**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| LOLA CARS INTERNATIONAL LIMITED, on its own behalf and derivatively on behalf of PROTO-AUTO, LLC, | : | |
| Plaintiff, | : | |
| v. | : | **C.A. No. 4479-VCN** |
| KROHN RACING, LLC, JEFF HAZELL and PROTO-AUTO, LLC, | : | |
| Defendants. | : | |
| LOLA CARS INTERNATIONAL LIMITED, | : | |
| Plaintiff, | : | |
| v. | : | **C.A. No. 4886-VCN** |
| KROHN RACING, LLC, JEFF HAZELL and PROTO-AUTO, LLC, | : | |
| Defendants. | : | |

**MEMORANDUM OPINION**

Date Submitted: June 10, 2010
Date Decided: August 2, 2010

David E. Wilks, Esquire and Thad J. Bracegirdle, Esquire of Wilks, Lukoff & Bracegirdle, LLC, Wilmington, Delaware, Attorneys for Plaintiff.

Rolin P. Bissell, Esquire, Elena C. Norman, Esquire, and Kerrianne M. Fay, Esquire of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, and D. Ferguson McNiel, III, Esquire, James A. Reeder, Jr., Esquire, and Stacey N. Vu, Esquire of Vinson & Elkins, L.L.P., Houston, Texas, Attorneys for Defendants.

NOBLE, Vice Chancellor

## I. INTRODUCTION

This post-trial memorandum opinion deals with a business relationship gone awry. The parties formed a joint venture for the purpose of constructing and selling race cars. They organized their joint venture in the form of a Delaware limited liability company; the parties shared equal board representation, but management responsibilities were vested primarily in one member. The parties' relationship has since deteriorated and their dysfunction may be irreconcilable. They have asserted a host of claims against one another—premised on either breach of contract or breach of fiduciary duty. One member seeks termination of the governing operating agreement and subsequent control over the company. It alternatively requests dissolution. The breach of contract and fiduciary duty claims were not proven at trial. For this reason, and because the members agreed upon a contractual mechanism through which the disgruntled party—which notably brought on much of the discord itself—may exit the company, the Court, in the exercise of its discretion, will not order dissolution.

## II. BACKGROUND

### A. *The Parties and the Operating Agreement*

Plaintiff Lola Cars International Limited ("Lola") is a company registered under the laws of England and Wales with its principal place of business in the United Kingdom. Lola is controlled by Martin Birrane ("Birrane").

Defendant Krohn Racing, LLC ("Krohn Racing") is a Delaware limited liability company with its principal place of business in Houston, Texas. It is owned by Tracy Krohn ("Krohn"). Collectively, Lola and Krohn Racing will be referred to as the "Member Parties."

Nominal Defendant Proto-Auto, LLC ("Proto-Auto") is a Delaware limited liability company with its principal place of business in Braselton, Georgia. It is governed by a limited liability company operating agreement (the "Operating Agreement"), which was executed by the Member Parties on March 5, 2007.[1] Pursuant to the Operating Agreement, Lola holds 51% of Proto-Auto's equity while Krohn Racing has the remaining 49%. Despite Lola's slight majority, the Member Parties agreed upon equal board representation: initially, Rupert Manwaring ("Manwaring") represented Lola and Jeffrey Hazell ("Hazell") represented Krohn Racing. At the time of Proto-Auto's inception, Manwaring served as Lola's Managing Director.[2] Hazell was Krohn Racing's team manager. Hazell was also explicitly selected as Proto-Auto's chief executive officer.[3]

---

[1] Joint Ex. ("JX") 28.
[2] Dep. of Rupert Manwaring ("Manwaring Dep.") 13.
[3] Op. Agmt. § 5.2(b). Hazell resigned from his post as Krohn Racing's team manager in anticipation of his Proto-Auto executive responsibilities; however, he continued to serve as an important consultant to Krohn Racing—a fact that will be discussed at greater length later in this memorandum opinion.

Proto-Auto's purpose, as defined by the Operating Agreement, is to manufacture and sell Daytona prototype race cars for competition in the Grand American Rolex Racing Series (the "Grand Am Series"), and to do so on a "sound, profit-making, commercial basis . . . ."[4] To achieve this end, the Member Parties took on separate, but complementary roles. Lola was responsible for evaluating the vehicle design, developing vehicle performance, organizing the manufacture and sourcing of the vehicles' parts, and developing a bill of materials.[5] Krohn Racing, on the other hand, was responsible for testing the vehicles to generate information that Lola could use to further enhance performance. Krohn Racing was also tasked with much of Proto-Auto's day-to-day operations: it agreed to provide, and to pay for, Hazell's services as Proto-Auto's chief executive officer;[6] it also agreed to provide, free-of-charge, Proto-Auto's headquarters and registered office.[7] Finally, Krohn Racing was obligated to ensure the production of certain accounting and budgetary statements and to make sure that Proto-Auto manufactured and held sufficient parts to service the vehicles.

---

[4] *Id.* at § 3.1.
[5] *Id.* at § 3.6.
[6] *Id.* at § 3.7(a).
[7] *Id.* Proto-Auto shares a facility with Krohn Racing in Braselton, Georgia. In addition, the parties agreed that Laura Weinstein ("Weinstein") would serve as Proto-Auto's secretary. *Id.* at § 5.2(c). Weinstein serves as an accountant for Krohn Racing. She also performs bookkeeping and accounting functions for Krohn personally. Tr. (Weinstein) 512-13.

B. *The Story of Proto-Auto*

When Proto-Auto entered the Grand Am Series, there were almost thirty prototype cars on the grid for each race. The Grand Am Series governing body, the Grand American Road Racing Association ("Grand Am"), anticipated that the number of prototype cars would expand in 2008 and 2009 to about thirty-five cars.[8] Riley Technologies ("Riley") was, and remains, the Grand Am Series' dominant manufacturer: it supplies about half of the cars on the grid. The parties believed that if Lola could develop a car superior to the Riley, as demonstrated by Krohn Racing's winning performance on the track, then Proto-Auto could compete effectively with Riley and others for the business of both current teams and new entrants. Thus, through Proto-Auto, Krohn Racing and Lola hoped to combine their very different skills and attributes to attain success within a growing market—success measured in terms of both business and sport.

The Member Parties projected that Proto-Auto's operations would proceed rapidly. Proto-Auto first needed to acquire an official Grand Am constructor's license, as well as two Daytona prototype chassis and other assets, from third-party manufacturers.[9] The vehicles would then be updated and improved by Lola, after

[8] Tr. (Hazell) 396.

[9] Op. Agmt. § 1.1. The "Daytona prototype race car" is one of two types of vehicles raced in the Grand Am series. The Operating Agreement anticipated purchases from two companies: Multimatic, Inc. ("Multimatic") and Menard Competition Technologies Limited.

which the two vehicles and their parts would be sold to Krohn Racing.[10] The Member Parties agreed that this initial sale would occur no later than the "date of the first race of the 2008 Grand Am Series season to ensure" Krohn Racing's entry into the competition.[11]

Proto-Auto purchased its Grand Am constructor's license and Daytona prototype chassis in the spring of 2007 from Multimatic, a Canadian corporation and automotive parts manufacturer.[12] Multimatic had originally wanted to develop and market the vehicle itself; however, it abandoned this plan and subsequently sold the prototype in part because the vehicle presented aerodynamic problems which Multimatic lacked the funds to address.[13] These problems would frustrate Proto-Auto as well: indeed, the car suffered from several performance and safety problems that required fixing before the vehicle could effectively and safely compete.[14]

---

[10] Krohn Racing was to receive a 5% discount on these parts and vehicles. Op. Agmt. § 3.8.

[11] *Id.* at § 3.8. Krohn believed that the cars would "be ready for the first race of 2008, the 24 Hours of Daytona." Tr. (Krohn) 533-34. The 24 Hours of Daytona is held every year on either the last weekend of January or the first weekend of February.

[12] JX 152 (Mar. 22, 2007 Joint Press Release Issued by Lola and Krohn Racing).

[13] Dep. of Martin Birrane ("Birrane Dep.") 79 (explaining that "funding" was the reason Multimatic stopped running its car); JX 152 (quoting Larry Holt ("Holt"), Multimatic's Vice President: "I was always satisfied with the mechanical aspects of the car but the aerodynamic program was undoubtedly lacking and the new rules will now allow this deficiency to be addressed. However, due to other business commitments we have taken the decision to pass the torch to the new Proto-Auto LLC partnership to exploit this substantial opportunity.").

[14] *See* Tr. (Krohn) 534 (explaining that "the car hadn't had adequate test time. We had some delays in design and construction. We felt like that the cars were too slow. We felt like they weren't as competitive as we thought.").

Also frustrating for Proto-Auto was a 2007 Grand Am rule change that affected the vehicle's roll hoop design.[15] Conformity with the revised rule would require significant redesign of the vehicle's roll hoop and surrounding structure. Instead of making the necessary adjustment, Proto-Auto, at Hazell's direction, decided to lobby for an exemption from the rule; [16] these efforts proved futile as Grand Am eventually denied Proto-Auto's request.[17] The time consumed by Proto-Auto's lobbying efforts, in addition to delays caused by the vehicle's other engineering problems, set Proto-Auto off schedule.[18] Indeed, Krohn Racing was unable to drive the Proto-Auto vehicle in the 2008 24 Hours of Daytona;[19] the Proto-Auto vehicle was instead first raced a "few months later," in either March or April of that year.[20] The design issues also caused the vehicle's development costs

---

[15] The revised Grand Am rule went into effect in 2007. Tr. (Moreton) 138. Ian Moreton ("Moreton"), Lola's chief engineer, described the "roll hoop [as] a key safety structure that fits inside the car. So if you are in a roll car, it fits around a beam post. The A post is where the windscreen goes, and the B post is where the door latches. And it's the main roll hoop that protects the driver." Tr. (Moreton) 137. Moreton explained that the roll hoop in the chassis purchased from Multimatic was "too narrow" to comply with Grand Am's revised rules. *Id.*

[16] *Id.* at 138 ("Proto-Auto, through . . . Jeff Hazell, instructed Andrew Burston, [a Lola] engineer, to engage in dialogue with Grand-Am to see if we could have this roll hoop accepted as it originally existed.").

[17] *Id.* at 141 (explaining how Proto-Auto lobbied for an exemption for three months until Grand Am finally made "it absolutely clear, you have to go with this roll hoop; we cannot make any exception."). This event occurred early in Proto-Auto's history: lobbying efforts began in April or May 2007, and Grand Am issued its final decision in July of that year. *Id.* at 140-41.

[18] Birrane Dep. 84 (explaining that the Grand Am lobbying efforts caused a thirteen week delay, after which "it was back to the drawing board, literally, redraw bodywork, redo the roll cage, redo—it was a different car really"); *see also* Tr. (Moreton) 142-43 (same).

[19] Krohn Racing nevertheless competed, but with two vehicles manufactured by Riley that it already owned and raced in the prior year. Tr. (Krohn) 534.

[20] Tr. (Krohn) 534.

to go over budget: roughly $3.1 million was spent developing the vehicle, which greatly exceeded Proto-Auto's $2 million development budget.[21]

There were other problems. Troubling accounting issues emerged in late spring and summer of 2008: Proto-Auto had difficulty finalizing the pricing and costs of the vehicles and parts sold to Krohn Racing.[22] Efforts to resolve these concerns revealed discrepancies between Proto-Auto's financial accounting system and its inventory tracking system. Evidence also emerged which showed that parts sales to Krohn Racing exceeded Proto-Auto's estimates.[23] In response, Lola grew uneasy about the reliability of Proto-Auto's accounting; it sought to verify the delivery of cars and parts sold to Krohn Racing, and to confirm the accuracy of the cost of sales assigned to those parts by Hazell and Krohn Racing personnel.[24] Representatives on both sides attempted to reconcile the inventory accounting problems, which Turnbull was told were caused in part by "software concerns" and

[21] *Compare* JX 369 (Business plan dated February 21, 2007 showing $2 million development budget) *with* JX 308 (Proto-Auto Financial Statement dated March 31, 2009).
[22] Tr. (Turnbull) 15; *see also* JX 77 (May 20, 2008 Email from Weinstein to Paul Turnbull with attached financial statements for year-end March 31, 2008, in which Weinstein described how the total "costs of the cars sold has been estimated" and that pricing for parts sold to Krohn Racing "has still not been finalized"). Paul Turnbull ("Turnbull") serves as Lola's finance director; he is also Lola's current representative on the Proto-Auto board. Tr. (Turnbull) 7.
[23] JX 82 (July 3, 2008 Email from Weinstein to Turnbull).
[24] Tr. (Turnbull) 21.

problems with "systems integration";[25] Turnbull visited Proto-Auto's facility on October 2, 2008 to work through these issues with Weinstein.[26]

During the visit, Krohn Racing personnel performed a physical check of Proto-Auto's parts, which revealed a discrepancy between the physical inventory and that recorded on Proto-Auto's books, and which therefore necessitated a $500,000 write-down of Proto-Auto's inventory.[27] Turnbull testified that the discrepancy "could have been due to quantity differences, or maybe some of it was due to the software issues that Proto-Auto was experiencing."[28] Weinstein was given responsibility for determining the cause of the discrepancy; roughly two weeks later she "identified the issue with inventory" as the result of an unintended automatic software adjustment that created an "overstatement of inventory and [an]

---

[25] JX 84 (Sept. 4-5, 2008 email exchange among Hazell, Weinstein, and Turnbull); *see also* Tr. (Turnbull) 23-24.

[26] Tr. (Turnbull) 26-27 ("[I]t was suggested that I would visit Atlanta and the Krohn Racing site where Proto-Auto is based and meet with Laura Weinstein face to face and establish a better relationship and to review the accounts and any process issues that we could see.").

[27] *Id.* at 27-28 (explaining how the physical inventory check resulted in the $500,000 write-down: ". . . looking at the actual quantities of inventory in the system, physically comparing those quantities, and validating that the quantities were correct, assessing the evaluation, the cost of the parts in the system, and whether they looked reasonable compared to purchase orders or invoices . . . and then the total valuation of that quantity times their unit price, comparing that to the inventory valuation that's stated in the accounting system under inventory . . . [a]nd then the difference between the two was effectively a reduction in the stock valuation of [$]500,000"); *see also* JX 87 (Turnbull's notes from his October 2, 2008 visit in which he described how the "[w]all to wall count carried out on 1st October and variances have been reviewed and validated. Physical inventory valued at $1,077k. Quick books inventory value as at 2nd October is $1,534k. Variance to be analyzed by [Weinstein]").

[28] Tr. (Turnbull) 29.

understatement" of cost of goods sold.[29] This discovery, however, did not allay all of Turnbull's concerns: he believed that Proto-Auto's revised financials still showed a negative gross profit margin, which indicated that parts sales to Krohn Racing were on a "negative margin basis."[30] Thus, according to Turnbull, the discrepancies in inventory accounting were not entirely caused by the "system integration" problems identified by Weinstein; he thought that there "were some other issues that needed to be resolved."[31]

Indeed, the inventory accounting problems represented only a subset of the concerns raised by Lola during the summer of 2008. Birrane "became alarmed" at the amount of money owed by Krohn Racing to Proto-Auto, and about a loan imbalance that existed between the Member Parties.[32] He was also disappointed in Proto-Auto's performance as it related to Lola; he felt that Proto-Auto "had been eating cash."[33] In late August 2008, Birrane met personally with Hazell and

---

[29] JX 88 (Oct. 14, 2008 Email from Weinstein to Turnbull).
[30] Tr. (Turnbull) 32.
[31] *Id.*
[32] Birrane Dep. 134. In brief, Krohn Racing owed Proto-Auto for parts, and Proto-Auto owed Lola for engineering expenses. Krohn Racing could pay Proto-Auto for the parts, and the proceeds could then be used to repay Lola for the engineering expenses. Alternatively, the Member Parties could treat, and apparently did treat, the unpaid engineering expenses as loans from Lola to Proto-Auto; this created a so-called loan imbalance between the Member Parties. The imbalance could be alleviated by Krohn Racing's payment to Lola of its share of the loan—an allocation that should mirror Krohn Racing's proportionate equity stake in Proto-Auto—or by Proto-Auto's repayment of the debt to Lola. A more-detailed discussion of the loan imbalance is taken up later in this memorandum opinion, in the text accompanying note 182, *infra*. It is relevant only that money was owed from Krohn Racing to Lola, either through Proto-Auto or to Lola directly, and that Lola insisted on payment under either or both formulations.
[33] *Id.* at 135.

demanded that Hazell obtain the repayment of roughly $800,000 owed by Krohn Racing to Proto-Auto.[34]

Birrane's dissatisfaction with Proto-Auto or, perhaps more accurately, with Hazell grew in the fall of 2008.[35] He was suspicious of Krohn Racing's explanation of the inventory accounting problems,[36] and frustrated that delays related to the Proto-Auto vehicle had caused Lola to divert attention away from other projects.[37] Turnbull emailed Hazell on October 24, 2008, to relay Birrane's concerns about outstanding parts invoices owed by Krohn Racing, and Proto-Auto's running costs and lack of sales.[38] Hazell wrote back the same day: he suggested that Krohn Racing was behind on payments because Lola had failed to produce cost information in a timely manner; he also highlighted Krohn Racing's efforts to improve vehicle performance, and explained that Proto-Auto had not yet

---

[34] *Id.* at 136-37. Birrane explained that Hazell "led [him] to believe" that the imbalance would be repaid in two months, something that Hazell supposedly later denied. *Id.* at 138, 141. Birrane, however, acknowledged that by November 2008, the imbalance was "well down." *Id.* at 142.

