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Re: Monier, Inc. v. Boral Lifetile, Inc., et al.
C.A. No. 3117-VCN
Date Submitted: February 28, 2008

Dear Counsel:

Plaintiff Monier, Inc. ("Monier") and Defendant Boral Lifetile, Inc. ("Boral") are the only members of Defendant MonierLifetile, LLC ("MLT" or the "Company"), a Delaware limited liability company; each owns a fifty percent stake in the Company. In Count I of its amended complaint, Monier seeks a declaratory judgment determining the percentage of Net Income that must be distributed under the MonierLifetile, LLC Operating Agreement dated August 15, 1997 (the

Operating Agreement").[1] Before the Court is Boral's motion to dismiss Count I pursuant to Court of Chancery Rule 12(b)(6).

I. BACKGROUND[2]

Monier and Boral formed MLT for the purpose of engaging generally in the manufacture, promotion, marketing, sale, and wholesale distribution of concrete roof tile and related accessory products.[3] In conjunction with the formation of the Company in 1997, Monier, Boral, and MLT entered into the Operating Agreement. The Operating Agreement provides for the Company to be managed by a six-member management committee (the "Management Committee")—three members of the Management Committee are appointed by Monier and three are appointed by Boral.[4]

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[1] Monier's amended complaint contains only two counts. Count II is a breach of contract claim against MLT premised upon MLT's alleged failure to pay distributions in accordance with the Operating Agreement for the 2005 and 2006 fiscal years. MLT has filed an answer to Monier's amended complaint.

[2] The facts recited in this letter opinion are drawn from the well-pled allegations in Monier's amended complaint ("Compl."). The Operating Agreement appears as Exhibit A to the amended complaint.

[3] Compl. ¶ 6; Operating Agreement, § 1.4(a).

[4] Compl. ¶ 5; Operating Agreement, §§ 2.1, 2.2. In the year 2000, when the Management Committee actions at issue in this litigation occurred, the three Monier appointees and the three Boral appointees to the Management Committee also were members of the boards of directors of their respective companies; moreover, the appointees constituted a majority of their respective boards. Compl. ¶ 9.

Among other things, the Operating Agreement also provides for distribution of the Company's net income between the members. Specifically, Section 7.1 of the Operating Agreement provides:

> Net Income. Subject to the provisions of Section 2.7 and except as provided in Article 14 relating to the liquidation of the Company, fifty percent (50%) of the Net Income of the Company (as reduced by Reserves and calculated as if Product Payments in accordance with Section 6.1 were an expense of the Company) generated during any calendar year will be distributed on or before March 31 of the following calendar year, or at such other times as determined by the Management Committee. All distributions by the Company to Members shall be made in proportion to their Membership Interests.

Distributions also are addressed in Section 2.7 of the Operating Agreement:

> Actions Requiring Approval without Dissent. The following actions may be taken by the Company only if approved by the Management Committee at a meeting at which a quorum is present where there is no dissenting vote:
>
> [. . . .]
>
> (b) Payment of dividends or other distributions to the Members; provided, however, that the Company shall distribute fifty percent (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*.[5]

[5] Emphasis added.

In February 2000, the Management Committee met and unanimously decided, at least as recorded in the meeting minutes, "From the year 2000, a dividend will be paid annually equal to the audited net profits of the Company."[6] The meeting minutes reflecting the change in the distribution rate were circulated among the members of the Management Committee, reviewed and commented upon, and, eventually, signed by the Secretary and inserted in the Company's minute book at the direction of the Management Committee.[7] Thus, in accordance with the authority conferred by Section 2.7(b), the Management Committee adjusted the distribution rate under the Operating Agreement to 100 percent of the Company's audited net profits (the "February 2000 Management Committee Action"); the question remains: what is the duration of that action?[8]

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[6] Compl. ¶ 8; Ex. B (Feb. 22, 2000 Mgmt. Committee Meeting Minutes ("February 2000 Minutes"), at § 12.4). Because the parties have not raised the issue, the Court presumes that the phrase "audited net profits" equates with "Net Income," a defined term in the Operating Agreement.

[7] Compl. ¶ 10.

