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Case No. 7801-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRETT WIGGS, CARL CHADWICK SMALL, ANDREW L. UNVERZAGT and PETER LEE,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 7801-VCN**
SUMMIT MIDSTREAM PARTNERS, LLC, SUMMIT MIDSTREAM HOLDINGS, LLC, DFW MIDSTREAM SERVICES LLC, and DFW MIDSTREAM MANAGEMENT, LLC,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: December 12, 2012
Date Decided: March 28, 2013

Samuel T. Hirzel, Esquire and Meghan A. Adams, Esquire of Proctor Heyman LLP, Wilmington, Delaware, and John T. Cox III, Esquire, Edward Jason Dennis, Esquire, and Christopher W. Patton, Esquire of Lynn Tillotson Pinker & Cox LLP, Dallas, Texas, Attorneys for Plaintiffs.

Srinivas M. Raju, Esquire and Jillian G. Remming, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, and Michael C. Holmes, Esquire, Marc A. Fuller, Esquire, and Sarah H. Mitchell, Esquire of Vinson & Elkins LLP, Dallas, Texas, Attorneys for Defendants.

NOBLE, Vice Chancellor

The Plaintiffs are former—terminated without cause—employees of Defendants. Their employment had been secured, in part, by a right to a profits stream—after capital contributions of Defendants (and others) had been reimbursed—through membership interests in a limited liability company, which was part of a relatively complicated, interrelated business structure established in 2009. The Defendants, without informing the Plaintiffs, made a number of changes in 2011 to one of the governing documents, which the Plaintiffs contend were improperly adopted to their detriment, and took other steps to delay or possibly to jeopardize their receipt of a share of the venture's profits.

They filed this action, challenging the 2011 contractual amendment, asserting claims for breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty, and seeking the Court-ordered dissolution of two of the entities involved in this arrangement.

The Court now addresses the Defendants' motion, brought under Court of Chancery Rule 12(b)(6), to dismiss this action.

I. BACKGROUND[1]

A. *The Parties*

Plaintiffs Brett Wiggs, Carl Chadwick Small, Andrew L. Unverzagt, and Peter Lee (collectively, the "Plaintiffs") reside in Texas.[2] Defendants Summit Midstream Partners, LLC ("Summit"), Summit Midstream Holdings, LLC ("Summit Holdings"), DFW Midstream Services LLC ("Services"), and DFW Midstream Management, LLC ("Management") are Delaware limited liability companies.[3]

In 2008, the Plaintiffs were employed by Energy Future Holdings Corporation ("EFH"). Through Services, part of EFH, they formed a group dedicated to developing a natural gas gathering system in the Barnett Shale region of the Fort Worth Basin.[4] Services created a gas gathering system and secured a number of long-term contracts with natural gas producers actively drilling wells around the system.[5] At the time, Services was a Texas limited liability company, and its sole member was the EFH-held Texas Competitive Electric Holdings Company, LLC ("TCEH").

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[1] Unless set out otherwise, the facts are drawn from the well-pleaded allegations in the Verified Complaint ("Compl.") and are presumed to be true for the purposes of the Defendants' Motion to Dismiss. *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).
[2] Compl. ¶ 2.
[3] Compl. ¶ 3.
[4] Compl. ¶ 4.
[5] Compl. ¶ 4.

The Plaintiffs soon sought funding from private equity sources outside EFH for Services' projected expansion.[6] Energy Capital Partners ("ECP"), a New Jersey-based private equity fund, made an initial investment by acquiring a 75% stake in Services through its holding company, Summit.[7] Services was converted to a Delaware limited liability company,[8] with three Members: Summit and TCEH as Class A Members, and Management as a Class B member.[9] ECP and Summit provided Plaintiffs with a compensation package to retain them as senior managers of Services.[10]

B. *The Agreements*

The Plaintiffs allege that the parties reached an understanding memorialized in three related contracts, which are sometimes referred to as the "Compensation Agreements":[11] (1) the Amended and Restated Limited Liability Company Agreement of DFW Midstream Services LLC, dated September 3, 2009;[12] (2) the Limited Liability Company Agreement of DFW Midstream Management, LLC,

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[6] Compl. ¶ 4.
[7] Compl. ¶ 5.
[8] *See* Transmittal Aff. of Jillian G. Remming ("Remming Aff.") Ex. 1 (Amended and Restated Limited Liability Company Agreement of DFW Midstream Services LLC) ("2009 Services Agreement") Recital C. "When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint." *Freedman v. Adams*, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012). Documents that are incorporated by reference into the complaint may be considered by the Court on a motion to dismiss. *Gantler v. Stephens*, 2008 WL 401124, at *6 (Del. Ch. Feb. 14, 2008).
[9] *See* 2009 Services Agreement Recital E & § 2.1.
[10] Compl. ¶ 6.
[11] Compl. ¶ 6.
[12] Remming Aff. Ex. 1.

dated September 3, 2009 (the "Management Agreement");[13] and (3) the Award Agreements among each Plaintiff, Services, and Management.[14]

1. The 2009 Services Agreement

Under the 2009 Services Agreement, the purpose of Services was to

> own, construct, develop, maintain, manage and operate one or more gas gathering systems for the gathering of natural gas (including its constituents), water from wells and related components and materials and to engage in the business of gathering, treating, processing, compressing, and transporting natural gas and to undertake such other matters as may be approved by the Board in accordance with Section 5.7 or Section 5.8.[15]

Sections 5.7 and 5.8 provide for other actions that require either approval of a majority or unanimous consent of the Board.

Section 3.3 states that the "management of the business and affairs of [Services] shall be vested in whole in the Board." Section 5.1 provides that: "[e]xcept as required by any non-waivable provisions of applicable law, the powers, business and affairs of [Services] shall be exercised by or under the authority of, and the business and affairs of [Services] shall be managed under the direction of, a single board of managers." Section 5.3(a) also provides that the Board would be composed of four managers—three of whom would be appointed

[13] Remming Aff. Ex. 2.
[14] Pls.' Answering Br. in Opp'n to Defs.' Mot. to Dismiss ("Answering Br."), Ex. 1-A to 1-D (the "Award Agreements"). The pertinent terms of each of the four Award Agreements are identical for the purposes of the Court's analysis.
[15] 2009 Services Agreement § 1.5.

by Summit and one by TCEH, for "so long as TCEH [held] a Contribution Percentage of not less than 20%." If TCEH did not maintain a 20% Contribution Percentage, the entire Board was to be appointed by Summit.