[35] Birrane was also displeased with Manwaring's performance. Manwaring tendered his resignation as Lola's managing director in March 2008. Birrane explained that by the summer of 2008, Manwaring "was very close to leaving, and he didn't seem to have that great an interest in what was happening. He wasn't telling me about it. It was his place, as the [managing director], to keep me informed about what was going on, but on the contrary, I was actually not being informed." *Id* at 136.

[36] *Id.* at 139-40 ("Yes, I was given a lot of stories, excuses about why this happened, computers not talking to themselves—not talking to each other, different figures by two different systems, and I have heard these stories from different people in the past when they owed money, so I wasn't taken in by it . . . I'm not accepting [the software issue] as a reason, it's an excuse.").

[37] *Id.* at 148-49.

[38] JX 89.

achieved any third-party sales because it had thus far not "achieved competitiveness" on the track, which Hazell in turn attributed to the withheld Grand Am approvals.[39] The relationship was beginning to fray.[40]

On October 29, 2008, Howard Dawson ("Dawson"), a Lola director and its chief executive officer, wrote to Hazell to state some deeper concerns about Proto-Auto.[41] Dawson pointed out that Lola's investment in Proto-Auto had exceeded "original expectations," while income from Proto-Auto had been "significantly less than budget" and "sales of new cars ha[d] been non-existent." According to Dawson, "[a] cursory examination of the business today might suggest that the principal objectives have been ignored and Lola is now caught up in a support role for the Krohn Racing Team which is neither viable nor acceptable to Lola."[42] Dawson demanded that Proto-Auto repay its debts to Lola in full, and he identified the need for a review of Proto-Auto's business plan and adoption of a "new strategy."

---

[39] Hazell's tone also grew more frustrated and combative. He suggested that he would be "happy to resign" if Birrane felt that he lacked drive with respect to sales. He also explained that he had not yet advised Krohn of the loan imbalance, in part, because Krohn Racing's contribution was a "real cash contribution against the Lola engineering costs that are at commercial rates for developing a car that failed to be competitive on debut." *Id.*

[40] This development was identified by Turnbull in response to Hazell's October 24, 2008 email. *Id.* Turnbull asked that Hazell "appreciate that I am not trying to sour the good relationship that we have established prior [to] and during my [October 2, 2008] visit."

[41] JX 163.

[42] *Id.* ("The Proto-Auto business is not paying its way and Lola is 'bleeding cash' whilst its bills remain unpaid.").

In a follow-up email, dated October 31, 2008 and addressed to Hazell, Dawson asked pointed questions regarding Proto-Auto's possible liquidation or sale; he also probed Krohn Racing's interest in acquiring Lola's share of the business.[43] Dawson explained the "need to be realistic about the prospects of this business going forward in the light of the environment we are now in . . . [and] about the size of the market we are selling into."[44] Dawson concluded his email by stating that Lola would withhold further investment until it reached agreement with Krohn Racing "that there is a viable and profitable business to participate in."

By November 14, 2008, Krohn Racing had reduced the outstanding loan imbalance to $50,894.[45] Hazell also reviewed Lola's ongoing engineering projects as they pertained to Proto-Auto; he asked that many of these projects be discontinued.[46] Lola, however, continued to express its frustration over the size of

---

[43] JX 164. Specifically, Dawson asked the following questions: "What are the options to liquidate Proto Auto's assets and wind down the trading side of the company? What would this yield? . . . What are the options for Lola to sell its shareholding and investment in Proto-Auto? . . . What are the options for Proto-Auto to sell its entire shareholding to another investor? . . . Would Krohn Racing be interested in purchasing Lola's shares in Proto-Auto and, if so, on what basis? . . . How can we reduce the ongoing costs and overheads of running Proto-Auto?" Hazell and Dawson met several weeks later; at that time, Hazell demurred as to Dawson's entreaties regarding a wrapping up of the venture. *See* JX 170.

[44] JX 164. Howard, however, expressed enthusiasm over Hazell's opinion that the car was now competitive, and Hazell's indication that "there may be two serious interests in buying a car at this time."

[45] JX 166 (Nov. 14, 2008 Email from Dawson to Hazell). In addition to the $50,894 loan imbalance, Proto-Auto also apparently owed Lola for invoices of $16,598.28 that were overdue and invoices of $91,926.18 that were due by the end of the November. *Id.*

[46] Tr. (Hazell) 405 (". . . I stopped all work except for that one item and made it very clear that in the future work would be defined to Lola, that they would quote on the work, that I would review that quote, and raise a purchase order for that figure."); JX 33 (Nov. 13, 2008 Email from Hazell

the loan imbalance and how long it took for all outstanding sums to be paid.[47] Lola intensified and expanded its criticism in the following weeks. On November 27, 2008, Birrane emailed Hazell to complain about a host of issues related to Hazell's stewardship of Proto-Auto.[48] In particular, Birrane was concerned as to why Proto-Auto was $2 million "worse off than projected," and he was critical of the efforts put into Proto-Auto's original business plan. Birrane demanded the regular submission of monthly statements, which before May 8, 2008, allegedly had never been provided; he asked why there had been no third-party sales in 2008 and 2009—sales of at least two cars in both years had been forecast in the original business plan; Birrane again raised Hazell's delay in rectifying the Member Party loan imbalances.[49] Finally, Birrane expressed how he regretted his decision, in late August, to "preserve the working relationship with Hazell" instead of "tak[ing] this issue up with [Krohn] straight away."[50]

---

to Krohn Racing personnel informing them that engineering tasks would first be reviewed by Proto-Auto before being assigned to Lola).

[47] JX 166. ("[I]t is wrong that we are being kept waiting for balancing payments from our joint venture partners and that we have overdue invoices from Proto-Auto itself. Jeff, you are in a position to influence all these matters and I must ask that you do so with some priority.").

[48] JX 168.

[49] Birrane also criticized Hazell for being rude to Lola staff and for raising intellectual property issues "in order to divert attention from the manner in which you have run Proto-Auto whilst refusing to answer questions raised by Howard which do require answers." *Id.*

[50] Hazell responded to Birrane's email the next day, November 28, 2008. JX 169. The response is defensive and reflects aggravation; it evidences a deteriorating relationship.

Birrane took his concerns to Krohn on December 16, 2008. He told Krohn that Lola had produced a competitive design and that the vehicle could have won by the end of 2008 had it "not been for some accidents, strategy and bad luck."[51] He proposed replacing Hazell with Turnbull as chief executive officer; he further requested that Stephen Charsley ("Charsley"), Lola's sales manager in the United States, be commissioned to sell Proto-Auto vehicles. In support of his proposal, Birrane attached a letter that he had sent to Hazell that day in which he detailed all of his grievances regarding Hazell's management.[52] These grievances were more detailed, severe, and critical of Hazell's motives and character than any of the previous complaints.

In this letter to Hazell, Birrane blamed him for the engineering delays and overages: he argued that such delays had been brought about by Hazell's decision to lobby Grand Am for a rule change instead of accepting Grand Am's revised roll hoop requirements.[53] Birrane also asserted, for the first time, that Hazell had *deliberately* not pursued potential sales leads or made more vigorous efforts to sell the Proto-Auto vehicles;[54] according to Birrane, Hazell did so because he wanted to "leave Krohn Racing as the single works team with spare cars and tons of spares

---

[51] JX 172.
[52] JX 173. Birrane's letter to Hazell was in part a reply to Hazell's email from November 28, 2008, in which Hazell attempted to answer Birrane's email sent the previous day. *See supra* note 50.
[53] *See supra* notes 15-17 & accompanying text.
[54] Emphasis added.

and no competition from other Proto-Auto Lola teams." Birrane then blasted Hazell for failing to meet the financial reporting requirements set forth in the Operating Agreement, and for incurring Proto-Auto expenses, "such as accountants, spares man, and the truck," which should have been paid-for by Krohn Racing. Birrane attributed Hazell's actions to an invidious motive,[55] and he contended that Hazell had "failed in [his] administrative and fiduciary responsibilities" to serve the interests of both Member Parties.[56]

Thus, Lola's open complaints had morphed, in the period of perhaps a month, from concern over loan imbalances, unpaid invoices, and inventory accounting to a full-fledged, expansive assault against Hazell, his management, loyalty, and alleged conspiratorial motives. Krohn met with Birrane a couple of

[55] JX 173. ("Your aim is clearly to create a situation where a breakdown of the [joint venture] is inevitable and with a view to presumably taking over Proto-Auto on the cheap."). Birrane alleged that Hazell had intended to put Lola into such debt that it would want to walk away from the business, and do so at a price favorable to Krohn Racing. Birrane Dep. 207-08. At the time of the letter, Birrane did not believe that Krohn "was with Jeff on this." *Id.* at 207. Birrane now believes Krohn was never an innocent bystander. *Id.* at 213; *see infra* note 74 & accompanying text.

[56] Two weeks later, on January 2, 2009, Turnbull emailed Weinstein with a detailed list of problems regarding Proto-Auto parts pricing and expenses. JX 174. His email contained the same overtures found in Birrane's letter of December 14, 2008. *Id.* ("My overriding concern is that Proto-Auto has had a single customer over the past 18 months and that being a beneficial member party of the joint venture . . . [o]n a detailed review of the operating expenses and the effective gross margins that the joint venture is achieving it is apparent that Krohn Racing is using Proto Auto as a vehicle to support its attendance in the Daytona prototype series."). Specifically, Turnbull complained that Proto-Auto was carrying excessive inventory, was paying too much in salary for work performed by Krohn Racing personnel on behalf of Proto-Auto, was inappropriately being charged for Krohn Racing engineering expenses, and was under-pricing car and spare sales to Krohn Racing. These concerns were memorialized and addressed in the Report on Management of Proto-Auto dated January 9, 2009. JX 175.

weeks later, on either January 2 or 3, to discuss Birrane's allegations; Krohn, however, deferred considering Hazell's removal as Proto-Auto's chief executive until he received more information.[57] A substantial amount of financial information was sent to Krohn on January 16, 2009, including a report on Proto-Auto's management prepared by Lola personnel.[58] Krohn then met with Lola's recently-appointed managing director, Robin Brundle ("Brundle")[59] on January 28, 2009.[60] Krohn, however, again refused to take action until he had sufficient time to evaluate Lola's claims.[61]

---

[57] Tr. (Krohn) 540-41 ("If we are going to replace a CEO, then I want to make sure that, one, it's correct; two, that we have all the information; and that we act prudently."); Birrane Dep. 222. Krohn became upset during the meeting. Tr. (Brundle) 230 ("During the meeting there was a request for removal of Mr. Hazell. At that point Tracy sort of banged the table, and it's the first time in my business career I have ever jumped out of my seat. It was that loud.").

[58] *See supra* note 56.

[59] Brundle's employment in this role formally began on January 2, 2009. Tr. (Brundle) 224.

[60] Krohn had met with Brundle as a "courtesy" to Birrane. This was because Birrane and Krohn had earlier agreed that no action would be taken with regard to Proto-Auto until after the 2009 24 Hours of Daytona, which was held the weekend after Krohn's meeting with Brundle.

[61] Tr. (Krohn) 543-44. Krohn and Brundle expressed different views on the success of the meeting. *Compare* Tr. (Krohn) 542-43 ("[W]e discussed his concern about Mr. Hazell being replaced as CEO. By the way, with [Hazell] and Laura Weinstein at the table. It's a pretty hard conversation to manage with somebody accusing the guy sitting right next to you of being less than competent and a bunch of other things that he can't prove.") *with* Tr. (Brundle) 241 ("We had good discussions around the problems with Proto-Auto, the fact that it had strayed away from solid mandate, the fact that it wasn't delivering financials, and the fact that really it needed to change from the CEO . . . I was quite pleased [with Krohn's reaction] because he actually said there was a lot of new stuff that we had talked about that was new to him and that he would actually go away and reflect . . ."). After the meeting, Krohn clarified that he would not accept Lola's allegations without a formal audit. JX 178 (Feb. 27, 2009 Email from Krohn to Turnbull and Birrane stating that "whatever financial information we have can only be called preliminary without having been audited").

Although most of the criticism had come from Lola, Krohn Racing had also put forth its own set of grievances. For example, Hazell complained to Birrane several times about Lola engineering costs and origination delays.[62] Hazell further maintained that Lola had failed to provide parts cost information within a reasonable time and, thus, was to blame for the inventory accounting problems as well as the loan imbalance.[63] Moreover, in December 2008, Lola requested that Multimatic stop shipment of a new vehicle chassis—specifically Chassis 8—to Proto-Auto in Georgia.[64] Krohn Racing had consistently requested that Chassis 8 be delivered,[65] but Multimatic would not release it without Lola's authorization, which Lola continued to refuse to give.[66] Finally, Krohn Racing demanded that

---

[62] JX 169 ("The design and manufacture were Lola's responsibility, and did not go well . . ."). Specifically, Hazell complained that the car design "ran very late," and that Lola's lead designer "quit in frustration in April [2008]" after struggling to get sufficient Lola personnel assigned to the project. Hazell also argued that Multimatic was "poorly supported by Lola with very limited visits, and that "[s]ubstantial further additional costs in design, windtunnel, retooling, and development were required to achieve a more competitive car." *Id.*

[63] *Id.* ("It was Lola's responsibility to provide a Bill of materials . . . [t]he imbalance is the result of Lola supplying parts from December to 22nd April without being able to supply a costed Bill of Materials to [Proto-Auto] despite repeated request as [Proto-Auto] wished to construct a price list, value inventory and invoice [Krohn Racing].").

[64] JX 268 (Dec. 19, 2008 Email from Moreton to Hazell informing him that "Chassis 8 has been retained at Multimatic until we have established cost of assembling chassis 7 and these costs have been signed off"); *see also* JX 311 (June 29, 2008 Letter from Turnbull to Holt "confirm[ing] that the previous instruction from Proto Auto and Lola for you to hold the chassis and other spare parts at Multimatic remains in place").

[65] JX 70 (Feb. 26, 2009 Email from Turnbull to Hazell acknowledging Hazell's email from February 20, 2009 in which Hazell evidently questioned why Chassis 8 was being retained); JX 311 (mentioning "request from Tracy Krohn to release the Grand Am chassis #8").

[66] JX 120 (July 6, 2009 Email from Holt to Hazell). In Holt's words: "I was expecting some sort of proof that you guys represented the controlling interest in Proto-Auto LLC and could therefore dictate my release of chassis # 8 . . . . Last week I also received a letter from Paul Turnbull (Finance Director of Lola Cars) representing himself as a Director of Proto-Auto LLC

Lola relinquish intellectual property that purportedly belonged to Proto-Auto but was held by Lola.[67]

Krohn, Birrane, and other representatives of the Member Parties met again on March 6, 2009, in London in the hope of finally putting their differences to rest.[68] The meeting, however, resolved little: the Member Parties continued to disagree over Proto-Auto's expenses and the margins it set on parts sales.[69] They

---

specifically instructing me to keep chassis #8 in our possession in Toronto. As you have failed to provide proof that you solely represent the interests of Proto-Auto LLC . . . and Lola has made a specific statement that they do represent these interests, I'm at a bit of a loss as to what to do."

[67] JX 169 (contending that Proto-Auto "has had difficulties investigating engineering detail design problems in Atlanta and have repeatedly asked for full remote access to the drawings file. I met with Rupert Manwaring and your [information technology] man on this months ago to find an access path to the entire Lola data base no solution has been forthcoming."); JX 102 (Feb. 20, 2009 Email from Hazell to Turnbull in which Hazell complained that a "serious condition does exist concerning blocking of information where Lola [has] refused to provide to Proto-Auto access to some of the intellectual property belonging to Proto-Auto in the form of the computer aided drawings. I trust you will rectify this condition quickly.").