[8] The crux of the parties' disagreement, as will be discussed below, is the temporal implication of the February 2000 Management Committee Action. Monier contends that the February 2000 Management Committee Action evinces an intent on the part of the members, acting through their representatives on the Management Committee, and confirmed through their subsequent course of conduct, to "(1) require MLT going forward to pay annual distributions in an amount equal to audited net profits unless and until otherwise unanimously agreed by the Management Committee; [or] (2) amend the Operating Agreement if and to the extent necessary to render the February 2000 Management Committee Action binding." *Id.* ¶ 11. Boral disagrees that the February 2000

The Company subsequently declared and paid annual distributions to the members in accordance with the February 2000 Management Committee Action without further debate, discussion, or formal action by the Management Committee.[9] In 2005, however, the prudence of the February 2000 Management Committee Action was questioned. For example, the minutes of the January 2005 Management Committee meeting indicate concern about the "future dividend policy" of the Company even though the Company would continue to pay a 100 percent distribution in 2004.[10] In addition, the minutes from the August 2005 meeting of the Management Committee state: "Returning to the policy to distribute fifty percent of post tax income of the Company, as set out in the original Operating Agreement, seems a likely compromise, but a final recommendation should be made . . . ."[11] Finally, in November 2005 and January 2006, the Management Committee meeting minutes reflect recommendations to "return" to the fifty percent

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Management Committee Action can be construed so broadly or that the Management Committee had the authority to make such a change to the distribution rate for the indefinite future.

[9] *Id.* ¶ 12(a).

[10] *Id.* ¶ 12(c).

[11] *Id.* ¶ 12(b).

distribution rate,[12] but no formal Management Committee action to achieve those recommendations is alleged to have occurred. In any event, the members' debate over the proper distribution rate notwithstanding, the Company paid out an amount less than even a fifty percent distribution to the members in 2005 and did not pay any distribution in 2006.[13] Monier then filed this action.

II. CONTENTIONS

A. *Monier's Views*

Monier advances two alternative theories in support of its claim that the February 2000 Management Committee Action is a binding and enforceable change of the distribution rate. It first argues that when the Management Committee unanimously resolved to pay future distributions at 100 percent of "audited net profits," it validly exercised its authority under Section 2.7(b) of the Operating Agreement to "approve[] greater . . . distributions without dissenting vote." In other

[12] *Id.* ¶ 12(d).

[13] Compl. ¶ 27. Setting aside its concerns over the 2005 distribution, Monier requested a distribution of fifty percent of the Company's net income in accordance with Sections 2.7 and 7.1 of the Operating Agreement for 2006; Boral, allegedly, objected to such a distribution and ordered the Company to disregard Monier's request. *Id.* ¶ 18. That dispute (and the 2005 distribution issue) appears to be driven by the parties' disagreement over the amount of income available for distribution in those years and is more properly considered within the context of Monier's breach of contract claim against the Company.

words, although the Operating Agreement specifies a baseline distribution rate of fifty percent, it also expressly confers broad authority on the Management Committee to adjust that rate as it deems appropriate, provided, however, that such action is unanimous; in February 2000, the Management Committee acted unanimously pursuant to that authority, and, thus, it validly adjusted the baseline distribution rate to 100 percent. Moreover, the distribution rate is not set, as Boral alleges, at 100 percent in perpetuity; rather, consistent with the terms of the Operating Agreement, the distribution rate can be adjusted to fifty percent (or any other rate) at any time, if the Management Committee once again acts unanimously to do so.

Monier's alternative theory is that the February 2000 Management Committee Action was a valid amendment of the Operating Agreement in accordance with the various provisions of the agreement bearing upon that process. In particular, amendment of the Operating Agreement is addressed in three sections: Sections 2.7, 2.10, and 15.9. Those sections provide, in pertinent part:

> [§] 2.7 Actions Requiring Approval without Dissent. The following actions may be taken by the Company only if approved by the Management Committee at a meeting at which a quorum is present where there is no dissenting vote:
>
> [. . . .]
>
> (k) Amendment of the Certificate or this [Operating Agreement];
>
> [§] 2.10 Restrictions on Authority of the Management Committee and Officers. Without the consent of all the Members acting through Management Committee action without dissent, no Member, member of the Management Committee or Officer of the Company shall have any authority to:
>
> [. . . .]
>
> (v) Amend this [Operating Agreement]; and
>
> [§] 15.9 Amendment. Any amendments to this [Operating Agreement] shall be in writing signed by all Members.