Under Section 2.1 of the 2009 Services Agreement, "Member" is defined as "each Class A Member or each Class B Member, as the context may require."[16] Members are "members" of Services as the term is defined in the Delaware Limited Liability Company Act.[17] Exhibit A to the 2009 Services Agreement identifies the Class A Members as Summit and TCEH, and the sole Class B Member as Management.[18] Notably, the 2009 Services Agreement does not identify the Plaintiffs as Members of Services.

2. The Management Agreement

The Management Agreement establishes the governance structure for Management and names each individual Plaintiff as a member, with Summit designated as the managing member.[19] Section 1.9 of the Management Agreement provides in part:

> The nature of the business or purposes to be conducted or promoted by [Management] is to engage in any lawful act or activity for which limited liability companies may be organized under [the Delaware Limited Liability Company Act]. [Management] may engage in any

[16] 2009 Services Agreement § 2.1 (Definitions).
[17] *Id.*
[18] 2009 Services Agreement Ex. A.
[19] Management Agreement § 2.1 & Ex. A.

> and all activities necessary, desirable or incidental to the accomplishment of the foregoing.[20]

Section 5.1 also states that "the powers, business, and affairs of [Management] shall be exercised by or under the authority of, and the business and affairs of [Management] shall be managed under the direction of, Summit, as the sole managing member."[21]

3. The Award Agreements

Each Plaintiff entered into a separate Award Agreement with Services and Management.[22] The Award Agreements were designed to induce the Plaintiffs' continued service at Services.[23] Each Award Agreement provides that it "sets forth the understanding among [Services, Management, and each Plaintiff] regarding the terms and conditions" under which Services would grant Management an award of Class B units or "Downstairs Units," and Management would grant each Plaintiff a corresponding award of "Upstairs Units."[24] Through the Award Agreements, the Plaintiffs, as Members of Management, indirectly held the right to participate in the profits of Services under certain conditions. They had no management or business decision-making authority.

[20] Management Agreement § 1.9.
[21] Management Agreement § 5.1.
[22] Compl. ¶ 6.
[23] Compl. ¶ 7.
[24] Award Agreements 1.

Under the 2009 Services Agreement, Services would distribute Available Cash to its Members annually.[25] After Class A Members received their capital contributions plus a 10% rate of return (the "Payout Hurdle"),[26] Management would receive 5% of the remaining cash from Services in the form of Downstairs Units.[27] Under the Management Agreement, upon receiving these Downstairs Units, Management would issue corresponding Upstairs Units in Management to the Plaintiffs.[28] These Upstairs Units "represent a right to receive any distributions received by [Management] in respect to the applicable Downstairs Units awarded to [Management]."[29]

In essence, 5% of the remaining cash held by Services each year after projected expenses and liabilities (assuming the Payout Hurdle had been achieved) would be awarded to Management as Downstairs Units under the 2009 Services

[25] 2009 Services Agreement § 4.1. By Section 2.1 Available Cash is generally defined as all cash held by Services minus any cash the Board determines as necessary to pay Services' expenses or liabilities and capital expenditures for the following year, subject to certain other provisions in the 2009 Services Agreement.

[26] 2009 Services Agreement § 2.1. Section 3.4(a)(i) provides that the capital contribution of Summit was $85,081,803.44 and that of TCEH was $28,360,601.15 at the time of the 2009 Services Agreement, for a total Payout Hurdle of $113,442,404.59 before the additional 10% rate of return. Thus, significant sums would be paid to Summit and TCEH before Management could expect any distribution.

[27] 2009 Services Agreement §§ 2.1, 4.1.

[28] Management Agreement § 3.3.

[29] Management Agreement, Recitals.

Agreement, and in turn to the Plaintiffs as Upstairs Units under the Management Agreement.[30]

C. *The 2011 Amendment*

On June 12, 2010, Summit purchased all of TCEH's remaining membership interest in Services. Under the 2009 Services Agreement, this additional investment gave Summit the right to appoint the fourth and final Board member of Services.[31] In April 2011, the Defendants executed the Second Amended and Restated Limited Liability Company Agreement of Services (the "2011 Amendment"), modifying and replacing the 2009 Services Agreement.[32] The Defendants then created Summit Holdings and transferred Summit's membership in Services to the newly created entity.[33]

The Plaintiffs assert that the changes made by the Defendants through the 2011 Amendment were invalid without their consent.[34] Of the changes complained about, the Plaintiffs particularly object to those that they claim affect distributions under the 2009 Services Agreement. The Plaintiffs argue that certain changes

[30] The receipt of Downstairs Units by Management under the 2009 Services Agreement triggered the issuance of Upstairs Units to the Plaintiffs under the Management Agreement. Section 3.3(a) of the Management Agreement provides that additional Units, to be issued when Management received additional Downstairs Units, "shall not entitle the recipient thereof to any payments or distributions from [Management] other than those payments and distributions received by Management in respect of the Downstairs Units that correspond with such additional [Upstairs] Units."

[31] 2009 Services Agreement § 5.3(a).

[32] Compl. ¶ 10; Remming Aff. Ex. 3.

[33] Compl. ¶ 9.

[34] Compl. ¶ 12.

decrease the issuance of Downstairs Units to Management under the 2009 Services Agreement, and in turn decrease the issuance of Upstairs Units to the Plaintiffs under the Management Agreement.