[68] Tr. (Krohn) 548. In the interim, Turnbull had met with Weinstein and Hazell on February 2 and 3, 2009, at which time he continued to press them on pricing and inventory issues. In the minutes from that meeting, it was noted that, while the quality of Lola parts "commands a higher price," the "market price may not be sufficient to recover a reasonable return," and thus Proto-Auto faced a "challenging sales issue." JX 98. To address this issue, it was suggested that Proto-Auto pursue "cost reduction opportunities" and a "sales strategy to manage customer expectation." Proto-Auto also experienced a $124,000 inventory write-down, for which Weinstein agreed to investigate the cause. The attendees surmised that the parts could have been "consumed by Krohn Racing without appropriate invoicing; however, the "most likely cause" was determined to be "credit notes generated at zero sales value" at the project's inception, which "gave rise to an increase in stock value." Finally, Lola identified certain Proto-Auto expenses that it disputed and attributed to Krohn Racing as additional loan imbalance. *Id.* ("Subject to a conclusion in the Proto Auto expenses challenged by Lola as attributable to Krohn racing balances for payments as of 3rd February are: [e]quity imbalance $162,216 due from Krohn Racing to Lola.").

[69] JX 181 (Mar. 19, 2009 Email from Birrane to Krohn and Hazell). *Compare* Tr. (Brundle) 256 ("[Parts pricing] was an issue. I could see from the figures that [Weinstein] was submitting to [Turnbull], the margins just simply weren't there . . . [t]here has been a lot of discussion around industry averages. And there is two or three comments I would like to make on that: [t]hat my experience of industry average is that it is 45 percent . . .") *with* Tr. (Hazell) 428 (explaining that

also remained in disagreement over the appropriate sales strategy[70] and the accuracy of Proto-Auto's financial statements,[71] but they did agree that an independent auditor should be employed to resolve the latter dispute.[72] Finally, Krohn refused to acquiesce in Hazell's removal as Proto-Auto's chief executive officer, even though Lola all but insisted on that as a condition to moving forward.[73] Matters seemed to have come to a head on April 6, 2009, when Birrane, after feeling slighted by Krohn's apparent lack of responsiveness, accused Krohn of entering the joint venture as part of a scheme to "dupe Lola from the outset."[74]

---

he was "speechless" when he saw Lola's proposed readjustments to the price of parts sold to Krohn Racing, which used "I think, a 45 percent gross margin" because such a figure "has no regard for competitive pricing whatsoever.") *and* JX 180 (Mar. 16, 2009 Email from Krohn to Birrane) (taking "great exception" to Brundle's position that the "confirmed industry average [profit] margin is 45%").

[70] JX 180 (writing that he "reminded everyone [at the March 6, 2009 meeting] that the doctrine has never changed in Proto-Auto's approach to the project and that is that first you have to win," while demanding a premium for the cars before demonstrating superior performance, as suggested by Lola, puts the "cart before the horse").

[71] *Compare* JX 179 (Mar. 10, 2009 Email from Krohn to Birrane) ("I just talked to [Weinstein] and she has informed me that there are no undisputed items outstanding that have not been resolved monetarily.") *with* JX 181 ("I am sure [Weinstein] has made you aware that there is $120,000 worth of spare parts missing from [Proto-Auto's] inventory.").

[72] JX 181 ("We both agree that an independent audit is necessary and desirable.").

[73] *Compare* JX 180 ("I did not say that I would remove [Hazell] for 'mismanagement,' as I do not have any idea of how Lola would assign the meaning of 'mismanagement." Let's not burn anyone at the stake until we have proven facts.") *with* JX 181 ("We remain convinced that Jeff's prompt replacement as CEO is necessary and appropriate.").

[74] JX 183 (Apr. 6, 2009 Email from Birrane to Krohn) ("Your trap has been carefully laid—painfully for Lola. We do not however have to jump into it."). Birrane concluded that Krohn Racing's plan all along was to choose a manufacturer to make a car for them. According to Birrane, Krohn Racing had chosen not just any manufacturer, but Lola—the "most successful ever." However, rather than pay Lola "something like $10 million" for the vehicle, Birrane believed that Krohn Racing instead had pursued a joint venture, "which would never work, because from the word go, apart from the accounts that weren't going to work, the computers that wouldn't talk to each other, the loading us up with debt at Lola, I don't believe, with

Birrane wrote that Krohn Racing pushed Proto-Auto and Lola into severe losses to force Lola to declare deadlock; this, according to Birrane, would allow Krohn Racing to purchase the company on the cheap; he warned that Lola instead would consider "other options."

Lola filed suit to dissolve Proto-Auto later that day and to recover damages for alleged wrongdoing by Hazell and Krohn Racing. Despite the suit, Krohn Racing continued to race the vehicle, which had shown marked improvement.[75] Indeed, Krohn Racing won with the Proto-Auto car at a race in New Jersey in May 2009. Also in May 2009, Brundle informed Hazell and Krohn that he had located a potential buyer for a Proto-Auto vehicle.[76]

The next month, the Member Parties retained an independent auditor, Bruce Phillips ("Phillips"), a certified public accountant, to review, and to issue a report on, Proto-Auto's balance sheets as of March 31, 2009 and 2008, as well as its statement of operations, changes in members' equity, and cash flows for those years.[77] Phillips also agreed to apply "supplemental audit procedures (in addition

---

hindsight now, I don't believe that [Krohn Racing] intended to make this into a business where cars would be sold." Birrane Dep. 201.

[75] The Member Parties dispute who is to take credit for the successful development efforts.

[76] JX 301, 302. It appears as though this sale, the details of which Brundle has kept confidential, has not materialized. Brundle testified that several of his efforts are "on hold"; he believes that "once we have got some sort of answer to [the litigation], we can then get on with the business; then try and actually put some more business through Proto-Auto." Tr. (Brundle) 272-73.

[77] JX 116 (June 1, 2009 Engagement Letter from Phillips to Turnbull and Weinstein). Phillips explained that "[t]he objective of review engagement is to express limited assurance that there are no material modifications that should be made to the financial statements in order for the

to the analytical procedures performed in connection with the review) related to inventory and the costing, and pricing of such."[78] Phillips tendered his findings as to the inventory on September 8, 2009.[79]

In the meantime, Krohn Racing won with the Proto-Auto vehicle at Watkins Glen in August 2009. That, however, would be the vehicle's final race of the year. On August 24, 2009, Krohn Racing issued a press release that announced both the lawsuit and its decision to shelve the Proto-Auto vehicle.[80]

---

statements to be in accordance with generally accepted accounting principles." *Id.* Phillips also wrote that a "review differs significantly from an audit of financial statements" insofar as a "review does not contemplate obtaining an understanding of the entity's internal control; assessing fraud risk,; tests of accounting records by obtaining sufficient appropriate audit evidence through inspection, observation, confirmation, or the examination of source documents." Thus, according to Phillips, a review does not provide the same level of assurance as an audit that the entity's financial statements are "free of material misstatement." That said, and as stated above, Phillips agreed to apply supplemental audit procedures related to the inventory, which stood at the heart of the Member Parties' accounting problems. *Id.*

[78] *Id.*

[79] JX 124. These findings are discussed in the following section. It is unclear whether Phillips ever furnished his final report. *See* JX 290 (Oct. 28, 2009 Email from Hazell to Phillips demanding that the review be "brought to a close," as the "continual obstacles to the completion of the review report are both taking too much time and adding significant cost"). It seemed as though there was difficulty over how to value Proto-Auto as a going concern, given the pending litigation. *Id.*

[80] JX 34. The press release reads as follows:

> Krohn Racing today has withdrawn their entry of the No. 76 car of Ricardo Zonta and Nic Jönsson from the forthcoming Montreal Grand-Am Rolex Sports Car Series event. Throughout 2009 Krohn Racing has continued without any technical assistance from Lola to improve the performance of the car and compete in all rounds of the Grand-Am Championship achieving victories and fastest laps, most recently at the last event at Watkins Glen. Krohn Racing is a co owner of Proto-Auto LLC, an Official Constructor of a Daytona prototype chassis. Tracy Krohn: "Regrettably Lola cars, also shareholders of Proto-Auto, have raised issues within Proto-Auto that they have chosen to pursue through their lawyers." "In these circumstances I do not wish to continue using the outstanding efforts of my team staff and our extensive team resources, to race a car presently badged as a Lola." "It is my expectation that Krohn Racing will return to the Grand Am

Lola filed its second lawsuit shortly after Krohn Racing's press release.[81] In its second suit, Lola sought a declaration that it had terminated the Operating Agreement pursuant to § 10.1, and could therefor assume unilateral control over Proto-Auto as its 51% owner. Meanwhile, Hazell and Turnbull continued to exchange, and disagree about, information pertaining to Proto-Auto's financials.[82] There were also some settlement discussions, but compromise was not reached.[83] Both actions were tried together.

## III. CONTENTIONS

Lola claims that Hazell mismanaged Proto-Auto, thereby breaching his fiduciary duties of loyalty and care. Specifically, Lola argues that Hazell's gross negligence caused crippling inventory problems, which in turn led to parts being

---

> Championship as soon as possible subject to the timing and outcome of the aforementioned matter, meanwhile Krohn Racing will continue permitted testing."

At post-trial oral argument, counsel for Krohn Racing represented that the Proto-Auto vehicle is being raced in 2010. Post-Trial Oral Arg. Tr. 64 ("[T]he car is being raced this year. Mr. Krohn is racing the car.").

[81] Lola's second action was filed on September 11, 2009.

[82] JX 288 (Sept. 25, 2009 Email from Turnbull to Hazell with attached spreadsheets detailing disputed costs that Lola believed were owed it by Krohn Racing: "parts sold below market value," "sales value of stock written off due to poor internal control that can only have been issued to customers," and "race team expenses charged to Proto Auto by Krohn Racing or Race team expenses incurred directly by Proto Auto"); JX 291 (Nov. 20, 2009 Email from Turnbull to Hazell contending that "$141,650 . . . has been taken to cost of sales and generated zero sales. This inventory has either been lost or stolen!" in response to Nov. 19, 2008 Email from Hazell to Turnbull in which Hazell maintained that Lola's analytic approach is "not reasonable . . . considering the software issues we had at implementation of POS . . ."); JX 310, 312 (Correspondence between Turnbull and Hazell from December 2009 regarding disputed expenses and inventory).

[83] Birrane Dep. 209-10.

either lost or misappropriated by Krohn Racing. As a related point, Lola asserts that Hazell under-priced parts sold to Krohn Racing. Lola also contends that Hazell disloyally pursued a passive sales strategy to favor Krohn Racing; this sales strategy, according to Lola, is the reason that Proto-Auto has been unable to sell any vehicles beyond the two provided for in the Operating Agreement. Lola alleges other specific instances in which Hazell either recklessly or intentionally favored Krohn Racing to Proto-Auto's detriment; it claims that Krohn Racing aided and abetted Hazell's fiduciary misconduct. Lola also maintains that Krohn Racing owes it interest on loans that have since been repaid, and that Proto-Auto owes it for uncompensated engineering work. Moreover, Lola claims that Krohn Racing breached both the Operating Agreement and its accompanying implied covenant to act in good faith.

Lola seeks several remedies. It requests damages on its breach of fiduciary duty and aiding and abetting claims. Lola further contends that Krohn Racing's alleged breaches of the Operating Agreement were material, and as such, they triggered a termination right provided in Section 10.1 of the Operating Agreement. Lola believes that it may exercise that right, and upon termination of the Operating Agreement, take control of Proto-Auto. It seeks a declaratory judgment to that effect. Alternatively, Lola asks the Court to exercise its discretion to dissolve

Proto-Auto and to appoint a liquidating trustee. Finally, it seeks an award of attorneys' fees.

Krohn Racing has filed several counterclaims. Specifically, it contends that Lola breached the Operating Agreement: 1) by failing to provide a competition-ready car on time and on budget; 2) by withholding intellectual property that rightfully belongs to Proto-Auto; 3) by wrongfully preventing the delivery of a race car chassis from one of Proto-Auto's suppliers to its headquarters in Georgia; and 4) by wrongfully seeking to terminate the Operating Agreement or, alternatively, to dissolve Proto-Auto. Krohn Racing seeks an injunction requiring Lola furnish the intellectual property that it has allegedly withheld and prohibiting Lola from continuing to block delivery of Chassis 8. Krohn Racing also requests damages and attorneys' fees under the bad faith exception to the American Rule.

## IV. ANALYSIS

Lola failed to prove its individual claims at trial. The legitimate concerns that initially frustrated Lola and aroused its suspicion—the loan imbalance and the inventory accounting issues—have either been rectified or proven immaterial and innocent. From these original grievances, Lola has added a host of complaints that are either insignificant or came about as a result of the economic downturn; several other of Lola's claims flowed directly from the business structure established by the Operating Agreement, or at worst, were criticisms of decisions that when made

had the blessing, either express or implied, of Lola's former board representative, Manwaring. Lola, perhaps reasonably, either wanted out of the business or sought to exert greater control over Proto-Auto's operations; Lola, however, stretched its concerns well beyond proportion in an attempt to achieve these objectives. For this reason as well, the Court will not order dissolution. Finally, Krohn Racing's damages claims also lack merit; the Court, however, will grant it the requested, limited injunctive relief.

A. *Hazell's Alleged Breaches of the Fiduciary Duties of Care & Loyalty*

The parties disagree over whether Hazell, as the manager of a limited liability company, owes the fiduciary duties of care and loyalty, or whether his managerial obligations are defined entirely by the Operating Agreement. A manager of a limited liability company owes the entity and its members the traditional fiduciary duties of care and loyalty; these duties, however, may be limited contractually by agreement among the member parties.[84] That said, the Member Parties nowhere agreed, either within the Operating Agreement or otherwise, to limit Hazell's fiduciary duties as the manager of Proto-Auto. For this

[84] *See Kelly v. Blum*, 2010 WL 629850, at *10 (Del. Ch. Feb. 24, 2010) ("Thus, unless the LLC agreement in a manager-managed LLC explicitly expands, restricts, or eliminates traditional fiduciary duties, managers owe those duties to the LLC and its members and controlling members owe those duties to minority members.") (citing *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *8 (Del. Ch. Apr. 20, 2009) ("[I]n the absence of a contrary provision in the LLC agreement, the manager of an LLC owes the traditional fiduciary duties of loyalty and care to the members of the LLC.")); *see also* 6 *Del. C.* § 18-1101(c).

reason, Hazell was bound by the traditional duties that otherwise govern the conduct of corporate fiduciaries: loyalty and care.

1. The Cost Overruns and Delays

Lola maintains that Hazell caused Proto-Auto to incur significant delays and cost overruns in the initial development and design of its vehicles. The focus of its claim rests on Hazell's decision, in the spring of 2007, to challenge, instead of acquiescing in, a then-recently amended Grand Am regulation concerning the vehicle's roll hoop.[85] Lola argues that Hazell's effort, which would prove futile, constituted a violation of his duty of care. To prove its claim, Lola must show that Hazell acted with gross negligence,[86] which has been defined as "reckless indifference" or conduct beyond the "bounds of reason."[87]

Lola has failed to meet this high standard. Hazell was certainly advised that his efforts were likely to fail, but the evidence shows that there was reason for him to try. Moreton did not believe the lobbying efforts would succeed, and he communicated this opinion to Hazell.[88] Moreton based his belief on his extensive experience in motor-sport, during which he observed that governing authorities are loathe to changing their regulations, especially those recently adopted.[89] Moreton,

---

[85] *See supra* notes 15-17 & accompanying text.
[86] *See McMullin v. Beran*, 765 A.2d 910, 921 (Del. 2000) ("Director liability for breaching the duty of care 'is predicated upon concepts of gross negligence.'") (citations omitted).
[87] *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. 2008).
[88] Tr. (Moreton) 139-40.
[89] *Id.* at 140.

however, understood why Hazell sought the exemption, especially given the Member Parties' recent investment in a vehicle that would have to be redesigned to material degree.[90] Birrane also grew frustrated with Hazell's insistence on fighting for an exemption, as he too believed that Grand Am was unlikely to revise one of its rules.[91] But like Moreton, Birrane was annoyed with Grand Am and its rule change.[92]

Especially harmful to Lola's claim is Manwaring's testimony. Manwaring did not believe the Grand-Am rule change "was fair," and he did not "agree with" its decision; he confirmed that Lola personnel "were in agreement with [Hazell]" as they "were all certainly unhappy with the rule changes that the organizers were coming out with."[93] Manwaring was supportive of Hazell's efforts because, as Hazell framed it, "if we could achieve what we were looking for, it would save us time and money."[94]

---

[90] *Id.* at 139 ("I could see why Jeff wanted to seek, get an exemption, because they had just bought a project from Multimatic for 190,000 sterling, and that was around $250,000 . . . I could see, because we made this purchase—this purchase was being made—it would be good to carry out the tooling for the Multimatic and the tooling from the Menard car.").

[91] Birrane Dep. 83-84 (explaining how Grand-Am is like NASCAR, "when they make up their minds, there's no changing it," and that it was "obvious to [him] that if we went two weeks or three weeks with them saying no, and refusing to back down, they weren't going to"). Birrane, however, also suggested that Hazell had information that Grand-Am had given an exemption to "somebody else, which is why he thought he could fight it." *Id.* at 85.