Monier contends that, consistent with Section 2.7(k), the February 2000 Management Committee Action constitutes an "amendment" to the dividend distribution rate that was approved unanimously by the Management Committee. Furthermore, because the members of the Management Committee in February 2000 constituted majorities of both the Monier and Boral boards of directors, the

members of MLT, in effect (if not explicitly), consented to the amendment of the default distribution rate; thus, Section 2.10 is satisfied. Finally, Monier argues that the signed writing requirement of Section 15.9 was satisfied by the Secretary's act of signing the February 2000 Minutes and entering those in the Company's minute book at the direction of both Monier and Boral, acting through the Management Committee. Thus, in its view, all the requirements to amend the Operating Agreement have been satisfied, and, therefore, the "default" distribution rate specified in the Operating Agreement was amended to 100 percent of audited net profits by the February 2000 Management Committee Action.

B. *Boral's Views*

Boral contests both theories articulated by Monier. In general, Boral views the distribution rate specified in Section 7.1 of the Operating Agreement—fifty percent of net income—as the contractual "default" distribution rate. Consequently, Boral reads Section 2.7(b) far more narrowly than Monier. According to Boral, Section 2.7(b) confers on the Management Committee limited authority to vary the distribution rate, with unanimous consent, from time to time but not in perpetuity; further, it contends that the expansive reading of Section 2.7(b) suggested by Monier

would be tantamount to authorizing the Management Committee to amend the Operating Agreement despite express amendment provisions requiring the participation and approval of the members in such efforts. Thus, Boral views the February 2000 Management Committee Action as something more akin to a limited policy change that was reaffirmed annually by the Management Committee (at least through its actions) until 2005 when certain members of the Management Committee dissented. It therefore maintains that the February 2000 Management Committee Action is invalid insofar as it purports to require the Company to pay 100 percent distributions until the Management Committee unanimously decrees otherwise; instead, it argues that the February 2000 Management Committee Action was valid only *so long as* the members of the Management Committee unanimously consented to 100 percent distributions, but a single dissenting vote could (and did) vitiate the 100 percent distribution policy embodied in that action and force a return to the "default" distribution rate specified in the Operating Agreement.

Not only does Boral argue that the February 2000 Management Committee Action exceeded the Management Committee's authority under the Operating Agreement, but also, in the alternative, Boral contends that Monier's construction of

Section 2.7(b) and the February 2000 Management Committee Action demonstrates a violation of the Management Committee's members' fiduciary obligations to the members and the Company. Essentially, it views the "binding policy" embodied in the February 2000 Management Committee Action (*i.e.*, 100 percent distributions until the Management Committee unanimously decrees otherwise) as an impermissible abdication of the Management Committee's members' duty to manage the Company because the unanimity requirement would tend to limit the ability of a dissenting member of the Management Committee to fulfill his fiduciary obligations in the event that he believed that 100 percent distributions were not in the best interests of the Company.

In addition, Boral disputes Monier's amendment theory. In its view, the amendment provisions of the Operating Agreement—Sections 2.7(k), 2.10, and 15.9—must be read to require, respectively, that all amendments (1) be approved by the Management Committee without dissent, (2) be approved by all Members (Boral and Monier), and (3) take the form of a writing signed by both Boral and Monier.[14]

[14] Def. Boral Lifetile, Inc.'s Br. in Support of Renewed Mot. to Dismiss ("Boral's Opening Br."), at 7-8.

In this case, Boral contends that the signed writing requirement of Section 15.9 was not met merely by a single sentence in the February 2000 Minutes, which was later approved as a matter of course and signed only by the Secretary for the meeting (as opposed to independent Monier and Boral representatives), who, incidentally, also happened to be a Monier designee. Thus, Monier's argument that the February 2000 Management Committee Action constituted a valid amendment of the Operating Agreement must fail as a matter of law.