For instance, the Plaintiffs claim that the Defendants entered into certain transactions encumbering Services with debt in order to retire unrelated Summit debt and to fund new Summit businesses.[35] The first was the Defendants' obtaining a $285 million credit facility from the Royal Bank of Scotland on behalf of Summit Holdings from which a significant portion of proceeds was distributed to ECP as a return on its investment, and pledging as collateral substantially all of Services' assets.[36] The second was an expansion of the credit facility to $550 million, with Services' assets pledged as collateral. Some of these funds were paid to ECP.[37] The Plaintiffs also allege that additional funds were slated for a new natural gas gathering system, unrelated to Services, in a different part of the country.[38]

The Plaintiffs argue that the Defendants deliberately structured the credit facility in the name of Summit Holdings, instead of Services, so that funds distributed from the credit facility would not count against the Payout Hurdle in the

[35] Compl. ¶ 13.
[36] Compl. ¶ 14.
[37] Compl. ¶ 15.
[38] Compl. ¶ 14.

2009 Services Agreement.[39] The Plaintiffs complain that the Defendants, through the credit facility and the 2011 Amendment:

> (1) pledged the assets of the joint company for more than a half a billion dollar loan to benefit a separate company owned entirely by Defendants; (2) pledged Plaintiffs' own equity interests in support of this same loan; (3) increased Plaintiffs' Payout Hurdle by 250%; and (4) refused to apply capital returned to them under this loan and a recent initial public offering to this Payout Hurdle.[40]

In March 2012, the Plaintiffs were terminated without cause from employment by Summit.[41]

II. CONTENTIONS

The Plaintiffs protest the changes made by the Defendants to the 2009 Services Agreement. They argue that the 2011 Amendment is invalid and in breach of the 2009 Services Agreement.[42] They then object to a number of actions taken by the Defendants pursuant to the 2011 Amendment,[43] actions that they claim would have been otherwise prohibited by the 2009 Services Agreement.[44] According to the Plaintiffs, these actions, as well as the very act of amending the

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[39] Compl. ¶ 16.
[40] Answering Br. 1.
[41] Compl. ¶¶ 19-20.
[42] Compl. ¶ 26.
[43] In Count II of the Complaint, the Plaintiffs allege that the Defendants erred in: "a. [u]nilaterally altering the fundamental character and risk profile of Plaintiffs' interest in DFW Services; b. [i]ntentionally and wrongfully circumventing the Class B interest distribution provisions; c. [e]ntering into significant business decisions without approval of the Board; and d. [r]efusing to issue the required reports and financial statements." Compl. ¶ 28. Similar allegations appear in Count III and IV. Compl. ¶¶ 33, 38.
[44] Compl. ¶ 28.

2009 Services Agreement constituted a breach of contract,[45] or alternatively a breach of the implied covenant of good faith and fair dealing.[46]

The Plaintiffs separately allege a claim of breach of fiduciary duty against Summit and Summit Holdings.[47] They assert that Summit and Summit Holdings have breached their fiduciary duties under both the 2009 Services Agreement and the Management Agreement by "*inter alia,* failing to disclose material information to Plaintiffs, acting in their own self-interest rather than in the best interest of Plaintiffs, and failing to act with due care in making decisions as to the management of [Services] and [Management]."[48]

The Plaintiffs also allege that Summit and Summit Holdings committed fraud by failing to alert Plaintiffs: (i) to the material fact that they had purported to amend the 2009 Services Agreement in a manner that materially and detrimentally affected Plaintiffs' membership interests;[49] and (ii) of the full scope and character of the credit facilities and resulting encumbrances upon Services that materially altered the risk and composition of Plaintiffs' membership interests.[50]

[45] Compl. ¶¶ 30-34.
[46] Compl. ¶¶ 35-39.
[47] Compl. ¶¶ 40-46.
[48] Compl. ¶ 44.
[49] Compl. ¶ 48.
[50] Compl. ¶ 49.

Finally, the Plaintiffs seek judicial dissolution of both Services and Management; they also ask that the Defendants be required to account to the Plaintiffs for their breaches.[51]

The Defendants, under Court of Chancery Rule 12(b)(6), have moved to dismiss all of these claims.

III. ANALYSIS

A. *Standard under Court of Chancery Rule 12(b)(6)*

The Plaintiffs' claims, when reviewed under a Rule 12(b)(6) motion to dismiss, are subject to the "reasonable conceivability" standard.[52]

> When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[53]

Although the Court "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,'"[54] a motion to dismiss will be denied "as long as there is a reasonable

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[51] Compl. ¶ 59.
[52] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (citation omitted).
[53] *Id.* at 536 (citation omitted).
[54] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011) (quoting *Price v. E.I. DuPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).

possibility that a plaintiff could recover."[55] Dismissal is proper under Rule 12(b)(6) if "it appears with reasonable certainty that, under any set of facts which could be proven to support the claim, plaintiffs would not be entitled to relief."[56]

B. *Standing*

The Defendants argue that "because the Plaintiffs are not Members of Services or parties in any capacity to the 2009 Services Agreement," the Plaintiffs lack standing in a lawsuit to enforce the 2009 Services Agreement, whether under their requests for declaratory judgment (Counts I and II) or for money damages (Count III).[57]

The Declaratory Judgment Act[58] requires an "actual controversy" to "form the basis for jurisdiction in a declaratory judgment action."[59] "The term 'actual controversy' should be liberally interpreted to give wide scope to the provisions of the [Declaratory Judgment Act] within the purposes thereof,"[60] and the courts "entertain declaratory judgment actions where the alleged facts are such that a true

[55] *Frank v. Elgamal*, 2012 WL 1096090, at *7 (Del. Ch. Mar. 30, 2012).
[56] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65 (Del. 1995) (citing *In re Tri–Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993)).
[57] Opening Br. in Supp. of Defs.' Mot. to Dismiss ("Opening Br.") 12.
[58] 10 *Del. C.* ch. 65.
[59] *Rollins Intern., Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (1973).
[60] *Id.*

dispute exists and eventual litigation appears to be unavoidable."[61] There are four "prerequisites of an 'actual controversy'":

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[62]

The Defendants challenge the second prerequisite, asserting that the "Plaintiffs have not pled facts to show that they have any legal interest in the [2009 Services Agreement]."[63] The Plaintiffs respond with the suggestion that, at least for the purposes of standing, the 2009 Services Agreement "incorporates" the Award Agreements (to which the Plaintiffs are undeniably parties) to a certain extent.[64]

Section 12.3 of the 2009 Services Agreement states that:

> [The 2009 Services Agreement], together with the Operative Agreements, constitutes the entire agreement among the Members relating to matters contemplated hereby and thereby, and supersede all prior Contracts or agreements with respect to the matters contemplated hereby and thereby, whether oral or written.[65]

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[61] *Id.* (citing *Stabler v. Ramsay*, 88 A.2d 546, 550 (Del. 1952)).
[62] *Id.* at 662-63 (citing *Marshall v. Hill*, 93 A.2d 524, 525 (Del. Super. 1952)).
[63] Opening Br. 12-13.
[64] Answering Br. 13.
[65] 2009 Services Agreement § 12.3.