[92] Birrane Dep. 82 ("[W]ell, of course, Grand-Am changed the rules to in the middle of what we were doing, which caught us out very badly.").

[93] Manwaring Dep. 63-64.

[94] Tr. (Hazell) 366-67.

Perhaps Hazell was naïve in believing he could sway Grand Am's collective mind. Perhaps he should have heeded Moreton's advice. There is no doubt, however, that there were legitimate reasons to lobby for an exemption, and that, if successful, doing so could save Proto-Auto from redesigning the roll hoop. Lola personnel were unified in their opposition to the Grand-Am regulation, even if there was disagreement as to the best means for dealing with the situation. Moreover, although the lobbying decision delayed Proto-Auto's development, that delay was only a portion of the total aggravation caused by the rule change. On these facts, Hazell's conduct was neither reckless nor the product of gross negligence.

2. The Inventory

Difficulties with Proto-Auto's inventory have stood and continue to stand at the heart of this case. Indeed, there have been two significant inventory write-downs in Lola's history: one of roughly $500,000 in October 2008[95] and another of about $125,000 in February 2009.[96] Lola maintains that approximately $141,000 in inventory has been either lost or taken by Krohn Racing. It concludes

[95] *See* supra note 27 & accompanying text.
[96] *See* supra note 68.

that Hazell has been grossly negligent in failing to implement an effective internal control system to prevent these losses.[97]

There is, however, no need to review Hazell's conduct and the adequacy of Proto-Auto's internal controls. This is because Lola has failed to demonstrate that any parts were actually lost or misappropriated and thus that Proto-Auto was injured. Where there were accounting irregularities, they were caused almost entirely by discrepancies between invoices for parts sold to Krohn Racing and parts as recorded on Proto-Auto's books, but not by discrepancies between the invoices and the actual inventory on the shelves.

Proto-Auto uses two software programs to follow its inventory: Quickbooks Financial ("Quickbooks"), which is an accounting program,[98] and Quickbooks Point of Sale ("POS"), which is an inventory tracking system.[99] Proto-Auto installed POS four months after it had set-up Quickbooks; it then synchronized the two programs so they could exchange information.[100]

---

[97] Lola also argues that parts were sold to Krohn Racing at inappropriately low prices. Lola, however, has not predicated liability for this claim on inventory accounting errors. Indeed, the alleged "under pricing" is a distinct issue from that discussed above and will accordingly will be taken up separately in the following sub-section.

[98] *See* Tr. (Weinstein) 499 ("Quickbooks is a widely used, widely recognized financial software in which day-to-day bookkeeping is done, bill payments are done, so forth and so on.").

[99] *See id.* ("Point of Sale is an independent software system used for inventory tracking.")

[100] *Id*. at 500.

The interfacing between the two programs contributed to some of the problems. Financials were to be produced for the year ending March 31, 2008.[101] Up until that point, however, Krohn Racing personnel, acting for Proto-Auto, had been entering individual parts into POS with zero cost.[102] Later, when Proto-Auto entered the actual cost of the inventory in POS, Quickbooks automatically

[101] The Member Parties agreed that Proto-Auto would have September 30 "in each year as its accounting reference date." Op. Agmt. § 5.2(f). Krohn Racing contends that Proto-Auto moved its year-end forward at Lola's behest. Defs.' Opening Post-Trial Br. 11. Turnbull, however, testified that the change came at Weinstein's request. Tr. (Turnbull) 80-81 ("Laura Weinstein informed me that, as a 51 percent shareholder, that Proto-Auto would have to change their reporting date, year-end date, to comply with effectively the parent company."). Lola reports on March 31. The change was made—on whomever's initiative—because of Lola.

[102] Tr. (Weinstein) 502-03; Dep. of James Steggar ("Steggar Dep.") 33-34. Specifically, James Steggar ("Steggar") was responsible for inputting the inventory costs into the Proto-Auto accounting systems. Steggar serves as Krohn Racing's administrative manager; he is also responsible for "look[ing] after Proto-Auto's spare parts," and its day-to-day bookkeeping. Steggar Dep. 5-6; Tr. (Hazell) 462. Steggar stated that inputting the inventory at zero cost was a "big mistake." Steggar Dep. 53-54. The parties, however, vigorously debate who is to blame for why the inventory was entered into POS with zero cost. Krohn Racing maintains this was done because it had insufficient price information at the relevant time from Lola. Steggar Dep. 33-34; Tr. (Weinstein) 502. Indeed, Krohn Racing contends that this information was not provided until Lola delivered its bill of materials in March 2008. Tr. (Hazell) 369-70, 375 (explaining that Proto-Auto had "no cost information" to attach to the inventory because the bill of materials came "very late," and "when you don't have the cost of the parts . . . you can't enter those parts into your inventory with cost"). Hazell also argues that Proto-Auto had inadequate time to fix the problem caused in part by the change in year-end. *Id.* at 377 ("[I]t was moved to the end of March. And at the end of March we didn't have sufficient information to complete the price list and generate all the invoices to Krohn Racing."). Lola, on the other hand, contends that Proto-Auto had adequate cost information. *See* Tr. (Turnbull) 17 ("Yes, they had [cost information] . . . in the form of kits."); Tr. (Moreton) 150 (testifying that as of February 2008, "I don't believe [Proto-Auto] needed a full bill of materials . . . because we were sending the parts to them in case, and then assemblies, so the information was on the invoices.") The Court notes that it is likely that each side shared responsibility, in some material way, for the zero-cost entries; it declines to pass judgment as to who was more culpable, however, because the debate is largely irrelevant given the Court's conclusion regarding Lola's entire missing or stolen inventory claim.

acknowledged the entry as "another piece of inventory, so it double counted."[103] Krohn Racing contends that the double count caused the first $500,000 inventory write-off.[104] Lola apparently accepted this explanation, although it remained concerned about the price at which the parts were sold, and consequently the gross profit margins.[105]

A second write-off was made in February 2009 of approximately $124,000. Lola contends that this write-off remains "unexplained,"[106] and that in sum, there exists $141,000 in inventory that Lola believes was lost or misappropriated by Krohn Racing.[107] Krohn Racing, however, has provided an explanation for the second write-off: inventory sold to Krohn Racing for installation on the first two

---

[103] Tr. (Hazell) 370-71; *see also* Steggar Dep. 34 ("[T]he computer had somehow within the program duplicated the cost of the goods. It had entered it into [Quickbooks] twice on quite a number of occasions."); Tr. (Weinstein) 505 ("[T]here were automatic adjustments that were being made to the financial system as a result of issuing the inventory.").

[104] Tr. (Hazell) 371.

[105] Tr. (Turnbull) 32 (explaining that he was not "totally convinced that the root cause of differences in inventory was specifically down to the systems integration," and that he was concerned that sales to Krohn Racing "had been made on a negative-margin basis"). As explained previously, the profit margin issues will be taken up in the following section.

[106] *Id.* at 47-48 (explaining that, after the second write-off, Proto-Auto's "inventory issues" had not been resolved to his satisfaction "[b]ecause there still remains an unexplained discrepancy of an inventory writeoff in the accounts of the company").

[107] *Id.* at 61-62 (stating that there exists a "cost of sales . . . of $141,000, roughly, with no sales value at all. And effectively that's the sum total, as I understand it, of missing parts that should have been charged to Krohn Racing."). Lola, however, seeks $235,000 in damages for the lost parts. It arrived at this number by assuming a profit margin of 45% less the 5% discount Krohn Racing is entitled to under the Operating Agreement. *Id.* at 62 (explaining that he arrived at $235,000 by "gross[ing] out the $141,000 figure to a sales value that's 39 percent, I think, off the top of my head, which would expect a 45 percent margin in the industry.").

vehicles—Chassis 5 and 6—was inputted into Quickbooks, but not POS.[108] As Weinstein explained, this was because parts for those two vehicles were shipped directly from Lola to Multimatic in Canada;[109] since the parts did not pass through Proto-Auto's warehouse, they were never booked into the inventory program.[110] This oversight resulted in another double invoice to Krohn Racing.[111] Likewise, the parts invoiced for Chassis 8 also have not been entered into POS because those parts too have not passed through Proto-Auto's stores but instead are with Multimatic in Canada.[112] Hazell and Weinstein contend that the parts issued for Chassis 5 and 6 account for $75,000 of the remaining discrepancy, while the parts allocable to Chassis 8 account for another $43,000.[113] This would seem to account for much of the discrepancy.[114]

---

[108] Tr. (Weinstein) 509.

[109] Multimatic was responsible for assembling the first two vehicles.

[110] *Id.*; *see also* Tr. (Hazell) 373 ("Those parts that went to those chassis were booked through Atlanta without going in and out of inventory, because they had been passed up to Toronto. And the reason it has taken so long to find it in the records is because it wasn't in the inventory records. It was only in the invoicing records.").

[111] *Id.* at 508. Although not explained, the Court assumes that the double invoice came about when the inventory costs were finally inputted into POS, which caused a second invoice to be issued by Quickbooks.

[112] Tr. (Hazell) 372-73 ("We certainly know that Chassis 8, which was held back by Lola in Toronto, was not counted in the inventory, although it was accounted for financially. Because it hadn't arrived into the stores in Atlanta, that had been missed.").

[113] Tr. (Hazell) 373; Tr. (Weinstein) 510. Turnbull too recognized "three kits that weren't broken down and put into the point of sale system." Tr. (Turnbull) 51.

[114] Applying simple arithmetic, the sum of these parts is $118,000. Weinstein described any other discrepancies between the physical count of inventory in the Proto-Auto warehouse and that inputted into the accounting system as "insignificant." Tr. (Weinstein) 506.

Indeed, there is no evidence that any physical inventory has gone missing from Proto-Auto's stores. Instead, the problems seem confined to how the inventory was recorded across Proto-Auto's different accounting programs. Phillips, the auditor retained to review Proto-Auto's books and audit its inventory,[115] confirmed Krohn Racing's explanation for the discrepancies and write-downs.[116] He recognized that the "physical inventory count was made difficult because of different 'locations' and inventory moving between them." He further observed that the implementation of Quickbooks and POS was "less than adequate," but "well-intentioned." Most important, Phillips concluded that the "differences in book to physical inventory" were "most likely" brought about by poor implementation of the accounting software, and "not necessarily theft or fraud." He also found that any differences "were not material as a whole."[117] Lola has offered no evidence to suggest otherwise besides contrary assertions by

[115] For an explanation of the procedures that Phillips performed, *see supra* note 77 & accompanying text.
[116] JX 124 (Sept. 8, 2009 Email from Phillips to Turnbull and Weinstein).
[117] *Id.* The Court notes that Phillips further concluded that the physical inventory was "conducted appropriately and a materially accurate count was obtained." He opined that the "inventory was well organized and labeled which facilitates good controls over the inventory itself."

Turnbull.[118] The Court therefore concludes that there are no missing or misappropriated parts.[119]

3. The Separate Issue of Parts Sold Below the Appropriate Profit Margin

Lola also contends that, before July 2009, Proto-Auto sold parts to Krohn Racing at below optimal prices. In July 2009, price adjustments were made to the

[118] *See* Tr. (Turnbull) 50-53 (describing his analysis of Proto-Auto's books, and concluding that there are parts sold by Lola to Proto-Auto that are no longer in inventory, but for which there exists no invoice to reflect a sale to Krohn). After trial, Turnbull requested that Hazell allow Lola to "perform a full inventory check of parts" held by Proto-Auto. *See* Aff. of Jeffrey Hazell ("Hazell Aff."), Ex. E. Accordingly, Lola thereafter sent Charsley and Moreton to Proto-Auto's headquarters to perform the inventory check. Pl.'s Mot. to Re-open the Trial Record, Ex. E (Aff. of Ian Moreton ["Moreton Aff."] ¶ 2) (explaining that he and Charsley visited Krohn Racing's facility "where Proto-Auto's inventory of parts is maintained . . . to conduct an audit of Proto-Auto's inventory of parts"). Although Moreton claimed that the "audit revealed a multitude of discrepancies in Proto-Auto's inventory . . .," *Id.* ¶ 3, he presented no evidence of lost or missing parts; his affidavit instead focused exclusively on alleged evidence of counterfeiting, which will be addressed later.

[119] As an ancillary matter, Lola also claims that parts were invoiced to Krohn Racing free-of-charge during the initial construction of Krohn Racing's two Proto-Auto vehicles. Tr. (Turnbull) 62-63 (". . . I identified a number of invoices at a part number level that were made at zero value but with a quantity being supplied to Krohn Racing. And so effectively, there is a cost to the company for those parts."); *see also* JX 138 at App. 2 (Dec. 3, 2009 Letter from Turnbull to Hazell with attached appendix). Turnbull calculated that those parts should have been invoiced at $68,311. Krohn Racing counters that the parts were either replacements for defective originals, or were paid for as part of the cost of the vehicles. Tr. (Hazell) 374 ("[W]e identified nearly all of those parts as either having gone to the car build or, in fact, they were free-of-charge replacement parts . . . [f]or example, the window material on the car shattered in a crash, as it shouldn't do, and so those parts were replaced free of charge to Krohn Racing for the parts on the cars and the spares they bought."). Hazell, however, testified that there was one "oversight" among the free-of-charge parts listed by Turnbull; Hazell explained that he has since invoiced Krohn Racing for that part in the amount of $13,000. *Id.* Otherwise, Hazell disagrees that Proto-Auto should have to pay for the other free-of-charge or replacement items. Absent any evidence demonstrating otherwise, the Court will uphold Hazell's discretion as Proto-Auto's chief executive to price those parts. Indeed, Lola has offered no evidence to corroborate Turnbull's conclusion that Krohn Racing should have paid for the items identified. The Court is also wary of the fact that these items were first brought to Hazell's attention one month before trial when they were invoiced at or around the time of Proto-Auto's inception.

pricing of Proto-Auto's parts; the prices were revised by Hazell and Charsley.[120] Lola argues that, had Proto-Auto previously sold its parts to Krohn Racing at the revised prices, it would have realized an additional $182,725 in revenue.[121]

Lola, however, presents no evidence that prices should be retroactively adjusted or that some other, higher price should apply.[122] According to Krohn Racing, the prices that Hazell and Charsley agreed upon represented only a three percent increase from the prices that Hazell himself had set for 2009.[123] Moreover, Hazell's original 2009 prices were themselves only three percent higher than those he set in 2008.[124] Lola does not dispute these assertions. Additionally, the evidence shows that parts prices are regulated by Grand Am, which may take

---

[120] Tr. (Hazell) 384; Tr. (Turnbull) 60-61 ("Mr. Charsley has got a very good knowledge of the price of auto parts and understands the Grand-Am business comparison of parts to competitor's parts, and has a good idea of how to be able to price parts in the market.").

[121] Tr. (Turnbull) 60. The analysis that led Turnbull to this figure can be found at Appendix 4 to JX 138. In his December 9, 2009 letter, Turnbull explained that "Appendix 4 details parts supplied to Krohn at the prices agreed to [by] Stephen Charsley *or the average expected increase where a price was not agreed*." (emphasis added). Thus, it appears as though not all of Lola's proposed damages for undersold parts were arrived at by simple application of the 2009 prices agreed upon by Hazell and Charsley.

[122] At various times Lola has argued that either a 35% or 45% gross profit margin should apply to parts sold by Proto-Auto. *See* Tr. (Turnbull) 90-93 (describing how he believes that 45 percent is the industry standard margin, and how that number drops to 35 percent upon application of Krohn's 5 percent discount); Tr. (Brundle) 256-57 (explaining that in his experience, the industry average for parts sales is "45 percent," and that "the Lola parts that we sell, again north of 35 percent are margin," while "Proto-Auto, frankly, wasn't achieving those numbers."). The Court notes, however, that Lola has not advanced an argument that either a 35 percent or 45 percent gross margin should apply to the parts that have previously been sold at an allegedly inadequate price. These percentages were instead used by Lola only to calculate damages related to its claims for lost or stolen parts, and lost sales. *See supra* note 107.

[123] Tr. (Hazell) 385.

[124] *Id.*

action against manufacturers who sell parts at unfairly high prices.[125] Finally, there is evidence that Manwaring knew and accepted Hazell's original prices.[126] As a whole, there is no evidence that parts prices were inappropriately low during the period before July 2009; Hazell did not violate any fiduciary duty when he set prices before that date.[127]

4. The Failure to Market or Sell Cars

The parties have also vigorously disagreed about third-party sales, or the lack thereof. Indeed, Proto-Auto has sold only two cars since its inception: the two vehicles that Krohn Racing agreed to purchase pursuant to § 3.7 of the Operating Agreement. Lola contends that Hazell intentionally failed to sell any vehicles to third-parties in order to keep Krohn Racing's competitors from having a superior Proto-Auto car of their own. This conduct, according to Lola, constitutes a breach of the duty of loyalty.

