IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TOWERHILL WEALTH MANAGEMENT LLC f/k/a CAPITAL PRIVATE WEALTH MANAGEMENT, LLC, TOWERHILL US EQUITIES, LLC f/k/a NEWPORT NET PERFORMANCE LLC, TOWERHILL LONG/ SHORT EQUITY f/k/a CAPITAL PRIVATE WEALTH STOCK SELECTION, LLC, and TOWERHILL INTERNATIONAL EQUITIES, LLC f/k/a CPW INTERNATIONAL EQUITIES, LLC, Delaware limited liability companies.	)	
Plaintiffs,	)	
v.	)	C.A. No. 3830-VCS
THE BANDER FAMILY PARTNERSHIP, LP,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: March 10, 2010
Date Decided: June 4, 2010

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STRINE, Vice Chancellor.

I. Introduction

This dispute is between a wealthy investor — Dr. Steven J. Bander and the vehicle through which he makes investments, the Bander Family Partnership, LP (collectively, "Bander") — and a local St. Louis, Missouri investment fund, Towerhill Wealth Management LLC ("Towerhill"), in which Bander invested from March 2005 to the end of 2007. Although the precise origin of the dispute still eludes me, it appears that the parties had a falling out in late 2007, when three of Towerhill's partners left to start a competing firm, taking Bander and about half of Towerhill's existing clients with them. As Towerhill unwound Bander's investments, Bander pressed a number of demands upon Towerhill, and the dispute grew more rancorous, eventually leading Towerhill to initiate this litigation. The ill will that has grown between Bander and Towerhill has affected the progression of this matter, which has moved forward ponderously due to foot-dragging in discovery and gratuitous motion practice, and has prevented the parties from resolving a dispute that should have been concluded long ago.

With one exception, Bander's claims have the flavor of someone who is using litigation, including allegations that beggar belief, to exact a toll on a personal adversary. For example, Bander alleges that Towerhill improperly delayed the return of the capital he invested after he notified Towerhill that he was pulling out of the fund. The agreements generally provide that 90% of the capital was to be returned within thirty business days, with the remaining 10% to be returned after valuation audits were conducted. Bander argues that the return of

90% of his investment was untimely even though Towerhill returned it *before* the 30 business day deadline expired. And, Bander argues that Towerhill unreasonably delayed the return of the remaining 10% even though Towerhill sent the money to Bander a couple of *days* after the audits were complete, and even though he has been unable, as he conceded at oral argument, to articulate a reason why that delay of a few days was material. Continuing in this vein, Bander argues that Towerhill refused to give him certain reports that he requested, and that this failure to disclose those reports require Towerhill to provide him with an accounting. But, Bander has failed to show that he is entitled to those reports, or that failing to receive those reports harmed him in any material way.

Thus, on Towerhill's motion for summary judgment, I decide those claims discussed above in Towerhill's favor. But, there is one claim where Bander's allegations have merit. Namely, Bander claims that Towerhill improperly withheld $1 million from his redemption. The undisputed facts reveal that Towerhill withheld the $1 million on the grounds that it needed the funds to cover any litigation expenses arising from Bander's redemption request. In other words, Towerhill held back some of Bander's money in order to fund the future legal battles with Bander that were brewing. Despite Towerhill's argument otherwise, I find no plausible basis in the relevant contracts for Towerhill's position. Those agreements only allow Towerhill to deduct expenses — such as administrative costs — associated with executing a redemption request. Therefore, Towerhill

must return the $1 million, with interest at the statutorily prescribed rate, to Bander.

II. Factual Background

Discussed below are the undisputed facts — as they emerge from the summary judgment record — that are relevant to the issues I must decide.

A. Bander Purchases Membership Interests In A Number Of Towerhill's Funds

In 2005, Bander entered into an investment advisory agreement (the "Investment Advisory Agreement") with Towerhill, and entrusted more than $26 million to Towerhill's management. Following Towerhill's advice, Bander invested in three funds that Towerhill managed, purchasing on March 21, 2005 membership interests in Towerhill U.S. Equities, LLC ("U.S. Equities"), Towerhill Long/Short Equity, LLC ("Long/Short Equity"), and Towerhill International Equities, LLC ("International Equities," collectively with U.S. Equities and Long/Short Equity, the "Investment LLCs"). The Investment LLCs were not standard mutual funds of the type in which the typical American invests, but rather complex private funds that invested subscribers' capital in relatively illiquid positions among a number of advisors independent from Towerhill.[1] When purchasing interests in these funds, Bander executed subscription agreements that bound Bander to the terms of the Investment LLCs' respective

[1] *See* Def.'s Ans. Br. Ex. J (Towerhill's Application for Investment Advisor Registration (Nov. 15, 2009)) (describing the nature of Towerhill's operations and investment strategy); Figura Dep. 74-77 (discussing the various advisors in which the Investment LLCs invested); Figura Aff. ¶ 7 (stating that the Investment LLCs made "diversified investments among 28 independent, unrelated investment management firms").

operating agreements (individually, the "US Equities Operating Agreement," the "Long/Short Equity Operating Agreement," and the "International Equities Operating Agreement," collectively, the "Operating Agreements"). Bander ultimately invested approximately $12.8 million in the Investment LLCs.[2]

B. The Relevant Agreements

1. The Investment Advisory Agreement

The Investment Advisory Agreement between Towerhill and Bander requires Towerhill to provide Bander "with monthly statements which will reflect estimated market values in the Account(s) during such time periods" and "[a]n annual report . . . listing all transactions of the previous year."[3] It also provides that "[o]n a quarterly basis, more detailed information about all Client's accounts and Investment Managers will be available for review."[4] The Investment Advisory Agreement contemplates that Bander would enter into separate Operating Agreements, discussed below, with the funds Towerhill selected to invest Bander's money.[5] In a schedule relating to compensation attached to the Investment Advisory Agreement, the parties agreed that "[Towerhill] will bill Client quarterly in arrears. . . . The annual fee shall include all expenses incurred by [Towerhill] in performance of its services, and accordingly, Client will not be

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[2] Def.'s Counterclaim ¶ 12.
[3] Bander Aff. Ex. 1 (the "Investment Advisory Agreement") § 6.
[4] *Id.*
[5] *Id.* at § 1 ("[Towerhill] has entered into an agreement with the Investment Managers in Schedule I pursuant to which the Investment Manager will provide day-to-day investment services to Client. Any Investment Manager in Schedule II that is chosen by [Towerhill] to manage assets in Client's Account(s) will enter into a separate agreement with Client to provide day-to-day investment services to Client.").

obligated to pay expense reimbursements to [Towerhill] relating to routine out-of-pocket expenses."[6]

As to disputes between the parties, the Investment Advisory Agreement provides that "[a]ny controversy or claim arising out of or relating to this Agreement, or to the interpretation, breach of enforcement thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association and judgment upon the award rendered may be entered in any court having jurisdiction thereover,"[7] and that "[t]his Agreement shall be governed by the laws of the State of Missouri without reference to its conflicts or choice of laws principles, except where such laws are preempted by Federal law, in which case Federal law shall govern."[8]

2. <u>The Investment LLCs' Operating Agreements</u>

In all relevant respects, each of the Operating Agreements contains identical or similar provisions. Those provisions implicated by the current dispute are discussed below.

a. <u>Reporting Obligations</u>

In addition to the reporting obligations in the Investment Advisory Agreement discussed above, there were also reporting obligations under each Investment LLC's respective Operating Agreement. In particular, the Operating Agreements all provide that:

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[6] *Id*. at Schedule 3.
[7] *Id*. at § 17.
[8] *Id*. at § 18.