Boral further argues that not only did the February 2000 Management Committee Action lack the requisite formality of an amendment, but also the committee members lacked the requisite intent to amend the Operating Agreement. In support of that argument, Boral points out that nowhere in the February 2000 Minutes is there any explicit evidence of an intent or effort to amend the Operating Agreement. Moreover, the Management Committee was capable of drafting formal resolutions to memorialize its actions when necessary, and, in fact, it drafted three such resolutions concerning other matters addressed in the February 2000 Minutes; the fact that the Management Committee did not undertake such efforts with respect to its purported amendment of the dividend distribution rate is, in Boral's view,

telling. Thus, Boral argues that the conclusory allegations in Monier's amended complaint regarding the intent of the members, as expressed through the actions of the Management Committee in February 2000, to amend the Operating Agreement to implement a new "default" 100 percent distribution rate cannot be credited.

III. ANALYSIS

A. *Applicable Standard*

The legal standards governing a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6) are well-settled. The Court must accept as true all well-pled allegations in the amended complaint and draw all reasonable inferences in favor of Monier, the non-moving party.[15] The Court will not, however, credit conclusory allegations unsupported by facts detailed in the amended complaint.[16] In short, in order to grant Boral's motion, the Court must be satisfied that there is no set of facts upon which Monier can prevail on its declaratory judgment claim.

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[15] *Territory of the U.S. Virgin Islands v. Goldman Sachs & Co.*, 937 A.2d 760, 783 (Del. Ch. 2007).
[16] *Id.*

B. *Monier States a Claim that Section 2.7(b) of the Operating Agreement Authorized the Management Committee to Change the Distribution Rate, as It Did, to 100 Percent for an Indefinite Period of Time*[17]

The parties have set forth competing interpretations of the authority conferred upon the Management Committee by Section 2.7(b) of the Operating Agreement. The proper interpretation of a contract is a question of law, and, thus, in appropriate circumstances, it is a question that may be decided on a motion to dismiss.[18] Where there are two (or more) reasonable interpretations of a contract, however, it is

[17] The Court briefly addresses the parties' debate over whether the February 2000 Management Committee Action constituted an amendment of the Operating Agreement and, if so, whether it was validly accomplished. Monier, as of course it may, is asserting mutually exclusive arguments: to be effective, either the adjustment in the distribution percentage was a Management Committee action within the scope of the Operating Agreement or it was an amendment of the Operating Agreement. If it was an amendment, there are serious questions about compliance with the amendment procedures specified in the Operating Agreement. There is nothing, however, in the February 2000 Minutes to suggest that the Management Committee or any of its members intended to amend the Operating Agreement's "default" distribution rate through the February 2000 Management Committee Action. The only reasonable inference to be drawn from the text of the February 2000 Minutes is that the Management Committee attempted nothing more than to exercise its management authority under the Operating Agreement. Moreover, Monier's conclusory allegations regarding the parties' intent to amend the Operating Agreement, *see* Compl. ¶¶ 11, 16, are just that: conclusory and not to be credited. Accordingly, the Court need not consider the validity of the February 2000 Management Committed Action under the amendment provisions of Operating Agreement. This conclusion does not, however, foreclose Monier from arguing that subsequent conduct evidences that an amendment was effectively implemented. *See id.* ¶ 12.

[18] *E.g.*, *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) (motion to dismiss is a proper framework for determining the meaning of unambiguous contract language).

ambiguous, and the Court "may not, on a Rule 12(b)(6) motion to dismiss, 'choose between two differing reasonable interpretations of ambiguous provisions.'"[19]

Ultimately, the Court's goal is to ascertain the shared intent of the parties in drafting Section 2.7(b) of the Operating Agreement. Delaware adheres to an objective theory of contracts.[20] Thus, where the language of a contract is "clear and unambiguous," the parties' intent generally may be determined from the ordinary meaning of the words chosen.[21] If the terms of a contract are ambiguous, however, the Court must look to extrinsic evidence to ascertain the parties' shared intent, and the motion to dismiss must be denied. The question, then, assuming the plausibility of Boral's reading, is whether Monier's interpretation of Section 2.7(b) is reasonable thereby rendering that provision of the Operating Agreement ambiguous.

At this stage of the proceedings, the Court cannot conclude as a matter of law that Monier's reading of Section 2.7(b) of the Operating Agreement is unreasonable, and, therefore, the Operating Agreement must be viewed as ambiguous. The

[19] *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007) (quoting *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1289 (Del. 2007)).
[20] *Id.*, at *2.
[21] *See generally West Willow-Bay Court, LLC v. Robino Bay-Court, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007).

language of Section 2.7(b) is very broad and imposes no express temporal limitation on the Management Committee's authority to adjust the distribution rate; thus, the provision could be read to authorize adjustments to the distribution rate that endure until the Management Committee again acts unanimously to change the rate. Moreover, there is no other provision in the Operating Agreement (except the amendment provisions) that would suggest any limitation on the Management Committee's authority under Section 2.7(b).

Boral argues that Monier's reading of the Operating Agreement—that the Management Committee's authority to adjust the distribution rate is not limited only to periodic adjustments of the distribution rate—would be tantamount to allowing the Management Committee to amend the Operating Agreement contrary to the other provisions of the Operating Agreement which provide for an amendment procedure involving the members. That is one plausible reading of the Operating Agreement. Indeed, all things considered, Boral's suggested reading may be the better reading of the Operating Agreement, but, on a motion to dismiss, the Court cannot conclude that Boral's reading is the *only* reasonable reading of Section 2.7(b). It also could be that the parties agreed to confer authority on the

Management Committee to determine a different distribution rate if it acted unanimously to implement that change. In other words, although the Operating Agreement provides for an amendment procedure, perhaps the parties intended to confer exclusive authority over the distribution rate on the Management Committee, such that setting the distribution rate under the Operating Agreement is outside the purview of the amendment provisions.[22] Certainly, at the very least, the parties' behavior in light of the February 2000 Management Committee Action supports an inference that the parties believed the Management Committee to have taken some type of broad action—*i.e.*, a change that was not limited only to the year 2000—with respect to the distribution rate specified in the Operating Agreement.

C. *Boral Cannot Demonstrate from the Allegations of the Complaint that Fiduciary Breaches on the Part of the Management Committee's Members Preclude Continued Carrying Out of the February 2000 Management Committee Action*[23]

Finally, assuming the validity of the February 2000 Management Committee Action (which Boral concedes for purposes of this particular argument), the Court

[22] Indeed, Section 7.1, which Boral views as specifying the "default" distribution rate, expressly states that its provision is "subject to the provisions of Sections 2.7" of the Operating Agreement.
[23] It is unusual for a breach of fiduciary duty claim to be raised through a motion to dismiss which limits the fact set that the Court may consider.

turns to Boral's argument that the mere setting of the distribution rate at 100 percent until the Management Committee unanimously decrees otherwise constituted an abdication of the Management Committee's members' fiduciary obligations to the Company and its members.[24] Boral has not explained why the members of the Management Committee have any more "abdicated" their duty to manage the Company if the baseline distribution rate is set at 100 percent of net income than if it is set at fifty percent (or any other rate, for that matter). In essence, Boral's argument depends upon either an *ipse dixit* conclusion that a 100 percent distribution rate is inherently sinister or speculation that the Management Committee will *never* achieve unanimity to reduce the distribution rate, even in the face of circumstances demanding such action. Neither theory is supported by the facts of the amended complaint. In short, if the members intended to confer broad authority on the Management Committee to set the distribution rate under Section 2.7(b), and the Management Committee validly exercised that authority, then there is no basis to conclude that the Management Committee's members

[24] There are two aspects of Boral's criticism of the February 2000 Management Committee Action: the magnitude of the percentage of Net Income to be distributed and the duration. It is primarily within the context of this argument that Boral challenges the wisdom of a 100 percent Net Income distribution.

breached their fiduciary duty to manage the Company simply by adopting a change to the baseline distribution rate.[25]

IV. CONCLUSION

In sum, the Court concludes that Count I of Monier's amended complaint states a claim sufficient to survive Boral's motion to dismiss. Monier's construction of Section 2.7(b) of the Operating Agreement may not ultimately be persuasive, but it is not unreasonable. In the context of the pending motion to dismiss, the Court may not choose between the parties' differing reasonable interpretations of the Operating Agreement, and, therefore, Boral's motion must be denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Richard L. Renck, Esquire
Register in Chancery-K

[25] Of course, this is not to say that the Management Committee's members' *failure* to exercise their authority to adjust the distribution rate would never constitute a breach of fiduciary duty. Such a claim, however, is not presently before the Court.