---

[125] *See* JX 102 (Feb. 20, 2009 Email from Hazell to Turnbull defending the Proto-Auto prices and explaining that "[t]he selling price was determined mindful of the Constructors License Agreement, wherein Grand Am have the right to compare constructors prices for comparable items and if price 'gouging' is assessed [Grand Am] may authorise a third party to manufacture and distribute the component at reduced prices"). Hazell's explanation was apparently corroborated by Manwaring: "I would have thought that some parts of a car have accepted sales prices, not necessarily just based on the cost of making them." Manwaring Dep. 66-67.

[126] JX 102 ("Lola's representative Rupert was advised of this process . . . and he arranged for a selection of the parts and selling prices to be reproduced as an additional page in the brochure . . . ."); Manwaring Dep. 66 (stating that the played a role in devising Proto-Auto's sales prices).

[127] Indeed, Lola presents no theory for holding Hazell or Krohn Racing liable for the allegedly low prices.

Lola begins its argument by showing how Hazell's loyalty is conflicted between Proto-Auto and Krohn Racing. Hazell, for all of Proto-Auto's existence, has served as a paid consultant to Krohn Racing.[128] Hazell in fact serves as something of a lieutenant to Krohn and describes his primary role within Krohn Racing as "looking after Tracy Krohn's interests."[129] Hazell previously served as the team manager for Krohn Racing's Grand Am team; although he resigned from that post in 2007,[130] it appears that he still performs a number of managerial duties that are critical to Krohn Racing's team operations.[131] His involvement is substantial enough that he could be considered Krohn Racing's *de facto* team manager.

Lola then gives several reasons to believe that Hazell's failure to sell any Proto-Auto vehicles was motivated by his loyalty to Krohn Racing. First, Lola

---

[128] Tr. (Hazell) 450 (explaining that he is paid $1,250 a day by Krohn Racing).
[129] *Id.*
[130] *Id*. at 346 ("When we started working with Lola and determined we were going to go into the business of building cars for sales to customers, in 2007 I considered it to be inappropriate to wear a team manager's hat once we were out there selling cars to other teams and I would need to give support to other teams.").
[131] Specifically, Hazell continues to oversee the Krohn Racing team's activities during races, again to ensure that Tracy Krohn's interests are protected. *Id.* at 450, 460. The titular team manager, David Brown ("Brown"), defers to Hazell in the event of an accident, *Id.* at 452; Hazell is also consulted on personnel and budgetary issues. Dep. of David Brown 15. Additionally, Hazell often addresses the media on Krohn Racing's behalf, and he took responsibility for withdrawing the Proto-Auto vehicles from the remainder of the Grand Am schedule in August 2009. In Hazell's words, that "extremely unusual occurrence was determined should be dealt with at my level." Dep. of Jeffrey Hazell ("Hazell Dep.") 141. Finally, Hazell would position himself in Krohn Racing's manager's seat during races, which in Brundle's opinion indicated to him and everyone else that Hazell was acting as Krohn Racing's team manager. Tr. (Brundle) 245.

argues that Hazell pursued a passive sales strategy.[132] It supports this argument primarily through Hazell's deposition testimony in which he opined that the Grand Am circuit is "not an environment where you can hard sell your product";[133] Hazell further described his sales approach as one in which he speaks with potential customers, but leaves it to them to pursue the sale further if they are interested.[134] Lola, on the other hand, believes that a more "structured" approach is necessary;[135] it cites the success of Bill Riley, who deploys a "semi-aggressive" approach and whose vehicles comprise a majority of all Grand Am entries.[136]

Second, Lola contends that Hazell created the impression among potential Proto-Auto customers that Krohn Racing was Proto-Auto's "works team"—a team funded by the manufacturer of the vehicle it races.[137] According to Lola, Hazell achieved this impression by placing a Proto-Auto parts trailer next to the Krohn Racing trailer and by Hazell's visible role during races as Krohn Racing's *de facto*

---

[132] Tr. (Brundle) 238 ("Jeff's stance was very simply, 'Everybody knows who we are. We are in the paddock. And if they want one, they will come and get it.'").
[133] Hazell Dep. 29
[134] *Id.* at 46-48 (explaining how he spoke with a potential customer: "We talked about his future plans. And we discussed in some detail his potential interest in Grand Am racing and working with Proto-Auto," but they did not communicate further as the customer was "quite capable of finding me if his interest continues and develops.").
[135] Tr. (Brundle) 304; *see also* Tr. (Charsley) 187-88 ("I stay very active. I stay very much in communication. . . . I make sure I have an agenda of meetings when I go to a racetrack.")
[136] Tr. (Charsley) 187.
[137] Tr. (Brundle) 237-38.

team manager.[138] Brundle testified that works teams possess unique and significant competitive advantages by virtue of their special relationship with the manufacturer; these advantages include testing priority and the first opportunity to use newly-engineered parts and components.[139] Thus, Brundle believes that Krohn Racing's position, real or perceived, as Proto-Auto's works team served to cool outside interest among potential customers who were, of course, also Krohn Racing's competitors.[140]

Third, Lola complains of missed Proto-Auto promotional opportunities. For example, Lola cites Hazell's decision not to allow potential customers to test drive the Proto-Auto cars at two "open days" sponsored by Grand Am in 2008 as a showcase for series constructors. Lola also argues that Hazell deliberately sabotaged a promotional opportunity in August 2009 when he allowed a journalist for the widely-circulated *Autosports* magazine to test drive the vehicle. Lola contends that Hazell permitted the test drive knowing that the vehicle's setup was inadequately configured, leading to poor handling on the track. Indeed, Hazell

---

[138] *See supra* notes 128-31 & accompanying text. The parts trailer was purchased by Krohn and leased to Proto-Auto. The expense of the parts trailer also has been challenged, and will be addressed separately.

[139] Tr. (Brundle) 237-38 ("So there is a real advantage to being a works team. You have a cutting edge.")

[140] *Id.* (explaining that potential customers "know that [they] are not likely to be allowed to win against a works team"). Hazell shared this concern. *See* Tr. (Hazell) 386 (explaining the importance, when selling race cars, to show "a degree of independence" between the manufacturer and the race team "for support operation, to give the customer comfort").

had been informed by one of Krohn Racing's professional drivers immediately before the journalist's test drive that the professional driver disliked the car's handling.[141] Lola contends that Hazell had adequate time to reconfigure the vehicle's settings, but neglected to do so. Consequently, the vehicle received a poor review in *Autosports* magazine, which Lola believes hampered sales.[142]

Finally, Lola claims that the August 2009 press release and Krohn Racing's temporary decision to cease using Proto-Auto vehicles virtually destroyed Proto-Auto's chances of completing a sale for the remainder of 2009.[143] Lola also complains that Hazell omitted material information from the press release. Indeed, it argues that the press release, as written, suggests that Lola affirmatively cut off engineering services and other assistance to Proto-Auto when it was Hazell who demanded that Lola cease much of its ongoing work related to the vehicle.[144] Lola claims that the alleged material omission amplifies the disloyalty reflected in the press release.

---

[141] Tr. (Hazell) 470 (testifying that one of Krohn Racing's drivers, Ricardo Zonta, warmed the car up before the *Autosports* test drive, and that Zonta "didn't like" the setup).

[142] JX 23. The journalist, Ben Collins ("Collins"), described his test run: "[a]s I hurl the car into the first few corners, I nearly spin. The car leans over and darts into the corner so fast that it feels like I'm on a Waltzer ride at a fairground. Talk about turn-in oversteer! The brake is hard but lacks feel." When asked by Brown what he thought of the vehicle, Collins replied: "[t]o be honest, that felt awful. The car felt like it was rolling and turning in on rubber bumpers." *Id.*

[143] *See supra* note 80; *see also* Tr. (Charsley) 194-98 (explaining that Dyson Racing was interested in purchasing a Proto-Auto vehicle but did not feel comfortable making that kind of investment following issuance of the press release); JX 146.

[144] *See supra* note 46. In addition, Krohn Racing did not request any assistance from Lola in 2009. Tr. (Hazell) 492.

As Lola did, the Court begins by briefly reviewing Hazell's divided loyalties. Hazell was certainly not independent of Krohn Racing. His lack of independence and his potential conflicts, however, were known from the outset: Hazell was not only selected as Proto-Auto's chief executive, but he was also appointed by Krohn Racing to serve as its representative on the Proto-Auto board.[145] In fact, Krohn Racing's right to select Proto-Auto's chief executive was a condition to its acceptance of a minority ownership stake.[146] These background facts diminish the concerns the Court might otherwise have regarding Hazell's loyalties based merely on his association with Krohn Racing.[147]

Turning to Lola's substantive claim, there is insufficient evidence to conclude that Hazell deliberately, or even recklessly, stunted Proto-Auto's sales efforts as a means of furthering Krohn Racing's interests. Before discussing Lola's specific arguments, its claim must first be placed within the appropriate economic context. Economic conditions declined, in some sectors significantly, from the time of Proto-Auto's formation in March 2007 to the early spring of 2008 when

---

[145] Op. Agmt. § 5.2(a).

[146] Tr. (Krohn) 531 ("Lola insisted on having a 51 percent interest. As a quid pro quo for that, I wanted quality on the board. I wanted to have [Hazell] as our CEO. I wanted to make sure that we had headquarters in Georgia, because that's where the series was—it was in the U.S.—and that's where our shop was.").

[147] Lola's knowledge that Hazell was potentially conflicted did not constitute an acquiescence in any fiduciary misconduct arising out of the conflict. Once again, the parties did not contract around Hazell's fiduciary duties; thus, despite his arguably conflicted position, he was still obligated to give Proto-Auto his utmost loyalty.

Proto-Auto had developed a competitive vehicle and was in position to sell to potential customers. In Proto-Auto's original business plan—which was drafted by Manwaring—it was expected that Proto-Auto would sell two vehicles to third parties in 2008, and another two vehicles in 2009.[148] Indeed, in 2006, Grand Am's president had predicted that the number of vehicles raced in the Grand Am circuit would increase over the next several years.[149] The total number of cars that raced in the Grand Am circuit, however, dropped from an average of 26 cars per race in 2006 to only 13 cars per race in 2009.[150] Total car sales within the Grand Am circuit diminished accordingly: only six cars were sold by Proto-Auto's competitors to third-parties in 2008 and only two cars were sold in 2009.[151] It should thus come as no surprise that Lola's own efforts to sell Proto-Auto vehicles have been unsuccessful as well.[152]

As for Hazell's sales strategy, although it may not have been as aggressive as Lola would have preferred, it was neither unreasonable nor was it quite as simplistic as Lola suggests. Hazell explained that the motorsport community presents "an extremely well-developed network," with a uniquely high level of

---

[148] JX 194

[149] *See supra* note 8.

[150] Tr. (Hazell) 397; Tr. (Charsley) 216 (conceding that the Daytona prototype market has shrunk).

[151] Tr. (Charsley) 198-99, 211, 218.

[152] Lola and Proto-Auto reached an agreement in January 2009 that Charsley would receive a commission for selling Proto-Auto cars; he too was unable to sell any vehicles from then until the time of trial. *Id.* at 210.

familiarity among and between its members.[153] Hazell further described how his marketing approach takes into account the tendencies and personality of the individual customer.[154] Moreover, Hazell explained his belief that selling cars in the Grand Am market depends in large part on the manufacturer's reputation and the vehicle's demonstrated performance on the track.[155] This strategy is not, on its face, misguided. In addition, it is not so different from the sales approach sponsored by Manwaring.[156] For this reason especially, Hazell's sales efforts can be considered reasonable, even if they were not, as Lola argues, optimal. This conclusion undermines Lola's argument that Hazell's strategy exemplified conduct used to benefit Krohn Racing at Lola's expense.

As for the negative *Autosports* article, it is difficult to draw a causal connection between the article and Proto-Auto's inability to sell any vehicles. Assuming the *Autosports* article was in fact detrimental to Proto-Auto's reputation,

---

[153] Hazell Dep. 28-29.

[154] *See id.* at 47-48 ("It depends on the circumstances of their team and the personality of the owner, whether you believe there is capital in consistent sales effort with that team. Many of these men are very intelligent. They don't appreciate hard and consistent selling. It can be very negative. You have to judge the people individually and what method you are going to use with them according to their circumstances and their personality.").

[155] Tr. (Hazell) 386 ("[A] car needs to be linked to the name of a well-known racing car manufacturer. It needs to be demonstrated by a team capable of winning . . . [i]t's absolutely fundamental . . . . [a]nd the car has to perform very, very well. Because in this series, unlike some others, you can buy winning equipment.").

[156] *See* Manwaring Dep. 88-89 (explaining that, in his opinion, the most effective way to sell cars in auto racing is to "show that the car is quick or that it definitely will be quick on the track, it is reliable, it is safe, and you know the company has got a good reputation. So it is a combination of all those things really.").

the Proto-Auto vehicle redeemed itself with its victory at Watkins Glen a mere two days after the test run.[157] The Court is unconvinced that the *Autosports* article actually harmed sales in light of the vehicle's actual success on the road.[158] As for Hazell's decision not to allow the cars to be raced at the two Grand Am "open days" in 2008, this was Krohn Racing's decision to make as the vehicles' owner, not Proto-Auto's choice as the supplier. Hazell feared that potential customers would wreck Krohn Racing's vehicles, and, after consulting with Brown, Krohn Racing's official team manager, chose not to make the vehicles available.[159] Although Hazell owed Proto-Auto his utmost loyalty, he is not required to commandeer or otherwise make business decisions on Krohn Racing's behalf simply to serve Proto-Auto's interests.[160]

---

[157] The Court is also skeptical that the *Autosport*s article gave rise to the negative publicity for which it has been credited. Collins' unenthusiastic impression came with heavy qualifications: "The only comparisons I can offer across all the different cars are quite meaningless . . . [v]ariations like high to low downforce and *driver-led mechanical set-ups* far outweigh the characteristics peculiar to one chassis or another." JX 23 (emphasis added). Collins wrote that Krohn Racing personnel, upon hearing his assessment given to Brown, concurred: "[r]egular driver Ricardo Zonta nods in agreement and smiles: 'Yes, it is. We tried something. I don't like it either!'" To support his claim that the feel of a car says little about its actual capability, Collins wrote that "Zonta didn't like the feel of his Lola on Friday so he changed it. He won [Watkins Glen] on Sunday." An objective reader would likely have taken the Collins's article for what it is: a Grand-Am friendly piece in which the author tempered his criticism of the Proto-Auto vehicle by describing how the feel of a car is largely the result of mechanical set-ups, as demonstrated by Krohn Racing's victory several days after Collins' test run.

[158] As can be gleaned from the preceding footnote, the Collins' article was published on September 17, 2009, well after Krohn Racing won at Watkins Glen.

[159] Hazell Dep. 49-50; Brown Dep. 47-48 ("I expressed the opinion I didn't think it would be a very good idea to allow all the drivers to jump in the car and drive around the fastest track that we compete on . . . [b]ecause I wanted to see the car in one piece when it came back.").

[160] This observation applies with equal force to any complaint Lola has regarding Krohn Racing's decision to stop using the Proto-Auto vehicles in August 2009.

With respect to Lola's argument that Hazell disloyally established Proto-Auto as a works team, the nature of its development was substantially predictable from the start.[161] Part of Proto-Auto's success was predicated on its affiliation with Krohn Racing—a winning, well-known race team whose success with the Lola vehicle would give the car the visibility needed to compete against entrenched manufacturers like Riley.[162] The Court understands that Lola may have soured on this arrangement as time went on; indeed, its reservations about works teams make sense. Although the perception of Krohn Racing as something of a Proto-Auto's works team may have been regrettable in hindsight, since it was anticipated by the parties it could not have been the result of Hazell's disloyalty.

Finally, the Court addresses Hazell's authorship of the August 2009 press release. This action was not a breach of Hazell's fiduciary duty of loyalty. Lola had already initiated litigation against Hazell and Krohn Racing; the press release more or less disclosed this non-confidential fact. The Court is hesitant to hold Hazell liable for explaining that Lola had raised issues regarding Proto-Auto and

[161] This statement should be taken literally. A "Project Plan" sent from Manwaring to Krohn and Hazell on June 29, 2006 described Krohn Racing's role in the venture as follows: "Krohn Racing would effectively become the 'Works Team,' there would be a close working relationship between the Team and Lola . . . [t]his kind of relationship has worked very well for both parties in similar circumstances in the past." JX 186.

[162] One way to attain heightened visibility would be through the presence of a parts trailer, which Brundle of course criticized at trial. Manwaring, however, while skeptical of the need for the parts trailer from the "very beginning," agreed that it was "definitely desirable" to have a trailer present at the races from a marketing perspective. Manwaring Dep. 89.

had sought to redress its grievances through legal action when Lola, in fact, had pursued that very course.[163] Indeed, the Court is wary of prescribing a general rule that would hold a fiduciary liable for making truthful disclosures to the public of non-confidential facts.[164]

Lola's claim for lost sales therefore fails both because Lola has been unable to show that Hazell's conduct was in any way part of a disloyal scheme engineered by or for Krohn Racing, and also because it is impossible to disentangle the "lost" sales from the broader, depressed economic context.