> [T]he Manager shall cause to be prepared and distributed to each Member and to the Company, at the expense of the Company, an audited balance sheet showing the assets and liabilities of the Company as of the close of [each fiscal year] and an audited statement of income and expenses showing the results of operations for such year . . . . The Manager shall cause to be prepared and distributed to a Member unaudited Financial Statements quarterly, and as of a Valuation Date upon the reasonable request of the Member. As soon as possible after the end of each fiscal year of the company, the Manager shall deliver to each Member such information as shall be necessary for the preparation by such Member of its Federal and state income or other tax and information returns.[9]

The Operating Agreements also required Towerhill to provide Bander "after the end of each month of the calendar year" with:

> (i) [A] statement of the value of the Member's Beneficial Interest in the Company; (ii) a cash statement of the transaction activity regarding the Member's Beneficial Interest since the end of the previous [period]; (iii) a portfolio level valuation report, if requested; and (iv) a portfolio level cash statement of the transaction activity, if requested. In addition, customized reports may be made available upon the request and at the expense, payable in advance, of the requesting Member.[10]

Finally, the Operating Agreements provide that if a client "does not file exceptions or objections to such report with the Manager within ninety (90) days after such reports is received, such member shall be deemed to have approved such report."[11]

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[9] Cordo Aff. Ex. 1 (the "U.S. Equities Operating Agreement") § 8.2(a); Ex. 2 (the "Long/Short Equity Operating Agreement") § 8.2(a); Ex. 3 (the "International Equities Operating Agreement") § 8.2(a).

[10] U.S. Equities Operating Agreement § 8.2(b); Long/Short Equity Operating Agreement § 8.2(b); International Equities Operating Agreement § 8.2(b).

[11] U.S. Equities Operating Agreement § 8.3; Long/Short Equity Operating Agreement § 8.3; International Equities Operating Agreement § 8.3.

b. Provisions Governing The Redemption Process

All of the Operating Agreements allow for quarterly and month-end redemptions with 30 day's notice.[12] That notice requirement allowed for an orderly redemption of shares for the purpose of protecting the funds' remaining members. All of the Operating Agreements require that 90% of the redeeming member's redemption value be returned within thirty business days, and that the remaining 10% be returned upon completion of the next audit. But, the language in the U.S. Equities Operating Agreement is slightly different from the Long/Short Equity Agreement and the International Equities Agreement. To wit, the U.S. Equities Operating Agreement provides that "[n]inety percent (90%) of the Redemption Value shall be paid no later than the thirtieth business day after the applicable Valuation Date. The remaining ten percent (10%) of the Redemption Value shall be paid upon completion of the next valuation audit."[13] The Long/Short Equity Operating Agreement and the International Equities Agreement differ slightly: "Ninety percent (90%) of the Redemption Value shall be paid *as soon as reasonably practicable but in any event* no later than the thirtieth business day after the applicable Valuation Date. The remaining ten percent (10%) of the Redemption Value shall be paid *as soon as reasonably practicable but in any*

[12] *See* U.S. Equities Operating Agreement § 6.3; Long/Short Equity Operating Agreement § 6.3; International Equities Operating Agreement § 6.3.
[13] U.S. Equities Operating Agreement § 6.3.

event upon completion of the next Audit."[14] Therefore, although the Long/Short Equity Operating Agreement and the International Equities Operating Agreement add "as soon as reasonably practicable," the general effect is largely the same — 90% of the redemption value must be returned within 30 business days, and the remaining 10% must be returned after the next audit. Furthermore, all of the Operating Agreements contain the following proviso:

> Notwithstanding the foregoing, in the event the Manager receives notification from the Custodian or one or more Account Managers to the effect that, or the Manager determines in its sole discretion that, such redemption cannot be effected or it is not reasonably practicable to effect such redemption within the time prescribed hereinabove, the Manager shall notify the redeeming Member of the same and shall cause the designated redemption to be made within such reasonable period of time as the Manager may deem appropriate.[15]

Therefore, it was within Towerhill's discretion to exceed the time limits for distributing a redemption if there was a reasonable basis to do so.

Of particular importance to this dispute, Section 6.3 of all of the Operating Agreements also provides that the return of the remaining 10% of the Redemption Value "shall be made net of expenses to the Company incurred by the Company in connection with such redemption," and that "[t]he redeeming Member shall

[14] Long/Short Equity Operating Agreement § 6.3 (emphasis added); International Equities Operating Agreement § 6.3 (emphasis added).

[15] U.S. Equities Operating Agreement § 6.3; Long/Short Equity Operating Agreement § 6.3; International Equities Operating Agreement § 6.3.

receive the Redemption Value less any fees charged in effecting such redemption."[16]

Finally, Section 6.3 of the Long/Short Equity Operating Agreement and the International Equities Operating Agreement, but not the U.S. Equities Operating Agreement, contains the following limitation:

> (b) Subject to the terms of Section 6.3(a) hereof, no Member may receive a full redemption of its Beneficial Interest until the following additional conditions are met:
>
> > (i) The Redemption Notice shall have been given to the Manager on or before 30 days prior to the applicable Valuation Date in accordance with Section 6.3(a) hereof; and
> >
> > (ii) *The Manager shall determine that the Company has paid or has the ability to pay all of its liabilities, including the remaining Beneficial Interests of any remaining Members*.[17]

Therefore, under Section 6.3(b) of those two Operating Agreements, Towerhill had the discretion to deny a redemption request if paying that redemption would jeopardize the Investment LLCs' solvency.

c. Provisions Precluding The Payment Of Interest On Capital Contributions

All of the Operating Agreements contain a provision stating that "[n]o Member shall be entitled to withdraw any part of his Capital Contribution, *to receive interest* or other earnings on its Capital Contribution or to receive any

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[16] U.S. Equities Operating Agreement § 6.3; Long/Short Equity Operating Agreement § 6.3; International Equities Operating Agreement § 6.3.

[17] Long/Short Equity Operating Agreement § 6.3 (emphasis added); International Equities Operating Agreement § 6.3 (emphasis added).

distribution from the Company, except as expressly provided in this Agreement."[18] No provision in the Operating Agreements provides that Towerhill must pay interest on contributions or even past-due distributions.

d. Dispute Resolution Provisions

All of the Operating Agreements contain the following choice of law and choice of forum clauses:

> This Agreement, including its existence, validity, construction and operating effect, and the rights of each of the parties hereto, shall be governed by and construed in accordance with the laws of the State of Delaware (without regard to principles of conflicts of laws) to the extent not preempted by applicable federal law. The Manager and the Members agree to submit to the jurisdiction of the Court of Chancery of the State of Delaware for resolution of any disputes arising under or in connection with this Agreement and that service of process may be effected upon each of them by serving the registered agent for the Company in the State of Delaware . . . .[19]

The Operating Agreements also include the following alternative dispute resolution provision:

> The foregoing [section] notwithstanding, the Members and the Manager agree that any disputes relating to, arising under or in connection with this Agreement or the Company generally shall first be submitted to non-binding arbitration or mediation in the State of California, County of Orange prior to being submitted to the Delaware Court of Chancery.[20]

[18] U.S. Equities Operating Agreement § 3.4 (emphasis added); Long/Short Equity Operating Agreement § 3.4 (emphasis added); International Equities Operating Agreement § 3.4 (emphasis added).
[19] U.S. Equities Operating Agreement § 13.8; Long/Short Equity Operating Agreement § 12.8; International Equities Operating Agreement § 12.8.
[20] U.S. Equities Operating Agreement § 13.9; Long/Short Equity Operating Agreement § 12.9; International Equities Operating Agreement § 12.9.

Therefore, before submitting a dispute to this court, the parties to the Operating Agreements were first to submit the dispute to non-binding arbitration or mediation in California.

C. Three Of Towerhill's Directors Leave The Firm, And Bander Follows Them

After nearly three years of participation in the Investment LLCs, during which time Bander realized a 17% annual return on his investment,[21] Bander abruptly gave notice on November 21, 2007 of a 100% redemption of his interest in the Investment LLCs.[22] That notice came shortly after three of Towerhill's directors departed from the firm to start their own fund.[23] The timing of Bander's withdrawal from Towerhill was not coincidental. After their departure, Bander moved his investments to a competing firm established by at least one of those directors.[24]

Towerhill acknowledged the redemption notice on November 30, 2007 and, as required under the Operating Agreements, informed Bander that the "Valuation Date" for the redemptions would be December 31, 2007.[25] During this same time period in November, Towerhill also received 39 other redemption notices from 24 other clients, nearly all of whom sought complete redemptions.[26]

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[21] *See Towerhill Wealth Mgmt. LLC v. The Bander Family P'ship, LP*, C.A. No. 3830-VCS, at 66 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT); Figura Aff. ¶ 3.
[22] Bander's Amended Ans. ¶ 16.
[23] *Id.*; Bander Aff. ¶ 10.
[24] Bander Aff. ¶ 10; *Towerhill*, C.A. No 3830-VCS, at 66 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT).
[25] Bander's Amended Ans. ¶ 17.
[26] Figura Aff. ¶ 4.

D. Towerhill Remits 90% Of Bander's Interest Within Thirty Business Days After Bander's Redemption Request, But Withholds $1 Million After Bander Initiates Arbitration

The total amount of redemptions requested was approximately 50% of the Investment LLC's aggregate estimated value at the time the requests were made.[27] Cash raised from sales of the Investment LLCs' assets was deposited into the Investment LLCs' accounts in December 2007, and January and February 2008.[28] Because of the large number of redemptions requested, and because Towerhill had to treat all redeeming clients equally, the Investment LLCs did not have sufficient funds for distribution of 90% of the redeeming clients' redemption values until the following dates: January 3, 2008 for U.S. Equities; February 1, 2008 for International Equities; and February 6, 2008 for Long/Short Equity.[29] Once the cash from the asset sales was deposited in the Investment LLCs' respective accounts, Towerhill distributed the funds simultaneously to all the redeeming clients. Bander received 90% of his redemption value as follows: $6,221,260.21 from U.S. Equities on January 24, 2008; $5,909,350.55 from International Equities on February 8, 2008; and $4,718,843.91 on February 11, 2008.[30] Importantly, all of those distributions were within the thirty business day limit required under the Operating Agreements.[31]

[27] *Towerhill*, C.A. No. 3830-VCS, at 79 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT).
[28] Figura Aff. ¶¶ 9,10.
[29] *Id.*
[30] Cordo Aff. Ex. 7 (Bander's Demand for Arbitration) ¶¶ 28, 31, 33.
[31] *See supra* pages 7-9. Taking the New Year's Day holiday into consideration, the thirtieth business day after December 31, 2007 was February 12, 2008.

Towerhill distributed the remaining 10% of Bander's redemption value after Rothstein, Kass & Company, LLP ("Rothstein Kass") prepared audited financial statements for the Investment LLCs, and valued the respective members' interests, including Bander's.[32] Rothstein Kass delivered its audit of U.S. Equities on May 6, 2008, its audit of International Equities on June 27, 2008, and its audit of Long/Short Equity on July 3, 2008.[33] Towerhill distributed the remaining 10% to Bander on June 5, 2008 for U.S. Equities, on July 2, 2008 for International Equities, and on July 7, 2008 for Long/Short Equity. But, Towerhill did not return the entire 10% to Bander. Rather, Towerhill withheld an aggregate $1 million from Bander's distribution on the grounds that those funds were necessary to cover legal fees and expenses incurred or anticipated in connection with Bander's challenges to the manner in which the redemption unfolded.[34] Notably, Towerhill did not withhold any money for litigation expenses from the other redeeming members' distributions.[35] Towerhill's alleged basis for anticipating those fees and expenses was the demand for binding arbitration Bander filed on June 2, 2008 with the American Arbitration Association ("AAA") in St. Louis, Missouri.[36] In that arbitration, Bander sought to recover interest on all distributions of his

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[32] *See* Bander Aff. Exs. 21, 22 (audited financial statements).
[33] *Id.*
[34] Cordo Aff. Ex. 8 (letter from Hal Kroeger to the Bander Family Partnership, LP (June 5, 2008)).
[35] *Towerhill*, C.A. No. 3830-VCS, at 24 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT).
[36] Cordo Aff. Ex. 7.

redeemed membership interest in the Investment LLCs from January 1, 2008 until the dates upon which full redemptions were completed.[37]

E. The Dispute As It Currently Stands

On June 13, 2008, shortly after Bander filed his demand for binding arbitration, Towerhill filed this lawsuit. In its amended complaint, Towerhill seeks a declaratory judgment that Bander is not entitled to interest on his redemption payments (Count I), that Bander's legal fees may be deducted from the redemption payments under the terms of the Operating Agreements (Count II), and that this court, and not a binding AAA arbitration panel, is the proper tribunal to decide the parties' dispute (Count III). Bander's complaint also seeks injunctive relief blocking the AAA arbitration proceeding in Missouri (Count IV), and specific performance of the Operating Agreements' forum selection clauses (Count V).

In a September 8, 2008 order implementing my August 22, 2008 bench ruling[38] and an October 9, 2008 letter opinion and order, I denied Bander's motion to dismiss and enjoined Bander from proceeding with the binding AAA arbitration.[39] Following that decision, Bander counterclaimed on October 14, 2008.

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[37] *Id.*
[38] *See Towerhill Wealth Mgmt., LLC v. The Bander Family P'ship, LP*, C.A. No. 3830-VCS, at 51 (Del. Ch. Aug. 22, 2008) (TRANSCRIPT); *Towerhill Wealth Mgmt., LLC v. The Bander Family P'ship, LP*, C.A. No. 3830-VCS (Del. Ch. Sept. 8, 2008) (ORDER).
[39] *See Towerhill Wealth Mgmt., LLC v. The Bander Family P'ship, LP*, 2008 WL 4615865 (Del. Ch. Oct. 9, 2008).

In his counterclaims, Bander alleges that Towerhill breached its fiduciary duties by failing to pay Bander the full amount of his redemption value and the interest on his redemption value, by failing to provide Bander with certain reports, and by charging excessive fees (Count I). Bander then alleges that Towerhill breached the Investment Advisory Agreement (Count II) and the Operating Agreements (Count III) by failing to provide Bander with certain reports, and by failing to pay Bander the full amount of his redemption value, and the interest on his redemption value. Bander also alleges that Towerhill violated the Missouri Securities Action of 2003 by depriving him of the interest on his redemption value, and for withholding $1 million for litigation expenses (Count IV). Finally, Bander alleges that the Investment LLCs breached the Operating Agreements by failing to provide Bander with certain reports, and by failing to pay Bander the full amount of his redemption value, and the interest on his redemption value (Counts V, VI, and VII).

As relief for those overlapping allegations, Bander asks that this court require Towerhill: to make an accounting of Bander's investments; to remit to Bander all amounts due Bander as shown by such accounting; to pay interest on all of Bander's redemption value at the statutory rate from the date each amount first became payable; to provide Bander with the requested reports; to return the $1 million withheld for litigation expenses; and to award Bander attorneys' fees incurred during the prosecution of this lawsuit.

After a lengthy period of discovery — during which time Bander sought an interlocutory appeal from the Delaware Supreme Court[40] regarding my decision to deny Bander's motion to dismiss and to enjoin the AAA arbitration, and, when that appeal was rejected, filed a Petition for a Writ of Certiorari with the Supreme Court of the United States, which was also denied[41] — Towerhill has moved for summary judgment on both its claims and Bander's counterclaims. The issues arising from that motion are discussed below.

III. Legal Analysis

A. Standard Of Review

Under Rule 56, in order to prevail on a motion for summary judgment, a party must show that there is no material fact at issue and that she is entitled to judgment as a matter of law.[42] In determining whether this burden is met, this court must view the facts in the light most favorable to the non-moving party.[43] Under Delaware law, "[t]he proper construction of any contract . . . is purely a question of law, [and] [w]hen a plain, common and ordinary meaning of the words lends itself to only one reasonable interpretation, that interpretation controls the litigation."[44] Here, the parties do not dispute any material facts. Rather, they

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[40] *See Bander Family P'ship, L.P. v. Towerhill Wealth Mgmt., LLC*, 962 A.2d 256 (Del. 2008) (declining to hear the appeal).

[41] *See Bander Family P'ship, L.P. v. Towerhill Wealth Mgmt., LLC*, 129 S.Ct. 1677 (2009) (rejecting Bander's petition).

[42] *See* Ct. Ch. R. 56(c); *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

[43] *E.g.*, *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 829-30 (Del. Ch. 2007).

[44] *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008).

differ primarily on how the Investment Advisory Agreement and the Operating Agreements are to be interpreted. Finally, the Delaware Supreme Court has held that "[w]hen a party moves for summary judgment under Chancery Court Rule 56, and the court concludes that the moving party is not entitled to summary judgment, and the state of the record is such that the nonmoving party clearly is entitled to such relief, the judge may grant final judgment in favor of the nonmoving party. The form of the pleadings should not place a limitation upon the court's ability to do justice."[45]

B. The Operating Agreements Do Not Prohibit An Award Of Damages Measured As Interest

In Counts I, III, IV, V, VI, and VII of its counterclaim, Bander seeks to recover, as damages for Towerhill's delays in paying Bander's redemption values, and as partial damages for Towerhill's failure to pay the withheld $1 million, interest at a statutorily prescribed rate. Count I of Towerhill's complaint, however, seeks a declaratory judgment that Bander cannot recover such damages because the Operating Agreements expressly provide that Bander is not entitled to interest on his capital contributions to the Investment LLCs. Therefore, a threshold issue in this matter is whether the Operating Agreements preclude Bander from receiving the relief which he seeks.

For support, Towerhill points to Section 3.4 of the Operating Agreements, which provides that no member will "receive interest or any other earnings . . .

[45] *Bank of Del. v. Claymont Fire Co. No. 1*, 528 A.2d 1196, 1199 (Del. 1987).

except as expressly provided in this Agreement."[46] Because no other provision in the Operating Agreements provides for the payment of interest on the members' contributions, Towerhill argues that the Operating Agreements therefore preclude Bander from claiming interest on the allegedly delayed distributions.

But Towerhill's argument overlooks the fact that Bander is not seeking interest on the funds contributed to the Investment LLCs when he subscribed to memberships in them. Nor is he attempting to receive some distribution in excess of the redemption values to which he was entitled. Rather, Bander is seeking *damages*, measured in interest, for Towerhill's alleged failures to meet its contractual obligations. The award of interest as a component of contract damages is well-established,[47] and Towerhill has not shown that the Operating Agreements in any way limit the payment of interest as a *remedy*. All Towerhill has argued is that interest is not part of the original redemption value due to Bander. But that argument misses the point. Indeed, Bander is not even contesting that he is due interest on his contribution under the terms of the contracts. Therefore, I do not disturb the default rule that interest is available as a component of damages for breach of contract.

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[46] *See supra* pages 9-10.

[47] *See Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 781-82 (Del. 1966); *Cliff House Condominium Council v. Capaldi*, 1997 WL 33177188, *1 (Del. Ch. May 28, 1997); *Levien v. Sinclair Oil Corp.*, 261 A.2d 911, 924 (Del. Ch. 1969), *rev'd on other grounds*, 280 A.2d 717 (Del. 1971); RESTATEMENT (SECOND) OF CONTRACTS § 354; RESTATEMENT (FIRST) OF CONTRACTS § 337.

C. Towerhill And The Investment LLCs Timely Paid Bander's Redemption Value

Because Bander is not precluded from seeking his requested remedy, I must now turn to the question of whether Towerhill did, in fact, breach the Operating Agreements. Bander's first argument in this regard is that he did not receive his redemption fast enough. That is, Bander argues that Towerhill breached the Operating Agreements by improperly delaying distribution of Bander's funds.

As discussed above, the redemption process as contemplated under the Operating Agreements is divided into two steps. First, 90% of the redemption value is to be returned shortly after the redemption request is made. The U.S. Equities Agreement provides that this 90% must be returned within thirty business days.[48] The Long/Short Equities Agreement and the International Equities Agreement are slightly different, in that they require Towerhill to remit 90% of the redemption value "*as soon as reasonably practicable but in any event* no later than the thirtieth business day."[49] And, second, the remaining 10% of the redemption value was to be returned after a valuation audit was performed.[50]

Bander's argument as to the 90% distribution is that, even though the distribution was made before the thirty business day deadline, Towerhill could have made that payment sooner. Of course, this argument does not apply to the U.S. Equities Agreement, which only requires payment of the 90% within thirty

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[48] U.S. Equities Operating Agreement § 6.3.
[49] Long/Short Equity Operating Agreement § 6.3 (emphasis added); International Equities Operating Agreement § 6.3 (emphasis added).
[50] Long/Short Equity Operating Agreement § 6.3 (emphasis added); International Equities Operating Agreement § 6.3 (emphasis added).

business days[51] — an obligation that Towerhill indisputably met. But even as to the distributions under the Long/Short Equity Agreement and the International Equities Agreement, which require Towerhill to return 90% to redeeming clients no later than thirty days but "as soon as reasonably practicable,"[52] there is no triable question that Towerhill met its redemption obligations. The language "but in any event no later than the thirtieth business day" found in these agreements generally sets an expectation for what is reasonable. In that regard, because the distributions were paid within thirty business days, Bander's expectations were fulfilled.

Furthermore, despite a lengthy discovery period, no evidence has been unearthed that would prevent summary judgment by suggesting that it was "reasonably practicable" for Towerhill to make the distributions any earlier. As mentioned above, the Investment LLCs were not highly liquid, like a common mutual fund, but rather were complex private funds that took positions with a number of independent advisors that Towerhill could not immediately unwind.[53] That is, Towerhill could not simply push a button and immediately produce the funds necessary to effect Bander's redemption. And, the reality was that approximately 50% of Towerhill's clients simultaneously requested full

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[51] U.S. Equities Operating Agreement § 6.3.

[52] Long/Short Equity Operating Agreement § 6.3; International Equities Operating Agreement § 6.3.

[53] *See supra* page 3.

redemptions.[54] Therefore, Towerhill had to get enough cash to pay out not only Bander's redemption request, but all of the other redemptions that were contemporaneously requested. Even Bander's counsel conceded that such a sizeable amount of redemptions required care on Towerhill's part so that its remaining members were not harmed by the sudden exit of funds.[55] And, even in normal operating conditions, "as soon as reasonably practicable" does not require the Towerhill management to drop everything else it was doing in order to push Bander's distribution out the door. To wit, "as soon as reasonably practicable" does not mean "as soon as possible." Nor was Bander entitled to some special treatment whereby his redemption request had to be given priority to the other redemption requests that came in at approximately the same time. At best, Bander quibbles about the timeliness with which Towerhill acted in paying out 90% of his funds without pointing to a rational evidentiary basis to conclude that Towerhill unreasonably delayed.[56] Therefore, the only rational inference to be drawn from the record is that Towerhill made the 90% distributions on time.

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[54] *See supra* page 11.

[55] *See Towerhill*, C.A. No. 3830-VCS, at 79 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT) ("The Court: . . . What percentage of the investors redeemed at this point? Mr. Knickmeyer: . . . somewhere around 50 percent. The Court: That's sort of a materially different situation, isn't it? Right? Mr. Knickmeyer: I think it probably is.").

[56] Bander's argument is strained on its face — the allegedly egregious delay of which he complains is, by his own admission, in general only a matter of *days*. *See* Def.'s Ans. Br. 36 (arguing that 90% of the redemption value for Bander's interest in U.S. Equities could have been paid on January 16, 2008, instead of January 24, 2008, that 100% of the International Equities redemption could have been made on February 1, 2008 instead of 90% on February 8, 2008, and that 90% of the Long/Short Equity redemption could have been made on February 6, 2008 instead of February 11, 2008).

Bander's argument as to the remaining 10% of his redemption is, similar to his argument above, that Towerhill could have reasonably paid earlier. But, again, that argument fails because Bander has not presented real evidence that suggests that the 10% distribution could have been made earlier. Indeed, as for the distribution of Bander's remaining interests in Long/Short Equity and International Equities, the distributions were made merely a business day or two after the valuation audits were completed.[57] And, although there was a delay of approximately one month after Towerhill received the valuation audit for U.S. Equities until Towerhill sent Bander his U.S. Equities distribution, Towerhill has explained that the delay was required in order to ensure that the remaining valuation audits for Long/Short Equity and International Equities, which were not completed until approximately four weeks later, comported with the U.S. Equity audit results.[58] Bander has not put forth a credible alternative explanation for the delay. Indeed, when asked "[w]hat was the insidious reason for delay?" at oral argument, Bander's counsel conceded, "I don't know, other than to use Bander's money to fund Towerhill, I suppose."[59] That conspiracy theory is not supported by any fact, and makes little common sense because Towerhill had already returned 90% of Bander's (and the other redeeming members') money. Without a plausible argument to support its allegation that Towerhill was unreasonable in not

[57] *See supra* pages 12-13.
[58] Pl.'s Reply Br. 13-16.
[59] *Towerhill*, C.A. No. 3830-VCS, at 74 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT).

making the redemption distributions earlier, Bander's argument as to the remaining 10% payments fails.[60]

D. But, Towerhill And The Investment LLCs Improperly Withheld $1 Million Of The Remaining 10% Of Bander's Redemption Value To Cover Litigation Expenses

Although the timing of Towerhill's distributions to Bander was proper, Towerhill's decision to withhold $1 million from the final 10% distribution was not. Towerhill's justification for retaining that $1 million is based in Section 6.3

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[60] Bander's alternative argument that Towerhill has breached §§ 409.5-501 and 409.5-502 of the Missouri Securities Act of 2003 also fails. Section 409.5-501 provides that:

> It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:
>
> (1) To employ a device, scheme, or artifice to defraud;
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> (2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or
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> (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

And, § 409.5-502(a) provides that:

> It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:
>
> (1) To employ a device, scheme, or artifice to defraud another person; or
>
> (2) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Here, Bander has identified no facts suggesting that Towerhill had the scienter necessary to support a finding of fraud under either statutory provision. Not only does Bander have no facts supporting his position, he also has no legal argument. In his briefing, Bander makes only a cursory reference in a footnote to a decision from the Supreme Court of the United States holding that misappropriating proceeds from a security by someone entrusted with managing that security is fraud, and a conclusory allegation that "[s]uch frauds are prohibited by the Missouri Securities Act." Def.'s Ans. Br. 33 n.17. Having failed to marshal any suggestive facts supporting his theory and to present legal arguments supporting his allegations, Bander's claim cannot survive a motion for summary judgment.

of the Operating Agreements, which provides: "[t]he remaining ten percent (10%) of the Redemption Value shall be paid upon completion of the next Audit and shall be made net of expenses to the Company incurred by the Company in connection with such redemption."[61] To wit, Towerhill argues that the costs of litigating with Bander over the redemption were "expenses . . . incurred . . . in connection with such redemption."

But, Towerhill's interpretation of Section 6.3 cannot be reconciled with a common sense reading of the plain language of the contract. Expenses incurred in connection with a redemption are costs associated with *executing*, not *defending*, that redemption. Those expenses would include, for example, transaction fees incurred to liquidate assets to generate the cash needed to pay a client's redemption value.[62] That language would not typically be understood to encompass the manager's legal fees for defending legal proceedings. Towerhill has presented no evidence, such as a prior course of performance or course of dealing, suggesting that the parties understood Section 6.3(a) to include litigation defense costs.[63] Therefore, the plain meaning of the contract controls.

Towerhill argues that the hold-back was necessary to protect Towerhill's remaining members from underfunding. That, of course, is a serious concern for a

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[61] U.S. Equities Operating Agreement § 6.3; Long/Short Equity Operating Agreement § 6.3(a); International Equities Operating Agreement § 6.3(a).

[62] Indeed, in her deposition testimony, Towerhill's Torie Figura identified the type of fees envisioned in Section 6.3 as "transaction fees associated with [the Operating Agreements] to effect those redemptions." Figura Dep. 69.

[63] Indeed, deposition testimony by Figura indicates that legal expenses were not withheld from prior redemptions made in 2007. Figura Dep. 63.

private investment fund that typically takes relatively illiquid positions with a number of separate advisors, especially where there is a mass exodus, such as Towerhill's experience in late 2007. But, the problem with Towerhill's argument is that the parties expressly provided for that contingency in Section 6.3(b) of the Long/Short Equity and International Equities Operating Agreements, which state that "no Member may receive a full redemption . . . until . . . [t]he Managing Member shall determine that the Company has paid or has the ability to pay all of its liabilities, including the remaining Beneficial Interests of any remaining Members."[64] That provision clearly provides the protection Towerhill needs by giving "*no* Member" a redemption until Towerhill confirmed there was enough money in the till to go forward. But, Towerhill did not use that protection. Namely, rather than withholding funds from or postponing the disbursements of *all* redeeming members' distributions, Towerhill only withheld money from Bander's pay out.[65] To interpret Section 6.3 as allowing that conduct is to give Towerhill the benefit of a bargain it never made.[66]

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[64] Long/Short Equity Operating Agreement § 6.3(b); International Equities Operating Agreement § 6.3(b)

[65] *See supra* page 13.

[66] In supplemental briefing to the court, Towerhill attempts to tie its choice to isolate the burden of litigation costs on Bander to Section 5.1 of the Operating Agreements. *See* Pl.'s Supplemental Br. 2-4. That provision provides that:

> As of each valuation date, the Manager shall determine the net investment income, the expenses, the net realized gain or loss from sale or other disposition of assets and the net unrealized appreciation or depreciation on assets since the last Valuation Date. Except as otherwise provided in Section 5.2, 5.3 and 5.4 hereof, the amounts so determined shall be apportioned among the Members in proportion to their Capital Accounts

Furthermore, to allow Towerhill to withhold defense costs would be inconsistent with the "American Rule" on the bearing of litigation expenses. Under the American Rule, absent a statutory authority or contractual provision otherwise, a litigant must pay her own attorneys' fees and costs.[67] The purpose of this rule is to "to avoid stifling legitimate litigation by the threat of the specter of burdensome expenses being imposed on an unsuccessful party."[68] Through bargaining, parties often reverse the American rule and provide that the losing party will bear the costs of any litigation that should arise.[69] But, there is no

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> by such equitable method or methods of apportionment as the Manager shall deem advisable.

U.S. Equities Operating Agreement § 5.1; Long/Short Equity Operating Agreement § 5.1; International Equities Operating Agreement § 5.1. Towerhill argues that the final sentence in Section 5.1 gives Towerhill the authority to apportion all of the litigation expenses to Bander. But this provision is inapplicable to the issue at hand because it is plainly a mechanism by which the results of Towerhill's investment decisions are divvied upon between the current participants in the fund. The provision has nothing to do with apportioning litigation expenses among members after a redemption request is made. Towerhill further cites to language in the Operating Agreements empowering Towerhill to "perform all acts . . . which [it] may in its sole discretion deem necessary or advisable . . . to carry out the purposes of the agreements." U.S. Equities Operating Agreement § 7.1; Long/Short Equity Operating Agreement § 7.1; International Equities Operating Agreement § 7.1. But that is simply a general provision that does not address the contingency that Section 6.3 speaks to with specificity. *See Brinckherhoff v. Tex. E. Prod. Pipeline Co., LLC*, 986 A.2d 370, 387 (Del. Ch. 2010) (noting that when construing a contract "a more specific provision prevails over a more general one").

[67] 20 AM. JUR. 2D *Costs* § 55 (also noting generally that "[t]here are two basic attorney's fee schemes: the English rule ('loser pays') and the American rule ('every man for himself')"); s*ee also In re Cox Radio, Inc. S'holders Litig*., 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010) ("The general or American Rule is that a litigant must defray her own attorneys' fees and litigation costs."); *Greenfield v. Frank B. Hall & Co.*, 1992 WL 301348, at *3 (Del. Ch. Oct. 19, 1992) (citing *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966)).

[68] 20 AM. JUR. 2D *Costs* § 55.

[69] *See West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009) ("Delaware generally follows the American Rule under which each party is obligated to pay its own attorneys' fees regardless of the outcome;

provision in any of the relevant agreements here that expressly allows Towerhill to withhold attorneys' fees from redeeming clients. To read Section 6.3 as allowing Towerhill to do so would strip Bander of the protection of the American Rule without him having had an opportunity to extract additional consideration from Towerhill in return for agreeing to that lack of protection.

E. Bander Has Not Produced Evidence Sufficient To Escape Summary Judgment On His Remaining Claims

Bander's remaining claims are inter-related, and therefore I address them collectively. Despite Bander's scattershot briefing of these issues, it is possible to distill his arguments into a single storyline: first, Bander argues that Towerhill charged him excessive fees while he was a client; and, second, to cover-up those excessive charges, Towerhill withheld certain reports from Bander. As a remedy, Bander requests an accounting to determine what damages resulted from Towerhill's overcharges, and demands that Towerhill turn over the reports to which he was entitled. For the reasons set forth below, I conclude that Bander's arguments fail because he has not raised a triable issue of fact as to any of those claims.

1. Bander Has Not Shown That Towerhill Breached Its Contractual Obligations By Charging Fees As It Did, Or That He Was Harmed Thereby

Bander makes two arguments that Towerhill overcharged him for its advisory services. First, Bander argues that Towerhill improperly paid its

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however, where the parties have determined the allocation of fees by private ordering, departure from this general rule and deference to their agreement are warranted.") (citing cases).

accountants, UHY Advisors, from the capital contributions of Bander and the other members, rather than paying UHY Advisors from the fees that Towerhill collected. In other words, Bander argues that the accountants' pay check should have come out of Towerhill's wallet rather than his. Second, Bander argues that the fees he paid to Towerhill were billed monthly in arrears whereas the Investment Advisory Agreement provided that they would be billed quarterly in arrears. For support for both arguments, Bander cites the fee schedule of the Investment Advisory Agreement, which provides that "[Towerhill] will bill Client quarterly in arrears . . . . The annual fee shall include all expenses incurred by [Towerhill] in performance of its services, and accordingly, Client will not be obligated to pay expense reimbursements to [Towerhill] relating to routine out-of-pocket expenses."[70]

As to both arguments, Bander has failed to raise an issue of triable fact. The first argument fails because it ignores the plain language of the Operating Agreements, which the Investment Advisory Agreement expressly requires Bander to enter into with the respective Investment LLCs.[71] The Operating Agreements provide that "[t]he Manager shall instruct the Custodian to pay from the assets of the Company all other fees and expenses of the Company, including, but not limited to Custodian, Account Manager, accounting, tax, audit or legal

[70] Investment Advisory Agreement at Schedule 3.
[71] *See supra* page 4.

fees."[72] In the Operating Agreements, the "Company" is defined as the respective Investment LLC.[73] Therefore, the plain language of the Operating Agreements provides that expenses, including accounting fees, are to be paid out of the "assets of the Company" — that is, out of the assets of U.S. Equities, Long/Short Equity, and International Equities. Bander has provided no alternative interpretation of these provisions, and has presented no facts suggesting the parties had a different understanding.

Furthermore, even if Towerhill breached its contractual obligations by paying UHY Advisors from its clients' capital, which it did not, Bander has not shown — after full access to discovery — how that method of payment has materially harmed him. It is well-established that a party must allege and prove damages to have a successful breach of contract claim.[74] After a lengthy period of discovery, the only fact Bander has marshaled to his support is that UHY Advisors was paid $158,000 by all of the Investment LLCs in 2007.[75] Of course, that amount was spread across all of Towerhill's clients, of which Bander was just one.

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[72] U.S. Equities Operating Agreement § 7.3; Long/Short Equity Operating Agreement § 7.5; International Equities Operating Agreement § 7.5.

[73] *See* U.S. Equities Operating Agreement at 1; Long/Short Equity Operating Agreement at 1; International Equities Operating Agreement at 1.

[74] *See VLIW Tech., LLC v. Hewlett-Packard Co.,* 840 A.2d 606, 612 (Del. 2003) (stating the elements for a breach of contract claim are: the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff); *H-M Wexford LLC v. Encorp, Inc*., 832 A.2d 129, 140 (Del. Ch. 2003) ("Under Delaware law, 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 plaintiff." (citing *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.,* 1995 WL 662685, at *7 (Del. Ch. Nov. 2, 1995))).

[75] *See* Knickmeyer Aff. Exs. G-I (account statements from Towerhill's custodian bank).

Therefore, Bander shouldered only a very small portion of the burden of that rather unshocking amount. Indeed, at oral argument, Bander's counsel conceded that no particular facts were pled in Bander's counterclaim regarding the fees and the materiality of the damages arising therefrom.[76] And, his summary judgment papers do not cure that problem; rather, the lack of evidence cited in them confirms it.

Bander's second argument also fails for a similar reason. Although Towerhill may have breached the Investment Advisory Agreement by billing on a monthly rather than quarterly basis, Bander has presented no record evidence showing how being billed on a monthly, as opposed to a quarterly basis, resulted in any harm to him.[77] That is, Bander has not argued that Towerhill actually took materially more in fees by billing monthly than it would have on a quarterly basis. Bander's briefing is silent on this issue likely for a common-sense reason: it is hard to imagine how the difference in timing would have any *material* effect on Bander's bottom-line. Indeed, Bander's own conduct confirms this conclusion:

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[76] *Towerhill*, C.A. No. 3830-VCS, at 58 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT) ("The Court: What's the facts pled about [the accounting and the advisory fees]? Mr. Knickmeyer: The facts were not particularized in the original counterclaim, Your Honor.").

[77] Indeed, at oral argument, Bander's counsel conceded that no particular facts were pled in Bander's counterclaim regarding the allegedly excessive fees and the damages arising therefrom. *Towerhill*, C.A. No. 3830-VCS, at 58 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT) ("The Court: What's the facts pled about [the accounting and the advisory fees]? Mr. Knickmeyer: The facts were not particularized in the original counterclaim, Your Honor.").

for the duration of his participation in Towerhill, he never complained about the way he was being billed.[78]

2. Bander Has Not Shown That He Is Entitled To Additional Reports

Bander has also failed to present any facts of record suggesting he was entitled to the reports that he now demands. To wit, Bander argues that Towerhill failed to provide Bander with an annual report providing the details of *all* sales and purchases of the various underlying funds in which the Investment LLCs invested. That is, Bander's position is that Towerhill had to provide a blow-by-blow account of transaction activity not just for the Investment LLCs, but also for all of the various funds in which they invested. For support, Bander points to the Operating Agreements, which provide that Towerhill would provide Bander with a "portfolio level cash statement of the transaction activity, if requested,"[79] and to the Investment Advisory Agreement, which requires Towerhill to provide Bander with "[a]n annual report . . . listing all transactions of the previous year."[80]

Bander's argument fails for three reasons. First, the Operating Agreement's requirement that Towerhill provide Bander with "a portfolio level cash statement of the transaction activity, *if requested*," does not support Bander's

[78] Bander Dep. 113-14, 148-149.
[79] U.S. Equities Operating Agreement § 8.2(b); Long/Short Equity Operating Agreement § 8.2(b); International Equities Operating Agreement § 8.2(b).
[80] Investment Advisory Agreement § 6.

position because Bander's deposition testimony indicates that Bander never requested such a report while he was a Towerhill client.[81]

Second, Bander has failed to show how the relevant language in either the Operating Agreements or the Investment Advisory Agreement requires Towerhill to provide Bander with details of the underlying funds' transaction activity. If an investor like Bander had actually bargained for an investment fund like Towerhill to provide him, not just with portfolio-level activity and reports of his own transaction activity, but with details about every transaction of the underlying funds in which the Investment LLCs invest, one would expect that bargain to be reflected in contractual language. Here, the contractual language contradicts, rather than supports the notion that Bander was entitled to fund-level transactional reports. The Investment Advisory Agreement only says that an "annual report . . . of all cash transactions" would be provided, making no indication that Towerhill's reports had to look through the various Investment LLCs to their underlying investments.[82] And, the language of the Operating Agreements expressly indicates that a "portfolio-level" statement would be provided[83] — that is, a statement summarizing the Investment LLC's entire portfolio, not detailing each individual fund in which it invested.

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[81] Bander Dep. 148-49.
[82] Investment Advisory Agreement § 6.
[83] U.S. Equities Operating Agreement § 8.2(b); Long/Short Equity Operating Agreement § 8.2(b); International Equities Operating Agreement § 8.2(b).

Third, Bander's demand for reports is time-barred under the Operating Agreements. As discussed above, the Operating Agreements provide that "[i]f such member does not file exceptions or objections to such report with the Manager within ninety (90) days after such report is received, such member shall be deemed to have approved such report."[84] Here, there is no record evidence indicating that Bander objected to any records or to not receiving any records within the 90-day deadline while he was a client of Towerhill's. Indeed, for over two years, Bander acted as if the reports, which he now alleges were deficient, were entirely acceptable.[85]

Of course, even if Bander were entitled to annual reports detailing the transactions of the underlying funds in which the Investment LLCs invest — which he has not shown — he still has not advanced record evidence suggesting that he was materially harmed by not receiving them. Bander's sparsely argued claims in this regard also fail to grapple with other important realities. In connection with the redemptions, a detailed audit of the Investment LLCs and valuations of the redeeming members' accounts were prepared.[86] Bander has had access to that information for a long time. Likewise, he has had full — nay, fulsome — discovery. Despite this, he is unable to point to any record evidence

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[84] U.S. Equities Operating Agreement § 8.3; Long/Short Equity Operating Agreement § 8.3; International Equities Operating Agreement § 8.3.

[85] *Towerhill*, C.A. No. 3830-VCS, at 45 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT) ("The Court: When did [Bander] first complain about the lack of reports? Mr. Knickmeyer: "The first formal complaint was probably my letter of February — I think it's the 21st or 22nd of 2008.").

[86] *See supra* page 13.

that he was materially injured by any conduct of Towerhill. Given the audits and discovery produced, there is no triable question about the *lack of need for an accounting*. And, in any event, if these fully-detailed statements are so crucial to Bander now, why did he not demand them earlier?[87] Furthermore, if these reports were so important to Bander, and he is so concerned about how his investments were handled, why did he follow his account managers, who had not provided him with these reports while they were at Towerhill, when they left to begin a new firm?

To summarize, Bander has failed to point to evidence creating a genuine triable issue of fact that: (1) Towerhill improperly charged fees, or that Bander was materially harmed thereby; and (2) Towerhill failed to provide Bander with certain reports, or that Bander was materially harmed thereby. Because Bander has not presented a triable issue of fact in regard to these claims, Towerhill is

[87] At oral argument, Bander's counsel attempted to introduce a new theory as to how Bander was harmed, and went on at length in an ineffably confusing way about how receiving these reports would have allowed Bander to pay less in taxes through creative tax planning. That new theory must be rejected because, as Bander's counsel conceded at oral argument, the tax issue was not raised in Bander's counterclaim. *Towerhill*, C.A. No. 3830-VCS, at 105 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT). Rather, Bander first raised the issue in his motion to amend his counterclaim in early 2010. That motion to amend was denied at oral argument. *Id*. at 9-13. Furthermore, it is worth observing that, as he had in previous years, Bander received a Schedule K-1 in July 2008 plainly stating, "PLEASE NOTE THAT THE WITHDRAWAL SHOWN IN BOX 19 CODE A OF THE K-1 MAY REFLECT DISTRIBUTIONS THAT WERE NOT MADE UNTIL 2008. PLEASE CONSULT YOUR TAX ADVISOR." Bander Dep. Exs. 5-7. And, when pressed, Bander's counsel conceded there would have been no difference in the way capital gains were treated, had Bander received the information, and that he could not identify how the information would have actually changed the results of Bander's tax planning strategy. *See Towerhill*, C.A. No. 3830-VCS, at 90-98 (Del. Ch. Feb. 3, 2010) (TRANSCRIPT).

entitled to summary judgment, and Bander's request for specific performance and an accounting is denied.

IV. Conclusion

For the foregoing reasons, Towerhill's motion for summary judgment is granted except as to the issue of whether it properly withheld $1 million from Bander for anticipated litigation expenses, in which case Towerhill's motion is denied, and summary judgment is granted in Bander's favor.[88] The parties shall submit a conforming final order within ten days.

[88] Because the parties have not presented any new arguments on the issue, my earlier ruling to preliminarily enjoin the AAA arbitration that Bander initiated is included within this grant of summary judgment. Therefore, the preliminary injunction entered by court order on September 8, 2008 shall be entered as a permanent injunction for the reasons given in my two earlier decisions on that issue.