The 2009 Services Agreement defines "Operative Agreements" as "the Contribution Agreement, the [Management] Agreement and the Management Rights Letters."[66] Although the 2009 Services Agreement does not include the Award Agreements within the Operative Agreements, the Management Agreement is listed as an Operative Agreement.

Section 12.4 of the Management Agreement provides that:

> [The Management Agreement], together with the [2009 Services Agreement] and the other Operative Agreements, constitutes the entire agreement among the Members relating to [Management] and supersedes all prior contracts or agreements with respect to [Management], whether oral or written.[67]

On September 3, 2009, joinders were executed to the Management Agreement,[68] and the Plaintiffs became Members as defined under the Management Agreement. Section 11.1 of the Management Agreement defines Operative Agreements as "this Agreement, any Award Agreement and any employment or service agreement between [Services], [Management] or any of their respective Affiliates and any Member (other than the Managing Member)."[69]

The Plaintiffs may have proffered, in the general sense, a reasonable inference that they have somewhat of a "claim of right or other legal interest" for

[66] 2009 Services Agreement § 2.1. The term "Management Rights Letters" refers to letter agreements between Services and ECP-related entities.
[67] Management Agreement § 12.4.
[68] Answering Br. Exs. 5-A to 5-D.
[69] Management Agreement § 11.1.

the purposes of the broad standing requirements of the Declaratory Judgment Act, or even for their damage claims because (i) their Award Agreements are listed as Operative Agreements under the Management Agreement, (ii) the Management Agreement is listed as an Operative Agreement under the 2009 Services Agreement, and (iii) the 2009 Services Agreement includes Operative Agreements. Because the Compensation Agreements were executed at the same time and address related subject matters, they should be read together in a way that treats language chosen for multiple agreements in a consistent fashion.[70] They are, however, separate agreements, each specifying separate rights and duties. Provisions in one agreement are not read into another agreement unless the wording of the agreement evidences the parties' intent to incorporate terms from another agreement.[71] The Court eschews a blanket approach to standing in lieu of direct consideration of each of the Plaintiffs' claims.

C. *Count I – The Validity of the 2011 Amendment*

Count I of the Complaint seeks a declaratory judgment that the 2011 Amendment "is invalid and in breach" of the 2009 Services Agreement.[72] The Plaintiffs allege that the Defendants, "without obtaining Plaintiffs' consent, amended the [2009 Services Agreement] in a way that materially affected each of

[70] *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *1 (Del. Ch. Feb. 28, 1990).
[71] *Wolfson v. Supermarkets Gen. Hldgs.*, 2001 WL 85679, at *5 (Del. Ch. Jan. 23, 2001).
[72] Compl. ¶ 26.

the Plaintiffs' interests."[73] The Plaintiffs rest this claim on Section 12.5 of the 2009 Services Agreement:

> [The 2009 Services] Agreement and any provision hereof may be amended, modified or supplemented from time to time only if approved by a written instrument signed by Class A Members holding in the aggregate not less than 80% of the aggregate Contribution Percentages held by all Class A Members; provided no such amendment, modification or supplement shall . . . adversely affect the interest of any Member in any Net Income, Net Loss, or distributions without the consent of such Member. . . .[74]

However, the Plaintiffs are not, and have never been, Members of Services. "Member" is defined under Section 2.1 of the 2009 Services Agreement as "each Class A Member or each Class B Member, as the context may require," and the 2009 Services Agreement states that such Members "shall constitute the 'members' (as the term is defined in the [Delaware Limited Liability Company] Act)" of Services.[75] Exhibit A to the 2009 Services Agreement identifies Services' Class A Members as Summit and TCEH, and the sole Class B Member as Management.[76] No part of the 2009 Services Agreement lists the Plaintiffs as Members. Therefore, the Plaintiffs may not rely on Section 12.5 of the 2009 Services Agreement. As the Plaintiffs have not pleaded any other grounds suggesting that their consent is required for amendments to the 2009 Services

[73] Compl. ¶ 26.
[74] 2009 Services Agreement § 12.5(b).
[75] 2009 Services Agreement § 2.1.
[76] 2009 Services Agreement Exs. A, A-2.

Agreement, they have not pleaded a reasonably conceivable claim under Count I. Thus, their challenge to the 2011 Amendment under Section 12.5 of the 2009 Services Agreement fails.

D. Counts II, III and IV: The Validity of Actions Purportedly Taken Pursuant to the 2011 Amendment

Counts II through IV of the Complaint generally challenge four categories of actions taken by the Defendants:

> (a) [u]nilaterally altering the fundamental character and risk profile of Plaintiffs' interest in [Services]; (b) [i]ntentionally and wrongfully circumventing the Class B interest distribution provisions; (c) [e]ntering into significant business decisions without approval of the Board; and (d) [r]efusing to issue the required reports and financial statements.[77]

The Plaintiffs have not pleaded a sufficient challenge to the validity of the latter two categories of the Defendants' actions. The Plaintiffs have seemingly abandoned their claim that the Defendants invalidly "enter[ed] into significant business decisions without approval of the Board." Summit, after it acquired all of TCEH's interest in Services, controlled the appointment of all four members of the

[77] Compl. ¶ 28; *see also* Compl. ¶¶ 33, 38. Count II seeks a declaratory judgment addressing these alleged failures; Count III seeks damages for breach of contract; and Count IV seeks damages for breach of the implied covenant of good faith and fair dealing. To the extent that Plaintiffs seek declaratory relief or breach of contract damages regarding actions allowed under the 2011 Amendment but not under the 2009 Services Agreement, those claims are barred because the Defendants held the authority to amend the 2009 Services Agreement. Another complicating factor is that Count II and Count III may be read as based on the 2009 Services Agreement and not the 2011 Amendment which was in effect at the time of most, if not all, of the challenged conduct.

Board.[78] The Defendants observe that it "makes no difference whether 'significant business decisions' are approved by Summit through a four-person Board that it unanimously appoints (and can replace for any reason or no reason at all) under the [2009 Services Agreement] or by Summit in its capacity as sole Managing Member under the 2011 Amendment."[79] The Plaintiffs did not pursue this contention in their briefing or at oral argument, and, therefore, have conceded it.

As for the "required reports and financial statements," these were required only to be issued to Class A Members under the 2009 Services Agreement.[80] The Plaintiffs—who were not Class A Members of Services—were never entitled (contractually or otherwise) to these "required reports and financial statements." Only Summit and TCEH initially, and later only Summit, could claim a right to receive such information. Moreover, the Plaintiffs have also abandoned this claim by failing to address it in their Answering Brief or at oral argument.

The Plaintiffs are left with the claims in Count II, III and IV of the Complaint that the Defendants "unilaterally altered the fundamental character and risk profile of the Plaintiffs' interest in Services" and "intentionally and wrongfully circumvented the Class B interest distribution provisions."[81] As discussed above, the Plaintiffs claim that the Defendants' modifications to distributions under the

[78] 2009 Services Agreement § 5.3(a).
[79] Opening Br. 23.
[80] 2009 Services Agreement §§ 6.3, 6.4.
[81] Compl. ¶¶ 28, 33, 38.

2009 Services Agreement would result in a decrease in Downstairs Units issued to Management, and a corresponding decrease under the Management Agreement in Upstairs Units issued to the Plaintiffs.

The Plaintiffs attempt to develop these claims in their Answering Brief,[82] by further focusing on how: (i) the Defendants raised Summit's deemed capital contribution amount from $85,081,803.44 to $283,612,300.81, increasing the Payout Hurdle by about 250% from its previous level of $113,442,404.00;[83] (ii) the revised agreement included a new provision that permitted Summit "to cause each Member to pledge, hypothecate, mortgage, assign, transfer, or grant security interests in or other liens on the Members' Units";[84] (iii) the amendments removed the limitation that borrowed money facilities could be entered into only on behalf of Services or one of its subsidiaries;[85] (iv) the Defendants revised the definition of Available Cash to remove limitations and allow the Defendants unbridled discretion to determine revenue, expenses and reserves.[86]

[82] Answering Br. 8. The Court will address all of these claims, even though some may have no basis in the Complaint and, thus, should not be considered because they were not advanced until the Plaintiffs filed their Answering Brief. *See, e.g.*, *King Constr. Inc. v. Plaza Four Realty, Inc.*, 976 A.2d 145, 155 (Del. 2009).
[83] 2011 Amendment § 3.3.
[84] 2011 Amendment § 9.12.
[85] *Compare* 2011 Amendment § 5.5 *with* 2009 Services Agreement § 5.8(g).
[86] 2011 Amendment § 2.1 (Definitions).

The Plaintiffs' first new theory relates to an increase in the Payout Hurdle that was established in the Services Agreement.[87] The definition of "Payout Hurdle" in the 2009 Services Agreement is tied to aggregate capital contributions—not to a number fixed in 2009.[88] Thus, the 2009 Services Agreement allowed for additional capital contributions—as one would reasonably expect for a growing business—and, under the business model adopted, Summit is to be reimbursed for its capital contributions before any "profits" are divvied up.[89]

The second new argument postulated by the Plaintiffs involves a pledge of members' interests. The interests that were pledged belong to Members of Services. The Plaintiffs, Members of Management, are not Members of Services and, thus, their interests were not pledged.[90]

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[87] The elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) a resulting damage to the plaintiffs. *H-M Wexford LLC v. Encorp. Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003).

The Plaintiffs do not assert their claims as third-party beneficiaries under the 2009 Services Agreement. "To qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract." *Madison Realty P'rs 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001). Section 12.6 of the 2009 Services Agreement expressly provides that "it is not the intention of the parties to confer third-party beneficiary rights upon any other Person" except to the extent provided for exculpation, indemnification, and reimbursement for members, managers and officers of Services.

[88] *See* 2009 Services Agreement § 2.1 (Definitions).

[89] The increase in the Payout Hurdle affects the timing (and, perhaps, the likelihood) of distributions to Management and not distributions directly to the Plaintiffs. The Plaintiffs' expectations are dependent upon Services' payment to the intervening entity—Management.

[90] The Plaintiffs' argument is based upon the Guaranty and Collateral Agreement which appears as Exhibit 4 to the Supplemental Transmittal Affidavit of Jillian G. Remming. A review of that document confirms that the only relevant "Subsidiary Guarantor" is Services, not Management.

The Plaintiffs' next argument is that the funds obtained through a Summit Holdings credit facility should be applied toward meeting the Payout Hurdle. Nothing in either the 2009 Services Agreement or the 2011 Amendment requires such a determination.[91]

Finally, the Defendants address the Plaintiffs' remaining questions regarding the revised definition of Available Cash by questioning whether any injury can be traced to those modifications. Services' board, under the 2009 Services Agreement, had the power to alter the process of calculating expenses. The Plaintiffs complain that this change somehow allows the Defendants to allocate the expenses of others to Services, but that power is tied to "Company [*i.e.*, Services] expenses." In addition, despite Plaintiffs' criticism of the risk that the Defendants might arbitrarily create excess reserves, even the 2009 Services Agreement authorized the Board to factor reserves into its determination of expenses. The

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In the Pledge Agreement portion (Article 3 and Schedule I), Management pledged its Class B units in Services. There is no pledge of any asset owned by the Plaintiffs. The Plaintiffs also rely upon a provision (Section 9.12) in the 2011 Amendment that limits any pledge of interest to matters involving "indebtedness of the Company." Services need not be the borrower under that provision, and the Court has no allegation from which to infer that Services was not otherwise indebted.

[91] The Plaintiffs' concerns about the pledge of Services' assets to support the credit facility is further undermined by the flexibility accorded Services in guaranteeing the obligations of another "Person." *See* 2009 Services Agreement § 5.7(f) and § 2.1 (Definitions).

Moreover, the funds obtained through the credit facility are not Available Cash for these purposes. For example, the 2011 Amendment defines Available Cash as "proceeds from the Company's operations . . . and any net cash from [equity issuance or debt issuance]." 2011 Amendment § 2.1. These funds, obtained by Summit Holdings, were not "net" cash to Services and, thus, even arguably available for distribution to Management or for application to satisfying the Payout Hurdle.

principal change accomplished by the 2011 Amendment, in this context, reflects the reality that Summit had gained control of all of Services' Class A membership units.[92]

Count IV of the Complaint alleges that the Defendants breached the implied covenant of good faith and fair dealing.[93] The Plaintiffs argue that even if the Defendants' actions were technically permissible under the 2009 Services Agreement or the 2011 Amendment, the Defendants still violated the implied covenant of good faith and fair dealing because they "repeatedly acted in bad faith to prohibit Plaintiffs from receiving the 'fruits of their bargain'" under the 2009 Services Agreement, the Management Agreement, and the Award Agreements.[94]

The Defendants concede that the elimination of language regarding the duty of good faith and fair dealing from the 2009 Services Agreement in 2011 Amendment had no legal effect, as Delaware law prohibits LLCs from eliminating such a duty,[95] and that the Defendants remain bound by the implied covenant of

[92] The Plaintiffs' claims specifically based on the revised definition of "Available Cash" first appear in their Answering Brief. The Complaint does allege that the change in the definition of Available Cash "radically alter[ed] the calculation of [their] distributions." Compl. ¶ 11. As noted, the Court has considered these arguments, even though they may have been untimely. Not only is consideration of untimely arguments somewhat unfair to the Defendants, but it also forces the Court to address contentions without the benefit of the well-developed factual allegations one expects (but does not always find) in a complaint. The Plaintiffs' arguments regarding Additional Cash are, if assessed at the Services level, more persuasive than some of their other arguments.

[93] Compl. ¶¶ 36-37.

[94] Answering Br. 2.

[95] 6 *Del. C.* § 18-1101(c).

good faith and fair dealing.[96] They maintain, however, that the Plaintiffs have failed to state a claim for the breach of the implied covenant of good faith and fair dealing.[97]

To state a claim for breach of the implied covenant, the Plaintiffs "must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff."[98] "General allegations of bad faith conduct are not sufficient."[99] "The plaintiff must allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract."[100] "The implied covenant comes into play, however, only where a contract is silent as to the issue in dispute."[101] If the "subject . . . is expressly covered by the contract[,]" the implied covenant does not apply.[102] In considering the implied covenant, the Court focuses on "what the parties likely would have done if they had considered the issues involved."[103] It must be "clear from what was expressly agreed upon that the parties who

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[96] Opening Br. 17.
[97] Opening Br. 24-25.
[98] *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).
[99] *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).
[100] *Id.*
[101] *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *10 (Del. Ch. Dec. 22, 2010) (citing *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *11 (Del. Ch. June 16, 2009)).
[102] *Id.* (quoting *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009) (internal quotation marks omitted)).
[103] *Lonergan v. EPE Hldgs. LLC*, 5 A.3d 1008, 1018 (Del. Ch. 2010) (internal quotation marks omitted).

negotiated the express terms of the contract would have agreed" to the implied term "had they thought to negotiate with respect to that matter."[104]

The Plaintiffs offered one formulation of the implied covenant: in order "to amend the Services [A]greement in a way that essentially eliminates any future payment for the [P]laintiffs, [the Defendants] specifically need to have the consent of the [P]laintiffs in order to modify the terms of their payout."[105] The shortcoming with the Plaintiffs' effort is that the amendment process is expressly set out in Section 12.5 of the 2009 Services Agreement, and does not require the consent of Plaintiffs as non-Members.[106] Because the 2009 Services Agreement expressly provides for the way in which it is to be amended, an implied covenant is not appropriate to supplement or to reform the express terms for the process to adopt amendments.[107]

The implied covenant, however, reaches beyond the mechanics of amending an operating agreement. Another formulation of the implied covenant appears in Plaintiffs' Answering Brief: "The purpose of the parties' bargain here is clear: in exchange for their continued service as the gas system's executives, Plaintiffs would receive a share of the profits generated by that system after Defendants

[104] *Id.*
[105] Tr. of Oral Arg. (Dec. 12, 2012) 49.
[106] 2009 Services Agreement § 12.5.
[107] *See, e.g.*, *Narrowstep, Inc.*, 2010 WL 5422405, at *11. The Plaintiffs are not looking for "gap-filling." They want the Court to draft a more favorable agreement.

received their return of capital as calculated under the Compensation Agreements' provisions."[108] Yet, the Plaintiffs have not alleged that this commitment has been breached. They retain their rights to a share of the profits of Services, as paid through Management.

The Plaintiffs rely upon *Bay Center* as a prime example of how the implied covenant can help parties in their position.[109] In that case, one member of a limited liability company contributed assets and the other member agreed to provide management skills. An agreement, orchestrated by the second member, between two other entities to provide management services failed and, for its own purposes, the second member did not act to protect the first member's expectations. Here, however, the relationship between the Defendants and the Plaintiffs is much different. Summit provided the vast bulk of the investment and the Plaintiffs implicitly acknowledged that by taking only an indirect interest in profits, and they did not acquire any corporate governance authority over Services. They may be disappointed in what Summit has done, but they have not shown how Summit acted outside of the business structure and the management discretion to which they agreed.

[108] Answering Br. 26.
[109] *Bay Ctr. Apts. Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009).

Although not articulated as such, the Plaintiffs seem to be arguing for an implied covenant that would require Summit to manage Services in such a way as would keep the Payout Hurdle low and allow for a distribution that would ultimately reach the Plaintiffs as quickly as possible. One understands why the Plaintiffs would seek to characterize the "fruits of their bargain" in that fashion, but it was not required of Summit (or of Services) either explicitly or implicitly. The Plaintiffs have not alleged, under the reasonable conceivability standard, any rights under an implied covenant of good faith and fair dealing.

E. *Count V: Breach of Fiduciary Duty*

Count V of the Complaint alleges that Summit and Summit Holdings have breached their fiduciary duties owed to the Plaintiffs under the 2009 Services Agreement and the Management Agreement.[110] Under the 2009 Services Agreement, Summit was the managing member of Services until April 1, 2011, at which point the 2011 Amendment established Summit Holdings as the managing member. Summit is and was at all relevant times the managing member of Management. The Plaintiffs allege that Summit and Summit Holdings breached their fiduciary duties by (i) failing to disclose material information to Plaintiffs, (ii) acting in their own self-interest rather than in the best interest of Plaintiffs, and

[110] Compl. ¶ 44.

(iii) failing to act with due care in making decisions as to the management of Services and Management.[111]

By 6 *Del. C.* § 18-1101(c), fiduciary duties, if they otherwise exist, may be eliminated:

> To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager . . . [those] duties may be expanded or restricted or eliminated by provisions in the [LLC] agreement . . . .[112]

1. Services

The difficulty with the Plaintiffs' fiduciary duty claims regarding Services is simple. They were not members of Services and no fiduciary duties were owed under the 2009 Services Agreement establishing Services. Section 5.11 of the 2009 Services Agreement provides that:

> No Manager . . . shall have any duties (including fiduciary duties) or liabilities relating thereto to the Company, the Members or the other Managers . . . [E]ach Manager shall be entitled to act solely on behalf, and in the interests, of the Member that has designated such Manager.[113]

This unambiguous language precludes any fiduciary duty claim against Summit or Summit Holdings.

[111] Compl. ¶ 44.
[112] 6 *Del. C.* § 18-1101(c).
[113] 2009 Services Agreement § 5.11.

2. Management

Section 5.6 of the Management Agreement provides that Summit:

> shall have no duties (including fiduciary duties) or liabilities relating thereto to [Management] or to the other Members, except as may be specifically provided [in the Agreement] and required by any provisions of the [Delaware LLC] Act or other applicable law that cannot be waived. Accordingly, [Summit] shall be entitled to act solely on its own behalf, and in its own interests.[114]

The Plaintiffs, however, argue that despite this language, Section 1.1 of the Management Agreement allows for the imposition of default fiduciary duties.[115] Section 1.1 provides that "except as provided herein, the rights, duties and liabilities of each Member will be as provided in the [Delaware LLC Act]."[116] The limiting aspect of this argument is that "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."[117] Because Section 5.6 of the Management Agreement specifically eliminates any fiduciary duties on the part of Summit, the Plaintiffs have not pleaded a reasonably conceivable claim that they are owed fiduciary duties.

[114] Management Agreement § 5.6.
[115] Answering Br. 22.
[116] Management Agreement § 1.1.
[117] *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

F. *Count VI: Fraud*

Count VI of the Complaint alleges fraud on the part of the Defendants.[118] Rule 9(b) requires that the Plaintiffs allege, with particularity,[119] that the Defendants either "(1) represented false statements as true, (2) actively concealed facts which prevented [the Plaintiffs] from discovering them, or (3) remained silent in the face of a duty to speak."[120] The Plaintiffs bring their fraud claim under the latter two theories of "active concealment" and "duty to speak,"[121] alleging that the Defendants failed to inform them of (i) the existence of the 2011 Amendment,[122] and (ii) "the full scope and character of the credit facilities and resulting encumbrances upon Services that materially altered the risk and composition of Plaintiffs' membership interests."[123]

The Plaintiffs argue that the Defendants had a "duty to speak" on the grounds that when an action requires consent, that requirement necessarily establishes a duty of disclosure.[124] As discussed above, the Plaintiffs are not (and have not been) Members of Services, and their consent to the 2011 Amendment

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[118] Compl. ¶¶ 47-52.
[119] Ct. Ch. R. 9(b).
[120] *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 143 (Del. Ch. 2005).
[121] Answering Br. 28.
[122] Compl. ¶ 48. "For almost a year, Summit and/or Summit Holdings failed to alert Plaintiffs to the material fact that they had purported to amend the [Services Agreement] in a manner that materially and detrimentally affected Plaintiff's membership interests."
[123] Compl. ¶ 49.
[124] Answering Br. 29 (citing *Bay Ctr.*, 2009 WL 1124451, at *11; *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992)).

was not required. The Defendants therefore had no duty to disclose either the existence of the 2011 Amendment or the credit facilities to the Plaintiffs.

In order to plead "active concealment," the Plaintiffs must "support[] an inference that the '[D]efendant[s] took some action affirmative in nature designed or intended to prevent and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent injury.'"[125] Like a claim of overt misrepresentation, a claim of fraudulent concealment requires the plaintiff to allege "an intentional deception of the plaintiff by the defendant, which the plaintiff relies upon to his detriment."[126] Under Delaware law, "active concealment" requires more than mere silence.[127]

The Plaintiffs, however, allege only two facts to support their theory of active concealment, both related to the existence of the 2011 Amendment.[128] They claim that Wiggs sought a copy of the 2011 Amendment, but was denied on the grounds that the 2011 Amendment prevented its disclosure.[129] They also claim that Small was not given an answer to his question as to whether there were any

[125] *Corp. Prop. Assoc. 14 Inc. v. CHR Hldg. Corp.*, 2008 WL 963048, at *7 (Del. Ch. Apr. 10, 2008) (quoting *Metro Commc'n Corp. BVI*, 854 A.2d at 150).
[126] *Metro Commc'n Corp. BVI*, 854 A.2d at 150.
[127] *See Bay Ctr.*, 2009 WL 1124451, at *12 ("[Active concealment] requires affirmative action on the part of defendant.").
[128] Answering Br. 30-31.
[129] Compl. ¶ 12; Answering Br. 30-31.

amendments to the 2009 Services Agreement or Management Agreement.[130] However, because the Plaintiffs could not challenge the adoption of the 2011 Amendment, their lack of knowledge of the 2011 Amendment could not have been relied upon to their detriment. Therefore the Plaintiffs have not pleaded a reasonably conceivable claim under Count VI.

G. *Count VII: Judicial Dissolution*

Count VII of the Complaint seeks an order dissolving both Services and Management.[131] The Plaintiffs seek to do so under 6 *Del. C.* §§ 18-802 and 18-803,[132] on two grounds: (i) that the "Defendants have entered into a series of transactions encumbering the assets of Services and Management that have harmed Plaintiffs" and cannot be easily undone,[133] and (ii) that the "Defendants' conduct has also prevented the parties from negotiating in good faith a fair and amicable separation of their respective business interests."[134]

By 6 *Del. C.* § 18-802:

> On 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.

[130] Compl. ¶ 18; Answering Br. 31.
[131] Compl. ¶ 59.
[132] Compl. ¶¶ 54-55.
[133] Compl. ¶ 57.
[134] Compl. ¶ 58.

Further, by 6 *Del. C.* § 18-803:

> [T]he Court of Chancery, upon cause shown, may wind up the limited liability company's affairs upon application of any member or manager, or the member's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee.

Because the Plaintiffs are neither members nor managers of Services, they cannot apply for dissolution of Services under either statutory provision. They are therefore left with their claim seeking dissolution of Management.

Judicial dissolution is "a limited remedy that Delaware courts grant sparingly."[135] In the absence of extensive case law interpreting § 18-802, the Court looks to the analogous limited partnership dissolution statute.[136] The two situations where the Court has ordered dissolution are (i) where there is "deadlock" that prevents a corporation from operating,[137] and (ii) where the defined purpose of the entity is fulfilled or impossible to carry out.[138] Plaintiffs do not allege deadlock on

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[135] *Roth v. Laurus U.S. Fund, L.P.*, 2011 WL 808953, at *3 (Del. Ch. Feb. 25, 2011) (citing *In re Arrow Inv. Advisors, LLC*, 2009 WL 1101682, at *2 (Del. Ch. Apr. 23, 2009)).

[136] *In re Seneca Invs. LLC*, 970 A.2d 259, 262 (Del. Ch. 2008) (citing *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005) ("Without much case law applying [§ 18-802], the court looks by analogy to the dissolution statute for limited partnerships, 6 *Del. C.* § 17-802, which contains essentially the same wording as the LLC statute.") (citation omitted)).

[137] *Id.* (citing *In re Silver Leaf*, 2005 WL 2045641, at *11 (ordering dissolution of an LLC where "[t]he vote of the members is deadlocked"); *Haley v. Talcott*, 864 A.2d 86, 89 (Del. Ch. 2004) (ordering dissolution of an LLC where there was "indisputable deadlock between the two 50% members of the LLC")).

[138] *Id.* (citing *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, 1989 WL 63901, at *6 (Del. Ch. June 8, 1989) ("ordering dissolution of a limited partnership where the purpose of the partnership was to acquire and operate certain real property and that purpose was frustrated because the sole lessee of the property became insolvent and market conditions made finding a new tenant 'practically impossible.'")).

the part of the managers, nor could they because under the Management Agreement, Summit solely controls Management.

In evaluating whether the defined purpose of the entity is fulfilled or impossible to carry out, "the Court must assess whether it is reasonably practicable to carry on the business of [the] limited partnership, and not whether it is impossible."[139] The Court looks to "the purpose clause set forth in the governing agreements,"[140] and determines "the nature of the limited partnership's business and whether the general partner can continue that business in accordance with the limited partnership agreement."[141] "Dissolution is an extreme remedy to be applied only when it is no longer reasonably practicable for the company to operate in accordance with its founding documents."[142]

The purpose clause in the Management Agreement provides that:

> The nature of the business or purposes to be conducted or promoted by [Management] is to engage in any lawful act or activity for which limited liability companies may be organized under [the Delaware Limited Liability Company Act]. [Management] may engage in any

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[139] *Roth*, 2011 WL 808953, at *3 (quoting *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10 (internal quotation marks omitted)); *see also Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *6 (Del. Ch. Sept. 10, 1999) ("[T]he standard to be applied in a dissolution proceeding under § 17–802 is that of reasonable impracticability rather than impossibility . . . ."); *PC Tower Ctr., Inc.*, 1989 WL 63901, at *6 ("The standard set forth by the Legislature is one of reasonable practicability, not impossibility.").

[140] *In re Seneca*, 970 A.2d at 263 (citing *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv.*, 1996 WL 506906, at *3 (Del. Ch. Sept. 3, 1996) (looking to the purpose clause in the partnership agreement to determine the purpose of the partnership)); *see also PC Tower Ctr.*, 1989 WL 63901, at *5.

[141] *Roth*, 2011 WL 808953, at *3.

[142] *In re Arrow*, 2009 WL 1101682, at *1.

> and all activities necessary, desirable or incidental to the accomplishment of the foregoing.[143]

In *Seneca*, the Court approved a similarly broad purpose clause that stated: "the purpose of the Company is to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law."[144] In that same case, the Court stated that "a corporation may be formed and maintained as a passive instrumentality-for example, an entity that does no more than take and hold title to tangible investments is a commonly encountered phenomenon."[145]

Although the Plaintiffs take issue with the credit facility entered into by the Defendants and the initial public offering of Summit Holdings,[146] they have not pleaded a reasonably conceivable claim that "it is no longer reasonably practicable for [Management] to operate in accordance" with its broad purpose clause, one which allows Management to engage in any lawful act or activity for which limited liability companies may be organized under the Delaware Limited Liability Company Act.

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[143] Management Agreement § 1.9.
[144] *In re Seneca*, 970 A.2d at 261.
[145] *Id.* (quoting *Giancarlo v. OG Corp.*, 1989 WL 72022, at *4 (Del. Ch. June 23, 1989) (internal quotation marks omitted)).
[146] Answering Br. 33.

IV. CONCLUSION

For the foregoing reasons, this action will be dismissed because the Complaint fails to state a claim upon which relief can be granted. An implementing order will be entered.