5. The Expenses

Lola next argues that Hazell improperly caused Proto-Auto to incur $439,326 in expenses that should have been paid for by Krohn Racing. Lola devoted only a sentence in its opening post-trial brief in support of this claim,[165] and it did little to flesh out the contention at trial. Instead, Turnbull merely

[163] Given the close-knit nature of the auto racing industry and the circulation of information among and between manufacturers and race teams, the Court is also skeptical that Proto-Auto's potential customers were not already aware of the struggles within Proto-Auto and the potential litigation before they read the press release.

[164] Granted there is the possibly materially misleading omission relating to assistance provided by Lola, or the lack thereof; however, it is difficult to see how this particular statement against Lola, even if it was misleading, at all harmed Proto-Auto. The damaging effect of the press release to Proto-Auto, if any, may be found in its notice that the two Member Parties to Proto-Auto were having serious difficulties dealing with one another and were engaged in litigation. Whether the press release gave the impression that Lola had affirmatively stopped providing assistance would have contributed little to growing market fears about Proto-Auto's stability especially when compared to those other more expansive and important comments contained within the release. Indeed, the car had proven a winner even without Lola's recent support.

[165] Pl.'s Opening Post-Trial Br. 35.

directed the Court to a list he had compiled of the various disputed expenses incurred until February 3, 2009;[166] he also complained that, after that date, Proto-Auto acquired a Catia license for $27,835.[167] Turnbull explained that Catia is a computer engineering design system; he contended that Proto-Auto had no need for such a system because Lola is the "design authority" for the vehicle.[168] Krohn Racing, however, counters that the software is necessary for Proto-Auto to read computer aided design or "CAD" engineering files sent from Lola.[169]

Starting with the Catia license, the Court disagrees with Lola that this expense was charged inappropriately to Proto-Auto's account. The record shows that Lola, perhaps not frequently, but certainly from time to time, sent Proto-Auto CAD files for specific parts.[170] While Moreton testified that the CAD information could be sent in a format that would obviate the need for a Catia license, he did not dispute that Proto-Auto has a need for some CAD files.[171] Perhaps, to Proto-Auto,

---

[166] Tr. (Turnbull) 63; JX 109. Turnbull provided a summary of the expenses along with a number of detailed accounting spreadsheets.
[167] *Id.* at 65. Turnbull explained that part of that cost was for time spent by Weinstein that he did not believe was appropriate.
[168] *Id.* at 65.
[169] Tr. (Hazell) 441 ("[W]ith the volume of requests for CAD files, you need a Catia license to have a Catia platform in Atlanta to open the file and to read the file.").
[170] Tr. (Hazell) 411 (explaining that Lola previously at one point had provided "very many" drawings for specific parts); Tr. (Moreton) 169 ("If [a CAD file] was required or we believed it was required and it was discussed, occasional ones were sent to Proto-Auto.").
[171] Tr. (Moreton) 171. Moreton explained that a CAD file would be provided to Proto-Auto when it wanted to source a part "directly with a supplier in America." *Id.* at 125. This situation would arise typically when Krohn Racing requested from Proto-Auto what Moreton called an "alternative solution," or a part designed by Lola but supplied by a local parts manufacturer. *Id.*

the Catia license is not worth its cost. That, however, is not a determination for the Court to make: Hazell is Proto-Auto's chief executive; absent a showing of disloyalty or gross negligence, there is no ground to hold him liable for the purchase of the challenged license.[172] As for the other expenses, given the abject lack of supporting evidence, the Court finds that Lola has failed to satisfy its burden of proof on the remainder of its claim.[173]

6. The Engineering Work for the Porsche Engine

Lola also contends that it has performed work for Proto-Auto for which it has not been paid. Specifically, Lola had undertaken engineering efforts on the

---

Proto-Auto could ostensibly be called upon to provide similar services for other customers, assuming it ever acquires third-party accounts.

[172] The decision to purchase the Catia license therefore falls firmly under the protection of the business judgment rule. *See, e.g.*, *Sutherland v. Sutherland*, 2010 WL 1838968, at *9 (Del. Ch. May 3, 2010).

[173] Indeed, several of the disputed expenses are plainly not actionable. For example, Lola has continuously complained of the expense of the parts trailer. Brundle revisited this contention during his testimony. Tr. (Brundle) 309, 332 (explaining that he is very critical of Proto-Auto's parts trailer, which he described as a "nice-to-have," and "in start-up companies and in difficult times you can't afford the nice-to-haves"). This expense is captured in Turnbull's disputed expense list as "Equipment Rental"; the amount disputed is $101,976.66. The record is clear, however, that Hazell began leasing the parts trailer with Manwaring's knowledge and consent. Manwaring Dep. 43-44 (explaining that it was none of his business what Krohn paid when it bought the trailer so long as Proto-Auto paid a reasonable rate on the lease, "and that is what happened. We went ahead and they bought the truck and leased, and rented it to Proto-Auto."); *see also supra* note 162. Moreover, Brundle testified that Manwaring also approved payments made by Proto-Auto to various Krohn Racing employees for services they provided to Proto-Auto. Tr. (Brundle) 314; *see also* Manwaring Dep. 40-41 ("Q. Did you voice any objections to these employees doing work for Proto-Auto? A. I don't believe so."). Lola has contested these expenses as unauthorized "administrative expenses." JX 109. The fact that Lola would dispute these expenses when it is clear that it at one time approved them undermines its remaining, unsubstantiated expense claims.

vehicle chassis to support the installation of a Porsche engine.[174] It contends that Hazell has wrongfully refused to cause Proto-Auto to pay Lola $41,904 for engineering work that it expended in this effort. Hazell responded that this work was invoiced to Proto-Auto after he had put a stop order on Lola's engineering projects in November 2008; for this reason, Hazell contends that the work was unauthorized.[175]

Although the invoice for the Porsche installation was certainly sent after Hazell's stop order,[176] most of the engineering work was performed before Hazell took that action.[177] Moreover, Hazell knew of the Porsche installation in August 2008.[178] There is no evidence that Hazell objected to the Porsche-related work before it began or during its progression, until, of course, he issued the stop order

[174] Tr. (Moreton) 161. Hazell explained that during the "early part of the program," the Member Parties had considered several different engine installations. Tr. (Hazell) 447. The chassis acquired from Multimatic was first fitted for a General Motors engine; it was later fitted for a Ford, a Nissan, and eventually, a Porsche engine. Hazell agreed that this flexibility enhances the car's marketability. *Id.* at 448. Indeed, the Penske team inquired about a Proto-Auto vehicle with an installed Porsche engine in the summer of 2008. Tr. (Moreton) 162.
[175] *See supra* note 46; Tr. (Hazell) 408-09.
[176] JX 103.
[177] Tr. (Moreton) 161 (explaining that at the time Hazell placed his stop order in mid-November 2008, we "were probably a couple or few days from completing [the installation]").
[178] Tr. (Hazell) 449. As suggested previously, the evidence shows that the parties had agreed, in some form or another, that Lola would configure the chassis for several different engine types.

in November 2008.[179] Thus, Proto-Auto owes Lola for its work up until that point.[180]

7. The Interest

Finally, Lola argues that Krohn Racing owes it interest in the amount of $11,792. This interest, according to Lola, accrued by virtue of the historic loan imbalance that existed between the Member Parties, and was not corrected until the fall of 2008.[181]

Lola and Krohn Racing agreed, pursuant to § 8.3 of the Operating Agreement, that if Proto-Auto's audited balance sheets for any financial year show that its liabilities exceed the value of its assets, they would loan Proto-Auto the difference, and do so in proportion to their respective ownership interests. If either member failed to extend its required share of the loan, then the other party could lend all or some of the difference or terminate the Operating Agreement pursuant to § 10.3.[182] Under § 8.4 that party would also be entitled to be paid a commercial

---

[179] *Id.* Hazell raised several concerns regarding the Porsche installation and acquiring certain approvals from Grand Am sometime "between August and November [2008]." *Id.* at 449-50. This testimony does little to demonstrate that the Porsche work was unauthorized.

[180] This amount is simply a debt owed to Lola by Proto-Auto; Hazell is not liable for the sum as there is no evidence that he breached a fiduciary duty by having Proto-Auto refuse to pay for the design work.

[181] *See supra* note 45 & accompanying text. Lola contends that the imbalance due to Lola averaged $378,000 from December 2007 to October 2008 and peaked at $445,000. Counsel for Lola has represented that, at the time of trial, there "probably" was no longer a loan imbalance; he opined that any loan imbalance might have been "$20,000 or perhaps zero." Post-Trial Oral Arg. Tr. 11.

[182] Op. Agmt. § 8.4.

rate of interest on the amount it loaned which exceeded its pro rata obligation; it could then can recover "the amount as a debt from the non-payer."

Proto-Auto no doubt owed Lola significant sums from much of its early existence until November 2008. There was an imbalance between the Member parties. This has been conceded by Krohn Racing.[183] The $11,000 interest figure appears reasonable given the amount of the imbalance historically. Krohn Racing offers no facts in rebuttal except to suggest, with little support, that Lola in fact owes money to Proto-Auto. Krohn Racing is therefore liable to Lola for the disputed interest.

B. *The Alleged Material Breaches and Section 10.1*

Lola seeks a declaratory judgment that it has terminated the Operating Agreement pursuant to § 10.1(a) and may lawfully assume control of Proto-Auto. Under § 10.1(a), either Lola or Krohn Racing may terminate the Operating Agreement by written notice if the other party:

> has committed a material breach of any of the terms of [the Operating Agreement] or the Articles [of Organization], and it has been advised in writing of the breach and the consequences of failure to rectify the breach, and it did not rectify the breach within 21 days of receipt of such advice (for the purposes of this clause a breach is rectified if the relevant obligation is performed or the breach put right within the 21-day period).

[183] *See* Tr. (Hazell) 402-03; Defs.' Pre-Trial Br. 16.

On September 22, 2009, Lola sent to Krohn Racing written notice that Krohn Racing had materially breached the Operating Agreement. Those breaches were alleged as follow:

> 1) Krohn [Racing's] failure to furnish Lola with track and performance data as required by Section 3.7(b) of the Operating Agreement; 2) Krohn [Racing's] failure to furnish Lola or its representative on the Proto-Auto Board with proposed budgets, comparative analysis of projected and actual accounts or profit and cash flow forecasts for Proto-Auto as required by Article 6 of the Operating Agreement; 3) Krohn [Racing's] failure to furnish Lola with Proto-Auto financial statements in a timely fashion as required by Section 6.6 of the Operating Agreement; 4) Krohn [Racing's] failure to cause Proto-Auto to repay Lola its disproportionate share of the members' loan imbalance as required by Section 11.3 of the Operating Agreement; and 5) Krohn [Racing's] failure to cause Proto-Auto to hold regular meetings of its Board as required by Section 5.3 of the Operating Agreement.[184]

Lola further informed Krohn Racing that it had until October 13, 2009, to cure the breaches; otherwise, Lola would terminate the Operating Agreement pursuant to § 10.1(a) and take action to assume control of Proto-Auto.

As a threshold matter, Lola miscalculated the amount of time that Krohn Racing had to cure the alleged breaches. The Operating Agreement defines "days" as business days, not including Saturday, Sundays, or "any holiday recognized by

[184] JX 126. As a matter of precision, the September 22, 2009 letter did not list the alleged material breaches described above. Those purported breaches were instead identified in an earlier letter sent from Lola to Krohn Racing on September 10, 2009. *See* JX 125. Lola incorporated that letter, and the list of breaches it contained, by reference into the September 22, 2009 letter.

the Federal Government of the United States."[185] Thus, Krohn Racing had until October 22, 2009, to cure the purported breaches.

This miscalculation is relevant because Krohn Racing attempted to cure the alleged breaches by two separate efforts, both of which occurred within the 21-day cure period.[186] Nevertheless, Lola maintains that Krohn Racing's curative efforts were insufficient. Lola also claims that Krohn Racing has breached the covenant of good faith and fair dealing implied in the Operating Agreement, which Lola contends establishes the materiality of Krohn Racing's other breaches.

In analyzing Lola's claims, the Court first looks to whether a breach in fact occurred. It then turns to whether the breach was material, and finally, whether the breach was cured within § 10.1's cure period. Neither "materiality," "material," nor "material breach" is a defined term within the Operating Agreement. As such, the Court will look to the factors enumerated in Section 241 of the Restatement (Second) of Contracts for guidance:[187]

---

[185] Op. Agmt. § 1.4.

[186] Tr. (Hazell) 407-408; Tr. (Moreton) 135 (testifying that Lola "received a disk" from Krohn Racing in October 2009 that contained racing test data, which, however, "wasn't too much use to us."); JX 292 (October 16, 2009 Email from Hazell to Turnbull in which Hazell writes, "[f]urther to your letter of September 22, 2009, and the reference therein to your letter of September 10, 2009 and the points 1 through 5 of that letter. . . . I have today dispatched to you by Federal Express the items identified in points 1, and 2."). Hazell attempted to rectify Krohn Racing's alleged failure to hold board meetings through an email offer sent on October 20, 2009. JX 130 ("This is to let you know that as Krohn Racing's representative to Proto-Auto's board, I am prepared to hold three monthly board meetings if you desire them pursuant to Section 5.3 of the Operating Agreement at dates of mutual convenience.").

[187] *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003).

> 1) the extent to which the injured party will be deprived of the benefit which he reasonably expected; 2) the extent to which the injured party can be adequately compensated for the part of that benefit which he will be deprived; 3) the extent to which the party failing to perform will suffer forfeiture; 4) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and 5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[188]

1. The Testing Data

In accordance with § 3.7(a) of the Operating Agreement, Krohn Racing was required to test the vehicles purchased from Proto-Auto and to "assist Lola to achieve the improvements in performance and safety of the [vehicles] by providing to Lola all data and any other information obtained from such testing." Krohn Racing had regularly delivered this information to Lola until sometime in late 2008 or early 2009, when Krohn Racing significantly reduced the quantity of information transmitted.[189] As set forth previously,[190] after receiving Lola's September 22, 2009, letter, Krohn Racing forwarded to Lola a disk containing testing data on October 16, 2009. According to Moreton, the information was of little use to Lola; specifically, he stated that it did not capture "the full picture."[191]

---

[188] *Restatement (Second) of Contracts* § 241.

[189] Tr. (Moreton) 135 (testifying that, until October 2009, Lola had not received any racing data during the 2009 season); *see also* Tr. (Hazell) 407. Hazell had asked Krohn Racing to forward testing data and other inquiries to him so that he could "determine what would go to Lola." *Id.* at 406. There is no dispute that testing information was withheld.

[190] *See supra* note 186.

[191] Tr. (Moreton) 135. Moreton also was of the view that Krohn Racing had *never* provided Lola with adequate racing and test data. *Id.* at 132. He claimed that Krohn Racing failed to disclose

Krohn Racing's decision to withhold the testing data for much of the 2009 racing season constituted a breach of the Operating Agreement. The Court thus turns to the question of whether or not this breach was material. The first Restatement factor looks to the extent to which the non-breaching party may be deprived of his reasonably anticipated benefit. By receiving test data, Lola sought to improve upon the Proto-Auto vehicle's performance. The benefits derived from Lola's potential efforts were two-fold: first, through improvement, the Proto-Auto vehicle would become more competitive, and thus marketable, which would in turn generate increased sales through which Lola would share in the profits; second, Lola would also be compensated for its design and engineering work. Lola has failed to demonstrate that the Proto-Auto vehicle required additional engineering to enhance track competitiveness; Krohn Racing actually won two races with the Proto-Auto vehicle in 2009. Lola cannot reasonably expect a steady stream of design business when there is no demonstrated need for such efforts.[192] For these

---

the set-up used in any particular race, "so it was difficult to then set the model to the same specification." *Id.* at 134.

[192] Moreover, Hazell testified that he stopped "the flow of information because I thought it was generating a vast amount of work that was unnecessary . . . ." Tr. (Hazell) 407. Thus, Krohn Racing argues that Hazell had a valid business justification for cutting off the flow of testing information. Indeed, Krohn Racing is obligated to procure that Hazell "uses all reasonable endeavors to ensure" that Proto-Auto's budget does not exceed its income, and that Hazell not commit funds to expenditures not contained within the budget. Op. Agmt. §§ 6.2, 6.5. As a corollary argument, Krohn Racing contends that Hazell withheld the racing data in response to complaints by Lola that Hazell had done a poor job containing Proto-Auto's expenses. JX 164 (Oct. 31, 2008 Email from Dawson to Hazell) ("How can we reduce the ongoing costs and overheads of running Proto-Auto?"); JX 172 (Dec. 16, 2008 Email from Birrane to Krohn) ("What must happen is that we stop the hemorrhaging of cash proposed by Jeff who seems hell

reasons, the Court finds that the breach was not material and thus could not be the basis for a § 10.1(a) termination.[193]

2. Krohn Racing's Failure to Furnish Budgets and Other Financial Documents

Article 6 of the Operating Agreement places upon Krohn Racing, as the member party whose board representation includes Proto-Auto's chief executive officer, several budgetary and financial reporting obligations. Under § 6.1(a) specifically, Krohn Racing must ensure, before the commencement of each financial year, that there is prepared a projected profit and loss account, an estimate of working capital requirements, an operating budget, a projected balance sheet for the end of that financial year, a business review, and a summary of business objectives as well as a business plan. Pursuant to § 6.1(b), Krohn Racing is required to submit the budget to Proto-Auto's board for its approval within one month before the beginning of the financial year. Further, Krohn Racing must ensure the production, within twenty-one days of the end of each month, of

---

bent on creating a split between us. I have so instructed him."). Krohn Racing suggests that Lola cannot have it both ways. While this may be so, withholding test information, and thus breaching the Operating Agreement, does not appear to be the only means by which Hazell or Krohn Racing could have limited Proto-Auto's engineering expenses. Hazell simply could have enforced his earlier stop-order and refused to pay for any design costs that he had not approved in advance.

[193] Improvement of the vehicle's design could, one supposes, always be facilitated with additional test data. Such a generalization does not conveniently translate into materiality, at least without something more concrete.

monthly management accounts;[194] such accounts must be forwarded to each member of Proto-Auto's board within three days of their being produced.[195]

Hazell admitted that he had never delivered an annual budget as required under the Operating Agreement until October 16, 2009;[196] Turnbull went even further and testified that neither Krohn Racing nor Hazell had ever produced *any* of the documents listed in § 6.1(a).[197] Moreover, evidence at trial showed that the monthly financial statements either were not produced at all or were frequently submitted late.[198]

The evidence, however, also shows that financial information was frequently exchanged between Hazell and Manwaring during the first two years of Proto-Auto's existence. Manwaring provided a detailed business plan in January 2007,

---

[194] Such monthly management accounts include a balance sheet, a detailed profit and loss account, a profit and cash flow forecast for the next succeeding period of three months, and additional information as may be reasonably requested by the Proto-Auto board of directors or individual Member Parties to explain discrepancies between budgeted and actual figures. Op. Agmt. § 6.3.

[195] *Id.* at § 6.4.

[196] Tr. (Hazell) 486.

[197] Tr. (Turnbull) 112.

[198] Tr. (Weinstein) 519 (testifying that "more often than not" Krohn Racing failed to meet its monthly reporting obligations in a timely fashion). Lola also contends that the monthly financial statements were sometimes not produced at all. It relies upon testimony by Weinstein in which she conceded that Krohn Racing's obligation to produce "timely financial statements" was not met "from time to time." *Id.* It is ambiguous as to whether Weinstein was admitting, as she did in the following question, that Krohn Racing failed to provide the statements in a timely fashion, or whether she was admitting that such documents were sometimes not provided at all. The Court accepts the former interpretation, partly because Lola's question was poorly worded, but mostly because that particular interpretation is supported by Hazell's testimony; Hazell testified that he could not recall any month after March 2008 when Proto-Auto did not provide a financial statement to Lola. Tr. (Hazell) at 416.

before the Operating Agreement was even entered into.[199] Manwaring produced a similar business plan on February 23, 2007,[200] to which Hazell responded three days later with some suggestions and revisions.[201] This give and take continued for about a year as Manwaring and Hazell worked to determine accurate origination and parts costs, and attendant working capital requirements.[202] Although the communications between Manwaring and Hazell technically concerned Proto-Auto's "business plan," that term in this context was given an expansive meaning as the parties dealt with the nitty gritty of constantly evolving budgetary forecasts and costs.[203] Manwaring continued his involvement with the business plan up until

[199] JX 194.
[200] JX 369 (describing in attached cover letter his opinion that in "the first two months cash that we put into Proto-Auto should be £ 150k (split 49/51) and then see how things pan out in the first month then for forecast again").
[201] JX 367.
[202] Tr. (Hazell) 417 (testifying that he and Manwaring would "sit side by side on our laptops together working on that business plan"); s*ee also* JX 395 (September 20, 2007 Email from Hazell to Manwaring with attached business plan detailing estimated origination payments and car and spares costs and deposits); JX 391 (October 16, 2007 Email from Hazell to Manwaring with attached revisions to the "spreadsheet we were working on," and describing to Manwaring how Proto-Auto may need additional working capital so as to attain "positive cashflow as suppliers on this side of the pond demand payment within 14 days"); JX 159 (January 18, 2008 Email and attached business plan from Hazell to Weinstein with the following message: "[W]orking with Rupert we revised the business plan to reflect the later start to the program and the increased origination and parts . . . .").
[203] Tr. (Hazell) 416 ("Q. Do you consider it a business plan, a budget, both, what? A. I think it served both purposes.").

his departure from Lola.[204] Thereafter, on November 17, 2008, Hazell updated the business plan and provided an accompanying cash flow projection.[205]

The record demonstrates additional exchanges of financial information between Lola and Krohn Racing. For example, on May 20, 2008, Weinstein sent to Turnbull a balance sheet, profit and loss statement, and business review for the fiscal-year ended March 31, 2008.[206] During 2008 and 2009 while Lola and Krohn Racing attempted to resolve Proto-Auto's inventory accounting problems, Turnbull was in frequent communication with Krohn Racing personnel; as discussed previously, he also twice visited Proto-Auto's facility, and, for a short period at least, had a productive working relationship with Weinstein.[207] Indeed, the record shows that during this time there was a significant exchange of financial information between Lola and Krohn Racing.[208]

Thus, insofar as Krohn Racing may have breached certain of Article 6's technical requirements, any such breach was immaterial. Article 6 existed to

---

[204] *See* JX 76 (May 9, 2008 Email from Manwaring to Turnbull with attached business plan); JX 368 (August 28, 2008 Email from Manwaring to Hazell with attached business plan and following message: "Jeff, [Birrane] asked for the business plan so I gave him this. So you have the same one to hand.").

[205] JX 194; Tr. (Hazell) 418 ("After Rupert had left, I found myself in a meeting at Lola's. I went there for the meeting, and Howard Dawson asked for a business plan.").

[206] JX 77. Weinstein testified that financial statements were also produced, upon Lola's request, for the accounting period ended December 31, 2007. Tr. (Weinstein) 519-20.

[207] *See supra* notes 22-31, 68 & accompanying text.

[208] In a February 26, 2009 letter from Turnbull to Hazell, Turnbull complained of the "absence of a formal and structured business plan," but stated that "during [his] recent visit with Laura [Weinstein] virtually all financial matters were researched, discussed and agreed." JX 104.

ensure that Lola was kept aware of Proto-Auto's financial condition.[209] The evidence shows a considerable amount of cooperation between Krohn Racing and Lola both before, and after, their relationship soured in the late summer and fall of 2008. This cooperation and the fact that Lola made little of the technical deficiencies regarding Krohn Racing's financial information exchange until after filing its first lawsuit, severely undermine its position. The Court has been given no basis upon which it can conclude that Lola was deprived of material financial information for any noteworthy period of time. The Article 6 breaches were, almost by definition, immaterial.

3. The Loan Imbalance

As stated previously, counsel for Lola concedes that there no longer exists a material loan imbalance between the Member Parties.[210] Lola, however, insists that at the time of its September 22, 2009, termination letter, there remained a material loan imbalance.[211] If true, Lola would have the right to terminate the Operating Agreement under § 8.4.[212] The record, however, demonstrates that the

[209] In Lola's words, "the Operating Agreement establishes a well-defined structure in which Krohn Racing is tasked with providing [Proto-Auto's] initial CEO and headquarters but, at the same time, Lola (located thousands of miles away from Proto-Auto's physical location) is afforded board representation and full transparency into [Proto-Auto's] financial affairs." Pl.'s Opening Post-Trial Br. 41-42.
[210] *See supra* note 181.
[211] Post-Trial Oral Arg. Tr. 11 ("[A]t the time that Lola terminated the agreement, the imbalance was still there.").
[212] *See* text accompanying note 182 *supra*.

loan imbalance was almost nonexistent by December 2008, and that any imbalances that arose after that time were timely paid back by Krohn Racing.[213] The loan imbalance, therefore, may not be cause for termination.

4. The Board Meetings

Finally, Lola and Krohn Racing agreed that the Proto-Auto board would hold "meetings . . . at least three-monthly."[214] They also agreed that any director "may request that a board meeting be called or propose items for inclusion in the agenda."[215] By the time of trial, Proto-Auto had never held a formal meeting of its board.[216] Turnbull, however, attempted to call a meeting of the Proto-Auto board in March 2009 to discuss Hazell's replacement, but he was rebuffed by Krohn Racing.[217] Lola maintains that Krohn Racing refused to recognize the meeting or

---

[213] *See supra* note 45 & accompanying text; JX 91 (Dec. 11, 2008 Email from Turnbull to Hazell setting loan imbalance at $9,416, excluding November part sales to Krohn Racing); Birrane Dep. 239 (explaining that, as of February 2009, he was not aware of any payments demanded by Lola, "either with regard to the loan imbalance, or with regard to parts sales," that were not being paid regularly by Krohn Racing). Lola argued in its opening post-trial brief that there existed a loan imbalance at that time of $460,404. Lola did little to substantiate this claim, which has since been abandoned. Since the record demonstrates that the loan imbalance was reduced significantly by December 2008, and has been paid off regularly since then, the Court will give little weight to the moving target presented by Lola—there existed no material loan imbalance as of the September 22, 2009, termination letter that was not otherwise timely cured by Krohn Racing.

[214] Op. Agmt. § 5.3.

[215] *Id.*

[216] Post-Trial Oral Arg. Tr. 58 (counsel for Krohn Racing explaining that Proto-Auto had held its first real board meeting approximately one month before post-trial oral argument).

[217] JX 104 (February 26, 2009 Email from Turnbull to Hazell with carbon copy sent to, among others, Krohn in which Turnbull "now [called] a full board meeting to be held on 6th March 2009"); *see also* Tr. (Turnbull) 55 (confirming February 26, 2009 email); JX 178 (February 27, 2009 Email from Krohn to Turnbull and Birrane).

to permit Hazell's attendance as its board designee. This refusal, according to Lola, constituted a material breach of the Operating Agreement.

Lola's argument fails for two reasons. First, Turnbull's attempt to call a meeting of the Proto-Auto board in March 2009 was defective. He selected the March date because it coincided with a scheduled meeting between Krohn and Birrane that was to take place in London.[218] Turnbull's email suggested that the so-called full board meeting would include himself, Birrane, and Krohn. Krohn responded to Turnbull's request for a board meeting by agreeing to meet with Birrane regarding Proto-Auto; Krohn, however, rightfully refused to "accept any such meeting as a so called 'Board of Directors' meeting."[219] This is because Birrane and Krohn were not at that time, or ever, Proto-Auto board members. Turnbull agreed to postpone the meeting; he instead scheduled an "informal meeting in London on Friday 6th March between Mr. Birrane and Mr. Krohn," with both Turnbull and Brundle available for part of the meeting.[220] The Court fails to understand how Krohn Racing's conduct during this series of events constituted a breach of the Operating Agreement, especially considering Turnbull's defective request for a board meeting and his subsequent agreement to postpone the requested board meeting in order to have an informal meeting in its place.

---

[218] JX 104.
[219] JX 178.
[220] JX 344 (March 2, 2009 Email from Turnbull to Birrane, Krohn, Hazell, Brundle, and others).

Second, even if Krohn Racing had inappropriately refused a Proto-Auto board meeting, and thus breached the Operating Agreement, there is no evidence that such a breach would at all have been material. Key persons within Lola and Krohn Racing actually met on March 6, 2009—the date Turnbull had set for a board meeting. The evidence also demonstrates frequent communication between the parties, particularly Turnbull, Hazell, and, earlier, Manwaring. The presumed purpose of frequent board meetings is to give the board members an opportunity to listen and be heard.[221] Given the ample communications described throughout this memorandum opinion, Lola has failed to demonstrate that the lack of Proto-Auto board meetings deprived it of any expectation it did not achieve through other means.[222]

In sum, Lola has failed to demonstrate that any breach identified in its September 22, 2009, termination letter was material. For this reason, it not entitled to terminate the Operating Agreement under § 10.1.

5. Krohn Racing's Good Faith

Although not contained in its September 22, 2009 notice, Lola has consistently argued that Krohn Racing breached the implied covenant of good faith and fair dealing by refusing to consider Hazell's replacement as Proto-Auto's chief

[221] Indeed Birrane explained that part of the problem for him was not that Krohn refused to listen, but that he did not appreciate his view of the problem. Birrane Dep. 214-16.
[222] The Court also notes that Krohn Racing agreed to a formal board meeting on October 20, 2009, within the § 10.1 cure period. *See supra* note 186.

executive. The implied covenant of good faith attaches to every contract.[223] Determining whether it has been breached, however, involves the "cautious enterprise" of inferring contractual terms not contained within the contract and handling contractual gaps not anticipated by the parties.[224] The Court will "only imply contract terms when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected."[225] The record demonstrates that Krohn Racing expressed willingness to consider Hazell's replacement or resignation, but refused to take that step without more information—in particular, proof of misconduct through the production of audited financials.[226] On these facts, and considering that Lola failed to prove the vast majority of its claims at trial, Krohn Racing did not breach the implied covenant of good faith.[227]

---

[223] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).
[224] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).
[225] *Id.*
[226] *See supra* notes 57, 61, 72.
[227] The record shows that Hazell, at Krohn's direction, has caused Proto-Auto to book Krohn Racing and Hazell's legal fees to Proto-Auto. *See* Tr. (Weinstein) 520-21; Tr. (Krohn) 569-70. These fees total approximately $250,000 (as of the time of trial). Of the accrued fees, about $9,500 has actually been paid. Tr. (Krohn) 570. Lola contends that the booking and payment of these fees represents a stark example of Krohn Racing's bad faith, and Hazell's disloyalty. Indeed, the Operating Agreement contains no advancement or indemnification provision; nor does it provide for the payment of one member party's legal fees, incurred in litigation against the other member party or otherwise. Considering that the vast majority of the booked fees have not yet been paid, the appropriate course of action is to wait and see how these fees are actually dealt with before determining whether Krohn Racing breached the Operating Agreement, or whether Hazell breached his fiduciary duties.

C. *Krohn Racing's Breach of Contract Counterclaims*

1. Did Lola Breach the Operating Agreement by Failing to Produce a Competition-Ready Car on Time and on Budget?

Krohn Racing contends that Lola failed to meet the targets set for the Proto-Auto vehicle's redesign and engineering both in terms of time and cost. Krohn Racing was unable to compete with the vehicle at the 2008 24 Hours of Daytona, which was the date set in the Operating Agreement for its debut race.[228] Moreover, Lola's engineering costs for 2007 and 2008 alone exceeded Proto-Auto's entire development budget.[229] These shortcomings, according to Krohn Racing, constitute a breach of the Operating Agreement.

Krohn Racing, however, has given the Court little reason to hold Lola liable for the timeline and budgetary shortcomings. Regarding the timeline, the Member Parties certainly envisioned, pursuant to § 3.8 of the Operating Agreement, that the Proto-Auto vehicle would be raced in the first race of the 2008 season—a milestone that was not met.[230] That said, even if Lola was responsible for

---

[228] *See supra* note 11 & accompanying text.

[229] *Compare* JX 76 (Manwaring's Original Business Plan) *with* JX 107 (Grand-Am Engineering Project Review prepared by Turnbull for March 2009).

[230] *See supra* notes 19-20 & accompanying text. Section 3.8 reads as follows:

> Krohn [Racing] undertakes to purchase from the Company two Vehicles and all Parts for the two Vehicles at the then current retail price less 5%. Krohn [Racing] shall purchase the two Vehicles as soon as reasonably practicable after the Prototype has been updated and improved by Lola in accordance with the provisions of clause 3.6 and is demonstrated to be competitive but in any event by no later than the date of the first race of the 2008 Grand Am Series season to ensure entry by Krohn [Racing] in the first race of the 2008 season.

providing a competition-ready vehicle by the beginning of the 2008 Grand Am series season, Krohn Racing has not demonstrated how the design delay caused it any quantifiable injury or frustrated any of its expectations. Krohn Racing was still able to race in the 24 Hours of Daytona, albeit with another car.[231] Thus, any delay did not cost Krohn Racing a competitive opportunity. In addition, the Court has already discussed Proto-Auto's struggles to generate sales, including the frustration brought on by the economic recession. Again, the broader economic context makes it difficult to assess the extent to which either of the Member Parties' conduct hampered Proto-Auto's sales efforts.

As for the hefty engineering expenses, Lola was not obligated under the Operating Agreement to keep its engineering fees within Proto-Auto's budget. Instead, it was Krohn Racing's duty, as the party "whose Board Representation" included Hazell as Proto-Auto's chief executive, to "procure that [Hazell] does not authorize or commit [Proto-Auto] to [an] expenditure which is not contained in the relevant budget."[232] There is therefore no legal basis for holding Lola accountable for the engineering overages.[233]

---

[231] *See supra* note 19.
[232] Op. Agmt. § 6.5.
[233] Both Lola and Krohn Racing were obligated to use all "reasonable endeavors to stop financial losses occurring in relation to [Proto-Auto]." Op. Agmt. § 3.5(j). Krohn Racing, however, has not persuaded the Court that Lola failed to undertake reasonable efforts to minimize the challenged engineering expenses. Indeed, those expenses were seemingly necessary to prepare the car for competition even if they were over budget.

Moreover, Krohn Racing has provided little evidence that the timeline and budgetary shortcomings were Lola's fault. Although there are several early emails from Hazell that demonstrate his frustration with delays by Lola in supplying parts,[234] these emails do little to prove that Lola was to blame for the lag time.[235] Indeed, the record shows that not only the unexpected delays, but also the overages, occurred because of the roll hoop issue and the aerodynamic problems that plagued Multimatic and which caused it to sell its Daytona prototypes in the first place.[236]

2. The Withheld CAD Files

Next, Krohn Racing argues that Lola withheld CAD files rightfully belonging to Proto-Auto. It premises its argument on § 12.4 of the Operating Agreement, which provides that "Intellectual Property developed by either Member Party during the Term relating to the Vehicles shall be the property of the

[234] JX 217 (Feb. 25, 2008 Email from Hazell to Manwaring) ("[W]e need to have a lengthy conversation in the next ten days regarding the performance of Lola as a supplier to Proto-Auto. We have today badly let down Krohn Racing in failing to supply steering arms scheduled to be tested here at Homestead and scheduled to be ready on 22 Feb . . . the supply failure reflects badly on Proto-Auto, . . . ."); JX 218 (Apr. 11, 2008 Email from Hazell to Manwaring describing Lola's efforts to supply Proto-Auto as "pathetic").

[235] Manwaring explained that he did not agree with Hazell's position; he believed Lola "always did our utmost to supply parts." Manwaring Dep. 66. According to Manwaring, the contested parts were "not manufactured inside Lola, they were manufactured by outside suppliers, and I am sure he was upset but I did think we put in quite a bit of effort to get them to him." *Id.* at 65.

[236] *See supra* notes 13-15 & accompanying text. Krohn Racing also contends that Lola's failure to provide on time a completed bill of materials also constitutes a breach of the Operating Agreement. As discussed above, the accounting issues resulted in no actual damages, and thus *both* parties' complaints regarding such issues are for naught.

[Proto-Auto]." The Operating Agreement defines "Intellectual Property" broadly to include "models . . . specifications and standards [and] information . . . ."[237] Indeed, Lola has acknowledged that the CAD files constitute Proto-Auto's intellectual property.[238]

Despite this acknowledgement, Lola claims that Krohn Racing has not demonstrated why Proto-Auto requires the information, which Lola contends is used almost exclusively for manufacturing purposes.[239] Moreover, Lola fears that Krohn Racing would use the CAD drawings to counterfeit Lola parts for the Proto-Auto vehicle. It bases this allegation on allegedly counterfeit parts it found during a post-trial inspection of Proto-Auto's premises.[240]

First, the Court notes that the evidence submitted into the re-opened trial record does not demonstrate counterfeiting.[241] Second, nothing in the Operating

---

[237] Op. Agmt. § 1.

[238] Tr. (Brundle) 313-14 ("Q. . . . Do you agree that CAD drawings prepared in the design and development of the cars is considered as the intellectual property as defined by the operating agreement between Krohn and Lola? A. It's the property of Proto-Auto, yes.").

[239] *See id.* at 267-68 ("[N]ot once has any request from Jeff Hazell to me had any evidence, despite requesting, had any evidence as to why that CAD information from a manufacturing perspective would be required.").

[240] *See supra* note 118. The record was reopened to allow Lola to submit photographic evidence of these parts; it also submitted portions of an affidavit by Moreton as a supplement; Krohn Racing submitted portions of an affidavit by Hazell in response. The Court reopened the record only because the evidence impaired Hazell's credibility; at the time of its decision, the Court did not weigh in on whether the evidence submitted at all proved counterfeiting. *See Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2010 WL 1818907, at *3 (Del. Ch. Apr. 23, 2010).

[241] Specifically, Lola found three gearbox suspension plates marked by hand-etched numbers identical to the numbers machine-etched by Lola onto its parts. Lola contends that Krohn Racing outsourced the plates' manufacture to a third-party and then applied the part numbers to pass the suspension plates off as Lola goods. *See* Moreton Aff. ¶ 6 ("[T]he only purpose in hand etching

Agreement permits Lola to hold on to the CAD files for itself. The files are plainly Proto-Auto's property. Krohn Racing's request for injunctive relief on this claim is therefore granted.

3. Chassis 8

Krohn Racing also seeks an injunction preventing Lola from blocking the shipment of Chassis 8 from Multimatic to Proto-Auto in Georgia.[242] Indeed, the evidence shows that Lola, acting on Proto-Auto's behalf, requested that Multimatic

---

a Lola part number onto a counterfeit part is to confuse, mislead and pass that part off as a genuine Lola part."). Lola also found a carbon brake duct assembly that it had manufactured, but which had never left Proto-Auto's stores. It believes that Krohn Racing counterfeited this assembly in aluminum and has been using this version instead of the original Lola model. *See id.* at ¶ 8 (contending that Hazell used the "carbon fiber brake duct assemblies . . . as a template for the manufacture of inferior counterfeit brake ducts made from aluminum . . . [which] are presently used in Krohn Racing's race cars).

The evidence of potential counterfeiting is not nearly as damning as Lola puts on. First, regarding the gearbox suspension plates, there is nothing in the Operating Agreement that restricts Proto-Auto from sourcing the manufacture of car parts to third-parties, even though Lola is responsible for determining what third parties are to perform the work. Op. Agmt. § 3.6(f). More to the counterfeiting point, however, there is no evidence that the suspension plates have ever been passed along as Lola parts. Indeed, since Lola machine etches its parts numbers, the hand-etched numbers would plainly indicate that an allegedly counterfeit part was from a different manufacturer. Moreover, there is reason to believe this number was sketched in only for internal inventory control purposes—so that all Proto-Auto parts could be properly identified no matter the manufacturing source. *See* Hazell Aff. ¶ 10 ("For Lola's convenience, at [its] inception . . . Proto-Auto agreed to use Lola's parts numbering system so that Lola would not have two different numbering systems in its building."). The Court finds Hazell's explanation persuasive; the evidence does not show that the permissibly outsourced parts were passed along as Lola merchandise.

Second, as for the brake ducts, Krohn argues that it, and not Lola, prototyped the original brake ducts to make the vehicle ready for a race in 2008. *Id.* at ¶ 15. Only after producing the aluminum brake ducts did Proto-Auto supposedly order carbon versions from Lola. Krohn Racing claims that Proto-Auto sent Lola photographs of the aluminum brake duct prototypes for Lola's use in the manufacture of its carbon model. *Id.* at ¶ 16. Lola presents no argument or evidence in response. These facts therefore sufficiently undermine Lola's counterfeiting allegation.

[242] *See supra* note 64 & accompanying text.

halt the chassis' shipment to Proto-Auto, and return it to Canada. Lola contends that it blocked the shipment out of respect for an agreement Proto-Auto had made with Multimatic by which Multimatic would assemble the vehicle; it also is concerned that Krohn Racing will overcharge for the assemblage.

Lola, however, has presented no evidence of such an agreement between Proto-Auto and Multimatic;[243] nor has it explained why the authority to stop delivery does not belong to Hazell as Proto-Auto's chief executive.[244] Lola must therefore cease its efforts to prevent delivery of Chassis 8.

4. Lola's Liability for Bringing Claims for Dissolution and/or Termination

Krohn Racing maintains that Lola violated the Operating Agreement by bringing its first lawsuit for dissolution in April 2009. It contends that § 10.1's notice and cure provision "vests in either party the right to cure any alleged material breach of the Operating Agreement before the other party can invoke" the Operating Agreement's termination provision, and that before Lola's filing of the April 2009 complaint, it had made no attempt to comply with this provision. Thus, according to Krohn Racing, Lola breached the Operating Agreement by depriving

[243] In fact, Holt, Multimatic's Vice President identified in note 13, *supra*, was willing to forward the chassis to Proto-Auto in Georgia if he could confirm that Lola did not have the authority unilaterally to stop delivery on Proto-Auto's behalf. *See supra* note 66.

[244] Although Lola is responsible for organizing the manufacture and sourcing of all parts, Op. Agmt. § 3.6(f), Proto-Auto is responsible for manufacturing, or appointing a sub-contractor, to manufacture the race cars themselves. *Id.* at § 1.1

Krohn Racing of its contractually-defined cure rights.[245] Krohn Racing further contends that Lola breached the Operating Agreement by refusing to follow the deadlock procedure contained in § 10.2 of the Operating Agreement.[246] According to Krohn Racing, this is because § 10.2 is the only contractual mechanism for exiting Proto-Auto absent a material breach of the Operating Agreement.

The Court is not persuaded by Krohn Racing's position. Lola did not predicate its first complaint on § 10.1 termination; thus, there was no reason for it initially to have followed the notice and cure requirements contained within that

---

[245] Krohn Racing also argues that Lola's decision to sue instead of pursue the Operating Agreement's termination provisions "could have hindered sales, and thus the alleged breach was material."

[246] Section 10.2 reads as follows:

> If a dispute relating to the affairs of the Company cannot be resolved within 15 days of such dispute arising either party may serve a written notice that it intends to implement the deadlock procedure set out in this clause. If the dispute cannot be resolved within a further period of 15 days after service of the written notice, either party may within 15 days thereafter serve written notice on the other party ("a Deadlock Resolution Notice"). If any party ("the Terminator") serves a Deadlock Resolution Notice, it shall require the other party ("the Recipient") to sell to the Terminator all, but not some only, of the Recipient's interests in the Company at the price determined in the Deadlock Resolution Notice ("the Price"). Upon receipt of the Deadlock Resolution Notice the Recipient shall have 15 days to either accept the requirement to sell all of its interests to the Terminator at the Price or to serve written notice on the Terminator requiring the Terminator to sell all, but not some only, of its interests in the Company to the Recipient at the Price. If the Recipient does not respond within the 15 day period, it will be deemed to have accepted the Terminator's Deadlock Resolution Notice.

Although § 10.2 is referred to within the Operating Agreement as the "deadlock procedure," this label may be misleading. The provision is triggered upon a "*dispute* relating to the affairs of the Company" arising between the Member Parties that remains unresolved for a period of approximately one month, and not necessarily upon a "deadlock" in the sense of impasse (emphasis added). A question not before the Court is whether there is major divergence between the terms "deadlock" and "dispute." "Dispute" suggests disagreement of a far less intense degree than that implied by "deadlock." *See* note 258, *infra* and accompanying text.

provision. Moreover, § 10.1, like the deadlock procedure contained in § 10.2, is permissive,[247] and neither provision precludes the filing of a suit for dissolution, breach of contract, or breach of fiduciary duty. The Court addressed similar arguments when ruling on Krohn Racing's motion to dismiss certain counts of Lola's first complaint.[248] There is no ground either to conclude that Lola breached the Operating Agreement by suing for dissolution or other relief before it attempted to terminate the Operating Agreement under § 10.1, or to impose liability upon Lola because it sought judicial dissolution instead of first invoking the contractual disentanglement option of § 10.2.

5. Bad Faith and Fee Shifting

As its final claim, Krohn Racing argues that Lola "knowingly advanced frivolous claims and defenses and engaged in a pervasive pattern of needlessly antagonistic litigation behavior";[249] thus, according to Krohn Racing, Lola should pay Krohn Racing's litigation costs under the bad faith exception to the American Rule.[250] In support of its request, Krohn Racing contends that several of Lola's

---

[247] "[E]ach Member Party agrees the other may terminate this Agreement by written notice *if*: . . ." Op. Agmt. § 10.1 (emphasis added).

[248] *See Lola Cars Int'l Ltd. v. Krohn Racing LLC*, 2009 WL 4052681, at *7 (Del. Ch. Nov. 12, 2009) (holding that the presence of several nonexclusive and permissive termination clauses will not preclude judicial dissolution as provided for in the Limited Liability Company Act where the Operating Agreement does not otherwise make judicial dissolution unavailable).

[249] Defs.' Opening Post-Trial Br. 47.

[250] Under the American Rule—which is routinely followed by the Court of Chancery—each litigant is responsible for defraying the fees of his or her own counsel. Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Del. Ct. of Chancery*

claims were baseless—specifically those involving the contested expenses that were agreed to by Manwaring, the allegedly missing inventory, Hazell's decision to seek an exemption from Grand Am's revised roll hoop regulation, and Hazell's purportedly disloyal sales strategy. Krohn Racing also challenges Lola's conduct during discovery and trial, basically arguing that several aspects of Lola's litigation strategy were annoying or obnoxious.[251]

The Court once again is not persuaded by Krohn Racing's contentions. There was nothing about Lola's conduct before or during trial that smacks of the bad faith that would justify fee shifting.[252] Of course, many of Lola's claims were flimsy, but all had some basis, even if minimal, in fact. There was no doubt something to be litigated. Indeed, Lola prevailed on some of its more minor claims; and the issues that it focused on originally—the monies owed it from Krohn Racing and the inventory problems—were genuinely troubling to it. Finally, Lola could have raised fewer procedural hurdles, but such is litigation. For these reasons, Krohn Racing's request for fee shifting is denied.

---

§ 13.03[a], at 13-6 (2009). While Delaware courts have been very cautious in granting exceptions to this rule," an award of attorney's fees may be considered when a party acts in bad faith in connection with the prosecution of litigation. *See id*. at 13-6 to 8.

[251] Specifically, Krohn Racing argues that Lola used "phony emergencies" as a pretext for requesting extraordinary injunctive relief, forced Krohn Racing to brief its motion to dismiss four times by waiting until the last possible moment to amend its second-filed complaint, and actively opposed Krohn Racing's efforts to depose Manwaring.

[252] *See Nagy v. Bistricer*, 770 A.2d 43, 64 (Del. Ch. 2000) (acknowledging that the court will not "lightly award attorneys' fees under the bad faith exception to the American Rule). Indeed, the parties' conduct must rise to a certain level of egregiousness before fees will be shifted under the bad faith exception. *See, e.g.*, *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

D. *Judicial Dissolution*

Finally, the Court turns to judicial dissolution. Section 18-802 of Delaware's Limited Liability Company Act provides that upon "application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement."[253] This is a high standard.[254] And, as the statute makes clear, even if the standard of "not reasonably practicable" is met, the decision to enter a decree of dissolution nonetheless rests with the discretion of the Court.[255] The Court's discretion has been guided by, among other considerations: 1) whether there is deadlock between the members at the board level; 2) whether the operating agreement gives a means of navigating around the deadlock; and 3) whether, due to the company's financial position, there is still a business to operate.[256] Of course, "[t]hese factual circumstances are not individually dispositive; nor must they all exist for a court to find it no longer reasonably practicable for a business to continue operating."[257]

---

[253] 6 *Del. C.* § 18-802.
[254] *See, e.g.*, *In re Arrow Inv. Advisors, LLC*, 2009 WL 1101682, at *2 (Del. Ch. Apr. 23, 2009) ("Given its extreme nature, judicial dissolution is a limited remedy that this court grants sparingly.") (citations omitted).
[255] *See Haley v. Talcott*, 864 A.2d 86, 93 (Del. Ch. 2004); Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Del. Ltd. Liab. Cos.*, § 16.02[E][4] at 16-19 to -20.
[256] *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *4 (Del. Ch. Jan. 13, 2009) (citing *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *11 (Del. Ch. Aug. 18, 2005)).
[257] *Id.*

The factors set forth above, although not strictly applicable here, are helpful nonetheless. For starters, there is no deadlock between the Member Parties as that word is commonly used.[258] Although representation on Proto-Auto's board is split evenly between the Member Parties, management of Proto-Auto's daily affairs is vested in Hazell as its chief executive. He cannot be removed unilaterally. The business may therefore continue even if the Member Parties have disagreements about its management because they agreed at the outset that Hazell would be responsible for Proto-Auto's operations. There is thus no disagreement, as revealed in the trial record, between the Member Parties that precludes Proto-Auto from functioning in conformity with the Operating Agreement.[259]

Proto-Auto, on the other hand, is a joint venture.[260] It requires cooperation between the Member Parties to thrive: as stated previously, Lola's design efforts are to enhance vehicle performance, as demonstrated by Krohn Racing's success on the track. These combined efforts are to lead to sales, with that effort spearheaded by Hazell. