion, was who was entitled to the increase in the value of the property (if any). Finally, the court also granted Coastal's motion for summary judgment on its conversion claim because it had shown each element of a conversation claim, namely that (1) Coastal had a property interest in the funds; (2) Coastal had a right to possession of the funds; and (3) the funds were converted.

4. *In re Grupo Dos Chiles, LLC*, C.A. No. 1447-N (Del. Ch. Mar. 10, 2006)

The petitioner, Shriver, and one of the respondents, Martinez, formed a Delaware LLC. The LLC's certificate of formation ("Certificate") named Martinez's son as the "initial" member, and the one page LLC Agreement named Shriver and Martinez as the "Managing Partners." Grupo eventually lost its good standing with the State of Delaware because it did not pay its Delaware taxes. Shriver sought reformation of the LLC Agreement to reflect accurately the true membership of the LLC and also sought a finding that Martinez's unilateral payment of back taxes on behalf of the company did not return Grupo to good standing with the State of Delaware.

In its letter opinion, the court emphasized that it considered the underlying facts and course of dealing among the parties to be at least as important as formalities. The court first held that both Shriver and Martinez were members of the LLC. Significantly, the court said in this regard that the LLC Agreement superseded the Certificate, and the LLC Agreement made it clear that both Shriver and Martinez were members of the LLC. In so holding, the court indicated that it did not think it important that the LLC Agreement referred to the parties as "Managing Partners," rather than as members. Moreover, the documentary evidence (letters, loan documents, etc.) made it clear that Shriver and Martinez were members of the LLC. The court also noted that, because the LLC Act does not require that members of an LLC be set forth in a certificate of formation, there did not appear to be a continuing obligation to amend a certificate of formation every time membership in an LLC changed.

The court declined to decide whether restoring the good standing of an LLC that had had its good standing cancelled for failure to pay taxes was a "ministerial" act that any member or manager could take, or whether such action required a vote of the members. Instead, the court narrowed its holding to the facts of the case and held that if an LLC lost its good standing for nonpayment of taxes, a member who represented less than a majority of the voting power, and who knew that there is a dispute as to whether the company should continue because another co-equal member has initiated litigation to dissolve the company, could not unilaterally restore the LLC to good standing by paying the taxes due. Thus, the court voided the Delaware Secretary of State's restoration of the LLC to good standing.

R. Limited Liability Company Agreement

1. *Seaport Village Ltd v. Seaport Village Operating Co., LLC*, C.A. No. 8841-VCL (Sept. 24, 2014)

Defendant, the prevailing party in an action brought by plaintiff in California and continued in the Chancery Court of the State of Delaware, sought attorney's fees and expenses from plaintiff pursuant to a fee-shifting provision in defendant's limited liability company agreement (the "Agreement"). The Agreement provided that the prevailing party in any action brought by a party to the Agreement against another party to the Agreement that arose out of the Agreement "shall be entitled to recover from the other party reasonable attorneys' fees, costs and expenses incurred in connection with the prosecution or defense of such action." It was undisputed that defendant was the prevailing party, that both suits arose out of the Agreement and that the amount requested was reasonable. Plaintiff's only defense was that defendant was not a "party" to the Agreement because it did not sign the Agreement. Section 18-101(7) of the LLC Act provides that a limited liability company is not required to execute its limited liability company agreement and is bound by its limited liability company agreement whether or not it executed the agreement. Therefore, the court held that defendant was a party to the Agreement and thus could enforce the fee-shifting provision against plaintiff. The court further held that defendant was entitled to attorney's fees and expenses incurred in bring the motion to enforce the fee-shifting provision.

2. *Graven v. Lucero*, C.A. No. 8919-VCN (Del. Ch. Dec. 20, 2013)

This decision was rendered in response to a motion for summary judgment in a summary proceeding in the Court of Chancery to determine the rightful controller of a Delaware LLC. Plaintiff claimed that a vote by the LLC's founding principals removed defendant from his position as managing principal and inserted plaintiff into such position. The dispute in this case arose from a disagreement as to which members of the LLC were founding principals and thus entitled to vote on the removal and appointment of the LLC's managing principal. The LLC's operating agreement identified the founding principals, but plaintiff and defendant differed as to which version of the operating agreement was in effect at the time of the vote. The version of the operating agreement believed by defendant to be the effective operating agreement listed a different set of founding principals than the founding principals set forth in the version of the operating agreement plaintiff asserted to be in effect. The court denied summary judgment, ruling that a genuine issue of material fact existed as to which version of the operating agreement was the final executed version.

3. *Olson v. Halvorsen*, C.A. No. 1884-VCL (Del. Ch. Oct. 22, 2008) and (Del. Ch. May 13, 2009), *aff'd*, No. 338, 2009 (Del. Dec. 15, 2009)

Plaintiff was one of three founding partners of an investment management firm and hedge fund known as Viking Global ("Viking"). Viking was initially comprised of three Delaware entities, each of which was governed by a written operating agreement. At plaintiff's insistence, a fourth Delaware entity was formed a few months later called Viking Global Founders LLC ("Founders"). No short-form LLC agreement was ever drafted for Founders. A long-form LLC agreement was drafted but never signed. This unsigned LLC agreement was drafted primarily by plaintiff and included a multi-year earnout provision not found in any of the other operating agreements. According to its terms, any of the three founders who voluntarily or involuntarily retired from Viking would be entitled to a percentage of Founder's income over the six years following his retirement. This provision diverged significantly from the withdrawal provisions in each of the other operating agreements, which provided that a departing member was entitled only to the balance of his capital account and accrued compensation upon leaving the firm.

Plaintiff was subsequently removed from his position at Viking and paid over $100 million, which amount represented his capital account balance and accrued compensation as called for under the terms of each of the written operating agreements. Plaintiff brought suit seeking, among other things, enforcement of the earnout provision in the unsigned Founders LLC agreement. Defendants disputed plaintiff's claim, arguing that they had never reached an agreement on the terms of the unsigned Founders LLC agreement. Both parties moved for summary judgment.

The primary issue before the court, and a matter of first impression in Delaware, was whether the statute of frauds applied to LLC operating agreements under Delaware law. In considering the issue, the court acknowledged that the Delaware LLC Act expressly allowed oral LLC agreements but noted that it did specify whether the statute of frauds applied to such agreements. The court noted that there was a disagreement among commentators as to whether the statute of frauds applied to the operating agreements of Delaware LLCs. Some commentators reasoned that without an express, specific indication of intent to overrule a statutorily enacted principle of contract law, the principle should apply. Others argued that the stated policy of the LLC Act to give maximum effect to the enforceability of LLC agreements, along with the express authorization of oral operating agreements, created an inference that the legislature intended to override the statute of frauds. The court ultimately concluded that the policy for the enactment of the statute of frauds — to protect defendants against unfounded or fraudulent claims that would require performance over an extended period of time—called for the application of the statute of frauds to LLC agreements if an LLC agreement contains a provision or multiple provisions that could not possibly be performed within one year, with the result that such provision or provisions would be unenforceable. However, the court went on to state that in keeping with the legislature's expressed intent to give maximum effect to the enforceability of limited liability companies, provisions of an oral LLC operating agreement that could possibly be performed within one year would not fall within the statute of frauds and would remain enforceable. The court also asserted that few oral LLC agreements were likely to contain any term or provision that could not possibly be performed within one year and, to that extent, the statute of frauds would not limit the enforcement of such agreements.

Having determined that the statute of frauds applied to LLC agreements, the court went on to conclude that the earnout provisions at issue in the unsigned Founders LLC agreement were subject to the statute of frauds because none of them could possibly be performed within one year. In reaching this conclusion, the court rejected plaintiff's argument that the statute of frauds did not apply because the only thing that remained to be done after one year was the payment of money. The court held that it was undisputed that, in addition to the payment of money, the unsigned Founders LLC agreement imposed substantive obligations and restrictions on the remaining members that would affect how they chose to run the business over a multi-year period. The court also held that the "multiple writings" and "part performance" exceptions argued by plaintiff did not apply to the facts of the case to remove the unsigned Founders LLC agreement from the statute of frauds. Thus, the court granted summary judgment as to plaintiff's breach of contract claim.

In a subsequent decision in this case, plaintiff sought fair value for his interests in various Delaware entities. Based on Section 17-604 of DRULPA and Section 18-604 of the LLC Act, the court held that where a valid and enforceable agreement of the parties conflicts with the applicable fair value statute, the agreement of the parties will govern. Thus, plaintiff was not entitled to fair value for his interests in the Viking entities because the parties had previously reached an oral agreement that conflicted with the fair value statutes by providing that a member would only take his accrued compensation and capital account balance upon leaving Viking. While this agreement was refined by subsequent written agreements for three of the four Viking entities, all of which were consistent with this limitation, the court found that it continued to apply to Founders as the original agreement governing its operation and constituted an enforceable oral limited liability company agreement because it was possible that it could be completed in the span of one year. Additionally, the court held that plaintiff failed to prove the existence of any superseding agreement that conflicted with the parties' oral agreement and, therefore, the plaintiff was entitled to the balance of his capital account and accrued compensation but nothing further.

As an alternative to his fair value claim, plaintiff sought damages based on theories of promissory estoppel, civil conspiracy, unjust enrichment and breach of fiduciary duty. However, the court held that plaintiff failed to prove any of the required elements of his estoppel claims and entered judgment in favor of defendants. With respect to plaintiff's other claims, the court held that they similarly failed because plaintiff failed to show deprivation of value to which he was entitled. According to the court, the operating agreements of the Viking entities uniformly provided that a departing member or partner would receive only his accrued compensation and capital account upon departure and, therefore, plaintiff, having already received such amounts, was entitled to no more.

In an appeal of this decision, the Delaware Supreme Court affirmed the Court of Chancery's judgment, including its ruling that the statute of frauds applies to LLC agreements. The Delaware Supreme Court held that the LLC Act's explicit recognition of oral and implied LLC agreements does not preclude the application of the statute of frauds to LLC agreements but, rather, gives maximum effect to LLC agreements by treating them similarly to most other contracts by permitting oral, written, or implied agreements. The court further held that because the statute of frauds and the LLC Act can be construed together and nothing in the text or legislative history of the LLC Act supports the inference that the legislature clearly intended the LLC Act to render the statute of frauds inapplicable, there has been no implied repeal of the statute of frauds. The court stated that if the legislature intends to limit the application of the statute of frauds by removing LLC Agreements from its scope, it must say so explicitly.

4. *Facchina v. Malley*, C.A. No. 783-N (Del. Ch. July 12, 2006)

This case is one in a long running dispute involving several related Delaware limited liability companies. The disputes generally involve control over the LLCs. In this opinion, the court found that there was no limited liability company agreement but, nonetheless, still found that there was a limited liability company and that it had members each owning a set, identifiable interest in the LLC, notwithstanding the fact that the LLC Act would seem to require an LLC agreement for various purposes including the determination of the members (*see* Section 18-301 of the LLC Act). The court held in the absence of an LLC agreement, the LLC Act would provide the governing framework for the LLC and that under Section 18-402 of the LLC Act, management of an LLC is vested in the members owning a majority percentage interest in the LLC.

S. Formation

1. *Phillips v. Schifino,* C.A. No. 3644-VCL (Del. Ch. Dec. 18, 2009)

This case was before the court on a motion for partial summary judgment. The dispute arose out of a start-up business that was to be conducted through a Delaware LLC. The court said that the agreements involved were so ambiguous that it was unclear whether the central document was even a limited liability company agreement. The document was entitled "Agreement," dated February 20, 2007 and appeared to list objectives to be accomplished, one of which included forming an LLC. Finding the facts to be too undeveloped and messy for disposition on summary judgment, the court denied defendant's motion.

2. *Ramone v. Lang*, C.A. No. 1592-N (Del. Ch. Apr. 3, 2006)

Plaintiff brought this action under theories of breach of contract, breach of fiduciary duty and promissory estoppel based on six months of discussions between plaintiff and defendant that failed to result in the contemplated formalization of their arrangement in an LLC agreement.

Before plaintiff's involvement with defendant, defendant had already signed a purchase agreement to buy property on which plaintiff had considered opening a public swim and fitness center. For months, plaintiff and defendant discussed varying deal terms but were unable to reach a final agreement. While negotiations were ongoing, plaintiff and defendant worked together to have the property rezoned, defendant represented to the press and his financing bank that plaintiff was involved in the project and plaintiff solicited members for a swim team at the property. Ultimately, defendant, frustrated by his inability to reach a final accord with plaintiff, entered into an LLC agreement with three other parties. Plaintiff then filed this action.

The court found that no binding contractual relationship existed between the parties. Plaintiff claimed that, through their e-mail exchanges, the parties established a final, binding agreement as to their respective rights and obligations in an LLC and as to the property. The court cited the general principle of contract formation in Delaware, which does not look to a party's subjective intent but rather requires an "overt" "manifestation of mutual assent to the exchange and consideration." For a party's assent to constitute an acceptance that would form a contract, it must include an expression of commitment that (i) is not conditional on any further act by either party and (ii) is on the terms proposed in the offer without the slightest variation. To be enforceable, a contract must contain all material terms and a court will not order specific performance if, as in this case, it would be required to supply essential terms. In this case, the language used in, and the negotiations that occurred after, the e-mail cited by plaintiff as constituting a final, binding agreement evidenced that a contract had not been formed.

The court then considered the theory of de facto partnership and concluded that a partnership relationship had not been created. Separate from the contractual duties that the court disposed of as discussed above, plaintiff claimed that the parties had become partners and that defendant was in breach of his fiduciary duties. The court stated that under DRUPA Section 15-202 a partnership exists where, regardless of the intent of the parties, two or more persons associate themselves to carry on a business for profit. The level of proof required to establish this type of association is higher in a suit between the alleged partners (as opposed to a suit by a third party). Under Delaware law, "there is no singularly dispositive consideration that determines whether or not a partnership existed," but a court must find a mutual obligation to share profits and losses and may consider the conduct of the parties. In this case, the court, while acknowledging that the lack of written agreement is not necessarily conclusive of the existence of a partnership, found that the absence of such an agreement left it without terms to enforce. In addition, the fact that the fiduciary relationship contemplated by the parties was as members of a limited liability company counseled against finding that they had created a general partnership. DRUPA Section 15-502 specifically provides that associations formed under other chapters of the Delaware Code are not partnerships and, in the opinion of the court, it would be an odd result that a failed attempt at creating an LLC would place the parties in a partnership. Even given this, however, the court posited that in a situation in which the parties had reached agreement on material terms and one side simply balked on the documentation of the LLC, it might be possible to find that a general partnership had been created. This, however, was not the situation in this case.

The court did find the doctrine of promissory estoppel to be available to plaintiff, as defendant had disappointed the expectation of plaintiff's participation in the property, on which plaintiff had reasonably relied. The court set forth the elements of promissory estoppel under Delaware law, which are clear and convincing evidence of (i) a promise; (ii) the reasonable expectation, from an objective viewpoint, of the promissor to induce action or forbearance by the promissee; (iii) the promissee's actual, reasonable reliance on the promise and action to his detriment and (iv) the binding effect of the promise because without enforcement there would be an injustice. The court espoused its view that the normal failure of parties to reach a binding contract is not grounds for invoking the doctrine and that promissory estoppel should be used in the relatively narrow circumstances in which the legitimate expectations of a party made vulnerable by promises in the negotiation process need to be protected. In this case, the court accepted plaintiff's argument that, even if the parties had not agreed on a final deal structure, the understanding throughout the process was that defendant would make the pool facilities at the property available for plaintiff's use and that plaintiff relied on this promise with the knowledge of defendant.

T. Remedies

1. Specific Performance

a. *NAMA Holdings, LLC v. Related World Market Ctr., LLC,* C.A. No. 2755-VCL (Del. Ch. Apr. 27, 2007) and *NAMA Holdings, LLC v. World Market Ctr. Venture, LLC,* C.A. No. 2756-VCL (Del. Ch. Apr. 27, 2007)

In two related cases, plaintiff, a Nevada limited liability company and indirect owner of one of the defendant Delaware limited liability companies, sought to enforce certain provisions in the operating agreement of that LLC with respect to which plaintiff was an intended third party beneficiary. Plaintiff's claims involved a demand for books and records and an action for specific performance limiting distributions and segregating the disputed funds. Defendants asserted that all of plaintiff's claims were subject to mandatory arbitration, that the inspection claim was moot because defendants had already voluntarily provided access to the requested documents and that plaintiff's claim for a specific performance should be dismissed because of failure to join indispensable parties and because plaintiff had an adequate remedy at law. The court rejected defendants' arguments on all grounds. First, it found that the disputes at issue did not come within the ambit of the arbitration language inasmuch as under the arbitration clause neither of the parties to that contract could compel arbitration and, therefore, it would be inequitable to allow them to compel arbitration with a third party beneficiary. The court also ruled that plaintiff had not been provided the requested information and with respect to the claim of indispensable parties held that "merely because a non-joined party may have a claim to a disputed amount does not inevitably deprive a court of the ability to render complete relief to the parties before it." Finally, with regard to defendant's claim that plaintiff could be adequately compensated with money damages and therefore had no right to specific performance, the court held "a remedy at law, i.e. money damages, will foreclose the equitable remedy of specific performance when that remedy is 'complete, practical and as efficient to the end of justice as the remedy in equity, and is obtainable as [a matter] of right.'" Under this standard, the court rejected defendants' argument. Under the LLC agreement, the duties of one of the defendants were stated to be purely ministerial in nature and that such defendant would incur no liability for any action taken or omitted under the relevant section except for willful misconduct, gross negligence or bad faith so long as such defendant acted in good faith. Under the standard, the court found that even if plaintiff proved noncompliance by such defendant with the relevant section, such defendant would have no liability if its noncompliance occurred only negligently and in good faith, therefore, plaintiff would be left without a legal remedy against such defendant. Moreover, the court also found that money damages, even if not barred by that section, would fail to provide a complete and efficient remedy to plaintiff. It held that a contractual covenant allowing a party to restrict distributions to others necessarily involved a bargained-for-benefit that money could not adequately compensate. The court held that the "leverage that type of covenant creates provides a 'material commercial advantage' to the party that can invoke it, and for a court to hold that money damages are an appropriate substitute for specific performance in a dispute like this one 'would essentially involve the judicial nullification of the leverage-conferring aspects of such a provision.'"

2. Injunctive Relief

a. *Henson v. Sousa*, C.A. No. 8057-VCG (Del Ch. Dec. 19, 2012)

Henson, Sousa and Wilkinson each owned a 1/3 interest in a Delaware LLC. Henson, believing Sousa and Wilkinson were taking steps to cut him out of the LLC's business, sought a temporary restraining order to enjoin Sousa and Wilkinson from engaging in actions to dissolve the LLC, terminate the LLC's employees, disrupt its customer relationships and transfer the LLC's assets and business to entities owned by Sousa and Wilkinson.

The court began its analysis by recounting the requirements to issue a temporary restraining order: (1) the existence of a colorable claim, (2) that irreparable harm will be suffered if relief is not granted and (3) a balance of hardships favoring the requesting party. With respect to the existence of a colorable claim, the court found that Henson alleged facts sufficient to establish colorable claims for breach of the LLC's Operating Agreement, which required unanimous member consent to dissolve the LLC, and breach of fiduciary duties by Sousa and Wilkinson. Turning to the irreparable harm prong, Henson first contended that irreparable harm would result from Sousa and Wilkinson terminating relationships with customers and employees of the LLC. The court rejected this contention for two reasons. First, the LLC's core business relied on the use of intellectual property licensed from a related entity that was in the process of being wound up as a result of a separate action brought by Henson in another jurisdiction. Thus, the LLC's operations were already effectively suspended pending completion of winding up of the entity holding the relevant intellectual property. Second, Henson had separately acknowledged that Sousa and Wilkinson did not intend to destroy the ongoing business relationships of the LLC but, rather, to transfer them to a separate entity of which Henson was not an owner. Henson also argued that Sousa and Wilkinson intended to engage in a fraudulent transfer of assets from the LLC to a separate entity owned by Sousa and Wilkinson and that, under the Delaware Uniform Fraudulent Transfer Act ("DUFTA"), a colorable claim of a fraudulent transfer automatically entitles the party making such claim to injunctive relief without a separate showing of irreparable harm. The court also rejected this argument, noting that the unambiguous language of DUFTA provides that injunctive relief to prevent a fraudulent transfer is subject to applicable principles of equity, and the court held that these principles of equity require a showing of irreparable harm. The court thus denied plaintiff's request for a temporary restraining order.

3. Appointment of Receiver

a. *Jagodzinski v. Silicon Valley Innovation Co., LLC*, C.A. No 7378-VCP (Del. Ch. Aug. 7, 2015)

Defendant, Silicon Valley Innovation Company, LLC, was placed into receivership in early 2013 at the request of plaintiff, a majority unitholder. Plaintiff's request was prompted by the alleged self-dealing and looting of defendant. The appointed receiver, Bram Portnoy, was an employee of plaintiff at the time of his appointment. As receiver, Portnoy commenced litigation against many of defendant's former officers and directors including a case in California that had a potential recovery of over $100 million. Subsequently, the receiver's compensation, initially paid on an hourly rate, was changed, by an order of the court, to a flat monthly rate with a contingent bonus for monies collected through litigation. In this action, plaintiff moved to terminate the receivership, or in the alternative, to reduce the receiver's compensation. The court denied plaintiff's motion to terminate the receivership; however, it did alter the receiver's compensation.

First, the court analyzed plaintiff's motion to terminate the receivership. As the standard for terminating a receivership in the LLC context was a novel issue, the court looked at corporate law to determine the proper standard. The court held that "once established, a receivership should continue in the discretion of the [c]ourt until its purpose has been fulfilled, at which time the [c]ourt ought to discharge the receiver." The court noted "that such discretion should be exercised sparingly and with caution." Plaintiff argued that the receivership should be terminated because the alleged looting and self-dealing that prompted the receivership had ceased. The court, while recognizing that the looting and self-dealing had concluded, denied plaintiff's motion because "the task of gathering and disposing of [defendant's] assets through litigation is ongoing." In addition, in expounding on its decision to deny plaintiff's motion, the court noted the following: Portnoy investigated the claims and commenced the pending lawsuits; Portnoy likely would have a role in the lawsuits going forward; plaintiff, in his motion to place defendant in receivership, asked the court to appoint Portnoy as the receiver; and "ending the receivership likely would place [defendant] at serious risk of promptly being placed into bankruptcy" because of the substantial pending claims against defendant.

Second, the court ruled on plaintiff's motion to alter Portnoy's compensation. Plaintiff contended that Portnoy should not receive a 10% fee for monies collected through litigation. This motion stemmed from the lawsuit that was pending in California with a potential $100 million recovery. The court first noted that receivers are entitled to reasonable compensation and the goal of the court in setting a contingency fee was to align a receiver's incentives "with the stockholders to seek the best risk-adjusted recovery without granting [the receiver] a windfall." The court, taking into account the potential $100 million recovery, held that the 10% contingency fee was reasonable. However, the court did adjust the contingency fee to "10% of the monies collected by [defendant,] net of the fees paid to Portnoy henceforth and any out-of-pocket expenses incurred in the administration of [defendant's] estate, including non-contingent attorney's fees and costs and expert witness fees actually paid by or for [defendant,] but not including the contingent recovery of the lawyers who have contingent fee arrangements." Finally, the court held that Portnoy was required to accurately keep track of his hours and prepare monthly invoices for all hours worked for defendant.

b. *Andrikopoulos v. Silicon Valley Innovation Co., LLC*, C.A. No. 9899-VCP (Del. Ch. July 30, 2015)

Silicon Valley Innovation Company, LLC (the "Company") was placed in receivership and its only assets were contingent claims against the Company's former officers and directors. The Company filed a lawsuit against two previous employees of the Company. Those former employees sued the Company for advancement of their legal expenses. The main dispute before the court was (i) whether, in the context of a receivership estate under Delaware law, advancement claims were administrative expenses or unsecured creditor claims, and (ii) if plaintiffs' claims were administrative expenses and afforded priority, whether the receiver's salary and expenses still had priority over those claims.

The Company argued that advancement was a pre-petition claim because it was based on conduct that occurred before receivership and was essentially a form of compensation for services rendered before receivership. Thus, the Company maintained that plaintiffs' claims should be paid pro rata with other unsecured creditors as would be the case in the bankruptcy context. Plaintiffs countered that these advancement obligations arose a part of the administration of the estate and the pursuit of the Company's only assets (contingent claims against management), and should therefore be paid on par with the receiver's compensation.

The Delaware LLC Act, and even the DGCL, provided little statutory guidance for the court; it therefore looked to case law and analogous circumstances in bankruptcy to inform its decision. The court ruled that plaintiffs' advancement claims should be treated on par with those of other unsecured creditors and not given priority. First, while the court acknowledged Delaware's strong public policy in favor of advancement, in the context of receiverships the justification for advancement as an inducement to attract qualified management is diminished in the face of the goal of winding up the company. Second, the Company pre- and post-receivership was governed by different individuals and different sets of rules; therefore, similar to the bankruptcy context, contractual advancement obligations were no different than other creditor claims. Third, the court recognized that although this result may frustrate advancement expectations, the best solution in the context of seeking advancement from an insolvent entity was insurance. Finally, the reality of practical administration weighed in favor of denying plaintiffs' claims because the court would otherwise have to engage in line-item accounting over the priority of various administrative expenses. Accordingly, plaintiffs' were treated as if they were any other unsecured creditor and not afforded priority.

c. *Jagodzinski v. Silicon Valley Innovation Co., LLC*, C.A. No. 6203-VCP (Del. Ch. Feb. 14, 2012)

In an earlier proceeding in this case, the court order defendant LLC to provide plaintiff with access to books and records pursuant to LLC Act Section 18-305 and the LLC's LLC agreement. After the LLC failed to comply with the court's original order and two subsequent contempt orders, plaintiff brought a motion for the appointment of a receiver for the LLC with broad powers over the LLC, its operations and management, including the power to (i) investigate and pursue claims and causes of action belonging to the LLC and to bring suit thereon to the extent the claims are against third parties and (ii) defend against third party claims. The LLC failed to respond to plaintiff's motion.

The court noted that, in circumstances prior to the cancellation of the LLC's certificate of formation and in which the LLC's agreement does not address the issue, the court has the authority in the exercise of its inherent equitable power to appoint a receiver for an LLC. In support of this determination, the court referred to Section 18-1104 of the LLC Act, which provides that in any case not provided for the LLC Act, the rules of law and equity shall govern. The court stated that the appointment of a receiver is an extraordinary remedy that should be undertaken cautiously and only as necessitated by the exigencies of the case. In this case, the court determined that appointment of a receiver was warranted based on the repeated failure of the LLC to comply fully with the court's previous orders. However, the court limited the receiver's authority to curing the LLC's contempt by effecting the production of books and records previously ordered by the court. The court denied plaintiff's request for a receiver with the authority to conduct the LLC's business and pursue any claims belonging to the LLC because such relief would exceed the scope of the contempt that gave rise to the appointment.

4. Recission

a. *Capano v. Capano*, C.A. No. 8721-VCN (June 30, 2014)

This case involved a family owned LLC with the following members: Louis, Joseph, the AAMM Trust, Louis III and the CI Trust. Another family member, Gerry, was the sole beneficiary of the CI Trust, a Delaware statutory trust with a third-party serving as trustee (the "Trustee"). The CI Trust served as the tie-breaking vote in the event of a deadlock among the other members of the LLC. The court was presented with a motion to dismiss by defendants Louis and Louis III, among others, relating to claims made by Gerry and Joseph, which claims included (i) Gerry's claim that a purported transfer by him to Louis of his interest in the CI Trust was invalid and (ii) a challenge by Gerry and Joseph to a purported merger effected by Louis of the LLC with and into an entity owned by Louis, which cashed out Joseph's interest in the LLC (the "Merger").

With respect to the first claim, the defendants relied on signed documents, pursuant to which Gerry purported to replace the Trustee as trustee of the CI Trust and then Gerry purported to assign all of his right, title and interest therein, including his position as trustee, to Louis. Gerry argued that there were a number of defects with these documents including, without limitation, that Louis backdated them without his consent and that Gerry was inebriated when he signed them. The trust agreement of CI Trust contained a spendthrift provision requiring the written consent of the trustee for the beneficial owner (i.e. Gerry) to transfer his interest in the CI Trust. The court denied the defendants' motion to dismiss this issue because, in light of the alleged defects noted above, there was a question as to who the trustee was at the time the transfer documents were effective and thus there was a question as to whether consent was given by the trustee in accordance with the trust agreement of CI Trust.

Turning to the Merger, the defendants argued that Gerry lacked standing to challenge the Merger because he had no rights in the CI Trust. The court found that if Gerry successfully demonstrated that the assignment of his interest in the CI Trust to Louis was invalid, then his remaining interest in the CI Trust would permit him to assert rights in the LLC to challenge the fairness of the Merger. Accordingly, the court denied defendants' motion to dismiss this claim for lack of standing.

Defendants also argued that Joseph lacked standing to challenge the transfer documents relating to the CI Trust because he was not an intended beneficiary of those documents. Joseph asserted that because the CI Trust held an interest in the LLC and essentially functioned as a tie-breaking voter, he was therefore an intended beneficiary of such documents. The court found in favor of the defendants on this issue by looking at the text of the trust agreement of the CI Trust, to which Joseph was not a party and was not identified as a third-party beneficiary. However, the court noted that Joseph would obviously have standing to challenge a transfer of interest in the CI Trust to the extent it violated the operating agreement of the LLC.

The court then turned to defendants' argument that the purported transfer of the interest in the CI Trust to Louis and another transfer by Louis of his interest in the LLC to a limited partnership (the "Louis LP") he controlled were ratified because the defendant members owned a majority of the voting power of the LLC. The court found that the power to wield a majority voting interest capable of ratifying the transfers was dependent upon compliance with the operating agreement of the LLC and if the transfer of interest in the CI Trust was invalid, a properly-constituted majority would not have ratified such transfers. Similarly, the defendants argued that because they controlled a majority of the economic interest, they "could" have consented. The court found that the factual issue must be resolved as to whether they actually did consent as a necessary precondition to Louis exercising the transferred interests under the operating agreement of the LLC.

In addition, Joseph alleged that the defendants (other than Louis but consisting of entities owned and/or controlled by Louis) aided and abetted Louis's alleged breaches of fiduciary duties owed to him. The defendants argued that a corporation could not be deemed to have conspired with its wholly owned subsidiary or its officers or agents. The court found that there were exceptions to this rule and cited a case that held that it was "uncontroversial for parent corporations to be subjected to claims for aiding and abetting breaches of fiduciary duty committed by directors of their subsidiaries." Defendants also argued, in the alternative, that they were acting as agents while acting in their capacities as trustee of the CI Trust and general partner of the Louis LP, and that an agent could not aid and abet its principal. The court found that the defendants mischaracterized these relationships because they were not agents of the LLC. For these reasons, the court denied the defendants motion to dismiss this claim.

The defendants also sought to dismiss a books and records request by Joseph. The court found that Joseph did not have any rights to books and records of entities for which he was not a member, but that if Joseph were successful in unwinding the Merger, he could separately request the LLC's books and records at that time. Therefore, Joseph's books and records request was denied.

Lastly, the defendants argued that Gerry and Joseph were precluded from a remedy of rescission because the LLC had entered into numerous transactions with third parties that could not be undone. The court held that defendants' argument may be compelling after additional factual development, but that it was premature to conclude that plaintiffs had no possibility of recovery that could include such a remedy.

U. Amendments

1. *Branin v. Stein Roe Inv. Counsel, LLC*, C.A. No. 8481-VCN (Del. Ch. June 30, 2014) and (July 31, 2015)

Plaintiff was an employee of defendants and sought indemnification under the limited liability company agreement (the "LLC Agreement") of one of the defendants, Stein Roe Investment Counsel LLC (the "Company"). Before joining the Company, plaintiff was a principal/owner and chief executive officer of another investment management firm. During that time, plaintiff's firm was acquired (the "Acquisition") by another investment management firm ("Bessemer"). The Acquisition was governed by a doctrine of New York law that prevented plaintiff from soliciting his former clients (the "Mohawk Doctrine"), although plaintiff could accept business from former clients if they approached him. While with the Company, plaintiff managed 30 clients that he previously managed while at Bessemer, and Bessemer sued plaintiff under the Mohawk Doctrine (the "Bessemer Action"). At the time plaintiff joined the Company and at the time the Bessemer Action was brought, the LLC Agreement provided broad indemnification rights that applied by its terms to employees of the Company (the "Original Indemnification Provision"). The Original Indemnification Provision provided indemnification "[t]o the full extent permitted by applicable law" for acts or omission taken on behalf of the Company in good faith and "in a manner reasonably believed to be within the scope of the authority conferred" by the LLC Agreement. A few months after Bessemer brought the Bessemer Action, the Company adopted an amendment to the LLC Agreement that excluded from the indemnification rights a claim based on actions by an employee that may have breached a contract between the employee and a third party that predated the employee's employment with the Company (the "Amended Indemnification Provision"). Defendants asserted that the Amended Indemnification Provision applied and precluded plaintiffs' claim.

The court held that, although there was no question that the Company could amend the LLC Agreement as it did, the Company's liability to plaintiff under the LLC Agreement matured when the Bessemer Action was filed, and the Original Indemnification Provision was still in place at that time. The court noted that plaintiff discussed the potential of bringing over his former clients with the Company's president and CEO and discussed the possible impacts of the Mohawk Doctrine. Further, the Company benefitted from plaintiff's clients, and therefore indemnifying plaintiff was consistent with the policy behind the terms of the Original Indemnification Provision. Additionally, at the time of plaintiff's conduct giving rise to the Bessemer Action, plaintiff reasonably anticipated he would have the protection of the Original Indemnification Provision, despite the language in the LLC Agreement allowing for modification of the LLC Agreement.

The court held that plaintiff established a right to pursue a claim for indemnification, and if plaintiff satisfied the other substantive requirements of the indemnification provision—acting in good faith and in a manner reasonably believed to be within the scope of his authority—the Company's liability for the claim was fixed before the Amended Indemnification Provision, which did not modify or eliminate any liability that already existed. The court rejected defendants' claim that plaintiff was sued in his personal capacity or by reason of his employment with Bessemer, noting that the Supreme Court of Delaware has stated that "if there is a nexus or causal connection between any of the underlying proceedings . . . and one's official capacity, those proceedings are 'by reason of the fact' that one was a corporate officer." *Quoting Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005). Noting plaintiff's discussions with the president and CEO of the Company, the court held that because plaintiff, as an employee of the Company, created tangible benefits for the Company because of his contacts and client accounts, such "nexus or causal connection" existed. However, the court dismissed plaintiff's motion for judgment on the pleadings because the parties disputed whether plaintiff acted in good faith and in a manner he reasonably believed to be within the scope of his authority, and thus there was a disputed question of fact.

In a subsequent decision, the court addressed whether accrual of a right to indemnification for purposes of the statute of limitations naturally flows from the vesting of a right to indemnification for purposes of coverage. The court held that it does not.

Plaintiff began working for defendant Stein Roe Investment Counsel LLC (the "Company") in 2002 and, shortly thereafter, he was sued by his former employer. Plaintiff defended himself against his former employer's allegations for ten years and, ultimately, all claims against plaintiff were dismissed. Plaintiff sought indemnification against defendants under a purported right to indemnification under the Company's limited liability company agreement (the "LLC Agreement"). In its July 30, 2014 decision (the "2014 Decision"), the court found that the first amendment to the LLC Agreement dictated plaintiff's indemnification rights, not the second amendment to the LLC Agreement that purported to remove plaintiff's indemnification rights related to his dispute with the former employer. However, based on the facts before it, the court could not resolve whether plaintiff was entitled to indemnification under the first amendment standard—that the party seeking indemnification must have acted in good faith on the Company's behalf and in a manner reasonably believed to be within the scope of the party's authority. The parties agreed to a stipulation and order on liability, which resolved those factual issues in plaintiff's favor. Defendants then amended their answer to add statute of limitations as an affirmative defense, and the parties cross-moved for summary judgment.

The court stated that the central issue to be resolved was whether the three-year statute of limitations on plaintiff's indemnification claim began to run when his contingent right to indemnification vested in 2002. The court noted the statute of limitations began to run when plaintiff could be confident any claim against him was resolved with certainty and found that plaintiff could not have enforced his right to indemnification until the nature of his conduct was determined in the action with his former employer, which was not dismissed until 2012.

The court then analyzed the applicability of the "law of the case doctrine"—that "once a matter has been addressed by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears"—because defendant argued that, in the 2014 Decision, the court held that plaintiff's right to indemnification vested in 2002 and, therefore, the three-year statute of limitations had run. The court rejected this argument, finding that "the vesting of a right under contract and the accrual of a claim for statute of limitations purposes are not inextricable tied together." In contrast to when a contractual right to indemnification is confirmed (in this case, the LLC Agreement indemnification provision in place when the conduct giving rise to the claim for indemnification occurred), a plaintiff must be able to bring suit for the statute of limitations on an indemnification claim to begin to run. Here, plaintiff could not have filed his indemnification action until the litigation concluded in 2012 because the court would have been unequipped to determine whether plaintiff's conduct had met the requisite standard for indemnification.

The court also found that, even if plaintiff's claim for indemnification accrued for statute of limitations purposes in 2002 (which it did not), defendants had a continuing duty to indemnify plaintiff under the theory of continuing breach.

Because plaintiff's claim for indemnification was timely, the court granted plaintiff's motion for summary judgment and held that he was entitled to prejudgment interest and fees on fees.

2. *In re NextMedia Inv'rs, LLC*, C.A. No. 4067-VCS (Del. Ch. May 6, 2009)

The potential adoption of an amendment to an LLC agreement was the crux of this motion for summary judgment on the petition of certain members of NextMedia Investors, LLC (the "Company") for (i) the judicial dissolution of the Company and (ii) the appointment of a liquidating trustee. The proposed amendment would have extended the date of dissolution of the Company by four years. Pursuant to the LLC agreement, the dissolution section, among others, could not be amended "to adversely affect any Member" without the consent of each member to be adversely affected. Petitioners argued that the proposed amendment, by extending the term of the Company, and therefore the members' investment period, created an adverse effect and required the consent of all members for adoption. Since petitioners had not given their consent, they argued that the amendment was ineffective and the Company had dissolved. The Company countered that (i) petitioners' interpretation of the amendment provisions of the LLC agreement was not reasonable or, in the alternative, another reasonable interpretation existed rendering the agreement ambiguous and (ii) whether petitioners were adversely affected was a relevant factual issue.

The court noted that summary judgment in the context of interpreting a contract requires that the contract be unambiguous. Assessing the amendment provision of the LLC agreement, the court found that the plain language of the agreement supported one reasonable meaning and therefore could not be considered ambiguous. The court agreed with petitioners that the dissolution provision could not be amended without the consent of all members because all members would be adversely affected by the extension of the term of the Company, which would deny them the ability to withdraw from the Company on the investment horizon that was originally contemplated by the LLC agreement. The court rejected the Company's argument that the approval of the amendment by a majority of the members proved that the amendment did not have an objectively adverse effect. Such a reading, the court stated, would have converted the amendment provision into a class voting provision, but its plain language granted each individual member a consent right. After finding petitioners' interpretation to be reasonable, the court addressed the Company's alternative reading of the amendment provision, which would require consent only if the board of managers subjectively intended that a proposed amendment adversely affect the members. The Company's proposed reading was based on a technical reading of the words "to affect" to require intention or purpose. The court rejected this interpretation as inconsistent with the plain meaning of the section, stating that the Company's interpretation required "the type of awkward linguistic leap that this court will not make in giving a practical reading to a contract."

Significantly, the court also rejected the Company's final argument, namely, that petitioners were not entitled to summary judgment because they had not provided the court with the factual basis to conclude that they were adversely affected by the proposed amendment. The Company's position was that petitioners must prove to the court, as an issue of fact, that they were adversely affected by the proposed amendment in order to demonstrate that their consent was required. The Company bolstered its position by offering affidavits from its officers indicating that a liquidation of its assets upon the original dissolution date would have resulted in no distributions to the Company's equity holders because of the depressed market prices of those assets. The court, however, rejected the Company's argument. It held that whether petitioners were to be adversely affected for purposes of the amendment section was necessarily a "before the fact question" and stated that a company cannot determine "who is entitled to vote on an action by first carrying out the action and then seeing who is adversely affected." The court added that petitioners should not be required to show they were entitled to vote on the proposed amendment through factual evidence. Rather, the court held, the question of who was entitled to vote was best judged "by who can be reasonably expected to be adversely affected." The court continued that whether an amendment triggers an individual approval right "depends not on an empirical, factual assessment of whether a member is correct about the effect of a change in the contract, but on whether the proposed contractual amendment would alter an economically meaningful term. If it does, the individual approval right [of the amendment provision] is implicated" and the court found that a change to the lifespan of the entity like the one proposed was clearly a triggering amendment. Thus the court held that petitioners were entitled to dissolution.

While the court granted the dissolution of the Company, it declined to appoint a liquidating trustee. Under the terms of the LLC agreement, the board of managers was authorized to liquidate the Company and if the board of managers did not, the Class A members were entitled to appoint a liquidator. Under the LLC agreement, this right was specifically subject to the right of any member or creditor to apply to a court in respect of the dissolution of the Company and the court interpreted this language together with Section 18-803 of the LLC Act to require petitioners at the very least to show cause as to why the Class A members should be denied their right to appoint the liquidating trustee. As petitioners had not done so, their motion to appoint a liquidating trustee was denied.

3. *Monier, Inc. v. Boral Lifetile, Inc.*, C.A. No. 3117-VCN (Del. Ch. Feb. 28, 2008)

Plaintiff and defendant were the only members of a Delaware LLC, each owning a fifty percent membership interest. Following a dispute among the members as to the distribution policy of the LLC, plaintiff filed an action for declaratory judgment in the Court of Chancery seeking a declaration as to the percentage of the LLC's net income that was required under the LLC Agreement to be distributed. This opinion addressed defendant's motion to dismiss.

The LLC was managed by a six-member management committee (the "Management Committee"), of which plaintiff and defendant were each permitted to appoint three members. The LLC Agreement provided that 50% of the net income of the LLC was required to be distributed on or before March 31 of the following calendar year "or at such other times as determined by the Management Committee." The LLC Agreement further provided that the LLC could only make other distributions so long as the LLC distributed 50% of its net income to the members on at least an annual basis "unless the Management Committee approves greater or lesser distributions without dissenting vote." In 2000, the Management Committee unanimously decided that "[f]rom the year 2000, a dividend will be paid annually equal to the audited net profits of the [LLC]." This decision was reflected in the minutes of the LLC which were signed by the Secretary of the LLC. The LLC adhered to this distribution policy over the next five years. In 2005, the members of the Management Committee appointed by defendant questioned the prudence of continuing to adhere to this distribution policy and recommended a return to the 50% distribution rate. The members of the Management Committee appointed by plaintiff disagreed and, without agreement among its members, no formal Management Committee action was adopted regarding the proper distribution rate.

Plaintiff argued that the Management Committee action had effected an amendment to the distribution policy in the LLC Agreement. The LLC Agreement required amendments to be approved by the Management Committee and signed by all members of the LLC. Plaintiff argued that because the members of the Management Committee unanimously approved the increase of the distribution rate and because, at the time of such approval, the members of the Management Committee constituted majorities of both plaintiff's and defendant's boards of directors, the

Management Committee and the members of the LLC, in effect, consented to the amendment in accordance with the provisions of the LLC Agreement. Plaintiff asserted that the requirement to sign the amendment was satisfied by the Secretary's act of signing the minutes.

The court addressed in a footnote plaintiff's argument that the Management Committee action in 2000 had effected an amendment to the LLC Agreement. The court stated that nothing in the Management Committee's action suggested an intent of the Management Committee or the members to amend the LLC Agreement and that the only reasonable inference to be drawn from such action is that the Management Committee was doing nothing more than exercising its authority to set the distribution rate.

V. Implied Covenants

1. *CMS Inv. Holdings, LLC v. Castle*, C.A. No. 9468-VCP (Del. Ch. June 23, 2015)

This case involved a dispute between plaintiff, an investor in a Delaware LLC, RP Holdings Group, LLC ("RPH"), and several defendants that managed RPH together with law firms run by such defendants and their holding companies. RPH was in the business of providing non-legal services to law firms, including law firms run by defendants. RPH was managed by a board of managers (the "Board of Managers"). Plaintiff, who owned most of the Class A units in RPH, had the right to appoint three members to the Board of Managers, and two defendants served as appointees of the Class B unitholders. These two defendants together with other defendants provided services to and consulted for RPH as members of an "Operating Board," which allowed them to work as independent contractors while exercising control over the day-to-day operations of RPH.

Plaintiff alleged that although RPH's business was performing remarkably well during the 2008 recession, defendants failed to pay RPH for the services it provided to law firms run by defendants. Plaintiff further alleged that defendants diverted those fees away from RPH and instead paid themselves directly. Although RPH accrued substantial accounts receivable balances, plaintiff and its appointees to the Board of Managers relied on defendants' reassurances that they would make good on the fees owed to RPH. In 2011, plaintiff's suspicions were corroborated by an accounting firm that they hired to investigate RPH's operational efficiency issues—particularly in regards to its accounts receivable collections processes—which found that defendants were indeed retaining all or part of the payments owed to RPH. The accounting firm also found that defendants had intentionally concealed RPH's true financial condition from plaintiff and its appointees on the Board of Managers.

In 2012, RPH defaulted on a credit agreement it entered into with Freeport Financial, which allowed Freeport Financial to foreclose on RPH's collateral. Plaintiff claimed that defendants secretly engaged in a self-dealing scheme with Freeport Financial to orchestrate the sale of the still-valuable services businesses to defendants while leaving RPH, and by extension plaintiff, empty-handed.

Plaintiff filed suit against defendants in March 2014, charging them with a myriad of claims, including: breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duties, aiding and abetting, civil conspiracy, and fraudulent transfer. Defendants moved to dismiss plaintiff's complaint as it related to them.

As an initial inquiry, the court found defendants' arguments that plaintiff's claims were derivative—rather than direct—to be unpersuasive. In applying the Tooley analysis, the court found that plaintiff's claims were more direct than derivative in nature, and at least dually direct and derivative. The court reasoned that if plaintiff's fiduciary duty and breach of contract claims are proven, then the Class A unitholders—including plaintiff—would recover individually rather than on a pro rata basis. In this regard, these claims were largely based on distributions that should have been made to plaintiff as a Class A unitholder but were improperly distributed to certain defendants. The court found that the predominant harm thus fell upon the Class A unitholders, despite defendants' argument that RPH itself was harmed.

The court then addressed defendants' arguments for dismissal of plaintiff's claims for breach of contract, breach of implied covenants and unjust enrichment. With regard to the breach of contract claims, a defendant on the Board of Managers argued that although his holding company, LEC Holdings, LLC ("LEC"), was bound as a member of RPH by being a signatory to the LLC agreement of RPH, he was personally not bound by the LLC agreement because he was not a party to it, and therefore could not be liable for any alleged breaches thereof. Citing Section 18-101(7) of the Delaware LLC Act, the court reasoned that his role as a member of the Board of Managers bound him to the LLC agreement. Certain other defendants conceded that they were bound but argued that the breach of contract claims against them must be dismissed because the relevant sections of the LLC agreement bound the Board of Managers and not such defendants as members. However, these defendants did have positions on the Operating Board and the court found that their positions of influence in the operational structure of RPH could lead to a plausible inference that they caused improper distributions in contravention of the provisions of the LLC agreement. As to another defendant, Caren Castle ("Castle"), despite her role as a member of the Operating Board and a high-level executive of RPH, the court found nothing in the record to support a reasonable inference that she intended to be bound by the LLC agreement of RPH as she was not directly a member or on the Board of Managers.

In regards to the breach of implied covenants claims against defendants, the court noted that the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain. For this claim, the court looked to an opinion (the "Opinion") that was received in connection with the formation of RPH that outlined the structure of the intent of RPH. In this regard, the court found that compliance with the Opinion was an implied term of the LLC agreement and that defendants breached the implied covenant by receiving fees directly instead of properly channeling them through RPH. In this regard, the court found that defendants frustrated the overarching purpose of the LLC agreement as evidenced by the Opinion by taking advantage of their positions to control implementation of the LLC agreement's terms. However, the court did dismiss the claim against Castle, as it reasoned that one cannot breach an implied covenant of an LLC agreement if that defendant is not bound by the express terms of the agreement.

The court next turned to fiduciary duty claims brought by plaintiff. It found that the LLC agreement did not alter the traditional standards of care underlying the fiduciary duties of care and loyalty. Relying on that finding, the court then found that defendants on the Board of Managers were fiduciaries given their role as members of the Board of Managers. The court also found that certain other defendants, including Castle, were fiduciaries through their roles as high-level officers of RPH. In addition, the court found that one defendant acted as a fiduciary through his role as CEO of a particular region because he was "vested with discretionary power to manage the business of the LLC." However, the court noted that a more fully developed record could contradict this finding at a later procedural stage. Finally, the court dismissed plaintiff's breach of fiduciary duty claims against the holding company defendants, reasoning that neither entity was a managing member of RPH, nor were they in a position to exercise control over the business and affairs of the LLC.

Concerning defendants' alleged breaches of fiduciary duty, the court found that, assuming plaintiff's factual pleadings were true, certain defendants could have plausibly breached their fiduciary duties by purposefully taking action to force RPH into insolvency and colluding with Freeport Financial to purchase its business assets at a favorable price out of receivership. The court similarly reasoned that a defendant member of the Board of Managers could have breached his fiduciary duties by failing to do more than simply resign from his position as a Board member if he was privy to the other defendant's machinations.

Reasoning that one cannot have both direct and secondary liability for a breach of fiduciary duty, the court dismissed the aiding and abetting claims against defendants who were found by the court to be fiduciaries. However, the court held that if the record later reflected that Castle and another defendant were not fiduciaries to RPH, they could very well be secondarily liable under the aiding and abetting theory. In regard to the individual defendants' various affiliated entities, such as the various law firms and holding companies, the court noted that secondary liability could exist where an entity acts as "'middleman for and beneficiary of improper disbursements by' the allegedly faithless fiduciaries with which they are affiliated." Thus, the court denied those entity-defendants' motions to dismiss plaintiff's aiding and abetting claim.

2. *Touch of Italy Salumeria & Pasticceria, LLC v. Bascio*, C.A. No. 8602-VCG (Del. Ch. Jan. 13, 2014)

Three individuals formed an LLC, the business of which was to operate an Italian grocery in Rehoboth, Delaware. The business was successful. However, one of the defendants decided to withdraw as a member of the LLC and gave notice pursuant to the LLC agreement, which provided that any member could withdraw after giving written notice to the other members. The withdrawing member allegedly told the remaining members that he intended to move to Pennsylvania and possibly start a new business there. However, ten weeks after he withdrew from the LLC, he opened a competing Italian grocery on the same block as the original Italian store. Plaintiffs sued and defendants filed a motion to dismiss, the subject of this opinion.

The court first addressed plaintiffs' breach of contract claim, looking to the LLC agreement itself to determine if defendant had breached the agreement. The court determined that the LLC agreement provided a mechanism for voluntary withdrawal and did not contain a non-compete provision. Further the court found that plaintiffs did not refer to any specific provision of the LLC agreement in support of their allegation of breach of the agreement. Therefore, the court dismissed this claim.

The court also dismissed plaintiffs' claims of fraud and misrepresentation because plaintiffs did not adequately plead any reliance on defendant's representations to their detriment in the complaint.

The court analyzed plaintiffs' allegation that defendant breached the implied covenant of good faith and fair dealing, which prevents a party from denying his or her contractual partners the benefit of their bargain based on circumstances that the parties did not anticipate. However, the court found that member withdrawal was specifically anticipated by the parties in the LLC agreement, which provided for voluntary member withdrawal. Further, the parties omitted a covenant not to compete in their LLC agreement, a "staple of employee contracts," which "omission the [p]laintiffs obviously now regret." The court refused to use the implied covenant to shoehorn a covenant not to compete into the parties' contract and dismissed this claim.

The court also dismissed plaintiffs' allegation that defendant breached his fiduciary duty to the LLC by making arrangements to open a competing business while he was still employed by the LLC. The court found that plaintiffs did not include any inferences supporting the conclusory allegation of breach of fiduciary duty in their complaint. Further, defendant would have owed no duties to the LLC in the ten weeks after he left the LLC until he opened his competing business.

Finally, the court dismissed plaintiffs' conversion claim because they failed to identify any specific property that defendant allegedly converted.

3. *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, C.A. No. 5843-VCL (Del. Ch. May 16, 2012); *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC,* 50 A.3d 434 (Del. Ch. 2012), *reversed*, *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. Ch. 2013), *remanded to ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC,* C.A. No. 5843-VCL (Del. Ch. Sept. 16, 2013)

Plaintiffs, which are pension funds advised by ASB Capital Management, LLC ("ASB"), entered into five joint ventures for the ownership, operation and development of student housing with defendants, special purpose entities wholly owned by The Scion Group, LLC ("Scion"). Plaintiffs provided at least 99% of the capital for each joint venture and defendants were the sponsor and invested no more than 1%. After an initial joint venture containing a standard capital-event waterfall provision with a promote provision, the parties agreed to a two tier promote going forward, which was memorialized in an email (the "Email") and agreed to by both parties.

The first joint venture agreement that contained the two tier promote provision placed the first promote after the first preferred return but before the return of capital, meaning defendants would begin to earn the promote before plaintiffs and defendants received back their capital. The parties executed several more joint venture agreements based on this form. When the mistake was discovered, plaintiffs sought to reform all of the agreements to conform to the two tier promote provision to what was agreed to in the Email. The Court of Chancery reformed the agreements under the doctrine of unilateral mistake, which allows for reformation when the party asserting the doctrine shows that it was mistaken "and that the other party knew of the mistake but remained silent" quoting *Cerberus Int'l Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002)). To prevail on a claim for reformation, the party must prove "by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement." The prior understanding tells the court exactly what the terms of the contract should be.

The court held that the prior Email constituted a "specific prior contractual understanding that provided the necessary foundation for reformation."

The court held that a "promote" is a term of art and contemplates the return of invested capital in the context of a capital event. Defendants' expert admitted that he had never heard of a real estate deal in which the promote was paid before the return of capital in a capital-event waterfall provision. The parties' understanding of the meaning of a "promote" was reflected in the two most heavily negotiated agreements—the initial agreement and a later agreement in which the parties attempted to mimic the two tier promote provision but did not use the prior forms, in that case drafting the return of capital to precede the first promote. Plaintiffs were unaware of the mistake in the agreements, and Eric, Scion's Executive Vice President and General Counsel admitted that he noticed the unusual placement of the first promote as well as the favorable implications for defendants, but remained silent. The court, noting that the basic principle of agency law—"knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal"—applies to limited liability companies, imputed Eric's knowing silence to Scion.

The court rejected defendant's defense that a senior individual at ASB failed to read the agreements, noting that, unlike with avoidance, reformation is not precluded by a party's failure to read the writing at issue. Because reformation requires a prior agreement that reflects the actual agreement by the parties but which was not properly memorialized in the writing, reformation does not turn on whether the agreement was read. Defendants' ratification defense also failed because in the context of reformation, imputed or constructive knowledge is not sufficient; rather to ratify a contract subject to reformation there must be actual knowledge of the error. Because the plaintiffs did not know of the error and believed the agreements accurately reflected the two tier promote that was previously agreed upon, plaintiffs did not have actual knowledge of the error and did not ratify the agreements.

In a subsequent decision, the court addressed the fee-shifting provisions contained in the LLC agreements at issue in the prior decision. The LLC agreements contained fee-shifting provisions which entitled ASB, as the prevailing party, to fees and costs. The fee-shifting provisions provided that in any action by a party to the agreement to enforce the provisions of the agreement, the non-prevailing party must reimburse the prevailing party for all reasonable fees and costs, including reasonable attorneys' fees.

When interpreting fee-shifting provisions, the court focuses on enforcing the agreement and making the prevailing party whole. Unless the agreement provides for partial or claim-by-claim awarding of fees, the fees are usually applied "in an all-or-nothing manner."

The court held that defendants' counterclaims for breach of fiduciary duties and violation of the implied covenant of good faith and fair dealing were contract claims brought to enforce one of the LLC agreements and therefore were subject to the fee-shifting provision. The fiduciary duty claims were brought pursuant to a specific provision in the LLC agreement regarding fiduciary duties. The court held that the implied covenant claim was also a contract claim because it was based on the terms the parties would have agreed to had they thought to negotiate the issue. The court emphasized the temporal focus of the implied covenant claim—what the parties would have done *at the time of negotiating* rather than what the parties would have done at the time of the wrong, as would be the case for a tort claim.

The court also considered Delaware case law where the implied covenant turned on a culpable mental state such as that required for a claim of fraud, which suggests that the claim is not contractual. Typically a party would not contractually agree to the other party committing fraud. Therefore, the court held that this aspect of fraud in prior cases does not mean that a claim for breach of the implied covenant requires fraud, but rather that fraud is a way of establishing a breach of the implied covenant because "no fraud" is an implied contractual term. Because all of the claims at issue related to the LLC agreement, the court held that the fees and costs incurred by plaintiff, as the prevailing party, qualified for reimbursement under the fee-shifting provision.

On appeal, the Delaware Supreme Court reversed the contractual award of fees and expenses because ASB's counsel represented ASB for free to avoid a malpractice action. Noting that ASB has not paid its counsel anything, the Supreme Court held that ASB had not "incurred" fees or expenses for purposes of the contractual fee-shifting provisions. The Supreme Court remanded the case to the Court of Chancery to determine whether fees and expense should be awarded on equitable grounds. The Court of Chancery then held that ASB was entitled under equitable fee-shifting principles to a portion of the fees and expenses it counsel incurred based on the bad faith conduct of Scion and its expert in the litigation.

4. *QVT Fund LP v. Eurohypo Capital Funding LLC I*, C.A. No. 5881-VCP (Del. Ch. July 8, 2011)

A German stock corporation operating as an international bank issued trust preferred securities to United States buyers, including plaintiffs, through affiliated Delaware statutory trusts. The Delaware statutory trusts used the capital from the sale of the trust preferred securities to purchase Class B shares of two Delaware LLCs affiliated with the bank. The Delaware LLCs, in turn, used the capital from the sale of the Class B shares to purchase subordinated debt from the bank. Shortly thereafter, the bank entered into a "domination and profit surrender agreement" under German law whereby it agreed to transfer all of its annual profits to subsidiary of the bank's ultimate parent and granted such subsidiary the power to direct the management of the bank, which plaintiffs' alleged could result in the bank ceasing to be a profit-seeking entity if that would benefit the bank's ultimate parent. This decision was issued with respect to defendants' motion to dismiss.

The LLC agreements governing each Delaware LLC contained "pusher provisions" providing that if the bank made any payment, redemption or other distribution on any "Parity" or "Junior" securities, the LLCs were required to make a corresponding payment on the Class B shares held by the Delaware statutory trusts, with such trusts being required to make a corresponding payment to the holders of the trust preferred securities. The LLC agreements defined both "Parity" and "Junior" securities as types of "preference shares," a term not defined in the LLC agreements.

Among the various claims raised by plaintiffs were the following: first, plaintiffs claimed that certain dividend payments made by the bank to holders of the bank's participation certificates triggered the "pusher provisions" under the LLC agreements, which obligated the bank to make distributions to the LLCs; and, second, plaintiffs argued that the bank violated the implied covenant of good faith and fair dealing by entering into the domination and profit surrender agreement and failing to protect the interests of the Delaware trusts in the bank continuing to be a profit-seeking entity.

The court's analysis began with a threshold issue: what law governs the determination of whether the bank's participation certificates constitute "preference shares" and, consequently, "Parity" or "Junior" securities? Relying on the internal affairs doctrine, defendants argued that German law should govern because the analysis required the court to determine where the participation certificates ranked within the capital structure of the bank, a matter of German corporate law and an issue integral and peculiar to the internal affairs of the bank. The court disagreed, concluding that German law was applicable for the limited purpose of discerning the attributes of the participation certificates for purposes of comparing those attributes to the definition of "preference shares," an undefined term used in LLC agreements executed under and governed by Delaware law and therefore to be interpreted in accordance with Delaware law. The court noted that its conclusion was consistent with investor expectations, especially in light of the fact that the LLC agreements contained choice of law provisions selecting Delaware law. Moreover, certain specific provisions of the LLC agreements provided for the application of German law, which indicated that where the parties to the LLC agreements intended the laws of another jurisdiction to apply, they expressed such intention explicitly. The court also noted that its determination of whether the participation certificates were "preference shares" under Delaware law would not affect the rights of holders of such certificates as a matter of German law, nor did it implicate a matter peculiar to the bank or the relationships among its directors, officers or stockholders. Having concluded Delaware law applied, the court turned to whether the participation certificates constituted "Parity" or "Junior" securities under Delaware law. Rejecting defendants' reliance on offering circulars for the trust preferred securities that characterized the participation certificates as debt securities, the court noted that Delaware law classifies securities not merely by the label attached to such securities, but through an analysis of their functional characteristics. The court found that the participation certificates had a number of characteristics that could qualify them as "preference shares" and, as a result, concluded that defendants' proffered interpretation was not the only reasonable interpretation. The court therefore denied this aspect of the motion to dismiss.

The court then turned to the implied covenant claim. Plaintiffs argued that defendants violated the implied covenant by refusing to make required payments on the Class B shares following the bank's entry into the domination and profit surrender agreement. Defendants countered that the LLC agreements expressly addressed the subject at issue, providing for mandatory payments only where the bank made a profit and under certain other circumstances. The court concluded that plaintiffs alleged sufficient facts with respect to the implied covenant claim to survive defendants' motion to dismiss. Specifically, the court stated that it understood plaintiffs to contend that an implied obligation arose out of the provision of the LLC agreement mandating payment on the Class B shares if the bank made a profit. According to the court, one plausible inference was that the bank did not make sufficient profits to trigger its payment obligation because the entity controlling the bank pursuant to the domination and profit surrender agreement took actions to limit or eliminate its profitability. Because the LLC agreements did not address whether the bank was required to remain a profit-seeking entity, the court found that an implied obligation may exist and therefore denied this aspect of defendants' motion to dismiss.

5. *In re Atlas Energy Res., LLC, Unitholder Litig.*, C.A. No. 4589-VCN (Del. Ch. Oct. 28, 2010)

This case involved a publicly-traded limited liability company, Atlas Energy Resources, LLC (the "Company"), which negotiated a merger with its controlling unitholder, Atlas America, Inc. ("America"). The plaintiffs were public unitholders of the Company. The plaintiffs argued that America, as controlling unitholder, breached its fiduciary and other common law duties to the minority unitholders by negotiating the merger through an unfair process that resulted in terms that were unfair to the minority unitholders. The plaintiffs further argued that certain directors of the Company breached their fiduciary duties by agreeing to the merger. The defendants filed a motion to dismiss these claims.

First, the court held that under Delaware law, in the absence of provisions explicitly disclaiming the applicability of fiduciary duties, controlling members in a manager-managed LLC owe minority members the traditional fiduciary duties that controlling shareholders owe minority shareholders. The court also highlighted that it was particularly wary of eliminating such duties in the context of a publicly traded LLC and required either an explicit disclaimer or language mandating a contractual resolution. With respect to whether America had effectively modified its default fiduciary duties, the court found that the relevant provision of the LLC agreement of the Company (the "Operating Agreement") provided that "[w]henever a potential conflict of interest exists or arises between any Affiliate of the Company, on the one hand, and the Company or any Group Member, on the other, any resolution or course of action by the Board of Directors in respect of such conflict of interest shall be permitted and deemed approved by all Members, and shall not constitute a breach of this Agreement . . . or of any duty existing at law, in equity or otherwise, including any fiduciary duty, if the resolution or course of action in respect of such conflict of interest is (i) approved by Special Approval . . . ." In reviewing this provision, the court found that it only governed conflicts of interest between the Company and its "Affiliates," such as America, but not conflicts of interest between America and the Company's minority unitholders. Thus, the Operating Agreement did not eliminate America's fiduciary duties as the controlling unitholder of the Company to the minority unitholders. Applying the corporate precedent of *Kahn v. Lynch*, the court held that a merger between an LLC and its controlling unitholder must be evaluated under entire fairness notwithstanding any protective devices, such as independent committee review or approval by a majority of the minority unitholders, that may have been employed because, regardless of the protections employed, such a merger is characterized by "inherent coercion."

In discussing whether the merger satisfied the entire fairness standard, the court addressed the issues of fair price and fair dealing. With respect to fair price, the court found that plaintiffs sufficiently alleged facts suggesting the units were worth more than the consideration received under the merger agreement. The court also found that plaintiffs sufficiently alleged facts suggesting the process approving the merger may not have been fair, including that America withheld material information, that America manipulated the alternatives to the merger to make it appear that the merger of the Company with America was the only choice and that it exerted influence over the consultants to the special committee that approved the merger. Accordingly, the court denied America's motion to dismiss.

With respect to the plaintiffs' claims against the defendant directors of the Company, the court focused on a provision in the Operating Agreement that provided that except as otherwise set forth therein, "none of the Directors, nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Company or any Member." The court found that this language unambiguously eliminated the traditional fiduciary duties of the Company's directors and officers and that they were replaced by a duty of good faith on the directors and officers, where "good faith" was defined as an action believed to be in the best interest of the Company. The court noted that good faith under the Operating Agreement required a subjective analysis in contrast to the object standard under the common law. The plaintiffs argued that such a provision was unenforceable because it eliminated the implied covenant of good faith and fair dealing. The court rejected this position, however, holding that the Operating Agreement clearly imposed a subjective good faith standard on the directors and the court would not invoke an implied covenant to override these provisions. The court noted that although the plaintiffs may have stated a colorable claim for breach of the traditional fiduciary duties of care and loyalty, they did not allege the type of subjective bad faith required to state a claim under the standard set forth in the Operating Agreement and, therefore, the claims against the defendant directors were dismissed.

6. *Vila v. BVWebties LLC*, C.A. No. 4308-VCS (Del. Ch. Oct. 1, 2010)

Bob Vila, the well-known home improvement expert ("Vila"), and his friend, George Hill ("Hill"), entered into a joint venture called BVWebties LLC ("Webties") for the purpose of promoting Vila's website, BobVila.com. Webties' LLC Agreement provided that Vila and Hill were the managers, each owning 49% of Webties with the remaining 2% owned by a trust. The LLC Agreement required the consent of a majority of the managers for all decisions or actions to be made or taken. In order to promote BobVila.com, Webties entered into a licensing agreement with Vila that allowed Webties to use certain intellectual property owned by Vila. Either party could unilaterally terminate the licensing agreement at any time for any or no reason. In late 2007, after losing Webties' biggest advertiser and with the housing bubble about to burst, Vila and Hill began to disagree on the direction of Webties. The disagreement culminated in (a) a stalemate between Vila and Hill as to the strategic direction of Webties, (b) Vila's termination of the licensing agreement and a related suit by Hill in Massachusetts, and (c) Vila's initiation of the this action in the Court of Chancery seeking judicial dissolution of Webties under Section 18-802 of the LLC Act.

The court began by stating that in a judicial dissolution action, "the party seeking dissolution must prove by a preponderance of the evidence that he is (i) a member or manager, and (ii) that it is 'not reasonably practicable to carry on the business in conformity with a limited liability company agreement.'" Since it was clear that Vila was both a manager and a member of Webties, the court focused on whether it was no longer reasonably practicable to carry on the business of Webties in accordance with its LLC agreement. Vila advanced two arguments in support of judicial dissolution. First, he argued that since the purpose of Webties was to operate BobVila.com and Vila had terminated the licensing agreement with Webties, it was impossible for Webties to continue to perform its purpose. Second, he argued that the LLC agreement required both Vila and Hill, as managers of Webties, to consent to Webties' decisions and actions, and given that Vila and Hill could not agree on how to operate the business, no actions could be taken in accordance with Webties' LLC agreement.

The court stated that "[w]hen two coequal owners and managers whose mutual agreement is required for any company action are deadlocked as to the future direction and management of the enterprise and the LLC agreement provides no mechanism by which to break the deadlock, it is not reasonably practicable for the LLC to operate consistently with its operating agreement and a judicial dissolution will be ordered." The court analogized this situation to cases brought under DGCL Section 273, which sets forth the following three prerequisites for a judicial dissolution: (i) the corporation must have two 50% stockholders, (ii) those stockholders must be engaged in a joint venture, and (iii) those stockholders must be unable to agree upon whether to discontinue the business or how to dispose of its assets. The court found that Vila and Hill were deadlocked over serious managerial issues, including the strategic vision for and current operation of Webties and that the LLC agreement did not provide any alternative basis for resolving the deadlock. The court also found that Webties could not continue to operate in conformity the LLC agreement after Vila's termination of the licensing agreement. The court noted that this was not a case in which Vila in bad faith manufactured a phony deadlock, terminated the licensing agreement on short notice and sought dissolution so that he could take profits for himself that otherwise would have come to Webties. The court stated that "a business is not being operated in accordance with its governing instrument when one fiduciary acts as sole manager in a situation where the agreement of others is required." For these reasons, the court granted Vila's request for judicial dissolution of Webties.

Hill brought counterclaims alleging that Vila breached Webties' LLC agreement, breached the implied covenant of good faith and fair dealing and breached his fiduciary duties. The court found no basis for Hill's claims that Vila breached the LLC agreement. The court also denied Hill's claims that Vila breached the implied covenant of good faith and fair dealing. Hill argued that Vila breached the implied covenant by bringing the judicial dissolution action and refusing to accept supposed offers to purchase Webties. The court's denial was based on the fact that judicial dissolution is a remedy expressly contemplated by the LLC agreement and that Vila, as an equity owner, was under no contractual duty to consider selling his interest in Webties at a price that he viewed as suboptimal. Finally, the court dismissed Hill's fiduciary duty claims, finding them to have arisen out of the same facts that formed the basis for Hill's breach of contract claims and thus to fail because they were superfluous.

7. *Related Westpac LLC v. JER Snowmass LLC*, C.A. No. 5001-VCS (Del. Ch. July 23, 2010)

This case involves a suit between members of two LLCs formed to pursue a land development project in Snowmass, Colorado. When the funding needs of the project exceeded the agreed upon budget, plaintiff, the operating member of the LLCs, issued a capital call which defendant refused to meet. Defendant also refused to give its consent to a variety of major decisions. Under the operating agreements, defendant could not unreasonably withhold its consent to certain decisions. However, defendant argued that as to additional capital calls and the other matters at issue, it had contractually bargained to withhold its consent for any reason. Plaintiff sought to have the court (a) impose a reasonableness condition as part of the operating agreements' implied covenant of good faith and fair dealing and (b) find that defendant breached its fiduciary duty as a joint venturer by refusing unreasonably to fund capital calls and unreasonably withholding its consent to necessary transactions.

The court agreed with the defendant that under the LLC Agreements, it could withhold its consent for any reason as to the matters in dispute, and citing to *Nemec v. Shrader*, 991 A.2d1120, 1125-26 (Del. 2010), which provided that the implied covenant could not be used to "rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal," the court rejected plaintiff's request to imply a reasonableness requirement, as "[t]he express bargain of the parties covere[d] this subject and implying such an obligation would override their express bargain."

The court similarly rejected plaintiff's breach of fiduciary duty claim. According to the court, the parties to an operating agreement have the contractual freedom to structure the entity as they see fit. When the parties "cover a particular subject in an express manner, their contractual choice governs and cannot be supplanted by the application of inconsistent fiduciary duties that might otherwise apply as a default." To imply a fiduciary duty of reasonableness in these circumstances would nullify the parties' express bargain. The court cannot do that: "When a fiduciary duty claim is plainly inconsistent with the contractual bargain struck by parties to an LLC or other alternative entity agreement, the fiduciary duty claim must fall, otherwise 'the primacy of contract law over fiduciary law in matters involving contractual rights and obligations [would be undermined].'" (footnote omitted). Significantly, the court held that under the operating agreements, defendant had the contractual right to give or withhold its consent for a variety of major decisions as it chose, in its own commercial interest, and suggested that such a provision would allow defendant to secure a personal advantage as consideration for giving its consent.

8. *Kuroda v. SPJS Holdings, L.L.C.*, C.A. No. 4030-CC (Del. Ch. Apr. 15, 2009); *Kuroda v. SPJS Holdings, L.L.C.*, C.A. No. 4030-CC (Del. Ch. Mar. 16, 2010)

Plaintiff was a member of defendant SPJS Holdings, L.L.C., a Delaware limited liability company ("SPJS"). Because of disagreements with his fellow members, plaintiff decided to withdraw from SPJS. Plaintiff and defendants entered into negotiations regarding his withdrawal, but the parties were unable to reach an agreement on the amount plaintiff was owed under the parties' agreements or resolve a controversy surrounding an allegedly inaccurate Schedule K-1. Plaintiff also alleged that the defendants attempted to undermine his reputation and undermine his economic opportunities in order to save their personal reputations, and plaintiff brought an action against SPJS and his fellow members for: (a) breach of contract, (b) tortious interference with contract, (c) tortious interference with prospective economic advantage, (d) breach of the implied covenant of good faith and fair dealing, (e) conversion, (f) unjust enrichment, and (g) civil conspiracy.

In their motion to dismiss, defendants Liberty Square Asset Management, L.L.C. ("Liberty Square") and WGL Capital Corp. ("Capital"), the managing members of SPJS, argued that the breach of contract claims against them should be dismissed because they were not liable for SPJS's purported breaches of the LLC agreement and pointed to language in the LLC agreement that tracked Section 18-303(a) of the LLC Act. While the court acknowledged that the provision of the LLC agreement did limit the liability of members of SPJS, the court held that it did not necessarily limit the liability of the managing members for the kinds of breaches alleged in plaintiff's complaint. Accordingly, their motion to dismiss was denied.

Plaintiff also alleged that SPJS, Liberty Square and Capital breached provisions of the LLC agreement when they issued a Schedule K-1 that improperly assigned him taxable income. To state a claim for breach of contract, the court stated that a plaintiff "must demonstrate: first, the existence of a contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." The court dismissed plaintiff's claim because (a) plaintiff, a Japanese citizen, failed to establish that he paid or even owed taxes in the U.S. or that he paid higher taxes or suffered any adverse consequence as a result of the schedule, and (b) plaintiff failed to make the contention that a tax audit was a logical and reasonably foreseeable consequence in his complaint, and, even if he had, such a speculative harm was not sufficient to state a claim for breach of contract.

Next, plaintiff argued that the principals of SPJS, Capital and Liberty Square tortiously interfered with plaintiff's contractual interests under the LLC agreement because they caused SPJS, Capital and Liberty Square to breach the contract. Because a party to a contract cannot be held liable for both breaching the contract and for tortiously interfering with that contract, plaintiff must show that these defendants were each "a stranger to both the contract and the business relationship giving rise to and underpinning the contract." As such, insofar as these defendants acted within the scope of their respective roles in the entities, they could not be held liable for tortious interference with contract. No factual allegation in the complaint sufficiently demonstrated that any defendant exceeded the scope of his authority. Accordingly, the claim was dismissed.

With regard to plaintiff's claim for tortuous interference with perspective economic advantage, the court stated that such a claim will survive a motion to dismiss where a plaintiff alleges: "(a) the reasonable probability of a business opportunity, (b) the intentional interference by defendant with that opportunity, (c) proximate causation, and (d) damages." Further, under Delaware law, direct claims relating to an LLC are only available where the member of the LLC has suffered damage that is independent of any damage suffered by the LLC. Because all of the harm allegedly suffered by plaintiff affected him through his interest in the LLC through which he did business, the court held that any claim for damages must be asserted by that LLC. Plaintiff failed properly to assert a derivative claim on behalf of that LLC. As such, the claim was dismissed.

In support of his claim for breach of the implied covenant of good faith and fair dealing, plaintiff alleged "arbitrary, unreasonable, and/or deceitful conduct" on the part of defendants. In its analysis, the court held that the implied covenant of good faith and fair dealing "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." However, it cannot be used to override the express terms of the contract. The court stated that to state a claim for breach of the implied covenant, a plaintiff must allege (a) a specific implied contractual obligation and (b) how the violation of that obligation denied the plaintiff the fruits of the contract. Because of its narrow purpose, the court added the implied covenant of good faith and fair dealing is only rarely invoked successfully. The court held that plaintiff failed to state a proper claim because his claim regarding defendants' failure to pay money due under the contract was governed by the express terms of the contract. Further, to the extent that plaintiff's claim was based upon allegations concerning defendants' attempts to undermine his reputation, plaintiff failed to allege any contractual benefit that he was denied as a result of such conduct. Accordingly, the claim was dismissed.

Conversion, the court stated, is any distinct act of dominion wrongfully exerted over the property of another in denial of the plaintiff's right or inconsistent with it. A plaintiff who wishes to assert a tort claim in addition to a contract claim must allege that the defendant violated a legal duty separate from its contractual duties. The court dismissed plaintiff's complaint because he failed to identify an interference with his right to the money that arose independently of the rights granted to him under the contract. Additionally, plaintiff's claim failed to fall within a narrow exception to the general rule prohibiting claims for the conversion of money—recognized in other jurisdictions, but not in Delaware—that permits a claim "only when it can be described or identified as a specific chattel, but not where an indebtedness may be discharged by the payment of money generally."

As to plaintiff's claims of unjust enrichment, the court defined such a claim as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." The court continued that the claim was not available where there was a contract that governed the relationship between the parties. Because plaintiff's complaint alleged that defendants were unjustly enriched by services that he provided pursuant to their consulting agreement, it was clear that the parties' relationship was governed by an express contract. While the plaintiff argued that his claims against certain defendants should not be dismissed because they were not parties to the relevant contracts, the court held that unjust enrichment could not be used "to circumvent basic contract principles recognizing that a person not a party to a contract cannot be held liable to it."

Finally, plaintiff brought a claim against defendants for civil conspiracy, alleging that they "knowingly entered into a confederation or combination to pursue unlawful ends vis-à-vis [plaintiff], including violations of implied covenants of good faith and fair dealing and tortious interference with [plaintiff's] contractual interests and economic expectancies." The court held, however, that civil conspiracy was not an independent claim. To be actionable, a civil action must embody an underlying wrong that would be actionable in the absence of the conspiracy. Because plaintiff failed to allege such a wrong, the court dismissed the claim.

Following the court's dismissal of the bulk of plaintiff's claims, the court addressed in a subsequent decision counterclaims by defendants against plaintiff for: (a) breach of fiduciary duty, (b) breach of contract and (c) breach of implied covenant of good faith and fair dealing. Defendants had formed two investment funds: the Feeder Fund and the Master Fund (collectively, the "Funds"). The Master Fund served as the principal investment vehicle for making investments in strategically targeted Japanese companies and the Feeder Fund was structured to serve as a vehicle for U.S. investors to invest in the Master Fund. Plaintiff was a member of defendant SPJS, which was created to serve as the Funds' general partner. Steel Partners Japan Asset Management ("SPJAM") served as the Funds' investment manager, while Steel Partners Japan, K.K. ("SPJ-KK"), a corporation in which plaintiff was a 50% shareholder, consulted with SPJAM in connection with its role as investment manager. Plaintiff had no experience managing investments or operating an investment fund, but had spent time evaluating Japanese companies and developing acquisition strategies for senior Japanese executives. As such, he worked as a trusted consultant to the Funds' investment manager. Because of disagreements with his fellow members, plaintiff decided to withdraw from SPJS. Upon his departure, plaintiff launched a fund that competed directly with the Funds. Defendants alleged, among other things, that plaintiff misappropriated confidential investor lists, unlawfully used confidential trade secret information and hired away employees.

In the breach of fiduciary duty claim, defendants asserted that plaintiff violated fiduciary duties that arose both from the terms of a consulting agreement between SPJAM and SPJ-KK and from his role at SPJS and in the overall structure of the investment endeavor. The court found that the argument that plaintiff had assumed the role of a fiduciary by virtue of his "central role" in the LLC agreement was entirely baseless, as he was a non-managing member who had no control, power or authority over a single investor's assets or any actions taken by SPJS. Plaintiff's only duties were contractual, not fiduciary. As such, the court granted plaintiff's motion to dismiss the claim for breach of fiduciary duty.

In the breach of contract claim, defendants asserted that plaintiff violated provisions of the Funds' operating agreements that prohibited the disclosure of trade secrets and other proprietary information relating to the Funds. Plaintiff argued that because he was not a party to either operating agreement he could not be bound by any of their provisions, including the confidentiality provisions. Defendants, however, sought an exception to the rule that a non-signatory to an agreement will not be bound by it, arguing that plaintiff had implicitly adopted the contract when he accepted the benefits of the operating agreements. The court rejected defendants' implied-adoption argument, stating that a non-managing member of SPJS could not be bound to an agreement signed by SPJS, and dismissed the claim for breach of contract.

As to the breach of the implied covenant of good faith and fair dealing, defendants argued that plaintiff impliedly promised (1) not to misappropriate trade secrets, (2) not to cause SPJ-KK to commit a material breach of the consulting agreement's confidentiality provisions, (3) not to commit a material breach of the Fund's operating agreements' confidentiality provisions, (4) not to cause SPJS to commit a material breach of the Fund's operating agreements' confidentiality provisions, and (5) not to engage in conduct destructive to the business of SPJS and the Funds. The court refused to apply the implied covenant of good faith and fair dealing to impose upon plaintiff a duty of confidentiality under the SPJS operating agreement. Relying on *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434 (Del. 2005), the court explained that the implied covenant of good faith and fair dealing requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain. To successfully invoke the implied covenant, one must allege a specific implied contractual obligation and allege how the violation of that obligation denied him the fruits of the contract. In this case, the SPJS operating agreement specifically excluded any duties relating to confidentiality, while other agreements, including the consulting agreement, did not. As such, there was no specific implied contractual obligation of confidentiality that plaintiff could have breached. The court, therefore, dismissed the claim for breach of the implied covenant of good faith and fair dealing.

9. *Kelly v. Blum*, C.A. No. 4516-VCP (Del. Ch. Feb. 24, 2010)

Plaintiff was a member, manager and the president of Marconi Broadcasting Company, LLC, a Delaware limited liability company (the "Company"). The Company was initially funded by plaintiff, who received Class B common membership units in consideration of his investment, and MBC Investment, L.P. ("MBC Investment"), which provided a loan to the Company plus an equity investment in Class A preferred units. MBC Investment was a wholly-owned subsidiary of ELB Capital Management, LLC ("ELB"). The Company began to experience cash flow problems and entered into an additional loan agreement with another wholly-owned subsidiary of ELB. In connection with this loan, the Company entered into an amended limited liability company agreement of the Company (the "LLC Agreement"), pursuant to which MBC Lender received Class C common membership units in the Company. The LLC Agreement required that all actions of the Company be approved by managers holding a majority of the voting power. The LLC Agreement also provided that the Company could not enter into any merger without the prior written approval of the Class A member or managers and the Class C member or managers. At all relevant times, Class A managers held 24%, Class B managers held 25% and Class C managers held 51% of the voting power. At a March 18, 2009 board meeting for the Company, a Class A manager of the Company, proposed a transaction by which a wholly-owned subsidiary of ELB would merge into the Company with "New Marconi" being the surviving entity (the "Merger"). The purchase price included a cash component, an assumption of the MBC Investment debt, and preferred units in New Marconi to be issued to MBC Investment. Further, all of the Class A, B and C common units in the Company would convert pursuant to the Merger into the right to receive $1 per class. Several weeks after the March 18, 2009 board meeting, MBC Investment and MBC Lender signed a written consent approving the Merger without plaintiff's consent. On April 8, 2009, MBC Investment and MBC Lender sent a copy of such written consent to plaintiff by fax and email, the confirmation of which was sent by FedEx on April 9, 2009. The Certificate of Merger was filed on April 17, 2009 to consummate the Merger. Plaintiff filed his complaint and all amendments thereto after the Merger was consummated.

The Delaware Court of Chancery first addressed plaintiff's motion for partial summary judgment on his claim for a declaratory judgment that the Merger was void either (1) because plaintiff did not receive adequate notice of its approval by written action as required by the LLC Agreement or (2) because the Merger closed before the notice period required by the LLC Agreement elapsed. The court noted that notwithstanding Section 18-209(b) of the LLC Act which provides that a merger of a Delaware limited liability company generally must be approved by members who own more than 50% of the then current percentage or other interest in the profits of such company, parties may contract to impose additional requirements as was the case in the LLC Agreement. As noted above, the LLC Agreement required prior written approval of the Class A member or Class A managers and the Class C member or Class C managers. The LLC Agreement further provided that any written consent that is not executed by any member "must be delivered to such Member no less than five (5) business days prior to the effective date of such consent." The LLC Agreement also provided that in the event notice was given by fax, a confirmation copy must be sent on the same day of the fax "by first class mail." Plaintiff asserted that the Defendants that approved the Merger technically violated this notice provision because the confirmation copy was sent the day after the fax. The court held that if the notice provision applied to a written consent (the court acknowledged that it may not apply as these provisions could be construed as ambiguous), the notice was in "substantial compliance." The court cited to corporate case law by analogy in indicating that substantial compliance "is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met."

The court then turned to Defendants' motion to dismiss each of plaintiff's other claims (each as explained below) for lack of standing. In this regard, Defendants claimed that plaintiff could not maintain standing subsequent to the Merger because plaintiff's claims were derivative in nature, plaintiff was no longer a member of the Company as a result of the Merger, and only members of the Company could assert derivative claims. The court agreed that under Section 18-1002 of the LLC Act, a plaintiff must be a "member or an assignee of a limited liability company interest" at the time of bringing a derivative action, and thus, plaintiff could only assert direct claims. The court noted two exceptions to this general rule under corporate case law precedent whereby a former shareholder could bring a derivative suit following a merger that terminates its interest (1) if the merger itself is subject to a claim of fraud being perpetrated merely to deprive shareholders of standing to bring a derivative action and (2) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise. Plaintiff did not allege these situations and thus they did not apply to this case. The court then applied the standing analysis set forth in the corporate case of *Tooley* to determine whether plaintiff's claims were direct or derivative.

The court first addressed plaintiff's claim that the Defendants that were members and managers of the Company violated their fiduciary duties of loyalty and care, which each owed to plaintiff as the minority equity holder, in approving a self-interested transaction (i.e., the Merger) on terms unfair to plaintiff. The court noted that Delaware cases interpreting Section 18-1101(c) of the LLC Act have concluded that despite the contractual freedom to restrict or eliminate duties owed by members and managers of a limited liability company, in the absence of a contrary provision in a limited liability company agreement, traditional fiduciary duties of loyalty (including good faith) and care apply. The LLC Agreement provided in a section entitled "Duties" that the board of managers "shall manage the Company in a prudent and businesslike manner . . . ." The LLC Agreement also contained an exculpatory provision which provided that managers of the Company would not be liable for money damages "for breach of fiduciary duty to the Company nor to any Member for their good faith actions . . . but only for their own willful or fraudulent misconduct or willful breach of their contractual or fiduciary duties under [the LLC Agreement]." The court found that these clauses did not explicitly disclaim or limit the applicability of default fiduciary duties. Further, the court held that if the Defendant managers of the Company entered into the Merger, as plaintiff alleged, to profit from squeezing out plaintiff and obtaining control of property held by the Company, this stated a direct duty of loyalty claim sufficient to survive a motion to dismiss. With respect to the exculpatory provision, the court noted that members could limit or eliminate a manager's or member's liability for breach of contract and fiduciary duties under Section 18-1101(e) of the LLC Act except for liability arising from a bad faith violation of the implied contractual covenant of good faith and fair dealing. The court interpreted the exculpatory language set forth in the LLC Agreement to require plaintiff to allege a "willful" breach of the Defendant managers' contractual or fiduciary duties to have a valid claim. The court did not determine whether "willful" required "evil intent to harm" or "acting recklessly and outside the bounds of reason" as the defendant managers asserted, but found that plaintiff had satisfied this standard by alleging facts sufficient to suggest that the Defendant managers "actually and specifically intended to extinguish [plaintiff's] membership interest in [the Company], knowing that such action would harm plaintiff." Accordingly, the court denied the motion to dismiss.

The court next addressed whether MBC Investment and MBC Lender owed fiduciary duties to plaintiff as controlling members of the Company. The court noted that, like managers of a limited liability company, in the absence of provisions to the contrary in a limited liability company agreement, controlling members in a manager-managed limited liability company owe minority members "the traditional fiduciary duties" that controlling shareholders owe to minority shareholders. Citing to corporate precedent, the court stated that these fiduciary duties include the duty "not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders." In respect of the Company, MBC Investment and MBC Lender were controlling members as they had the authority to appoint managers with 24% and 51% of the voting power, respectively, and further, they had the collective power to cause the Company to enter into merger agreements, among other things. The court found that plaintiff sufficiently alleged facts that, if true, showed that MBC Investment and MBC Lender, with the aid of their respective managers of the Company, effected the Merger to benefit themselves at the expense of plaintiff, and accordingly, the court denied the motion to dismiss.

With respect to plaintiff's claim that MBC Investment and MBC Lender breached their implied contractual covenant of good faith and fair dealing under the LLC Agreement by approving the Merger, not seeking alternative strategies for the Company and allowing the Company to enter into a self-interested transaction, the court noted that to have a valid claim, plaintiff must have alleged a "specific implied contractual obligation and allege how the violation of that obligation denied [plaintiff] the fruits of its contract." The court found that plaintiff did not sufficiently allege any specific implied contractual obligation, how it was breached, or how he was damaged by such breach. In this regard, the court observed that the LLC Agreement expressly addressed self-interested transactions. Therefore, the court granted the motion to dismiss this claim.

The court then addressed plaintiff's claim that ELB aided and abetted the alleged breaches of fiduciary duties explained above. The court stated that under Delaware law, to state such a claim, plaintiff must show "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) the defendant, who is not a fiduciary, knowingly participated in the breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that plaintiff had sufficiently alleged that ELB knowingly participated in the breaches of fiduciary duty by the other Defendants through the acts of ELB's officers and its two wholly-owned subsidiaries (MBC Investment and MBC Lender) that directly harmed plaintiff for the same reasons as discussed above. Accordingly, the motion to dismiss was denied.

Finally, plaintiff also sought a declaratory judgment to invalidate the loan agreement between the Company and MBC Lender. The court specifically noted that plaintiff consented to such loan and pledged his membership interest in the Company to obtain the loan. On that basis, the court dismissed this claim.

10. *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, C.A. No. 4479-VCN; Lola Cars Int'l Ltd. v. Krohn Racing, LLC, C.A. No. 4886-VCN (Del. Ch. Oct. 20, 2009)

This case involved a joint venture named Proto-Auto, LLC, a Delaware LLC (the "Company"), which was formed by an English company ("Lola") and a Delaware LLC ("Krohn"). Lola held 51% of the interest in the Company and Krohn held 49%, but the parties agreed to equal representation on the Company's board, each company appointing one director. Krohn appointed its manager, Hazell, as its director, and agreed to contribute Hazell's services as the Company's CEO. Hazell was also a defendant in this case. This decision addressed the Defendant's motion to dismiss both of Lola's complaints.

Lola's first complaint alleged that (1) Krohn breached the Company's Operating Agreement (the "Agreement"), (2) Hazell, as CEO and a director of the Company, breached his fiduciary duties of loyalty and care, and (3) Krohn aided and abetted Hazell's disloyalty. On these claims, Lola sought (1) dissolution of the Company and appointment of a liquidating receiver, (2) an injunction to prohibit the Company from taking action outside the ordinary course of business, and (3) damages against Krohn and Hazell.

Krohn argued that the Company should not be dissolved under Section 18-802 of the LLC Act because the facts alleged by Lola could not support a finding that it was "not reasonably practicable to carry on the business [of the Company]." Krohn interpreted the statutory reasonable practicability standard to mean that "the business has been abandoned or that its purpose is not being pursued." The court rejected this interpretation and applied the test from *Fisk Ventures, LLC v. Segal*. The three *Fisk* factors, which provide guidance in evaluating a situation in regard to the reasonable practicability standard, are: (1) whether the members' vote is deadlocked at the Board level; (2) whether there exists a mechanism within the operating agreement to resolve the deadlock; and (3) whether there is still a business to operate based on the company's financial condition.

The court found at least two of the three *Fisk* factors were present. First, Lola and Krohn were deadlocked over whether to replace Hazell as CEO. Second, although the Agreement contained a buy-out provision in case of a member dispute, it was entirely voluntary. Third, there was serious doubt as to whether the Company could continue in light of its financial condition because Lola had been extending the Company significant additional capital to keep it running. Furthermore, the court found that Lola's claims of Hazell's mismanagement and disloyalty, plus the Company's overall failure, added to the reasonable conclusion that dissolution may be appropriate.

Krohn had also argued that judicial dissolution under Section 18-802 was inappropriate because the Agreement defined the circumstances upon which it could be terminated, and such circumstances did not include judicial dissolution. The court rejected Krohn's argument stating that, even assuming that Section 18-802 of the LLC Act could be precluded by contract, the fact that the Agreement (1) contained self-termination options, and (2) did not expressly allow for judicial dissolution, could not render judicial dissolution unavailable. Consequently, the court denied defendant's motion to dismiss the claim for judicial dissolution.

Krohn moved to dismiss Lola's fiduciary claims on the ground that Lola failed to plead demand futility with particularity as required by Section 18-1003 of the Act. The court noted that it relies on corporate precedent in interpreting Section 18-1003 of the Act, and that in the corporate context, demand is considered excused when allegations in the complaint create a reason to doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. (Citing *Wood v. Baum*). The court denied Krohn's motion because Lola satisfied the particularized pleading standard by claiming that Hazell faced a substantial risk of liability due to his failure to maintain appropriate inventory levels and pay state taxes in a timely fashion, and his use of Company assets for Krohn's benefit in violation of his duty of loyalty to the Company. Furthermore, the court noted that where the directors of a two-director board have equal voting power and one is interested, demand should be excused because that one interested director alone has the power to preclude litigation.

Krohn moved to dismiss Lola's claim of breach of the implied covenant of good faith and fair dealing because the Agreement specifically stated that Hazell was to be CEO and that Krohn could replace him if he resigned from that position. The court agreed with Krohn that the implied covenant could not be applied to matters covered by contract. Therefore, Krohn's argument went, since the contract spoke to the issues of who is CEO and which party had the right to replace him, the implied covenant did not apply. Furthermore, Krohn argued that Lola could have bargained for the right to replace the CEO if that is what it wanted. The court determined that although the Agreement did not require Krohn to assent to Lola's wishes regarding replacement of Hazell, Krohn's refusal to even consider replacing him, or even attend board meetings to discuss the matter, allowed the court a reasonable inference of a breach of the implied covenant. In other words, the implied covenant did not apply to who was CEO or who could replace him, but it did apply to Krohn's consideration of Lola's suggestions.

Lola's second complaint relied on the termination clause in Section 10.1 of the Agreement, which allowed a member to terminate the Agreement after a breach by the other by notifying the breaching party of (1) the breach, and (2) the consequences of a failure to rectify the breach. Under Section 10.1 of the Agreement, the breaching party then had 21 days to rectify the breach, after which time the non-breaching party was permitted to terminate. Lola argued that its first complaint served as the requisite notice to Krohn and that more than 21 days had passed since the first complaint was filed, so Lola was entitled to terminate the Agreement. Also, Lola contended that upon termination of the Agreement, it should receive the right to manage and control the Company because of its majority position. Lola requested relief in the form of a TRO and permanent injunction prohibiting Hazell and Krohn from interfering with Lola's control of the Company, or acting as its agents.

The court denied Lola's request for interim injunctive relief, and refused to declare a termination of the Agreement based on Section 10.1 of the Agreement because Lola's first complaint did not notify Krohn of the consequences of failing to rectify the breach. Lola then moved for leave to file a supplemental complaint, alleging that (1) it sent Krohn a letter giving notice that Krohn had materially breached the Agreement and outlining the consequences of Krohn's failure to rectify its breach, and (2) that more than 21 days had passed since the letter was sent. In the alternative, Lola asked the court to dismiss its second complaint without prejudice so that it could file a new complaint that incorporated the letter to Krohn, and the court granted this request.

11. *R&R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, C.A. No. 3803-CC (Del. Ch. Aug. 19, 2008); R&R Capital, LLC v. Merritt, C.A. No. 3989-CC (Del. Ch. Sept. 3, 2009)

Plaintiffs sought, among other things, judicial dissolution of nine Delaware LLCs pursuant to Section 18-802 of the LLC Act. The court, in declining to judicially dissolve the LLCs, upheld the enforceability of a provision in the LLC agreements of certain of the LLCs waiving a member's right to seek dissolution. Among their several arguments, petitioners argued that the waiver of a member's right to seek dissolution violated the public policy of Delaware and offended notions of equity. The court rejected this argument for three reasons. First, the court reasoned that the LLC Act was based on the policy of freedom of contract and allowing the members of an LLC to order their affairs contractually as they deemed appropriate. Further, Delaware as a freedom of contract state has a policy of enforcing the voluntary agreement of sophisticated parties, such as those party to the LLC agreements. Thus, because the LLC agreements were among sophisticated parties, the court concluded that the state's policy "mandates that [the] Court respect and enforce the parties' agreement." Second, the court reasoned that there are legitimate business reasons why members of an LLC would want to include a provision whereby members prospectively waive their right to seek dissolution or the appointment of a receiver in its LLC agreement. For example, a lender under a loan agreement may require an LLC prospectively to agree to waive their rights to judicial dissolution to protect the LLC, otherwise a disgruntled member could push the LLC into default on all of its outstanding loans simply by filing a petition with the court. Third, the court found petitioners' plea to the court's sense of equity misplaced, finding that the LLC Act did not leave petitioners without any recourse. The court emphasized that the LLC Act prohibits parties from waiving the implied covenant of good faith and fair dealing and stated that it is the protection of the "implied covenant that allows the vast majority of the remainder of the LLC Act to be so flexible."

In a further decision in this case, after holding that the manager of the nine LLCs had been properly removed for cause, the court stated that the relationship of petitioners and the manager had become "completely dysfunctional and beyond repair or reconciliation" and that the removal of the manager, which did not affect her continued status as member, was insufficient to resolve the parties' dispute. The court thus granted petitioners' request for the appointment of a receiver to dissolve and wind up the LLCs.

12. *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, C.A. No. 3658-VCS (Del. Ch. Apr. 20, 2009)

This action arose out of a failed development project between plaintiff Bay Center Apartments Owner, LLC ("Bay Center") and defendant Emery Bay PKI, LLC ("PKI"). PKI was owned and operated by defendant Alfred E. Nevis ("Nevis"). To effectuate the development project, Bay Center and PKI formed defendant Emery Bay Member, LLC, a Delaware LLC ("Emery Bay"), and designated PKI as its managing member. Emery Bay's LLC Agreement provided for PKI to manage the project, but the details of its management duties were defined in a separate Development Management Agreement, which was an exhibit to the LLC Agreement. Under the LLC Agreement, PKI was required to cause one of its subsidiaries to enter into the Development Management Agreement with the Development Manager, which was defined as PKI or one of its affiliates. PKI designated another Nevis-owned affiliate, defendant Emery Bay ETI, LLC ("ETI"), as the Development Manager. Thus, the entity with primary responsibility for the success of the development project, the Development Manager, was not in contractual privity with Bay Center. Under the LLC Agreement, however, PKI had the power and authority to cause the Development Manager to perform its obligations under the Development Management Agreement.

Soon after the project began, Emery Bay defaulted on a construction loan that Nevis had guaranteed. Bay Center alleged that defendants secretly renegotiated the loan on several occasions, which both diverted cash flow from the development project and allowed Nevis to avoid triggering his personal guarantee. After a series of other problems allegedly resulting from mismanagement by PKI's affiliates, the development project failed and was put into receivership. In this case, Bay Center pursued a breach of contract claim against PKI, the only defendant that was party to the LLC Agreement, and sought to expand its remedial options by filing suit for breach of the contractually implied covenant of good faith and fair dealing, breach of fiduciary duty, common law fraud, and aiding and abetting a breach of fiduciary duty. This decision addressed defendants' motion to dismiss all of Bay Center's claims except for those based on breach of contract.

In its breach of contract claim, Bay Center argued that, under the terms of the LLC Agreement, PKI was required to cause ETI to perform its obligations under the Development Management Agreement and cause Emery Bay to perform its obligations under the loan documents. PKI, on the other hand, argued that it was simply empowered, not required, to cause these entities to perform such obligations. The court found the LLC Agreement to be ambiguous on this point and, for purposes of the motion to dismiss, construed the ambiguity against Bay Center. The court then examined the question of whether that obligation could be implied in the LLC Agreement. The court stated that Delaware courts have only sparingly applied the implied covenant of good faith and fair dealing, especially in detailed, complex agreements, but they have "recognized the occasional necessity of implying contractual terms to ensure the parties' reasonable expectations are fulfilled." In this case, the court found that PKI was required to act in good faith in managing Emery Bay and exercising its discretion to cause the supporting agreements to be performed. Thus, PKI could not "engage in 'arbitrary or unreasonable conduct' that had the effect of preventing Bay Center from 'receiving the fruits of the bargain,'" which bargain in this case was that, in exchange for Bay Center's contribution of real estate, Bay Center would enjoy the benefit of PKI's project management skills and efforts. Because Bay Center pled facts from which it could be reasonably inferred that PKI's actions were not in good faith, the court found that Bay Center had sufficiently pled that PKI had an implied duty of good faith to cause performance of the supporting agreements and that PKI had breached this duty.

The court next turned to Bay Center's aiding and abetting claims and stated that to allege a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must plead: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary." The court found that Bay Center had pled sufficient facts in this regard and thus denied defendants' motion to dismiss the aiding and abetting claims.

With respect to Bay Center's common law fraud allegations, the court stated that there are three ways to demonstrate common law fraud: (1) overt misrepresentation; (2) silence in the face of a duty to speak; or (3) deliberate concealment of material facts. In its claim, Bay Center argued that PKI and Nevis had a duty to speak and failed to do so. The court stated that to commit common law fraud through silence, a defendant must have a duty to speak that arises by operation of law, not purely by contract. For purposes of this motion, the court considered PKI subject to traditional fiduciary duties and held that fiduciaries of an LLC have a duty to disclose fully and fairly all material information within their control when they seek members' consent. Because the LLC Agreement required Bay Center's consent for any refinancing or restructuring of loans and the facts alleged showed that PKI failed to notify Bay Center of six of seven loan modifications, the court held that Bay Center successfully pled its fraud claim against PKI. The court stated that under Delaware law, "[a] corporate officer can be held personally liable for the torts he commits and cannot shield himself behind a corporation when he is a participant," which includes situations where a corporate agent participates in corporate fraud. On this basis, the court found that Bay Center had a proper claim against Nevis for his individual participation in PKI's fraud.

13. *Fisk Ventures, LLC v. Segal,* C.A. No. 3017-CC (Del. Ch. May 7, 2008) and (Del. Ch. July 3, 2008)

Genitrix, LLC (the "Company") was formed to develop and market biomedical technology. The equity in the Company was divided into three classes, a Class A membership interest primarily owned by Dr. Andrew Segal ("Segal"), a Class B membership interest primarily owned by Dr. H. Fisk Johnson ("Johnson"), Fisk Ventures, LLC ("Fisk") and affiliates of Fisk and Class C membership interests owned by passive investors. The Company's LLC Agreement required the cooperation of the Class A and Class B members for the effective operation of the Company. However, the Class A and Class B members consistently disagreed on matters related to research and financing. The failure of the Class A and Class B members to agree left the Company virtually frozen and at the time of litigation the Company had only one employee, no office, no capital funds, no grant funds and it generated no revenue. The Class B members initiated a suit to dissolve the Company under Sections 18-801 and 18-802 of the LLC Act. In response, Segal counterclaimed against Fisk, Johnson and Stephen Rose and William Freund (who were representatives of Fisk on the board of representatives of the Company) alleging that the counterclaim/third party defendants breached the Company's LLC Agreement, breached the implied covenant of good faith and fair dealing implicit in the LLC Agreement, breached their fiduciary duties to the Company and tortiously interfered with Segal's employment agreement with the Company. Johnson moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction and the other counterclaim/third party defendants moved to dismiss the claims under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The court's opinion addressed the motions to dismiss made by the counterclaim/third party defendants.

The court granted all the other counterclaim defendants' motion to dismiss under Rule 12(b)(6). As to Segal's first claim for breach of contract with respect to the Company's LLC Agreement, the court noted that before it could begin its analysis as to whether a breach had occurred, it had to determine that there was a duty. In this respect it found that Segal failed to identify any breaches of duties found in the Company's LLC Agreement. Segal argued that the Company's LLC Agreement established a code of conduct to which the members of the Company were bound, namely, a duty to act without gross negligence, fraud or intentional misconduct. The court, however, found that the provisions cited by Segal did not establish a code of conduct, but rather limited or waived liability, and the court declined to turn an exculpation clause into an all-encompassing and seemingly boundless standard of conduct. Further, the court reasoned that even assuming such a code of conduct had been created, Segal failed to show that the counterclaim defendants acted with gross negligence, willful misconduct or bad faith or knowingly violated the law. The fact that the Class B members did not take actions suggested by Segal to assist the Company in obtaining financing did not indicate that they acted in bad faith. Additionally, Segal argued that the Class B members breached the Company's LLC Agreement by removing him as CEO with a vote of less than 75% of the board. The court found, however, that under the Company's LLC Agreement and Segal's employment agreement, the board was entitled to remove Segal with a vote of less than 75% of the board, thus Segal's removal by less than 75% of the board was not a breach of duty but rather an exercise of a contractual right.

Segal also alleged that the counterclaim defendants breached the implied covenant of good faith and fair dealing contained in the Company's LLC Agreement by frustrating or blocking the financing opportunities proposed by Segal. The court, in discussing the implied covenant, found that it is invoked to protect the spirit of what was actually bargained and negotiated for in the contract and further, because it is implied, it cannot be invoked where the contract itself expressly covers the subject at issue. Here, the court found that the Company's LLC Agreement did not provide Segal with a unilateral right to determine what fundraising or financing opportunities the Company would pursue. In fact, the Company's LLC Agreement specifically addressed financing and provided that financings required the approval of 75% of the board. The court found that implicit in this provision was the right of Class B board representatives to disapprove of and block Segal's proposals.

W. No Interest in Specific LLC Property

1. *Credit Suisse Sec. (USA) LLC v. West Coast Opportunity Fund, LLC*, C.A. No. 4380-VCN (Del. Ch. July 30, 2009)

Gary Evans was the Chairman, CEO and President of Greenhunter Energy, Inc. ("Greenhunter"). In connection with an investment in Greenhunter by West Coast Opportunity Fund, LLC ("WCOF"), Evans, along with other executives of Greenhunter, executed a lockup agreement prohibiting the direct or indirect transfer of Greenhunter stock for a period of time. Evans wrote "Chief Executive Officer" under his name on the signature block of the lockup agreement but the parties to the lawsuit agreed that Evans signed the lockup agreement in his personal capacity. Evans did not own any Greenhunter stock personally, however. All of his Greenhunter stock was owned by a Delaware LLC, of which he was the sole member and manager. During the period of time in which the lockup agreement prohibited Evans from transferring his Greenhunter stock, Evans executed a pledge agreement on behalf of the LLC in his capacity as the manager of the LLC pledging the LLC's Greenhunter shares to Credit Suisse as security for a margin account. Following a margin call by Credit Suisse, WCOF objected, based on the lockup agreement, to any sale of the LLC's Greenhunter stock to meet the margin delinquency.

In this decision, the Chancery Court addressed the question of whether the LLC was bound by the lockup agreement even though it was not an express party thereto. WCOF argued that, even though the lockup agreement makes no mention of the LLC, it should be interpreted to preclude the pledge of Greenhunter stock held by the LLC based on the language of the lockup agreement prohibiting "direct or indirect" transfers of such stock. The court, with reference to LLC Act Section 18-701 for the proposition that a member has no interest in specific LLC property, stated that the Greenhunter stock was entirely the property of the LLC and that Evans' status as a member of the LLC did not alter that fact. The court, after citing the general rule under Delaware contract law that only the formal parties to a contract are bound by its terms, held that since Evans did not sign the lockup agreement in his capacity as a member or manager of the LLC and that there is no evidence of an intent to act in either of those capacities, the lockup agreement did not bind the LLC. The court went on to state that Evans cannot encumber property that he does not own and, accordingly, that the lockup agreement did not prevent the LLC's transfer of the Greenhunter stock pursuant to the pledge agreement. The court noted that Evans may have violated the lockup agreement by causing the LLC to pledge its Greenhunter stock but that issue was not before the court.

X. Good Faith/Bad Faith

1. *Stewart v. BF Bolthouse Holdco, LLC*, C.A. No. 8119-VCP (Del. Ch. Aug. 30, 2013)

Plaintiffs, former employees of the defendant LLC (the "Company"), brought claims against the Company and its board of managers (the "Board") for breach of contract, breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing in connection the Company's repurchase of plaintiffs' membership units in the Company (the "Units"). Plaintiffs acquired their Units by executing the LLC agreement of the Company (the "LLC Agreement") and a purchase agreement (the "Purchase Agreement"). Upon plaintiffs' voluntary termination of their employment with the Company, the Company exercised its right under the Purchase Agreement to repurchase plaintiffs' vested and unvested Units. The Board determined the Fair Market Value (as defined in the Purchase Agreement) of plaintiffs' Units under the Purchase Agreement was $0.00 and cancelled the Units without paying any consideration.

The court granted defendants' motion to dismiss plaintiffs' claims of breach of fiduciary duties and breach of the implied covenant of good faith and fair dealing, and denied in part and granted in part the motion with respect to the breach of contract claim. In light of an e-mail from the president and CEO of the Company valuing the Units at $200 each three weeks after the Board determined the Fair Market Value was $0.00, the court held that it was reasonably conceivable that the Fair Market Value of the Units was greater than $0.00 and that the Board acted in bad faith in determining the value in breach of the Purchase Agreement. The court also noted that defendants did not argue that any material event occurred during those three weeks that affected the valuation. The court further held that plaintiffs sufficiently pled facts that defendants' valuation of $0.00 was determined in bad faith because of facts indicating a value of the Units greater than $0.00 in surrounding years, and because the valuation was done at a time when defendants were no longer obligated to provide plaintiffs with relevant financial information of the Company. Moreover, plaintiffs pled a plausible motivation—to increase the majority owner's interest in the Company or, alternatively, as retribution for plaintiffs' unexpected departure from the Company at a time when plaintiffs were important to the future success of the Company. The court noted that although a claim of wrongful inducement, trickery or deception may be sufficient to establish bad faith, those elements are not necessary under Delaware law. The court therefore denied defendants' motion to dismiss plaintiffs' breach of contract claim that the Board determined the Fair Market Value of the Units in bad faith.

The court held that the LLC Agreement's fiduciary duty provision—which provided that the managers owed the same fiduciary duties as a director of a corporation—applied to the Board's determination of the value of the Units because execution of the LLC Agreement by plaintiffs was a condition precedent to receipt of their Units under the Purchase Agreement, and the duties to act carefully and loyally were not inconsistent with or contradictory to the Purchase Agreement's requirement that the Board determine the Fair Market Value of the Units in good faith. However, because plaintiffs made no allegations regarding the Board's valuation process, the court held that plaintiffs failed to state a claim for breach of the contractual duty of care. Plaintiffs also failed to state a claim of breach of the duty of loyalty on the basis that the repurchase was an interested transaction because plaintiffs did not allege that defendants stood on both sides of the repurchase transaction, nor did they allege that defendants were in a position to benefit from an unfairly low repurchase in a manner not shared equally with all owners of the Company. However, for the same reasons the contractual bad faith claim under the Purchase Agreement survived, the court held that plaintiffs sufficiently alleged that defendants acted in bad faith in determining the Fair Market Value in breach of the contractual duty of loyalty under the LLC Agreement. The court therefore denied defendants' motion to dismiss this claim.

The court dismissed plaintiffs' claim that defendants breached the LLC Agreement's requirement that the Company deliver to the members annual financial statements because the LLC Agreement only required the Company to provide the financial statements to a person with a present ownership interest in the Company, and plaintiffs no longer had a present ownership interest in the Company at the time the annual financial statements were required to be provided. The court also dismissed plaintiffs' claim that defendants breached the Purchase Agreement by "cancelling" the Units rather than "repurchasing" them as provided in the Purchase Agreement, holding that the only issue was whether the Company properly exercised the repurchase right, and so that claim was duplicative of plaintiffs' breach of contract claim.

The court similarly dismissed plaintiffs' breach of fiduciary duty claim because it was duplicative of and foreclosed by the breach of contract claim. Under Delaware law, a fiduciary duty claim that depends on the same nucleus of operative facts as a breach of contract claim only survives where it may be maintained independently of the breach of contract claim. Plaintiffs' fiduciary duty claim—that defendants acted contrary to their fiduciary duties to plaintiffs when they purported to declare the Units held no value and cancelled them—arose from the dispute relating to the contractual repurchase right under the Purchase Agreement. The breach of fiduciary duty claim was not broader in scope, nor did it implicate potentially different remedies. Finally, the court dismissed plaintiffs' claim that defendants violated the implied covenant of good faith and fair dealing by failing to act in good faith when valuing the Units. Plaintiffs did not allege a specific implied contractual obligation that was breached, and the issue was covered by an express term in the Purchase Agreement requiring the Board to value the Units in good faith. Therefore, the court also held the claim was duplicative.

2. *Ross Holding and Mgmt. Co. v. Advance Realty Grp. LLC*, C.A. No. 4113-VCN (Del. Ch. Mar. 7, 2013)

In this case, the court considered plaintiffs' challenge to Advance Realty Group's ("ARG") failure to repurchase plaintiffs' units when they were terminated and to ARG's adoption of a Conversion and Exchange Agreement ("Conversion Agreement") that involved a capital restructuring of ARG that allegedly adversely affected the value of plaintiffs' ARG holdings because defendants diverted ARG's assets for their benefit. Defendants moved for summary judgment.

The court granted defendants' motion for summary judgment as to the two issues to which the court applied Delaware law—breach of fiduciary duty claims against Rayevich, a member of the ARG managing board, and against Sheridan, ARG's Chief Financial Officer ("CFO"), in connection with their alleged involvement with ARG's failure to repurchase plaintiffs' units and ARG's adoption of the Conversion Agreement.

Rayevich was bound by the ARG Operating Agreement to manage ARG reasonably and in good faith; the Operating Agreement exculpated him from liability absent willful misconduct or bad faith. The court noted that Rayevich, although a member of ARG's managing board, had no discretion in how to vote because he was required to vote as directed. Notwithstanding Rayevich's lack of discretionary voting power, the court stated that fiduciary duties extended beyond voting and could involve studying the proposed transaction, determining its appropriateness, expressing dissenting views to fellow board members and, under proper circumstances, informing unit holders about potential adverse effects. However, because plaintiffs failed to provide any facts that demonstrated Rayevich's lack of good faith in connection with the Conversion Agreement, the court granted defendants motion for summary judgment.

Sheridan did not dispute that she, as ARG's CFO, owed fiduciary duties to plaintiffs, ARG unit holders. The court noted that fiduciary duty liability exists within the management framework of an LLC, its managing board and its unit holders. Furthermore, it stated that when a fiduciary makes misleading disclosures but no unit holder action is sought, a plaintiff must prove that the fiduciary knowingly disseminated materially false information and must prove the elements of reasonably reliance, causation and damages. Here, the court found that plaintiffs failed to demonstrate that Sheridan's alleged misstatements, omissions and misrepresentations in ARG's financial statements caused them any damage or that they relied on any of her alleged misrepresentations regarding the Conversion Agreement. The court granted defendants motion for summary judgment.

The court also addressed claims of breach of the Unit Holders Agreement and civil conspiracy under New Jersey law; the court granted summary judgment regarding breach of the Unit Holders Agreement but refused to grant summary judgment as to certain fiduciary claims against Sheridan because participation in a civil conspiracy against ARG unit holders precluded dismissing those claims.

IV. GENERAL PARTNERSHIPS & JOINT VENTURES

A. Formation

1. *Grunstein v. Silva*, C.A. No. 3932-VCN (Del. Ch. Jan. 31, 2011)

In this decision, the Court of Chancery addressed, among other things, defendants' motion for summary judgment on plaintiffs' claim that defendants had breached an oral partnership agreement. Defendants argued that plaintiffs failed to prove that a partnership agreement ever existed, pointing to the existence of several unsigned drafts of partnership agreements as evidence that no definitive partnership agreement had ever been entered into among plaintiffs and defendants.

The court began its analysis by stating that under DRUPA Section 15-202(a), "a partnership is formed when two or more persons either (i) operate a for-profit business as co-owners or (ii) carry on any purpose or activity not for profit if the persons intend to form a partnership." The court noted that there is no single test that is determinative of whether a partnership exists; rather, existence of a partnership is a question of intent. According to the court, a partnership exists if the parties had a "common obligation to share losses as well as profits." The court stated that it looks at the language of any agreement and at "the parties' acts, dealing, conduct, and admissions" to determine whether a partnership has been formed and that, as with any other contract, a partnership agreement will be enforceable only if it contains all material terms.

In this case, the court found that the existence of unsigned drafts of a partnership agreement did not automatically prove that the parties' never entered into a partnership agreement. The plaintiffs argued that an oral partnership agreement was reached at the beginning of the parties' relationship, and since none of the later versions of the partnership agreement had been signed, the initial oral partnership agreement controlled. The court stated that it would eventually need to evaluate the credibility of plaintiffs' explanation for why the drafts of the partnership agreement had not been signed but not on a motion for summary judgment. The court thus denied the defendants' motion for summary judgment.

2. *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, C.A. No. 4119-VCS (Del. Ch. Mar. 4, 2010)

This case was before the court on a motion for reargument. The plaintiffs argued that dismissal had been unwarranted for two reasons: First, because the contract over which the dispute centered was executed under seal (and, thus, the statute of limitations had not expired); and, second, because the parties were engaged in a joint venture before the disputed contract was executed (therefore the defendant owed the plaintiff fiduciary duties).

The court dismissed the plaintiff's first argument because it had failed to raise the argument at any point prior to its motion for reargument. However, the court went on to clarify that the word "SEAL" must appear alongside each signature line in order to reap the benefit of the twenty year statute of limitations associated with contracts under seal. In this case, the word "SEAL" did not appear next to the signatures. Rather, the contract included a lead-in to the signatures which said "IN WITNESS WHEREOF, the parties have set their Hand and Seal as of the day of the year first written above." The court ruled that this statement (without the word "SEAL" opposite the signatures) was not sufficient to provide for a twenty year statute of limitations.

With respect to the plaintiff's second argument, the court listed the factors that must be present for a joint venture to be created: (1) a community of interest in the performance of a common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits, and (5) a duty to share in the losses which may be sustained. These factors did not exist prior to the signing of the contract, therefore the court determined that the parties were not engaged in a joint venture before entering into the contract. Instead, the parties were only in negotiations over how and whether to enter into an agreement. The court denied the plaintiff's motion for reargument.

3. *Total Holdings USA, Inc. v. Curran Composites, Inc.*, C.A. No. 4494-VCS (Del. Ch. Oct. 9, 2009)

Plaintiff, Total Composites, Inc., a Delaware corporation ("Total"), and defendants Curran Composites, Inc., a Missouri corporation and its subsidiary C-Two, LLC (collectively, "Curran"), formed a joint venture, Cook Composites and Polymers ("Cook Composites"), to develop, market, and manufacture composite materials. The original partnership agreement, dated February 9, 1990, stated that "the Participants shall . . . organize and associate themselves as partners in a general partnership . . . in, and in accordance with the laws of, the State of Delaware." At the time the parties entered into the original partnership agreement, the Delaware Uniform Partnership Act ("DUPA") governed general partnerships organized under Delaware law. In 1999, Delaware enacted the Delaware Revised Uniform Partnership Act ("DRUPA"), which repealed the DUPA and provided that it would govern all Delaware general partnerships after the expiration of a two year grace period.

In 2004, Total and Curran had entered into a new partnership agreement that restated the original partnership agreement and the amendments thereto. The 2004 partnership agreement included an option for Curran to require Total to buy Curran's interest in the joint venture at book value. In 2009, Curran exercised its right to put its interests to Total. On April 7, 2009, Total filed a complaint in the Court of Chancery seeking to recover the amount it believed it overpaid for Curran's interest in Cook Composites, and on April 9, 2009 Curran responded by filing its own complaint in a Missouri state court alleging that Total underpaid for the interest. Defendants filed a motion to dismiss in this case for lack of personal jurisdiction and this opinion addresses defendants' motion. Before the court could consider whether Curran was subject to jurisdiction in Delaware, it had to determine which partnership statute governed the Cook Composites partnership agreement because the DRUPA, unlike the DUPA, included a personal jurisdictional consent mechanism that allows jurisdiction to be exercised over non-resident partners.

The defendants argued that DRUPA could not apply to them because the statutory language did not explicitly state that it would be applied retroactively. The court disagreed and stated that Section 1206 of the DRUPA makes clear that the DRUPA was intended to apply to all general partnerships, whether formed before or after the DRUPA came into effect. Section 1206 of the DRUPA states that "[o]n and after January 1, 2002, this chapter governs all partnerships." The court noted that the language makes explicit that any general partnership formed under DUPL is on notice that unless it chooses otherwise, the DRUPA will apply to it. In addition, the court rejected the plaintiffs' argument that application of the DRUPA to Cook Composites would violate well-established principles of statutory interpretation used by the court. The court distinguished this situation from the case cited by defendants relating to the deemed consent provisions of the Delaware Revised Uniform Limited Partnership Act ("DRULPA") in which the court found that Section 17-109 of the DRULPA would not be applied retroactively because the DRULPA did not give sufficient notice to the parties of the particular changes that would affect their relationship, whereas in this case the defendants were on notice that the DRUPA would apply to all general partnerships after January 1, 2002. In addition, the court noted that this dispute could be further distinguished from the cases cited because the parties restated their partnership agreement after the DRUPA was in effect.

Next, the court considered the defendants' argument that Cook Composites was not a Delaware general partnership at all because it did not meet the prerequisites set forth in Section 15-106(c) of the DRUPA. Essentially, the defendants argued that, except as noted below, Section 15-106(c) of the DRUPA was the exclusive means by which Delaware law would be applied to a general partnership. Under Section 15-106(c), two preconditions must be met for Delaware law to apply to a general partnership, (i) the inclusion of a Delaware choice of law provision and (ii) registration with the Secretary of State of the State of Delaware. Absent compliance with the foregoing preconditions, Curran argued, a general partnership would be governed by the state where its operations were located, unless Delaware had other ties to the general partnership that gave it a claim to apply its law. The court disagreed. First, it noted that to interpret the statute as suggested by the defendants would mean the DRUPA would only apply to general partnerships that register with the State of Delaware, while the statute clearly contemplated that Delaware general partnerships could be both registered and unregistered. Further, the court found that the defendants had overlooked Section 15-106(a) of the DRUPA, which provides that Delaware law will govern to the extent a partnership agreement contains an effective choice of Delaware law.

Thus, the issue before the court was to determine whether Delaware law would apply under the traditional choice of law analysis that Section 15-106(a) of the DRUPA invoked. The Restatement (Second) of Conflict of Laws provides that the law chosen by the parties will apply except if (i) the chosen state has no substantial relationship to the parties or the transaction and there is no reasonable basis for the parties choice or (ii) the application of the chosen state's law would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the matter. The court reasoned that the language used in the partnership agreement was sufficient to indicate that the parties intended Delaware law to govern. In spite of the clear choice of law provision in the partnership agreement, Curran argued that Delaware law should not apply because the State had "no substantial relationship" to the parties or the transaction. The court rejected this argument finding that it ignored the Restatement's language calling for the parties' choice of law to govern if there was a "reasonable basis" for the choice. Citing the Delaware legislature's clear expression that choosing Delaware law amounts to a substantial relationship with Delaware, the court stated that Delaware courts will generally honor a contractually-designated choice of law provision if it is reasonable in light of the parties' objectives. The court found that it was reasonable for the parties, from two different jurisdictions, to choose Delaware law, a shared language of commerce, to govern its internal affairs. Further, Curran failed to argue that Missouri had a "materially greater interest" in adjudicating the dispute or that adjudicating the dispute in Delaware would contravene one of Missouri's fundamental policies. Therefore, finding that Section 15-106(a) was satisfied, the court held that Cook Composites was a Delaware general partnership.

The court then determined whether Curran would be subject to personal jurisdiction under Section 15-114 of the DRUPA. The relevant language in Section 15-114 provides that "[a] partner . . . of a partnership which is formed under the laws of the State of Delaware or doing business in the State of Delaware 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 partnership or a violation by the partner . . . of a duty to the partnership or any partner of the partnership." The defendant argued that the "involving or relating to the business of the partnership" requirement was not satisfied because the dispute was merely a routine contract dispute that did not involve the partnership's core business. The court, however, rejected this argument, finding that the instant dispute, where Curran was alleged to owe a duty to pay money back to a partner because it was overpaid under a put provision in the partnership agreement, fell squarely within the plain language of the statute, and, further, that a disagreement over the partnership's controlling agreement was not a routine contract dispute. Therefore, the DRUPA provided a statutory basis to exercise jurisdiction over Curran.

Finally, based on the language of the consent to jurisdiction provision, the court found that satisfaction of the requirements of Section 15-114 obviated any due process concerns because the dispute concerned Cook Composite's internal affairs and "Curran should not be surprised that a controversy over the interpretation of the governing document of Cook Composites, a Delaware general partnership, provides a basis for adjudicating that dispute in [the Delaware Court of Chancery]." Therefore, the court concluded exercising jurisdiction over Curran would not offend Curran's due process rights and any modest incremental burden it may incur by having to litigate in Delaware, rather than Missouri, would not justify a stay of this first-filed action. Thus the court denied the defendants' motion to dismiss.

4. *Ramone v. Lang*, C.A. No. 1592-N (Del. Ch. Apr. 3, 2006)

Plaintiff brought this action under theories of breach of contract, breach of fiduciary duty and promissory estoppel based on six months of discussions between plaintiff and defendant that failed to result in the contemplated formalization of their arrangement in an LLC agreement.

Before plaintiff's involvement with defendant, defendant had already signed a purchase agreement to buy property on which plaintiff had considered opening a public swim and fitness center. For months, plaintiff and defendant discussed varying deal terms but were unable to reach a final agreement. While negotiations were ongoing, plaintiff and defendant worked together to have the property rezoned, defendant represented to the press and his financing bank that plaintiff was involved in the project and plaintiff solicited members for a swim team at the property. Ultimately, defendant, frustrated by his inability to reach a final accord with plaintiff, entered into an LLC agreement with three other parties. Plaintiff then filed this action.

The court found that no binding contractual relationship existed between the parties. Plaintiff claimed that, through their e-mail exchanges, the parties established a final, binding agreement as to their respective rights and obligations in an LLC and as to the property. The court cited the general principle of contract formation in Delaware, which does not look to a party's subjective intent but rather requires an "overt" "manifestation of mutual assent to the exchange and consideration." For a party's assent to constitute an acceptance that would form a contract, it must include an expression of commitment that (i) is not conditional on any further act by either party and (ii) is on the terms proposed in the offer without the slightest variation. To be enforceable, a contract must contain all material terms and a court will not order specific performance if, as in this case, it would be required to supply essential terms. In this case, the language used in, and the negotiations that occurred after, the e-mail cited by plaintiff as constituting a final, binding agreement evidenced that a contract had not been formed.

The court then considered the theory of de facto partnership and concluded that a partnership relationship had not been created. Separate from the contractual duties that the court disposed of as discussed above, plaintiff claimed that the parties had become partners and that defendant was in breach of his fiduciary duties. The court stated that under DRUPA Section 15-202 a partnership exists where, regardless of the intent of the parties, two or more persons associate themselves to carry on a business for profit. The level of proof required to establish this type of association is higher in a suit between the alleged partners (as opposed to a suit by a third party). Under Delaware law, "there is no singularly dispositive consideration that determines whether or not a partnership existed," but a court must find a mutual obligation to share profits and losses and may consider the conduct of the parties. In this case, the court, while acknowledging that the lack of written agreement is not necessarily conclusive of the existence of a partnership, found that the absence of such an agreement left it without terms to enforce. In addition, the fact that the fiduciary relationship contemplated by the parties was as members of a limited liability company counseled against finding that they had created a general partnership. DRUPA Section 15-502 specifically provides that associations formed under other chapters of the Delaware Code are not partnerships and, in the opinion of the court, it would be an odd result that a failed attempt at creating an LLC would place the parties in a partnership. Even given this, however, the court posited that in a situation in which the parties had reached agreement on material terms and one side simply balked on the documentation of the LLC, it might be possible to find that a general partnership had been created. This, however, was not the situation in this case.

The court did find the doctrine of promissory estoppel to be available to plaintiff, as defendant had disappointed the expectation of plaintiff's participation in the property, on which plaintiff had reasonably relied. The court set forth the elements of promissory estoppel under Delaware law, which are clear and convincing evidence of (i) a promise; (ii) the reasonable expectation, from an objective viewpoint, of the promissor to induce action or forbearance by the promissee; (iii) the promissee's actual, reasonable reliance on the promise and action to his detriment and (iv) the binding effect of the promise because without enforcement there would be an injustice. The court espoused its view that the normal failure of parties to reach a binding contract is not grounds for invoking the doctrine and that promissory estoppel should be used in the relatively narrow circumstances in which the legitimate expectations of a party made vulnerable by promises in the negotiation process need to be protected. In this case, the court accepted plaintiff's argument that, even if the parties had not agreed on a final deal structure, the understanding throughout the process was that defendant would make the pool facilities at the property available for plaintiff's use and that plaintiff relied on this promise with the knowledge of defendant.

5. *Hyanansky v. Vietri*, C.A. No. 14645 (Del. Ch. Aug. 7, 2003)

Plaintiff, allegedly a partner in an alleged general partnership, brought an action against defendant, an alleged partner, to obtain payment of defendant's initial capital contribution and defendant's pro rata share of the business venture's losses. The business venture was formed to purchase and develop a parcel of land pursuant to an alleged partnership agreement signed by the parties. Because of zoning obstacles, the parcel was sold at a substantial loss. Defendant had never made the initial capital contribution called for in the alleged partnership agreement. Plaintiff moved for summary judgment, asserting that a partnership had been formed and that defendant therefore was required to pay his initial capital contribution and share in his portion of the losses. Defendant filed a cross-motion for summary judgment, claiming that a partnership had not been formed, that his understanding was that the business venture would be in the form of a limited liability entity and that he was not to become an equity participant in the joint venture until the parcel had been successfully rezoned.

Initially, the court undertook a brief review of the parole evidence rule, which prevents the use of extrinsic evidence of an oral agreement to vary the terms of a fully integrated agreement that the parties have reduced to writing but which allows the use of evidence to show that the agreement was rendered invalid because of fraud, illegality, duress, mutual mistake, lack of consideration or incapacity. The court found that defendant failed to provide any evidence of any of the exceptions to the parole evidence rule, and that extrinsic evidence of an oral agreement was therefore not admissible.

On the issue of whether a partnership had been formed, the court stated that a partnership is defined as an association of two or more persons to carry on a business as co-owners for profit, and that the creation of a partnership is a question of intent. The court further stated that, in demonstrating the intent of the parties and the existence of a partnership, the acts, dealings, conduct, admissions and declarations of the parties may be utilized, and that when the controversy is between two partners, as here, stricter proof of the intention to create a partnership is required. Because the attendant circumstances must be taken into consideration by the court in reaching a determination that a partnership existed, the court did not grant summary judgment to either party as to whether a partnership existed.

6. *In re Partition of the Lands & Tenements of the Heirs of the Estate of Annie F. Fenimore*, C.A. No. 7680 (Del. Ch. Oct. 8, 1999)

This case arose when the petitioner heirs sought to resolve a conflict between respondent judgment creditor and respondent mortgagee, each of whom claimed a right to a portion of the proceeds of a partition sale of real estate inherited from petitioners' mother. The matter had been referred to a special master, and the court adopted the master's findings of fact. The issue presented to the master was which would be given priority: a judgment obtained on October 9, 1990 but not filed of record until November 26, 1991 or a mortgage given on October 31, 1990 and recorded on November 7, 1990. Given the dates of filing, if the mortgage were valid, it would take priority. However, the court found that the payments that the mortgage had been given to secure were not a loan, but rather payments by one partner to another for use in partnership business. In finding a partnership existed, the court referred to Section 1507 of the DUPL and noted that the agreement pursuant to which certain monies were paid by the mortgagor to the mortgagee did not describe them as a loan but rather stated that they were "advanced . . . to conduct the business of buying and selling motor vehicles." The agreement also provided that profits from each vehicle would be divided and that one party would pay the cost of borrowing money and the other would pay the ordinary operating expenses. Based on this agreement, the master found that as a matter of Delaware law a partnership existed. The court further found that at the time the mortgage in question was given, the mortgagor was insolvent. Thus, the holder of the mortgage had the obligation to show fair value had been given. Since she could not, the master held that the mortgage was fraudulent to the judgment debtor and that priority should therefore be given to the judgment debtor.

7. *Talley Bros., Inc. v. Ford Motor Co. and Ford Leasing Dev. Co.*, C.A. 89C-0C-220 (Del. Super. Ct. Sept. 16, 1992)

A subcontractor filed suit against the owner of a project to recover for the work completed on the project after the general contractor's contract was canceled due to unsatisfactory performance. The owner counterclaimed alleging that the subcontractor was a joint venturer with the general contractor and, therefore, was liable to the owner for losses the owner incurred in completing the project.

In granting the owner's motion for summary judgment on its counterclaim and on the claims against it, the court ruled that the general contractor and the subcontractor had engaged in a joint venture, even though no formal agreement had been entered into by the parties. The court found that the arrangement under which the general contractor agreed to supply property, the subcontractor agreed to provide skill and knowledge, and they both agreed to share the profits satisfied the criteria for forming a joint venture and thereby established a joint venture by implication. The court then rejected the subcontractor's contention that, although it may have been a joint venturer with the general contractor, the subcontractor should not be liable to the owner for damages resulting from the general contractor's misconduct since the owner never knew of the joint venture between the general contractor and the subcontractor and, therefore, did not rely on the subcontractor as a joint venturer. The court stated, "[i]t is settled law that even undisclosed or secret partners who are not known to the third party who has contracted with the partnership or joint venture may be held liable."

8. *Coca-Cola Bottling of Elizabethtown v. Coca-Cola Co.*, 696 F. Supp. 57 (D. Del. 1988)

In a suit against the Coca-Cola Company by several Coca-Cola bottlers challenging the pricing of its syrups, the bottlers argued that, because Coca-Cola had characterized its relationship with them as a "special partnership," a partnership or joint venture had been formed that gave rise to special fiduciary duties between the parties, which had subsequently been breached. In granting Coca-Cola's motion for summary judgment, the court concluded that the soft drink company and the bottlers were not partners or joint venturers under Delaware law because the necessary elements of integrated management, risk-sharing, and joint control or ownership of assets between the parties were not present.

B. Fiduciary Duties

1. *Klig v. Deloitte LLP,* C.A. No. 4993-VCL (Del. Ch. Nov. 21, 2011)

Plaintiff was a partner of two Deloitte limited liability partnerships. Following plaintiff's arrest on a criminal charge, Deloitte management placed him on unpaid leave of absence. When plaintiff later asked to return to work, Deloitte management decided to resume paying plaintiff his annual compensation but would not allow him to come into the office or resume his practice. After plaintiff pled guilty to the criminal charge, he was terminated as a partner of the Deloitte LLPs and all actions of management taken with respect to plaintiff were ratified by the boards of directors of the Deloitte LLPs. Plaintiff then brought this action, alleging breach of partnership agreement, wrongful dissociation and other related claims. The court rendered this decision on plaintiff's and defendants' cross-motions for summary judgment.

Plaintiff claimed that the Deloitte LLPs breached their partnership agreements because management of the Deloitte LLPs, rather than the boards of directors of the Deloitte LLPs, took the actions of placing him on leave. The Deloitte LLP partnership agreements provided that the boards of directors had the authority to grant a leave of absence. The court held that defendants had strong arguments that management was authorized to take the actions it did but, even if management was not authorized to take such actions, any breach of the partnership agreements was cured by the boards' ratification of management's actions. Plaintiff also claimed that he was wrongfully disassociated from the Deloitte LLPs and thus was entitled under DRUPA Section 15-701 to a buyout of his partnership interests for fair value. Because the court had already determined that his termination was not in breach of the partnership agreements, the court held that plaintiff was not wrongfully disassociated. In addition, the partnership agreements specifically provided that the termination provisions of the partnership agreements superseded and replaced the buyout provisions of DRUPA Section 15-701 and thus held that plaintiff was not entitled to the fair value buyout he sought. Plaintiff also argued that the Deloitte LLPs violated the implied covenant of good faith and fair dealing by placing him on leave of absence and refusing to reinstate him upon his request to return to work. The court disagreed, stating that it was inconceivable that during the original bargaining over the terms of the Deloitte LLP partnership agreements, the parties would have decided that the Deloitte LLPs could not place on unpaid leave a partner indicted from the types of shocking crimes of which plaintiff was accused, and the court was confident that, had the issue been raised during the drafting of the partnership agreements, the parties would have agreed that the Deloitte LLPs could act precisely as they did. Plaintiff further alleged that the Deloitte LLPs breached their duty of loyalty under the Deloitte LLP partnership agreements, which required that each partner of the Deloitte LLPs to be "just and faithful" to the Deloitte LLPs and the other partners in all actions. The court denied this claim because only the partners of the Deloitte LLPs owed fiduciary duties, not the Deloitte LLPs, and plaintiff had sued only the Deloitte LLPs. Accordingly, the court granted summary judgment to the Deloitte LLPs on all counts.

2. *Deloitte LLP v. Flanagan*, C.A. No. 4125-VCN (Del. Ch. Dec. 29, 2009)

Plaintiffs were two accounting firms formed as Delaware limited liability partnerships. Defendant was a former partner of each firm and a certified public accountant who had provided audit services to a number of the firms' clients. As a partner, defendant had been required to enter into agreements with the firms setting forth his fiduciary obligations to the firms and requiring him to comply with the firms' policies regarding independence. Under the firms' independence policies, defendant was obligated, among other things, to disclose all of his investments on a tracking system and to make annual representations to the firms as to his compliance with such policies.

Following defendant's resignation, the firms accused defendant of having engaged in more than 300 instances of insider trading in contravention of his agreements with the firms and the fiduciary duties he owed to the firms and of fraudulently misrepresenting his trading activity in both the firms' tracking system and his annual representations to the firms. The firms sued defendant in the Court of Chancery for breach of contract, breach of fiduciary duty, equitable fraud and common law fraud and moved for partial summary judgment as to the question of liability. The court granted the firms' motion for summary judgment.

Focusing on a subset of unauthorized trades for which defendant did not proffer a defense, the court held that defendant had breached his agreements with the firms by trading in securities of the firms' clients and failing to properly report such trades in either the firms' tracking system or in his annual representations to the firms. The court further held that defendant's conduct—namely defendant's misrepresentations with respect to his holdings—constituted a breach of his fiduciary duty to be "just and faithful" to the firms, which was the express fiduciary obligation to which defendant was subject under his agreement with the firms, and also satisfied the principal elements of equitable fraud and common law fraud. With respect to the fraud claims, the court dismissed defendant's assertion that the firms had failed to establish the requisite element of reliance by not presenting any evidence that they had actually relied on defendant's misrepresentations. The court held that there was no material issue of fact as to the firms' reliance on defendant's misrepresentations because it is a "truism" of the accounting profession that "because an auditor sells at base, its independence and integrity, the firm relies heavily on the purported honesty and independence of its professionals."

3. *Grunstein v. Silva*, C.A. No. 3932-VCN (Del. Ch. Dec. 8, 2009)

This action arose from the alleged breach of an oral partnership agreement between plaintiffs Leonard Grunstein ("Grunstein") and Jack Dwyer ("Dwyer") to form a Delaware general partnership for the purpose of acquiring Beverly Enterprises, Inc. ("Beverly"), an eldercare and rehabilitative services company. Following the formation of the partnership, defendant Ronald E. Silva ("Silva") allegedly accepted an invitation to join the partnership for purposes of participating in the proposed acquisition of Beverly as an equal partner with Grunstein and Dwyer. Plaintiffs asserted that the three partners orally agreed to share profits and losses resulting from the acquisition and that "each partner would share in all economic benefits received by any of them (or any entities controlled by them) resulting from the [acquisition]." The acquisition was structured to occur through a merger with Beverly pursuant to a merger agreement (the "Merger Agreement") among Beverly and three special purpose entities established to make the acquisition for the partnership. The Merger Agreement was signed by the special purpose entities, with the consent and approval of each of the partners, and an initial deposit to Beverly of $7 million was advanced on behalf of the partnership by an entity owned and controlled by Dwyer. Pursuant to an amendment to the Merger Agreement consented to by Grunstein and Dwyer, the three special purpose entities assigned their rights and obligations under the Merger Agreement to three entities owned and controlled by Silva. Plaintiffs asserted that the substitution of Silva's entities for the special purpose entities originally party to the Merger Agreement was based on Silva's representations and promises that Grunstein, Dwyer and Silva were still partners and that the agreements between plaintiffs and Silva would be carried out by Silva's companies. When the merger was completed, Beverly was owned solely by Silva's companies.

Plaintiffs asserted in this action that Silva and the entities controlled by Silva, in violation of the Partnership Agreement, retained all economic benefits of the acquisition to the exclusion of plaintiffs. Silva, however, denied the existence of the Partnership Agreement.

Plaintiffs brought, among other causes of action, claims for breach of fiduciary duty and breach of contract against Silva and the entities controlled by Silva. In this decision, the Court of Chancery addressed defendants' motion to dismiss the breach of fiduciary duty and breach of contract claims as well as other claims.

Plaintiffs asserted that Silva and those entities controlled by Silva breached their fiduciary duties to plaintiffs, in part, by taking all of the economic benefits from the acquisition for themselves and failing to provide plaintiffs with their share of such benefits. Defendants argued that plaintiffs' fiduciary duty claim should be dismissed under the principle of Delaware law that a breach of fiduciary duty claim will be dismissed where such claim completely overlaps a breach of contract claim and arises from the same underlying conduct or nucleus of operative facts. Plaintiffs argued that this case falls within a narrow exception to this rule, which was delineated in *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842 (Del Ch. June 13, 2008), that permits joint pleading of breach of contract and breach of fiduciary duty claims when additional, broader facts and remedies distinguish the two causes of action. The court held that the breaches of fiduciary duty alleged by plaintiffs would also constitute breaches of the Partnership Agreement and that any remedy for breach of the Partnership Agreement would encompass the same remedies sought for breach of fiduciary duty and thus granted defendants' motion to dismiss the fiduciary duty claims.

Defendants moved to dismiss Dwyer's breach of contract claims based on Delaware's statute of frauds. Defendants asserted that Dwyer's primary responsibility under the Partnership Agreement was to underwrite the portfolio of Beverly nursing homes for HUD financing, which defendants' argued constituted a contract for the lending of money for an amount greater than $100,000 and, therefore, was required to be in writing pursuant to the statute of frauds. Plaintiffs claimed that Dwyer's obligation was not to lend money, but rather to function as an underwriter, and therefore was not subject to the statute of frauds. Accepting plaintiffs' assertions as true for purposes of the motion, the court denied defendants' motion to dismiss, stating that Dwyer's obligation appeared to fall outside the statute of frauds, which governs only a "contract, promise, undertaking or commitment to loan money."

4. *Madison Realty Partners 7, LLC v. AG ISA, LLC*, C.A. No. 18094 (Del. Ch. Apr. 17, 2001)

A general partnership was formed to purchase, hold and manage limited partnership interests and similar securities. The partnership had two general partners, one partner that was responsible for managing the partnership and the other partner that was responsible for providing the capital funding. When the funding partner failed to make a required capital contribution, the managing partner filed suit alleging, among other claims, breaches of contract and fiduciary duty and the funding partner moved to dismiss the action for failure to state a claim upon which relief could be granted.

The court first addressed the threshold question of whether a written, unsigned draft of the partners' partnership agreement submitted by the defendants but disputed by the plaintiffs could be considered by the court in connection with the funding partner's motion to dismiss. Plaintiffs had alleged certain terms of the partnership agreement but not submitted a complete copy. Because on a motion to dismiss the court was required to take the pled facts as true in deciding whether a legally valid claim is stated, the court held that it had to assume that the terms of the partnership agreement pled by the plaintiff were correct and could not consider defendants' version.

Defendants' also argued that the plaintiffs lacked standing to bring the breach of contract claims because the consent of all partners was required under the draft version of the partnership agreement to bring a lawsuit on behalf of the partnership under the partnership agreement. However, because the term was only included in the defendants' version of the partnership agreement, the court rejected it on a motion to dismiss.

The court also addressed defendants' argument that the plaintiffs' breach of fiduciary duty claims should be dismissed. The fiduciary duty claims related to obligations that were expressly treated by the partnership agreement and were the subject of the plaintiffs' breach of contract claims. In dismissing such fiduciary duty claims, the court upheld the general principle under Delaware law that "[t]o allow a fiduciary duty claim to coexist in parallel with [a contractual] claim, would undermine the primacy of contract law over fiduciary law in matters involving . . . contractual rights and obligations."

C. Authority of Partners

1. *Klig v. Deloitte LLP,* C.A. No. 4993-VCL (Del. Ch. Nov. 21, 2011)

Plaintiff was a partner of two Deloitte limited liability partnerships. Following plaintiff's arrest on a criminal charge, Deloitte management placed him on unpaid leave of absence. When plaintiff later asked to return to work, Deloitte management decided to resume paying plaintiff his annual compensation but would not allow him to come into the office or resume his practice. After plaintiff pled guilty to the criminal charge, he was terminated as a partner of the Deloitte LLPs and all actions of management taken with respect to plaintiff were ratified by the boards of directors of the Deloitte LLPs. Plaintiff then brought this action, alleging breach of partnership agreement, wrongful dissociation and other related claims. The court rendered this decision on plaintiff's and defendants' cross-motions for summary judgment.

Plaintiff claimed that the Deloitte LLPs breached their partnership agreements because management of the Deloitte LLPs, rather than the boards of directors of the Deloitte LLPs, took the actions of placing him on leave. The Deloitte LLP partnership agreements provided that the boards of directors had the authority to grant a leave of absence. The court held that defendants had strong arguments that management was authorized to take the actions it did but, even if management was not authorized to take such actions, any breach of the partnership agreements was cured by the boards' ratification of management's actions. Plaintiff also claimed that he was wrongfully disassociated from the Deloitte LLPs and thus was entitled under DRUPA Section 15-701 to a buyout of his partnership interests for fair value. Because the court had already determined that his termination was not in breach of the partnership agreements, the court held that plaintiff was not wrongfully disassociated. In addition, the partnership agreements specifically provided that the termination provisions of the partnership agreements superseded and replaced the buyout provisions of DRUPA Section 15-701 and thus held that plaintiff was not entitled to the fair value buyout he sought. Plaintiff also argued that the Deloitte LLPs violated the implied covenant of good faith and fair dealing by placing him on leave of absence and refusing to reinstate him upon his request to return to work. The disagreed, stating that it was inconceivable that during the original bargaining over the terms of the Deloitte LLP partnership agreements, the parties would have decided that the Deloitte LLPs could not place on unpaid leave a partner indicted from the types of shocking crimes of which plaintiff was accused, and the court was confident that, had the issue been raised during the drafting of the partnership agreements, the parties would have agreed that the Deloitte LLPs could act precisely as they did. Plaintiff further alleged that the Deloitte LLPs breached their duty of loyalty under the Deloitte LLP partnership agreements, which required that each partner of the

Deloitte LLPs to be "just and faithful" to the Deloitte LLPs and the other partners in all actions. The court denied this claim because only the partners of the Deloitte LLPs owed fiduciary duties, not the Deloitte LLPs, and plaintiff had sued only the Deloitte LLPs. Accordingly, the court granted summary judgment to the Deloitte LLPs on all counts.

2. *Rudnitsky v. Rudnitsky*, C.A. No. 17446 (Del. Ch. Nov. 14, 2000)

On a motion for summary judgment filed by one partner and the general partnership, the court addressed plaintiffs' claims that three mortgages executed by the defendant partner purportedly on behalf of the general partnership should be judicially invalidated. At the time of the entry into the challenged mortgages, the general partnership consisted of two partners with the plaintiff partner owning a 2/3 interest and the defendant partner owning a 1/3 equity interest in the partnership. Its purpose was to own and manage a specified commercial property (the "Building") that was rented to a related corporation managed by the defendant partner. When the corporation began having financial troubles, defendant caused several mortgages to be placed on the Building, the proceeds of which were used to pay off his personal debts and debts of the corporation.

The court determined the three challenged mortgages were invalid *ab initio* based on its findings that the defendant partner lacked both actual and apparent authority to bind the partnership when he purported to execute the mortgages on its behalf and the partnership did not receive any consideration for such mortgages. The partnership agreement expressly provided that the "prior written unanimous approval of all partners" was required to "mortgage any or all of the partnership partners." The defendant partner did not have actual authority to bind the partnership with respect to the mortgages because all partners did not authorize the partnership's entry into the mortgages. The court also had to address defendants' argument that the defendant partner had apparent authority to execute the mortgages on behalf of the partnership. Because the most recent version of the partnership agreement was entered into prior to the passage of DRULPA, the court analyzed this argument under the provisions of DUPL, although it noted that the applicable provisions of DUPL (Section 1509) have been preserved in DRULPA (Section 15-301). Citing Section 1509(a) of DUPL, the court stated that the acts of a partner "for apparently carrying on in the usual way the business of the partnership" will bind the partnership, unless the partner "has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing had knowledge of the fact that he has no such authority." Further, under Section 1509(b), "[a]n act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners." In reaching its conclusion that none of the mortgages were within the ordinary course of the partnership's business, the court noted that it could consider the partnership's stated purposes, the precedent set by the partnership's prior "custom or course of dealing" and "the general custom" of analogous partnerships. The court stated that although mortgaging the business was included within the partnership's stated purposes, encumbering the Building to procure funds for purposes unrelated to the partnership did not fall within the ordinary course of its business. Therefore, the mortgages were invalid under DUPL Section 1509(b). The court went on to state that even if the mortgages were within the ordinary course of the partnership's business, two of the mortgages would be invalid under DUPL Section 1509(a) because the evidence showed that the applicable mortgagees knew that the defendant partner lacked the authority to execute such mortgages on the behalf of the partnership. With respect to the third mortgage, the court reluctantly concluded that a question of material fact existed as to whether that mortgagee had inquiry notice of the fact that the partnership agreement prohibited the defendant partner from validly executing such mortgage but noted that the third mortgage was still invalid because it was not in the ordinary course or supported by consideration.

With respect to plaintiffs' claim that the partnership was dissolved, the court held that plaintiffs were entitled to a judgment declaring that the partnership had been dissolved. The plaintiff partner duly called a partners' meeting at which she voted her two-thirds partnership interest in favor of dissolution and the court found that such action by the plaintiff partner effectively dissolved the partnership under the terms of the partnership agreement. However, the court denied plaintiffs' request for an order permitting the plaintiff partner to complete the winding up of the partnership without the participation of the defendant partner. The court noted that the partnership agreement required the "prior written unanimous approval of all of the partners" for any conveyance of partnership property and that the plaintiffs proffered no statutory or contractual provision upon which to ground their requested remedy.

The court also reviewed plaintiffs' request for an adjustment of the partners' capital accounts to credit the plaintiff partner with the amount of the expenses that she expended personally on behalf of the partnership as a result of the defendant partners' actions with respect to the mortgages and the failure to appropriately pay certain taxes. The court found that the plaintiff partner did pay for certain partnership liabilities with her personal funds. However, the court held that plaintiffs failed to demonstrate a legal basis under either DUPL or the Partnership Agreement for making an adjustment to the partners' capital accounts to account for the amounts expended by the plaintiff partner personally on behalf of the partnership. Rather, the court concluded, the plaintiffs in effect sought equitable indemnification or contribution from the defendant partner and should have, but did not, seek the entry of a money judgment against him personally which could have been executed against his assets including his capital account. Consequently, the court denied plaintiffs' motion for summary judgment granting an adjustment of the partners' capital accounts.

D. Removal of Partners

1. *Klig v. Deloitte LLP*, C.A. No. 4993-VCL (Del. Ch. Nov. 21, 2011)

Plaintiff was a partner of two Deloitte limited liability partnerships. Following plaintiff's arrest on a criminal charge, Deloitte management placed him on unpaid leave of absence. When plaintiff later asked to return to work, Deloitte management decided to resume paying plaintiff his annual compensation but would not allow him to come into the office or resume his practice. After plaintiff pled guilty to the criminal charge, he was terminated as a partner of the Deloitte LLPs and all actions of management taken with respect to plaintiff were ratified by the boards of directors of the Deloitte LLPs. Plaintiff then brought this action, alleging breach of partnership agreement, wrongful dissociation and other related claims. The court rendered this decision on plaintiff's and defendants' cross-motions for summary judgment.

Plaintiff claimed that the Deloitte LLPs breached their partnership agreements because management of the Deloitte LLPs, rather than the boards of directors of the Deloitte LLPs, took the actions of placing him on leave. The Deloitte LLP partnership agreements provided that the boards of directors had the authority to grant a leave of absence. The court held that defendants had strong arguments that management was authorized to take the actions it did but, even if management was not authorized to take such actions, any breach of the partnership agreements was cured by the boards' ratification of management's actions. Plaintiff also claimed that he was wrongfully disassociated from the Deloitte LLPs and thus was entitled under DRUPA Section 15-701 to a buyout of his partnership interests for fair value. Because the court had already determined that his termination was not in breach of the partnership agreements, the court held that plaintiff was not wrongfully disassociated. In addition, the partnership agreements specifically provided that the termination provisions of the partnership agreements superseded and replaced the buyout provisions of DRUPA Section 15-701 and thus held that plaintiff was not entitled to the fair value buyout he sought. Plaintiff also argued that the Deloitte LLPs violated the implied covenant of good faith and fair dealing by placing him on leave of absence and refusing to reinstate him upon his request to return to work. The disagreed, stating that it was inconceivable that during the original bargaining over the terms of the Deloitte LLP partnership agreements, the parties would have decided that the Deloitte LLPs could not place on unpaid leave a partner indicted from the types of shocking crimes of which plaintiff was accused, and the court was confident that, had the issue been raised during the drafting of the partnership agreements, the parties would have agreed that the Deloitte LLPs could act precisely as they did. Plaintiff further alleged that the Deloitte LLPs breached their duty of loyalty under the Deloitte LLP partnership agreements, which required that each partner of the Deloitte LLPs to be "just and faithful" to the Deloitte LLPs and the other partners in all actions. The court denied this claim because only the partners of the Deloitte LLPs owed fiduciary duties, not the Deloitte LLPs, and plaintiff had sued only the Deloitte LLPs. Accordingly, the court granted summary judgment to the Deloitte LLPs on all counts.

2. *Cole v. Kershaw*, C.A. No. 13904 (Del. Ch. Aug. 15, 2000), (Del. Ch. Sept. 5, 2000) and (Del. Ch. Apr. 2, 2001)

Plaintiff was a partner of a Delaware general partnership formed to purchase and develop real estate. For the first twenty-two months of the Partnership's existence, plaintiff paid his share of all cash calls on a current basis. Thereafter plaintiff stopped meeting his financial obligations to the Partnership, stopped communicating with the other partners and failed to execute documents necessary to refinance a loan critical to the success of the Partnership's business. The Partnership

Agreement did not set forth the consequences for the failure of a partner to meet a cash call. After the other partners were able to refinance the loan without the participation of plaintiff, they decided to eliminate plaintiff as a partner by merging the Partnership into a Delaware limited liability company whose members were all of the Partnership's partners except plaintiff. Plaintiff was not given notice of the merger until nine months after the merger when he received merger consideration consisting of a cash payment unilaterally determined by the other partners without any independent or expert financial advice based on an appraisal of the historical cost of the assets of the Partnership at the time plaintiff stopped meeting his financial obligations.

Plaintiff asserted two claims for relief against the other partners of the Partnership. First, plaintiff claimed that the merger was legally invalid because neither the DUPL nor the Partnership Agreement authorized a merger of a general partnership into an LLC and therefore, at the time of the trial, the Partnership still existed, he remained a partner and his damages should be determined as of the date of the trial. Second, in the alternative, plaintiff claimed that the merger was equitably invalid because it was not entirely fair and was therefore a breach of fiduciary duty by Defendants to plaintiff. Defendants raised the affirmative defenses that (i) plaintiff had unclean hands because his egregious violations of his duties to the Partnership created the need for the merger to assure the survival of the Partnership and therefore he should be barred from seeking relief for the consequences of the merger and (ii) plaintiff was not a partner at the time of the merger because his conduct either constituted an abandonment of the Partnership or operated legally as a dissolution of the Partnership. Defendants argued, in the alternative, that the merger was valid equitably because it was entirely fair in terms of both process and price.

The court addressed the affirmative defenses first. The court rejected the unclean hands defense because its application in this case would fill the gap in the Partnership Agreement regarding the consequences of a partner's failure to make cash calls with the inequitable result of a forfeiture of plaintiff's partnership interest. The court found this to be a perverse application of the unclean hands defense, which itself is a doctrine intended to accomplish equity. The court also rejected Defendants' contention that plaintiff was not a partner at the time of the merger. The court failed to find that plaintiff's conduct constituted an abandonment of the Partnership or worked a dissolution of the Partnership under DUPL Section 1531 by constituting "a change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business." The court thus rejected this affirmative defense, finding it to be completely inconsistent with their rationale for entering into the merger, which was to eliminate plaintiff as a partner, and to be inequitable because Defendants had not provided plaintiff with prior notice of their legal position or their intent to eliminate his partnership interest and had not given plaintiff an opportunity to protect his interests.

The court then addressed plaintiff's claims. The court disagreed with plaintiff's claim that the merger was legally invalid because the DUPL did not expressly provide for a merger of a general partnership into a Delaware LLC. The court cited Section 1505 of the DUPL, which provides that "[i]n any case not provided for in [the DUPL] the rules of law and equity shall govern," and Section 209 of the LLC Act, which is a rule of law expressly authorizing a merger of a general partnership with an LLC. With respect to plaintiff's claim that the merger was equitably invalid, all parties agreed that, since Defendants were on both sides of the merger, entire fairness was the applicable standard of review for the merger. The court stated that entire fairness requires fair dealing and a fair price. With respect to fair dealing, the court refused to accept Defendants' assertion that plaintiff was not entitled to the same level of fair treatment that would be required in different circumstances based on his egregious conduct. The court acknowledged that the requisite procedures to ensure fair process may differ in certain circumstances but held that the failure to provide advance notice to plaintiff s so that he could seek to protect his interests and the unilateral self-interested valuation of his partnership interest without independent or disinterested valuation advice violated fundamental requirements of fair process that cannot be dispensed with. The court also held that the price, which was based on the date plaintiff stopped meeting his financial obligations rather than the date of the merger and which did not take future earning capacity of the assets of the Partnership into account, was unfair. The court held that plaintiff was entitled to his proportionate share of the net worth of the Partnership on the date of the merger, with such amount being adjusted downwards to compensate the remaining partners for the loss of cash calls that plaintiff failed to contribute and to reflect the incremental risk plaintiff inflicted upon the remaining partners by refusing to pay his cash calls and to execute the loan refinancing documents. The court then undertook to value plaintiff's interest to determine plaintiff's damages using the testimony of the parties' valuation experts. Following submission of supplemental memoranda by the parties, in a subsequent opinion issued on April 2, 2001, the court determined the money judgment to which plaintiff was entitled.

In a letter opinion issued on September 5, 2000, the court denied plaintiff's motion for a new trial based on newly discovered evidence, holding that such evidence was unlikely to change the outcome of the trial and was a result of plaintiff's own lack of diligence. The court also denied plaintiff's motion in the alternative for reargument based on an allegedly erroneous admission of hearsay by the court and an allegedly erroneous finding by the court that there was a statutory authorization for the merger, ruling that plaintiff's arguments merely rehashed contentions made in plaintiff's post-trial briefs that had been considered and rejected by the court.

3. *Hindman v. Salt Pond Assocs.*, C.A. No. 1536 (Del. Ch. Dec. 21, 1992), *aff'd*, 633 A.2d 370 (Del. 1993)

The court rejected an expelled partner's assertion that the general partnership must wind up its affairs and pay him his partnership interest upon his expulsion. Although dissolution of the general partnership does occur by operation of law under DUPL Section 1531 upon the expulsion of any partner, the partnership may be continued without winding up its affairs and the expelled partner's right to receive his partnership interest may be forfeited if the partnership agreement so provides.

E. Withdrawal of Partners

1. *Anderson v. Snyder's Fishing Club*, C.A. No. 2137-MA (Del. Ch. June 21, 2007)

Plaintiff was a partner in a family partnership (the "Partnership") that owned a piece of real estate in Sussex County, Delaware (the "Property"). After action by the other family members to remove plaintiff as president of the Partnership, plaintiff submitted a notice of withdrawal from the Partnership. Plaintiff's withdrawal was accepted but a disagreement arose regarding what payment plaintiff was entitled to upon her withdrawal. Plaintiff filed an action in the Court of Chancery seeking a determination of the buyout price for her interest in the Partnership. The dispute was referred by the court to a Master in Chancery and this is a summary of the master's report. Plaintiff asserted that pursuant to Section 15-701 of DRUPA, she was entitled to one-ninth of the fair value of the Property. The Partnership countered that DRUPA was irrelevant because the partnership agreement of the Partnership provided a specific and unambiguous formula for determining the value of a retiring partner's interest in the event that the remaining partners continued the Partnership. The master agreed with defendant that the partnership agreement expressly provided a method for determining the value of a retiring partner's share and that, therefore, Section 15-701 of DRUPA did not apply. However, the master found that the terms of the partnership agreement were confusing and ambiguous and therefore turned to its extrinsic evidence. Based on this evidence, the master found that it was the intent of the parties that a retiring partner's buyout price was limited to his or her net capital investment in the Partnership and ordered that this amount be paid over to plaintiff. The master also briefly addressed plaintiff's claim that she withdrew her retirement notice, but finding that she received the Partnership's letter officially accepting her letter of retirement on the same day she mailed her letter rescinding her notice, the master concluded, based on contract principles of offer and acceptance, that her attempt to revoke her retirement letter was unavailing.

2. *Holland v. Moore-Kenton*, C.A. No. 2318-S (Del. Ch. Mar. 2, 2005)

Plaintiff, who dissociated from a Delaware partnership of which she and defendant were the only partners, brought this action to value her share of the partnership as of the date of the dissociation. As the court noted, plaintiff's dissociation was not wrongful.

In determining the value of plaintiff's share, plaintiff and defendant disagreed as to the value that should be attributed to the cash-on-hand of the partnership at the time of the dissociation. Plaintiff contended that she was entitled to an accounting with respect to the cash-on-hand while defendant maintained that plaintiff was only entitled to a share of the actual amount of the cash in the partnership's account as of the date of the dissociation. Based on plaintiff's review of the partnership books, she claimed that the cash-on-hand should have been five thousand dollars more than the actual amount of cash in the partnership's account. Further, plaintiff testified that the disparity between the two figures was primarily attributable to defendant's conduct of the business in the period immediately preceding plaintiff's dissociation, during which time plaintiff's involvement in the business was significantly reduced. Defendant countered this assertion with testimony that loose accounting and handling of the partnership's assets was the normal practice of the partnership and that this, not malfeasance, led to the discrepancy. The court, citing DRUPA

Section 15-404, found that the cash-on-hand as demonstrated by plaintiff's accounting was the basis for calculating plaintiff's share. The court also rejected defendant's analogy to "lost asset" cases in Delaware Family Court, which provide that the division of property upon a divorce cannot make reference to assets of a marriage that were lost during the course of the marriage. The court held that the rationale underlying such a rule had no application in the context of a partnership in which one partner exercised her statutory right to dissociate from the partnership and the other partner retained the business that was the subject of the partnership. The court held that equity required that the cash-on-hand as demonstrated by plaintiff's accounting be used in computing the plaintiff's share.

Separately, defendant took exception to the court's failure to reflect depreciation in the valuation of the hard assets of the partnership. The court used the acquisition cost of such costs in the valuation of the plaintiff's share. The court denied this exception, stating that the issue was not whether the assets had less market value at the time of the dissociation than when they were acquired. Rather, the issue was their value to the ongoing business, now operated by defendant, at the time of the dissociation. The court held that the record did not demonstrate that the value of the assets to the business had deteriorated or that depreciating the assets was appropriate. The court therefore denied defendant's exception.

3. *Lost Creek Land & Cattle Co., Inc. v. Wilson*, C.A. No. 1516-K (Del. Ch. Aug. 19, 2004)

Plaintiff and defendant entered into a joint venture to grow, harvest and sell a potato crop pursuant to an oral agreement. After becoming dissatisfied with plaintiff's work ethic, defendant advised plaintiff that he was terminating the joint venture, even though the potato crop was still in the ground and had not yet been harvested or sold, and offered to pay plaintiff $300 an acre plus certain out-of-pocket expenses to "buy out" plaintiff's interest in the venture. Plaintiff failed to deliver a statement of his out-of-pocket expenses to defendant in a timely manner, and defendant purported to withdraw the buy-out agreement. Plaintiff then brought this action to enforce the buy-out agreement.

The court found that the joint venture constituted a partnership for a particular undertaking, which, pursuant to DRUPA Sections 15-601 and 15-801, was dissolved when defendant unilaterally dissociated himself from the partnership. The court noted that under DRUPA Section 15-602 a partner's dissociation in a partnership for a particular undertaking is wrongful where the partner withdraws by express will before the completion of the undertaking. The court found that defendant's dissociation was wrongful in this case because he withdrew before the potato crop had been harvested and sold. The court stated that, pursuant to DRUPA Sections 15-602 and 15-807, unless the partners agree otherwise, upon such a dissociation, the dissociated partner is liable for any damages caused by his dissociation and the partnership is required to be wound up, with each partner entitled to an accounting and a sharing of the profits or losses on a 50-50 basis. In this case, the court held that the partners had agreed otherwise through the buy-out agreement, that plaintiff had accepted the buy-out agreement and that defendant was obligated to perform under such agreement., C.A. No. 112-N (Del. Ch. Mar. 30, 2005)

4. *Wills v. Morris, James, Hitchens & Williams*, C.A. No. 15297 (Del. Ch. Nov. 6, 1998)

A withdrawing partner disputed the method by which the general partnership calculated her final distribution reflecting her last year's partnership income. The partnership agreement provided that the share of undistributed net income of the partnership for a fiscal year was to be determined (i) as of the end of the month in which the withdrawal occurred and (ii) after the end of such current fiscal year. The withdrawing partner argued that the language of the partnership agreement mandates that her last year's income be derived from the partnership's income for the entire year in which she withdrew as a partner. The partnership argued that the partnership agreement restricted the withdrawing partner's right to partnership income in the final year to the period up to the month in which the partner withdraws. In other words, the partnership asserted that the first phrase determines the time frame for the distribution calculation while the second phrase indicates that the calculation is to be performed subsequent to the end of the fiscal year.

In reaching its decision, the court applied the contractual construction principle that when the interpretation of one party better comports with the remaining contents of a document or gives effect to all the words in dispute, the court may resolve the meaning of the disputed term in favor of the superior interpretation without resorting to extrinsic evidence. The court then held for the partnership because it found the partnership's interpretation allowed the two phrases at issue to coexist without impairing the meaning of either one. Specifically, the court found the use of the term "after" in the second phrase to mean that the calculation defined in the first phrase would be performed subsequent to the end of the fiscal year, as argued by the partnership, harmonizes the meaning of that phrase and the use of "after" in a third phrase which stated that the share of income shall be payable without interest within 30 days after the amount shall have been determined by the partnership's accountants. In contrast, the court held that under the withdrawing partner's interpretation, if the second phrase required calculation of a partner's share of income after the end of the fiscal year, the first phrase regarding determination of share of income as of the end of the month became meaningless and further that the usage of the phrase "as of" in the first phrase flatly contradicted the argument that the partnership intended a withdrawing partner to receive a portion of the firm's end-of-year income based on the number of months worked divided by twelve months. The court also noted that the partnership's proposed usage of "after" and "as of" comported with the usage of those same words in other parts of the partnership agreement.

F. Dissolution

1. *Rudnitsky v. Rudnitsky*, C.A. No. 17446 (Del. Ch. Nov. 14, 2000)

On a motion for summary judgment filed by one partner and the general partnership, the court addressed plaintiffs' claims that three mortgages executed by the defendant partner purportedly on behalf of the general partnership should be judicially invalidated. At the time of the entry into the challenged mortgages, the general partnership consisted of two partners with the plaintiff partner owning a 2/3 interest and the defendant partner owning a 1/3 equity interest in the partnership. Its purpose was to own and manage a specified commercial property (the "Building") that was rented to a related corporation managed by the defendant partner. When the corporation began having financial troubles, defendant caused several mortgages to be placed on the Building, the proceeds of which were used to pay off his personal debts and debts of the corporation.

The court determined the three challenged mortgages were invalid *ab initio* based on its findings that the defendant partner lacked both actual and apparent authority to bind the partnership when he purported to execute the mortgages on its behalf and the partnership did not receive any consideration for such mortgages. The partnership agreement expressly provided that the "prior written unanimous approval of all partners" was required to "mortgage any or all of the partnership partners." The defendant partner did not have actual authority to bind the partnership with respect to the mortgages because all partners did not authorize the partnership's entry into the mortgages. The court also had to address defendants' argument that the defendant partner had apparent authority to execute the mortgages on behalf of the partnership. Because the most recent version of the partnership agreement was entered into prior to the passage of DRULPA, the court analyzed this argument under the provisions of DUPL, although it noted that the applicable provisions of DUPL (Section 1509) have been preserved in DRULPA (Section 15-301). Citing Section 1509(a) of DUPL, the court stated that the acts of a partner "for apparently carrying on in the usual way the business of the partnership" will bind the partnership, unless the partner "has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing had knowledge of the fact that he has no such authority." Further, under Section 1509(b), "[a]n act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners." In reaching its conclusion that none of the mortgages were within the ordinary course of the partnership's business, the court noted that it could consider the partnership's stated purposes, the precedent set by the partnership's prior "custom or course of dealing" and "the general custom" of analogous partnerships. The court stated that although mortgaging the business was included within the partnership's stated purposes, encumbering the Building to procure funds for purposes unrelated to the partnership did not fall within the ordinary course of its business. Therefore, the mortgages were invalid under DUPL Section 1509(b). The court went on to state that even if the mortgages were within the ordinary course of the partnership's business, two of the mortgages would be invalid under DUPL Section 1509(a) because the evidence showed that the applicable mortgagees knew that the defendant partner lacked the authority to execute such mortgages on the behalf of the partnership. With respect to the third mortgage, the court reluctantly concluded that a question of material fact existed as to whether that mortgagee had inquiry notice of the fact that the partnership agreement prohibited the defendant partner from validly executing such mortgage but noted that the third mortgage was still invalid because it was not in the ordinary course or supported by consideration.

With respect to plaintiffs' claim that the partnership was dissolved, the court held that plaintiffs were entitled to a judgment declaring that the partnership had been dissolved. The plaintiff partner duly called a partners' meeting at which she voted her two-thirds partnership interest in favor of dissolution and the court found that such action by the plaintiff partner effectively dissolved the partnership under the terms of the partnership agreement. However, the court denied plaintiffs' request for an order permitting the plaintiff partner to complete the winding up of the partnership without the participation of the defendant partner. The court noted that the partnership agreement required the "prior written unanimous approval of all of the partners" for any conveyance of partnership property and that the plaintiffs proffered no statutory or contractual provision upon which to ground their requested remedy.

The court also reviewed plaintiffs' request for an adjustment of the partners' capital accounts to credit the plaintiff partner with the amount of the expenses that she expended personally on behalf of the partnership as a result of the defendant partners' actions with respect to the mortgages and the failure to appropriately pay certain taxes. The court found that the plaintiff partner did pay for certain partnership liabilities with her personal funds. However, the court held that plaintiffs failed to demonstrate a legal basis under either DUPL or the Partnership Agreement for making an adjustment to the partners' capital accounts to account for the amounts expended by the plaintiff partner personally on behalf of the partnership. Rather, the court concluded, the plaintiffs in effect sought equitable indemnification or contribution from the defendant partner and should have, but did not, seek the entry of a money judgment against him personally which could have been executed against his assets including his capital account. Consequently, the court denied plaintiffs' motion for summary judgment granting an adjustment of the partners' capital accounts.

2. *Paciaroni v. Crane*, 408 A.2d 946 (Del. Ch. Sept. 18, 1979)

Plaintiffs and defendant formed an at will Delaware general partnership to own and race a three-year-old racehorse named Black Ace. Plaintiffs owned a combined 75% partnership interest and defendant, who was also the full-time trainer of Black Ace, owned the remaining 25% partnership interest. The partnership had no formal agreement, but it was understood that defendant, as trainer, would control the day-to-day operations of the partnership. Following the partners' discovery that Black Ace had a medical condition and a few poor performances by Black Ace, the partners began to disagree on the best course of action for the partnership. Defendant advised plaintiffs that they should discontinue their business relationship and wind up the partnership. Plaintiffs responded by directing defendant to turn Black Ace over to another trainer for the remainder of his scheduled races. Defendant delivered Black Ace to another trainer but refused to surrender the eligibility papers that would allow Black Ace to participate in future races. In this action, plaintiffs sought an injunction compelling defendant to surrender Black Ace's eligibility papers and defendant sought a declaration that the partnership had been dissolved and appointment of a receiver and liquidation of the partnership assets (including the sale of Black Ace) as soon as possible with his continued control of Black Ace in the meantime.

The court, in applying the Delaware Uniform Partnership Law ("DUPL"), which was the precursor to DRUPA, confirmed that the partnership was a partnership at will and concluded that the partnership had dissolved by the express will of the partners pursuant to DUPL Section 1531. Having reached this conclusion, the court then turned to the issue of how the partnership would be wound up. Plaintiffs contended that, as majority owners, they had the right to control the winding up of the partnership. Plaintiffs cited DUPL Section 1518(8), which provided that "[a]ny difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners." The court disagreed with plaintiffs, finding the exceptional circumstances of this case to not fall within the scope of ordinary matters connected with partnership business. Defendant argued that it was industry custom for an owner-trainer to train the horse so long as the partnership continued and that, based on the second half of Section 1518(8), the industry custom was an implied part of their oral partnership agreement and any act in contravention of that would require the consent of all three partners. The court also disagreed with defendant's position, holding that the application of such an industry custom in this case had not been proven by defendant.

The court held that the winding up process was governed by DUPL Section 1537, which provided that "[u]nless otherwise agreed the partners who have not wrongfully dissolved the partnership . . . have the right to wind up the partnership affairs; provided, however, that any partner . . . , upon cause shown, may obtain winding up by the court." The court found that both parties had sought a winding up of the partnership by the court and then discussed the authority the court possessed in the winding up. The court noted that the court does not have the power to compel one side to the controversy to buy out the interests of the other. The court stated that it is generally accepted that once dissolution occurs, the partnership continues only to the extent necessary to close out affairs and complete transactions begun but not then finished and that it is not generally contemplated that new business will be generated or that new contractual commitments will be made. The court further stated, however, that "where, because of the nature of the partnership business, a better price upon final liquidation is likely to be obtained by the temporary continuation of the business, it is permissible, during the winding up process, to have the business continue to the degree necessary to preserve or enhance its value upon liquidation, provided that such continuation is done in good faith with the intent to bring affairs to a conclusion as soon as reasonably possible." In applying this test, the court reasoned that racing Black Ace was the business purpose of the partnership, Black Ace was fit to race, there were only seven races remaining over the next six weeks (upon the conclusion of which scheduled and reputable horse auctions would be taking place), the remaining prize money was substantial, the risk of injury to Black Ace was no greater than it had been in the past and the remaining races were all races that the three partners had agreed to enter while still under good terms. Weighing the risk of loss with both the possible benefits in liquidation and the short time frame for which continuation of the partnership would be necessary, the court appointed plaintiffs as the liquidating partners for the partnership and held that plaintiffs could continue to run Black Ace in the seven remaining races under a new trainer. As a condition to serving as liquidating partners, the court required plaintiffs to post a $100,000 surety as security for defendant's share of the value of Black Ace to protect defendant against the possibility that the value of Black Ace be lost or diminished by destruction or injury to the horse prior final liquidation as a result of continuing to race Black Ace.

G. Accountings

1. *Geier v. Meade*, C.A. No. 1328-K (Del. Ch. Jan. 30, 2004)

Plaintiff sought an accounting to establish that his partner in a Delaware general partnership was liable for half of the amounts that plaintiff had paid to creditors of the partnership since the partnership ceased operations. Defendant did not dispute that plaintiff had made the payments to creditors claimed by plaintiff but alleged that at the time he formed the partnership with plaintiff, it was agreed that plaintiff would be responsible for all pre-existing expenses and obligations of the business. Defendant also alleged that plaintiff may have improperly used assets of the partnership to pay such pre-existing expenses and obligations. Plaintiff moved for summary judgment.

The court stated that the partnership agreement of the partnership contained no agreement to exclude prior obligations incurred by plaintiff prior to the formation of the partnership and, in addition, contained an integration clause which explicitly stated that the partnership agreement set forth all agreements between plaintiff and defendant and superseded any prior agreements between them. The court also found the fact that the valuation upon which defendant had purchased his interest in the partnership was based on the value of the assets of the partnership minus the liabilities of the partnership strongly suggested that defendant recognized that pre-existing obligations were the responsibility of the partnership and not just plaintiff. The court also found that defendant failed to present any evidence to support a reasonable inference that the debts paid by plaintiff were in existence prior to the formation of the partnership. The court noted that this case had been pending for over seven years and that defendant had repeatedly delayed the case, had not used the documents he received in his request for production of documents to develop any specific allegations and had failed to take a single deposition or pursue any other type of discovery. The court thus refused to excuse defendant's failure to present any specific evidence to support his claim that the amounts sought by plaintiff should be adjusted to account for one or more pre-existing debts paid by the partnership. The court granted plaintiff's motion for summary judgment and held defendant liable for half of the amounts plaintiff had paid to creditors of the partnership.

H. Procedural Issues

1. Arbitration

a. *Johnson v. Foulk Road Medical Ctr. P'ship*, C.A. No. 18984 (Del. Ch. Nov. 5, 2001)

A partner in a Delaware general partnership brought an action in the Court of Chancery asserting several claims against the other partners and the partnership, including a claim for judicial dissolution pursuant to Section 1532 of the DUPL. Defendants moved to dismiss for lack of subject matter jurisdiction asserting that a broad arbitration clause in the partnership agreement provided an adequate legal remedy. Plaintiff conceded that most of his claims were subject to the arbitration clause but argued that his claim for judicial dissolution was not arbitrable. For this proposition, plaintiff cited DUPL Section 1532, which provides that on application by or for a partner the court shall decree a dissolution whenever the circumstances specified in Section 1532 exist.

The court first determined that the arbitration clause in the partnership agreement was broad enough to cover plaintiff's claim for judicial dissolution and that there was nothing inherent in plaintiff's claim for judicial dissolution that could not be fully and fairly litigated in the context of an arbitration. The court then addressed the question of whether the jurisdiction of the Court of Chancery to entertain petitions to dissolve Delaware partnerships was exclusive. Pointing to the policy under Delaware law that favors arbitration of disputes, the court held that the grant of jurisdiction to the Court of Chancery in DUPL Section 1532 over claims for judicial dissolution did not mean that the court must exercise jurisdiction over such claims where there was an otherwise valid and binding agreement to arbitrate. The court thus granted defendants' motion to dismiss.

Although this dispute was governed by the DUPL, the court went on to conclude that partners may contractually commit resolution of claims for judicial dissolution to arbitration under the DRUPA as well.

b. *SBC Interactive, Inc. v. Corp. Media Partners*, C.A. No. 15987 (Del. Ch. Dec. 24, 1997), *aff'd*, 714 A.2d 758 (Del. 1998) and *SBC Interactive, Inc. v. Corp. Media Partners*, C.A. No. 16397 (Del. Ch. Oct. 7, 1998)

Plaintiff, a partner in a general partnership withdrew from the partnership. The remaining partners claimed that the plaintiff's withdrawal constituted a breach of the partnership agreement and formally demanded arbitration of their claims pursuant to the broad arbitration clause in the partnership agreement. The plaintiff brought an action in the Court of Chancery for a declaration that the defendants were not entitled to arbitrate the "invalid withdrawal" claim. Both parties moved for summary judgment and the plaintiff moved for a preliminary injunction to halt the arbitration. Based on the strong public policy favoring arbitration, the court held that arbitration was appropriate in any case in which the contract could reasonably be interpreted to require arbitration and that any doubts as to whether particular issue was arbitrable must be decided in favor of arbitration. Applying this standard to the broad arbitration clause at issue, the court held that the plaintiff had a duty to arbitrate the invalid withdrawal and granted the defendants motion for summary judgment. Plaintiff appealed and the Delaware Supreme Court affirmed finding that all issues raised by plaintiff, including its defense that defendants' invocation of arbitration was not timely, were properly left to the arbitrator.

After the Court of Chancery's ruling that plaintiff was required to arbitrate the issue of the validity of its withdrawal from the partnership, an arbitration took place and the arbitration panel issued a decision in which it entered a judgment and award in favor of the defendants. Plaintiff then filed an action in the Court of Chancery to vacate the arbitration award and enjoin the defendant from taking any further steps to confirm the award. The defendants responded that the Court of Chancery lacked subject matter jurisdiction to rule on plaintiff's motion to vacate the arbitration award. The question before the court was whether it had subject matter jurisdiction to enforce awards rendered under the Federal Arbitration Act. Under the partnership agreement, the parties had agreed to arbitrate any disputes in New York but to submit the enforcement, modification or vacating of any award to the non-exclusive jurisdiction of the state and federal courts located in Wilmington, Delaware. Based on the Court of Chancery's inherent equity jurisdiction, the

Court held that it did have subject matter jurisdiction over the enforcement, modification or vacating of the arbitration award rendered under the Federal Arbitration Act.

2. Attorney-Client Privilege

a. *SBC Interactive, Inc. v. Corp. Media Partners*, C.A. No. 15987 (Del. Ch. Dec. 9, 1997)

During the discovery phase of the plaintiff partner's action seeking a declaration that its withdrawal from the general partnership was not arbitrable (*see SBC Interactive, Inc.*) the plaintiff moved to compel the production of certain documents that had been withheld on the ground of attorney-client privilege and work product immunity. The contested documents contained legal advice given by the general partnership's attorney to the remaining partners during the sixty day period between the plaintiff's giving notice of its intent to withdraw and the date the plaintiff's withdrawal purportedly became effective. The plaintiff asserted that, based on its status as a partner during such period, it was a client of the attorney for the partnership and thus had a right to the documents. Citing the strong public policy favoring confidentiality of communications between lawyer and client, the court rejected the plaintiff's assertion that an attorney-client relationship automatically arises between a partnership's general counsel and each of its partners. The court stated that whether an attorney-client relationship exists depends upon the facts and circumstances and, in this case, the plaintiff, after giving notice of its intent to withdraw, had no reasonable expectation that it was represented by the partnership's attorney.

3. Stay of Proceedings

a. *Strickler v. Sussex Life Care Assocs.*, 541 A.2d 587 (Del. Super. Ct. 1987)

A former partner brought suit in Superior Court against the general partnership and its remaining partners for breach of contract. The partnership and its partners answered the plaintiff's claim by raising the affirmative defense of fraud in the inducement. The partnership and its partners subsequently filed a companion suit in the Court of Chancery and moved in Superior Court for dismissal or, in the alternative, a stay of the former partner's legal claim pending resolution of the equitable action.

The Superior Court found jurisdiction to exist both at law and in equity but decided to forego its concurrent jurisdiction because the circumstances rendered an investigation by the court of equity more convenient and effectual. The paramount issue in both cases centered on the value of the former partner's interest in the partnership, which was likely to entail an extensive evaluation of the partnership and could involve an accounting and possible rescission. Therefore, the most appropriate jurisdiction was the Court of Chancery. The Superior Court, thus, granted the defendants' motion to stay the Superior Court proceeding pending the outcome of the claim in Chancery Court.

4. Statute of Limitations/Accounting

a. *DiGiacobbe v. Sestak*, C.A. No. 14525, (Del. Ch. Mar. 3, 2003)

This accounting action involving allegations of unequal distribution of assets and breaches of fiduciary duty stemmed from the failure of a home construction business operated by the plaintiff and defendant. Although the parties had incorporated two separate corporations in connection with the conduct of their business, the court found that the business had been operated by the parties as a de facto 50-50 partnership rather than as active corporations that observed requisite corporate formalities. Under the more informal relationship of the parties, each partner was entitled to an equal share of the business and was entitled to take "draws" from business funds. After the collapse of the business, the plaintiff brought suit against the defendant seeking damages for alleged conversion of business funds and mismanagement of the business by the defendant and an accounting of amounts due to the business.

The court rejected the defendant's argument that the accounting action should be dismissed because an accounting should be ordered only where a partner has been excluded from the books and records of the partnership. Instead, the court held that an accounting may be ordered as required by equity such as this case where the parties stood in a fiduciary relationship and intended to share the expenses, profits and losses of the partnership on an equal basis. While the court held that the plaintiff failed to support his breach of fiduciary duty claims against the defendant based on his extra draws and alleged mismanagement of the business, the court did find that the partnership assets retained by the defendant exceeded those retained by the plaintiff in contravention of the agreement of the parties that the assets were to be divided equally and that such amount must be accounted for and distributed to the plaintiff. The defendant sought to offset the amount of his greater draws against certain amounts that he had paid to satisfy partnership debt after the business became defunct. The court found that the defendant was entitled to an offset equal to the amounts paid to settle an outstanding business loan and outstanding amounts owed for supplies of certain services and materials provided to the business, the payment of which had been guaranteed by the partners, because such payments worked a direct benefit to the partners and the partnership regardless of any other benefits that may have inured to the defendant individually as well. In contrast, the defendant was not entitled to an offset with respect to certain other payments made to creditors of the business related to services provided to the business because he failed to demonstrate that those payments worked any financial benefit to the partnership or that he was legally compelled to make them on behalf of the partnership.

b. *Fike v. Ruger*, C.A. No. 16791 (Del. Ch. Nov. 19, 1999), *aff'd*, C.A. No. 604 (Del. May 4, 2000)

Plaintiffs were two minority members of a joint venture formed pursuant to a written joint venture agreement executed in 1981. In 1998, after years of losses, the joint venture agreed to sell the commercial real property it had been formed to purchase, hold and develop. The plaintiffs sought to participate in the distribution of proceeds from the sale by seeking to have certain amounts allegedly owing under several loan agreements originating in 1981 between the joint venture and other of its members characterized as non-interest bearing capital contributions rather than loans. If the amounts were characterized as loans, the plaintiffs would not be entitled to receive any distribution of sale proceeds. However, if the amounts were recharacterized as capital contributions, plaintiffs would be entitled to some distribution of sale proceeds. Defendants moved for summary judgment. The court held that the claims relating to the loans arose at the time the loans were made and thus that those claims were barred by the three year statute of limitations. The court also found that plaintiffs' effort to revive their claims in the context of an accounting would be unavailing. In this regard, the court, although construing the DUPL, looked for guidance to the Revised Uniform Partnership Act which addressed when a partner's right to seek an accounting accrued for purposes of statutes of limitations. Based on that guidance, the court held that plaintiffs' right to bring an action for an accounting under Section 1522 of the DUPL created an obligation to do so in a timely manner or else to risk forfeiture of their claims even in a post-dissolution accounting under Section 1543 of the DUPL. Thus, the court granted defendants' motion for summary judgment.

5. Jurisdiction

a. *New Media Holding Co. L.L.C. v. Brown*, C.A. No. 7516-CS (Nov. 14, 2012)

Plaintiff, which was a partner in Iota Ventures LLP, a Delaware limited liability partnership ("Iota LLP"), sued Grant Brown, who, in his capacity as an employee of a fiduciary services company based in the Channel Island of Jersey, had been hired to manage Iota LLP, and sued the fiduciary services company, alleging that Brown and the fiduciary services company had abused their management position and helped dilute plaintiff's interest in Iota LLP. Defendants moved to dismiss for lack of personal jurisdiction.

The court found that Delaware's long-arm statute did not confer personal jurisdiction on defendants because plaintiff's claims were not related to acts that defendants carried out in Delaware. The court stated that defendants' acts of creating Iota LLP and paying its annual partnership taxes in Delaware did not relate to the acts that formed the basis for plaintiff's claims. The court noted that DRUPA's implied consent statute (DRUPA Section 15-114) provides for service of process on the partners and liquidating trustees of partnerships, but not on others performing management functions for a Delaware partnership. The court thus granted defendants' motion to dismiss.

b. *Total Holdings USA, Inc. v. Curran Composites, Inc.*, C.A. No. 4494-VCS (Del. Ch. Oct. 9, 2009)

Plaintiff, Total Composites, Inc., a Delaware corporation ("Total"), and defendants Curran Composites, Inc., a Missouri corporation and its subsidiary C-Two, LLC (collectively, "Curran"), formed a joint venture, Cook Composites and Polymers ("Cook Composites"), to develop, market, and manufacture composite materials. The original partnership agreement, dated February 9, 1990, stated that "the Participants shall . . . organize and associate themselves as partners in a general partnership . . . in, and in accordance with the laws of, the State of Delaware." At the time the parties entered into the original partnership agreement, the Delaware Uniform Partnership Act ("DUPA") governed general partnerships organized under Delaware law. In 1999, Delaware enacted the Delaware Revised Uniform Partnership Act ("DRUPA**")**, which repealed the DUPA and provided that it would govern all Delaware general partnerships after the expiration of a two year grace period.

In 2004, Total and Curran had entered into a new partnership agreement that restated the original partnership agreement and the amendments thereto. The 2004 partnership agreement included an option for Curran to require Total to buy Curran's interest in the joint venture at book value. In 2009, Curran exercised its right to put its interests to Total. On April 7, 2009, Total filed a complaint in the Court of Chancery seeking to recover the amount it believed it overpaid for Curran's interest in Cook Composites, and on April 9, 2009 Curran responded by filing its own complaint in a Missouri state court alleging that Total underpaid for the interest. Defendants filed a motion to dismiss in this case for lack of personal jurisdiction and this opinion addresses defendants' motion. Before the court could consider whether Curran was subject to jurisdiction in Delaware, it had to determine which partnership statute governed the Cook Composites partnership agreement because the DRUPA, unlike the DUPA, included a personal jurisdictional consent mechanism that allows jurisdiction to be exercised over non-resident partners.

The defendants argued that DRUPA could not apply to them because the statutory language did not explicitly state that it would be applied retroactively. The court disagreed and stated that Section 1206 of the DRUPA makes clear that the DRUPA was intended to apply to all general partnerships, whether formed before or after the DRUPA came into effect. Section 1206 of the DRUPA states that "[o]n and after January 1, 2002, this chapter governs all partnerships." The court noted that the language makes explicit that any general partnership formed under DUPL is on notice that unless it chooses otherwise, the DRUPA will apply to it. In addition, the court rejected the plaintiffs' argument that application of the DRUPA to Cook Composites would violate well-established principles of statutory interpretation used by the court. The court distinguished this situation from the case cited by defendants relating to the deemed consent provisions of the Delaware Revised Uniform Limited Partnership Act ("DRULPA") in which the court found that Section 17-109 of the DRULPA would not be applied retroactively because the DRULPA did not give sufficient notice to the parties of the particular changes that would affect their relationship, whereas in this case the defendants were on notice that the DRUPA would apply to all general partnerships after January 1, 2002. In addition, the court noted that this dispute could be further distinguished from the cases cited because the parties restated their partnership agreement after the DRUPA was in effect.

Next, the court considered the defendants' argument that Cook Composites was not a Delaware general partnership at all because it did not meet the prerequisites set forth in Section 15-106(c) of the DRUPA. Essentially, the defendants argued that, except as noted below, Section 15-106(c) of the DRUPA was the exclusive means by which Delaware law would be applied to a general partnership. Under Section 15-106(c), two preconditions must be met for Delaware law to apply to a general partnership, (i) the inclusion of a Delaware choice of law provision and (ii) registration with the Secretary of State of the State of Delaware. Absent compliance with the foregoing preconditions, Curran argued, a general partnership would be governed by the state where its operations were located, unless Delaware had other ties to the general partnership that gave it a claim to apply its law. The court disagreed. First, it noted that to interpret the statute as suggested by the defendants would mean the DRUPA would only apply to general partnerships that register with the State of Delaware, while the statute clearly contemplated that Delaware general partnerships could be both registered and unregistered. Further, the court found that the defendants had overlooked Section 15-106(a) of the DRUPA, which provides that Delaware law will govern to the extent a partnership agreement contains an effective choice of Delaware law.

Thus, the issue before the court was to determine whether Delaware law would apply under the traditional choice of law analysis that Section 15-106(a) of the DRUPA invoked. The Restatement (Second) of Conflict of Laws provides that the law chosen by the parties will apply except if (i) the chosen state has no substantial relationship to the parties or the transaction and there is no reasonable basis for the parties choice or (ii) the application of the chosen state's law would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the matter. The court reasoned that the language used in the partnership agreement was sufficient to indicate that the parties intended Delaware law to govern. In spite of the clear choice of law provision in the partnership agreement, Curran argued that Delaware law should not apply because the State had "no substantial relationship" to the parties or the transaction. The court rejected this argument finding that it ignored the Restatement's language calling for the parties' choice of law to govern if there was a "reasonable basis" for the choice. Citing the Delaware legislature's clear expression that choosing Delaware law amounts to a substantial relationship with Delaware, the court stated that Delaware courts will generally honor a contractually-designated choice of law provision if it is reasonable in light of the parties' objectives. The court found that it was reasonable for the parties, from two different jurisdictions, to choose Delaware law, a shared language of commerce, to govern its internal affairs. Further, Curran failed to argue that Missouri had a "materially greater interest" in adjudicating the dispute or that adjudicating the dispute in Delaware would contravene one of Missouri's fundamental policies. Therefore, finding that Section 15-106(a) was satisfied, the court held that Cook Composites was a Delaware general partnership.

The court then determined whether Curran would be subject to personal jurisdiction under Section 15-114 of the DRUPA. The relevant language in Section 15-114 provides that "[a] partner . . . of a partnership which is formed under the laws of the State of Delaware or doing business in the State of Delaware 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 partnership or a violation by the partner . . . of a duty to the partnership or any partner of the partnership." The defendant argued that the "involving or relating to the business of the partnership" requirement was not satisfied because the dispute was merely a routine contract dispute that did not involve the partnership's core business. The court, however, rejected this argument, finding that the instant dispute, where Curran was alleged to owe a duty to pay money back to a partner because it was overpaid under a put provision in the partnership agreement, fell squarely within the plain language of the statute, and, further, that a disagreement over the partnership's controlling agreement was not a routine contract dispute. Therefore, the DRUPA provided a statutory basis to exercise jurisdiction over Curran.

Finally, based on the language of the consent to jurisdiction provision, the court found that satisfaction of the requirements of Section 15-114 obviated any due process concerns because the dispute concerned Cook Composite's internal affairs and "Curran should not be surprised that a controversy over the interpretation of the governing document of Cook Composites, a Delaware general partnership, provides a basis for adjudicating that dispute in [the Delaware Court of Chancery]." Therefore, the court concluded exercising jurisdiction over Curran would not offend Curran's due process rights and any modest incremental burden it may incur by having to litigate in Delaware, rather than Missouri, would not justify a stay of this first-filed action. Thus the court denied the defendants' motion to dismiss.

I. General Construction and Application of Partnership Agreements

1. *Grunstein v. Silva*, C.A. No. 3932-VCN (Del. Ch. Dec. 8, 2009)

This action arose from the alleged breach of an oral partnership agreement between plaintiffs Leonard Grunstein ("Grunstein") and Jack Dwyer ("Dwyer") to form a Delaware general partnership for the purpose of acquiring Beverly Enterprises, Inc. ("Beverly"), an eldercare and rehabilitative services company. Following the formation of the partnership, defendant Ronald E. Silva ("Silva") allegedly accepted an invitation to join the partnership for purposes of participating in the proposed acquisition of Beverly as an equal partner with Grunstein and Dwyer. Plaintiffs asserted that the three partners orally agreed to share profits and losses resulting from the acquisition and that "each partner would share in all economic benefits received by any of them (or any entities controlled by them) resulting from the [acquisition]." The acquisition was structured to occur through a merger with Beverly pursuant to a merger agreement (the "Merger Agreement") among Beverly and three special purpose entities established to make the acquisition for the partnership. The Merger Agreement was signed by the special purpose entities, with the consent and approval of each of the partners, and an initial deposit to Beverly of $7 million was advanced on behalf of the partnership by an entity owned and controlled by Dwyer. Pursuant to an amendment to the Merger Agreement consented to by Grunstein and Dwyer, the three special purpose entities assigned their rights and obligations under the Merger Agreement to three entities owned and controlled by Silva. Plaintiffs asserted that the substitution of Silva's entities for the special purpose entities originally party to the Merger Agreement was based on Silva's representations and promises that Grunstein, Dwyer and Silva were still partners and that the agreements between plaintiffs and Silva would be carried out by Silva's companies. When the merger was completed, Beverly was owned solely by Silva's companies.

Plaintiffs asserted in this action that Silva and the entities controlled by Silva, in violation of the Partnership Agreement, retained all economic benefits of the acquisition to the exclusion of plaintiffs. Silva, however, denied the existence of the Partnership Agreement.

Plaintiffs brought, among other causes of action, claims for breach of fiduciary duty and breach of contract against Silva and the entities controlled by Silva. In this decision, the Court of Chancery addressed defendants' motion to dismiss the breach of fiduciary duty and breach of contract claims as well as other claims.

Plaintiffs asserted that Silva and those entities controlled by Silva breached their fiduciary duties to plaintiffs, in part, by taking all of the economic benefits from the acquisition for themselves and failing to provide plaintiffs with their share of such benefits. Defendants argued that plaintiffs' fiduciary duty claim should be dismissed under the principle of Delaware law that a breach of fiduciary duty claim will be dismissed where such claim completely overlaps a breach of contract claim and arises from the same underlying conduct or nucleus of operative facts. Plaintiffs argued that this case falls within a narrow exception to this rule, which was delineated in *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842 (Del Ch. June 13, 2008), that permits joint pleading of breach of contract and breach of fiduciary duty claims when additional, broader facts and remedies distinguish the two causes of action. The court held that the breaches of fiduciary duty alleged by plaintiffs would also constitute breaches of the Partnership Agreement and that any remedy for breach of the Partnership Agreement would encompass the same remedies sought for breach of fiduciary duty and thus granted defendants' motion to dismiss the fiduciary duty claims.

Defendants moved to dismiss Dwyer's breach of contract claims based on Delaware's statute of frauds. Defendants asserted that Dwyer's primary responsibility under the Partnership Agreement was to underwrite the portfolio of Beverly nursing homes for HUD financing, which defendants' argued constituted a contract for the lending of money for an amount greater than $100,000 and, therefore, was required to be in writing pursuant to the statute of frauds. Plaintiffs claimed that Dwyer's obligation was not to lend money, but rather to function as an underwriter, and therefore was not subject to the statute of frauds. Accepting plaintiffs' assertions as true for purposes of the motion, the court denied defendants' motion to dismiss, stating that Dwyer's obligation appeared to fall outside the statute of frauds, which governs only a "contract, promise, undertaking or commitment to loan money."

2. *DeBakey Corp. v. Raytheon Serv. Corp.*, C.A. No. 14947 (Del. Ch. Aug. 25, 2000)

A partnership was formed by three entities to develop and sell certain medical technology. Pursuant to their joint venture agreement, one partner was obligated to provide the initial financing for the partnership and had the right to terminate the partnership if its financing obligation exceeded $2 million. When its financial contribution reached $2 million, the money partner exercised its right to terminate the partnership. Approximately two years later, the other partners and the partnership brought suit against the money partner and its parent entity asserting (i) that the partner breached the joint venture agreement and breached its fiduciary duties to the other partners, (ii) that the parent aided and abetted the partner's breach of fiduciary duty and tortiously interfered with the joint venture agreement and (iii) that the partner and its parent wrongfully induced the plaintiffs to enter into the joint venture agreement through fraudulent or negligent misrepresentations. The defendants counterclaimed, contending that the other partners breached the joint venture agreement and wrongfully induced the defendants to enter into the joint venture agreement.

In evaluating the plaintiffs' claims, the court held that the plaintiffs failed to meet their burden of proof with respect to their breach of contract claims. With respect to their breach of fiduciary duty claims, the court acknowledged that the money partner, as a partner in and as the managing partner of the joint venture, owed fiduciary duties to the other partners and that its parent, as the money partner's sole shareholder, owed fiduciary duties to the money partner's partners as well. The court, however, rejected plaintiffs' breach of fiduciary duty claims for lack of evidentiary support. Because the court held that there had been no breach of contract and no breach of fiduciary duty by the money partner, the court also rejected the related claims of tortious interference and aiding and abetting against its parent. With respect to the plaintiffs' wrongful inducement claims, the court found that the plaintiffs failed to establish that the defendants representations were false and, in any event, were not justified in relying on the claimed misrepresentations in entering into the joint venture agreement because all of the claimed misrepresentations were oral representations that were inconsistent with the express provisions of the joint venture agreement. Therefore, the court held that the plaintiffs were not wrongfully induced by the defendants to enter into the joint venture agreement.

Turning to the defendants' counterclaims, the court held that the defendants' breach of contract claims against the plaintiffs were meritless and, with respect to the defendants counterclaim of wrongful inducement, the court found that certain of the plaintiffs' alleged misrepresentations were not actionable because the defendants were aware of the material facts underlying the representations and that the defendants' reliance on the other alleged misrepresentations of the plaintiffs was not reasonable or justifiable because the defendants failed to take reasonable steps to protect themselves, such as through performing adequate due diligence to verify plaintiffs' representations and through requiring plaintiffs to provide written representations and warranties in the joint venture agreement. Therefore, the court rejected defendants' counterclaims.

3. *Cianci v. JEM Enter., Inc.*, C.A. No. 16419-NC (Del. Ch. Aug. 22, 2000)

John Cianci and Jeffrey Minner, through separate companies, operated commercial janitorial services franchises. In 1991, Cianci and Minner, reached an oral agreement to consolidate their operations and operate the combined enterprise as equal partners (the "1991 Agreement"). The parties never defined the exact nature of the consolidation of their businesses beyond their agreement to split profits and losses evenly, to run their operation through JEM Enterprise, Inc. (the corporation through which Minner operated his franchise), to maintain Cianci's franchise, and to have Minner handle sales while Cianci managed operations. As time passed, tension grew between the partners and Minner was forced to take on additional responsibilities beyond those to which he agreed in the 1991 Agreement. In 1997, the parties initiated discussions and eventually reached an agreement regarding the dissolution of the partnership and payment to Cianci of a five year annuity as compensation for his partnership interest (the "1997 Agreement"). When Minner repudiated the 1997 Agreement, claiming that his assent was obtained by duress, Cianci filed this action, seeking enforcement of the 1997 Agreement or, in the alternative, half of the value of the partners' combined business as of the date that the partnership was effectively dissolved.

The court found that when the parties entered into the 1991 Agreement, they created a 50/50 partnership without any real delineation of the partners' rights and obligations. Based on the weight of the evidence, the court rejected the argument that the 1991 Agreement included an agreement that Cianci would retire and turn over his share of the partnership to Minner at the end of five years. Further, Minner claimed that he had a right of setoff against any amounts awarded to Cianci because Cianci was paid more than he deserved for his contributions to the combined business. The court declined to address this claim beyond its statement that no setoff based solely on inadequate productivity shall be granted because there was no contractual provision making the partners' relative ownership percentages contingent on a certain level of performance or output by the partners.

The court also analyzed whether certain threatening remarks made by Cianci to Minner during the discussions in connection with the 1997 Agreement coerced Minner's assent to Cianci's demands in connection with his withdrawal from, and the dissolution of, the partnership. Although the court found Cianci's remarks to be improper because they involved a physical threat and Cianci knew or should have known that Minner would take such remarks seriously, the court determined that under the attendant circumstances, they did not amount to wrongful duress and did not render the 1997 Agreement voidable. Taking into consideration the totality of the evidence presented by the parties, the court concluded that Minner's assent to Cianci's terms for Minner's buyout of his partnership interest was driven by several external pressures and business practicalities and was a result of Cianci's threatening remarks only to a limited extent, if at all. The court went on to hold that even if Minner's assent was the result of duress, Minner ratified the 1997 Agreement by accepting Cianci's performance of his obligations thereunder and Minner's partial performance of his obligations thereunder. Thus, the 1997 Agreement was not voidable by Minner. The court found that Minner accepted all of the benefits of the parties' bargain without asserting that the contract was tainted and even partially performed himself until it was time to begin making monthly payments for the buyout to Cianci. Thus, the court held that Minner ratified the agreement by his actions and should be bound by its terms.

J. Liability of Partners

1. *Tuoni v. Binkley*, C.A. No. 2002-10-339 (Del. Com. Pleas Nov. 18, 2004)

Plaintiff brought this action in the Delaware Court of Common Pleas to recover a debt from the three partners of a Delaware partnership. One of the partners claimed that he was not liable for the debt because the debt resulted from the wrongful conduct of the other two partners. The court stated that under the DRUPA the partnership is liable for the wrongful act of a partner acting in the ordinary course of business and that all partners are jointly and severally liable for the actions of the partnership. The court thus rejected this claim and held that the three partners were jointly and severally liable for the debt.

K. Partnership Opportunities

1. *Quill v. Malizia*, C.A. No. 2239-S (Del. Ch. Mar. 4, 2005)

This case involved an informal partnership between plaintiff and defendants and plaintiff's claim that a property that defendants purchased from the mother of one of the defendants was a partnership opportunity which should have been offered to plaintiff. Although the court recognized that plaintiff and defendants had formed an informal partnership to purchase and sell for profit certain real estate properties, given the very informal nature of the partnership, the court was reluctant to find that the opportunity to acquire the property at issue was a partnership opportunity. This property had been initially under contract for purchase by the partnership. However, when the partnership was unable to finance the acquisition of the property, it was bought by the father of one of the defendants and the court found that there was never an enforceable agreement between the partnership and the defendant's father to reacquire the property. The property remained with the father for several years and then passed to the mother on the father's death. (Plaintiff had sought a constructive trust over the property arguing the father held it on behalf of the partnership, but the court found no evidence to support this argument.) Notwithstanding the informal nature of the partnership, the court assumed for purposes of its analysis that the eventual opportunity to acquire the property was an opportunity of the partnership. However, the court found that the defendants had in fact offered to allow plaintiff to participate in their acquisition of the property and, therefore, they had satisfied whatever obligations might have arisen under the partnership opportunity doctrine.

V. STATUTORY TRUSTS

A. Fiduciary Duties

1. *Cargill, Inc. v. JWH Special Circumstance LLC*, C.A. No. 3234-VCP (Del. Ch. Nov. 7, 2008)

This case involved breach of fiduciary duty claims against the managing owner (the "Managing Owner") of a Delaware statutory trust (the "Trust") and against Cargill Investor Services, Inc. ("CIS"), which was the parent of the Managing Owner, and Cargill, Inc. ("Cargill" and, together with CIS, the "Cargill Plaintiffs"), which was the parent of CIS. The claims arose from Cargill's sale of, among other things, control of the Managing Owner to Refco Group Ltd., LLC, a wholly owned subsidiary of Refco, Inc. (collectively, "Refco"). As a result of the Refco transaction, certain accounts of the Trust were transferred to Refco and its affiliates. Soon after the Refco transaction, Refco became embroiled in a financial scandal that resulted in the bankruptcy of Refco and certain of its affiliates and consequently the loss of approximately $35 million of the Trust's assets.

The Cargill Plaintiffs filed a declaratory judgment action in the Court of Chancery seeking, among other things, a declaration that the Cargill Plaintiffs did not owe any fiduciary duties to the Trust and a declaration that the Cargill Plaintiffs did not breach any fiduciary obligation to the Trust. JWH Special Circumstance LLC ("JWH") acted on behalf of the Trust in answering the complaint and asserting counterclaims against the Cargill Plaintiffs alleging, among other things, breaches of fiduciary duties owed to the Trust and aiding and abetting breaches of fiduciary duties by the Managing Owner. This opinion addressed the Cargill Plaintiffs' motion for judgment on the pleadings and motion to dismiss JWH's counterclaims.

JWH argued that the Cargill Plaintiffs breached fiduciary duties to the Trust and aided and abetted the Managing Owner's breach when they sold control of the Managing Owner to Refco without obtaining the consent of the unitholders of the Trust. Although the Trust Agreement contained an anti-assignment provision that applied to the Managing Owner, it did not contain a change of control provision that was broad enough to be triggered upon the sale of the equity of the Managing Owner. JWH alleged that the sale of the equity of the Managing Owner, in lieu of an assignment by the Managing Owner of its rights under the Trust Agreement to Refco, circumvented the requirement for unitholder approval under the Trust Agreement and that this circumvention constituted a breach of fiduciary duty. The court found that the sale of control of the Managing Owner did not breach the provisions of the Trust Agreement and that, in any event, neither of the Cargill Plaintiffs were a party to the Trust Agreement and therefore could not have breached the Trust Agreement. The court thus found no basis for JWH's fiduciary duty claims and dismissed JWH's "circumvention" allegation for failure to state a claim.

The court next addressed JWH's claims that the Cargill Plaintiffs breached their fiduciary duties as the parent and grandparent of the Trust, citing to the line of cases in the partnership context beginning with In re USACafes, L.P., Litigation. Under this line of cases, if a corporate parent of a fiduciary exercises dominion and control over the fiduciary in connection with a transaction that benefits the corporate parent at the expense of the underlying entity, the corporate parent may owe fiduciary duties directly to the underlying entity in connection with the transaction. JWH argued that under this line of cases, the Cargill Plaintiffs at least owed a duty of loyalty to the Trust because they caused the Managing Owner to consent to take actions in furtherance of Refco transaction for the benefit of the Cargill Plaintiffs at the expense of the Trust. The Cargill Plaintiffs argued that the USACafes line of cases is not applicable in the statutory trust context because, according to the Cargill Plaintiffs, the DTA preempts the application of common law fiduciary duties to statutory trusts and thus unless a trust agreement explicitly provides a corporate parent with fiduciary duties, it does not owe any fiduciary duties to the statutory trust. The court rejected this argument, holding that common law fiduciary duties apply to statutory trusts except (i) to the extent a trust's governing instrument provides otherwise and (ii) to the extent provided in the DTA.

The court then addressed whether the Trust Agreement or the DTA modified the common law fiduciary duties that would otherwise be owed by Cargill Plaintiffs to the Trust. The court stated that, like a corporate fiduciary, a fiduciary of a trust does owe a duty of care and a duty of loyalty under the common law. However, by virtue of Section 3809 of the DTA, which provides that, except to the extent otherwise provided in the governing instrument of a statutory trust or in the DTA, Delaware law pertaining to common law trusts applies to statutory trusts, the court stated that fiduciaries of statutory trusts are subject to the more rigorous standards associated with the common law duty of care and the duty of loyalty under trust law. After reviewing the provisions of the Trust Agreement, the court concluded that the Trust Agreement did not eliminate the common law fiduciary duties that the Cargill Plaintiffs may have owed to the Trust.

The court also examined whether the DTA itself preempts any common law fiduciary duties the Cargill Plaintiffs would otherwise have owed to the Trust. In support of their contention that they owed no fiduciary duties to the Trust, the Cargill Plaintiffs pointed to Section 3806(a) of the DTA for the proposition that an entity's exercise of power over the trust's manager does not cause such person to become subject to the fiduciary duties of a trustee. The third sentence of Section 3806(a) states, "Except to the extent otherwise provided in the governing instrument of a statutory trust, neither the power to give direction to a trustee or other persons nor the exercise thereof by any person (including a beneficial owner) shall cause such person to be a trustee." The court acknowledged that an entity's exercise of power over a trust's managing owner, in and of itself, does not subject that entity to the fiduciary duties of a trustee but held that this does not mean that Section 3806 of the DTA precludes a claim against a parent entity under the USACafes line of cases. The court rejected the Cargill Plaintiffs' interpretation of Section 3806(a) and found that the applicable language contained in the fourth sentence of Section 3806(a), which provides that "[t]o the extent provided in the governing instrument of a statutory trust, neither the power to give direction to a trustee or other persons nor the exercise thereof by any person (including a beneficial owner) shall cause such person to have duties (including fiduciary duties) or liabilities relating thereto to the statutory trust or to a beneficial owner thereof," requires that a provision be included in a trust instrument to override any fiduciary duties that those who have control over the managing owner might otherwise have under the trust law.

Having concluded that neither the Trust Agreement nor the DTA preempted the common law fiduciary duties owed by the Cargill Plaintiffs to the Trust, the court then considered whether the Cargill Plaintiffs in fact owed a duty to the Trust under the USACafes line of cases. The court noted that the USACafes line of cases arise from the law of trusts and found that the reasoning in these cases is applicable in the statutory trust context. Applying the law from these cases, the court stated that for JWH to defeat the pending motions it must have alleged specific facts that lead to a reasonable inference that the Cargill Plaintiffs exercised control over the Trust or its assets in connection with the Refco transaction to benefit themselves at the expense of the Trust. The court found that the facts alleged by JWH were sufficient to support such an inference and therefore denied the Cargill Plaintiffs' motions to dismiss the breach of fiduciary duty claims.

The court then turned to JWH's claims for aiding and abetting the Managing Owner's breach of fiduciary duty. To successfully prove an aiding and abetting claim, the court stated that JWH would have to have shown (i) the existence of a fiduciary relationship; (ii) the fiduciary breached its duty; (iii) a defendant, who is not a fiduciary, knowingly participated in a breach; and (iv) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary. The court found that the Managing Owner was a fiduciary of the Trust and that JWH's allegations were sufficient to allege breaches of the Managing Owner's fiduciary duties of care and loyalty based on the Managing Owner's conduct in connection with Refco transaction. The court also found that JWH sufficiently alleged that the Cargill Plaintiffs knowingly participated in the breach and that damages resulted from the actions of the Cargill Plaintiffs and the Managing Owner. The motion to dismiss the aiding and abetting claims were thus denied.

B. Indemnification

Following the approach of Section 17-108 of the DRULPA and Section 18-108 of the LLC Act, Section 3817 of the DTA provides that a statutory trust may indemnify and hold harmless any trustee or beneficial owner or other person from and against any and all claims and demands whatsoever, subject to the standards and restrictions set forth in the governing instrument of the statutory trust. The Delaware courts have explicitly recognized the disparate treatment accorded to indemnification by the DGCL and the DTA, and have given effect to the breadth and flexibility inherent in the construction of the DTA.

1. *Nakahara v. The NS 1991 Am. Trust*, C.A. No. 15905 (Del. Ch. Mar. 20, 1998) and (Del. Ch. Sept. 28, 1998)

Plaintiffs were trustees of a Delaware statutory trust who sought advance indemnification from the trust under an advancement provision in the trust's governing instrument. A beneficiary of the trust's parent trust objected to the advancement on the grounds that the DTA did not permit statutory trusts to advance litigation expenses and also on the grounds that plaintiffs had not satisfied the pre-conditions set forth in the trust's advancement provision. The court acknowledged that Section 3817(a) of the DTA does not specifically address advancement of expenses but only addresses indemnification, in contrast to the DGCL which separately authorizes indemnification and advancement of expenses (Section 145). However, the court noted that there were many differences between the DGCL and the DTA and concluded that the legislature's failure to mention "advancement" in the DTA did not indicate its intent to prohibit statutory trusts from making advancements. Rather, the court concluded, that the two statutes were different in scope, purpose and approach and that the DTA simply was intended to be more flexible than the DGCL. The court compared the DTA to the DRULPA and noted that in the *Delphi Easter Partners* case the Court of

Chancery assumed without discussion that the DRULPA authorized advancement in addition to indemnification based on language comparable to that at issue under the DTA. Thus, the court concluded that the breadth of the language of the DTA implicitly allowed statutory trusts to authorize advancement of litigation expenses. In addition, the court found that plaintiffs had satisfied all contractual conditions prerequisite to obtaining advancement under the trust's governing instrument. However, because the plaintiffs had, prior to the court's determination, engaged in "self help" by taking substantial sums of money from the trust to pay their legal fees, the court found that they had unclean hands and thus, were not entitled to advancement of expenses.

In a related proceeding, the court considered whether the plaintiffs could avoid the effect of the court's initial holding of unclean hands and consequent denial of advancement of expenses by attempting to undo their improper conduct after the court's initial adverse ruling. The plaintiffs had, after the court's initial ruling, taken it upon themselves to return $900,000 to the statutory trust, the exact amount of money they had improperly withdrawn. However, the court concluded that plaintiffs had failed to meet the standard for relief from a judgment under paragraph (6) of Court of Chancery Rule 60(b) because they failed to demonstrate that their position either avoided manifest injustice or presented a case of extraordinary circumstances. Rather, the court concluded that the plaintiffs' after the fact action did not alter the fact that plaintiffs came to the court with unclean hands and remained in front of the court with unclean hands even after final judgment and, therefore, the court denied plaintiffs' request.

C. Procedural Issues

1. *Hartsel v. The Vanguard Grp., Inc.*, C.A. No. 5394-VCP (Del. Ch. June 15, 2011)

This case was brought by stockholders of certain series (the "Funds") of two Vanguard Delaware statutory trusts (the "Trusts") that purchased shares of allegedly illegal foreign online gambling businesses. Defendants included, among others, the boards of trustees of the Trusts, which were composed of the same individuals, various financial advisory firms to the Funds and certain employees of these firms. Acadian Asset Management, LLC, a Delaware limited liability company ("Acadian"), was one such financial advisory firm and it exercised managerial and operational oversight over the investment strategy of one of the Funds. Plaintiffs argued that all defendants, as fiduciaries for managing and advising the Funds, breached their fiduciary duties by causing the Funds to purchase shares in the illegal businesses. The damages were related to precipitous drops in the share prices of these businesses after the United States heightened its law enforcement focus on internet gambling, which caused a decrease in the value of the assets held by the Funds.

The individual defendants that were employees of Acadian moved to dismiss the action as against them arguing that there was no basis for the court to exercise *in personam* jurisdiction over them. Plaintiffs claimed that these defendants were subject to the court's jurisdiction under Section 18-109(a) of the LLC Act—the implied consent statute—because each such defendant was an officer of Acadian, a Delaware limited liability company. Plaintiffs contended that because these defendants shared responsibility for implementing the challenged investments and such investments "involve or relate to" Acadian's business, they qualified as managers of Acadian and, therefore, have consented to the court's jurisdiction. Plaintiffs interpreted Section 18-109(a) of the LLC Act in the disjunctive so that it applied in two distinct situations: (i) in actions involving or relating to the business of an LLC or (ii) in actions claiming a violation by a manager of a duty to the LLC he manages. The court indicated that a literal reading of the LLC Act provided support for this position but noted that broadly reading the "involving or relating to" language could lead to the assertion of personal jurisdiction in circumstances that did not meet the minimum requirements of the Due Process Clause. Citing to the cases of *Assist Stock Mgmt. L.L.C. v. Rosheim* and *Vichi v. Koninklijke Philips Electronics N.V.*, to protect against an unconstitutionally broad application of Section 18-109(a) of the LLC Act, the court held that to invoke the "involving or relating to" clause, plaintiffs must establish that the exercise of personal jurisdiction over the subject defendants would not offend traditional notions of fair play and substantial justice, which would be found if plaintiffs could show that (1) the allegations against the defendant-manager focused centrally on his rights, duties and obligations as a manager of a Delaware LLC, (2) the resolution of the matter was inextricably bound up in Delaware law and (3) Delaware had a strong interest in providing a forum for the resolution of the dispute relating to the manager's ability to discharge his managerial functions. Further, the court found that the "rights, duties and obligations" language of this test referred to the LLC the defendant managed. In this case, plaintiffs claimed that the alleged managers of Acadia breached duties owed to plaintiffs and the Trusts. The court held that these claims did not involve or relate to Acadian's business in the "sense of its internal business" as required by the LLC Act and the Due Process Clause and, thus, Section 18-109(a) of the LLC Act did not provide a basis for personal jurisdiction. The court also denied plaintiffs other claims to assert jurisdiction under a conspiracy theory and the Delaware long-arm statute. The court noted in dicta that in addition to demonstrating a statutory basis for personal jurisdiction as to each defendant, plaintiffs must have also shown, to satisfy due process, that the court's exercise of jurisdiction over them met the so-called minimum contacts analysis. With respect to the employees of Acadian, the court found that although they worked for a Delaware LLC, they lived and worked outside of Delaware and did not own real property or any other assets in Delaware. On this basis, the court found that plaintiffs had not shown that these defendants had the requisite minimum contacts with Delaware to justify subjecting them to personal jurisdiction in Delaware.

The court next discussed the motion by defendants to dismiss plaintiffs' direct claims, arguing that they were derivative in nature, and also moving to dismiss plaintiffs' derivative claims, arguing that plaintiffs failed to satisfy the applicable demand requirements. Plaintiffs argued that they properly stated certain direct claims and that with respect to the derivative claims, making a demand on the Boards of Trustees of the Trusts would have been futile and therefore was excused. The court found that under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, it must examine (i) whether a stockholder's claimed direct injury is independent of any alleged injury to the company and (ii) whether a stockholder would receive the benefit of any remedy. Plaintiffs argued that each day there was a decline in the market value of the shares in the allegedly illegal businesses, they suffered actual injury by a reduction in the value of their shares in the Funds even though the Funds had not necessarily realized any loss and would not until the shares in the allegedly illegal businesses were sold. The court granted defendants' motion to dismiss these direct claims, finding that the unlawful conduct in purchasing shares in allegedly illegal businesses involved trustee mismanagement and under Delaware law, trustee mismanagement was generally considered derivative in nature. Plaintiffs further argued that with the unique structure of a series Trust, plaintiffs were essentially minority shareholders of the Trusts with no common interests with the investors in the other series of such Trusts. In addressing this, the court indicated that it was more appropriate to assess the injury suffered by the Funds and not the Trusts because each Fund acted as a segregated fund in the business of investing in securities. The court further noted that besides each Fund being a discrete economic unit, each Fund is often treated as a separate investment company under the Investment Company Act of 1940 (the "ICA") even though it may not have a separate legal form and may be covered under the umbrella of a single trust entity. The court cited to non-Delaware cases for the notion that an investor that invests in a series within a single trust does not necessarily have standing to assert claims for purported wrongdoing on behalf of all of the series within that trust. The court also noted that finding these claims to be derivative would comport with the Delaware Statutory Trust Act ("DTA"), which permits a statutory trust, through its governing instrument, to treat different series as distinct economic entities. Thus, any injury to plaintiffs would be derivative to the alleged injury suffered by the Funds themselves. As to the second prong of *Tooley*, the court observed that the benefit may flow only to the Funds and not the other series of the Trusts, but consistent with the DTA, there was no reason that this would have caused the claims to be direct and not derivative. Finally, the court denied plaintiffs' claims that the fiduciary duty and negligence claims could be both direct and derivative under *Gentile v. Rossette*, finding that this has only been permitted in limited circumstances involving controlling stockholders, which was not the case here.

The court next addressed whether demand was excused. In making this determination, the court referred to both the *Aronson* test and the *Rales* test. The court indicated that the *Aronson* test applied to claims involving contested board action with respect to a specific transaction or decision, and this provided that demand would be excused if the complaint contained particularized factual allegations that raised a reasonable doubt that either: (1) the board of directors was disinterested and independent or (2) the challenged transaction or conduct was otherwise the product of a valid exercise of business judgment. On the other hand, the *Rales* test would apply when the subject of the suit was the board's inaction leading to a violation of its oversight duties. Under *Rales*, demand would be excused if the court found that there was "a reasonable doubt that a majority of the Board would be disinterested or independent in making a decision on demand." The court did not determine which test would apply because it found that the complaint did not allege particularized facts sufficient to cast reasonable doubt on the independence or disinterestedness of the Trustee defendants under either test. The court observed that the DTA permitted a statutory trust to delineate in its governing instrument requirements to bring a derivative claim in addition to those set forth in the DTA. The governing instrument of each Trust contained a provision that demand would be excused only if a majority of the Board of Trustees were not "independent trustees." Under the DTA, an independent trustee is defined as a trustee who is not an "interested person" under the ICA, and the court found that the trustee defendants to whom plaintiffs would have needed to make their demand were not "interested persons" under the ICA. Plaintiffs also argued that the Trustee defendants were not independent under the ICA because they served on boards of other series of the Trusts and on the board of the trust advisor. The court pointed to Section 3801(d) of the DTA, which provided that service as an independent trustee of more than one investment company shall not affect the status of a trustee as an independent trustee, in support of its finding that service on multiple boards alone is insufficient to cast reasonable doubt as to independence of a Trustee defendant. With respect to the specific claim by plaintiffs that demand was excused because the Trustee defendants served on the board of the advisor to the Trusts, the court noted that under the ICA, the trust advisor here did not constitute an "investment advisor" because it provided its services to the Funds at cost. The court also noted that although plaintiffs could successfully argue that demand was excused if they could demonstrated that the Funds exercised control over the trust advisor, plaintiffs failed to plead particularized facts from which the court could reasonably infer that the Funds had sufficient net assets in relation to the other Trusts within the Vanguard mutual fund complex to be able to exercise a controlling influence over Vanguard's management or policies. The court found that as a general matter, plaintiffs failed to allege any particularized facts to cast a reasonable doubt on the Trustee defendants' disinterestedness or independence. "Disinterested" generally means "that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." "Independence" generally means "that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."

With respect to plaintiffs' further basis for claiming that demand was excused under the second prong of *Aronson*, the court noted that to satisfy this second prong, plaintiffs must have alleged particularized facts sufficient to raise "(1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision." The court also noted that under *Rales*, directors who face a "substantial likelihood of personal liability are deemed to be interested" but demand is only excused where director conduct is "so egregious on its face that board approval cannot meet the test of business judgment." Plaintiffs argued these tests were met because defendants invested in illegal businesses. However, the court found that there was no evidence that the laws governing these illegal businesses applied to passive public stockholders and plaintiffs failed to allege that it would apply to the Funds. Thus, the court held that demand was not excused under either the second prong of *Aronson* or under *Rales*.

D. General Construction of Governing Instruments

1. *Simon v. The Navellier Series Fund*, C.A. No. 17734 (Del. Ch. Oct. 19, 2000)

A Delaware statutory trust moved to dismiss an action filed by a former trustee for indemnification of legal fees. The former trustee's claim arose from a breach of fiduciary duty action brought against him and certain other trustees by several shareholders of the trust. The former trustee prevailed in the underlying action but the appeal of the jury verdict was pending in appellate court.

The trust moved for dismissal of the action based on improper venue because the trustee's indemnification agreement with the trust provided that the courts of Reno, Nevada shall be the exclusive venue for indemnification disputes. The trustee counterargued that the venue provision contained in the indemnification agreement must be disregarded because he filed his indemnification claim pursuant to the declaration of trust, not the indemnification agreement, and the declaration of trust neither contained a venue provision nor incorporated the indemnification agreement by reference. Both agreements contained provisions regarding the trust's responsibilities to indemnify trustees but only the indemnification agreement also contained a venue provision.

As a result of its determination that the indemnification agreement and the declaration of trust together comprised the parties' agreement on the subject of indemnification, the court found that the only reasonable interpretation of the venue provision is that it would govern all indemnification disputes between the trust and the former trustee. In reaching this conclusion, the language of the two agreements and the objective circumstances of their execution were among the chief factors relied upon by the court. In its analysis, the court relied on the principle that "in construing the legal obligations created by [a] document, it is appropriate for the court to consider not only the language of that document but also the language of contracts among the same parties executed or amended as of the same date that deal with related matters." Because the two agreements were entered into contemporaneously for all relevant purposes, the court stated that they must be viewed together in their entirety to ascertain the scope and nature of the parties' indemnification arrangements. The court also found that the indemnification agreement was a subordinate document entered into under the declaration of trust based on the language contained in the indemnification agreement stating that it was entered into "pursuant to" the declaration of trust and that the former trustee entered into the indemnification agreement "in consideration" of his agreement to act as a trustee. The court further stated that the former trustee's indemnification claim came within indemnification agreement's provisions for indemnification and thus within the scope of its venue provision and it held that the only reasonable construction of the venue provision was that it was devised by the parties to ensure that all indemnification disputes would be litigated in the city in which the trust's business operations were centered and that such an objective was of obvious utility.

The court then granted the trust's motion to dismiss premised on the argument that the former trustee's action was not ripe for decision pending the trust's exhaustion of its appeals in the underlying action. The court noted that as a matter of judicial efficiency, it was not practical for the court to decide claims for indemnification (in contrast to claims for advancement of legal expenses) in advance of a non-appealable final judgment. Highlighting that in the corporate context the Delaware courts have assumed that the statute of limitations for indemnification claims runs from the time that the underlying investigation or litigation was definitively resolved, the court stated that adjudication of indemnification claims only after the underlying action is definitely resolved would reduce the chance that, in the absence of a showing of undue hardship, the court engaged in a wasteful exercise.

E. Standing

1. *Capano v. Capano*, C.A. No. 8721-VCN (June 30, 2014)

This case involved a family owned LLC with the following members: Louis, Joseph, the AAMM Trust, Louis III and the CI Trust. Another family member, Gerry, was the sole beneficiary of the CI Trust, a Delaware statutory trust with a third-party serving as trustee (the "Trustee"). The CI Trust served as the tie-breaking vote in the event of a deadlock among the other members of the LLC. The court was presented with a motion to dismiss by defendants Louis and Louis III, among others, relating to claims made by Gerry and Joseph, which claims included (i) Gerry's claim that a purported transfer by him to Louis of his interest in the CI Trust was invalid and (ii) a challenge by Gerry and Joseph to a purported merger effected by Louis of the LLC with and into an entity owned by Louis, which cashed out Joseph's interest in the LLC (the "Merger").

With respect to the first claim, the defendants relied on signed documents, pursuant to which Gerry purported to replace the Trustee as trustee of the CI Trust and then Gerry purported to assign all of his right, title and interest therein, including his position as trustee, to Louis. Gerry argued that there were a number of defects with these documents including, without limitation, that Louis backdated them without his consent and that Gerry was inebriated when he signed them. The trust agreement of CI Trust contained a spendthrift provision requiring the written consent of the trustee for the beneficial owner (i.e. Gerry) to transfer his interest in the CI Trust. The court denied the defendants' motion to dismiss this issue because, in light of the alleged defects noted above, there was a question as to who the trustee was at the time the transfer documents were effective and thus there was a question as to whether consent was given by the trustee in accordance with the trust agreement of CI Trust.

Turning to the Merger, the defendants argued that Gerry lacked standing to challenge the Merger because he had no rights in the CI Trust. The court found that if Gerry successfully demonstrated that the assignment of his interest in the CI Trust to Louis was invalid, then his remaining interest in the CI Trust would permit him to assert rights in the LLC to challenge the fairness of the Merger. Accordingly, the court denied defendants' motion to dismiss this claim for lack of standing.

Defendants also argued that Joseph lacked standing to challenge the transfer documents relating to the CI Trust because he was not an intended beneficiary of those documents. Joseph asserted that because the CI Trust held an interest in the LLC and essentially functioned as a tie-breaking voter, he was therefore an intended beneficiary of such documents. The court found in favor of the defendants on this issue by looking at the text of the trust agreement of the CI Trust, to which Joseph was not a party and was not identified as a third-party beneficiary. However, the court noted that Joseph would obviously have standing to challenge a transfer of interest in the CI Trust to the extent it violated the operating agreement of the LLC.

The court then turned to defendants' argument that the purported transfer of the interest in the CI Trust to Louis and another transfer by Louis of his interest in the LLC to a limited partnership (the "Louis LP") he controlled were ratified because the defendant members owned a majority of the voting power of the LLC. The court found that the power to wield a majority voting interest capable of ratifying the transfers was dependent upon compliance with the operating agreement of the LLC and if the transfer of interest in the CI Trust was invalid, a properly-constituted majority would not have ratified such transfers. Similarly, the defendants argued that because they controlled a majority of the economic interest, they "could" have consented. The court found that the factual issue must be resolved as to whether they actually did consent as a necessary precondition to Louis exercising the transferred interests under the operating agreement of the LLC.

In addition, Joseph alleged that the defendants (other than Louis but consisting of entities owned and/or controlled by Louis) aided and abetted Louis's alleged breaches of fiduciary duties owed to him. The defendants argued that a corporation could not be deemed to have conspired with its wholly owned subsidiary or its officers or agents. The court found that there were exceptions to this rule and cited a case that held that it was "uncontroversial for parent corporations to be subjected to claims for aiding and abetting breaches of fiduciary duty committed by directors of their subsidiaries." Defendants also argued, in the alternative, that they were acting as agents while acting in their capacities as trustee of the CI Trust and general partner of the Louis LP, and that an agent could not aid and abet its principal. The court found that the defendants mischaracterized these relationships because they were not agents of the LLC. For these reasons, the court denied the defendants motion to dismiss this claim.

The defendants also sought to dismiss a books and records request by Joseph. The court found that Joseph did not have any rights to books and records of entities for which he was not a member, but that if Joseph were successful in unwinding the Merger, he could separately request the LLC's books and records at that time. Therefore, Joseph's books and records request was denied.

Lastly, the defendants argued that Gerry and Joseph were precluded from a remedy of rescission because the LLC had entered into numerous transactions with third parties that could not be undone. The court held that defendants' argument may be compelling after additional factual development, but that it was premature to conclude that plaintiffs had no possibility of recovery that could include such a remedy.

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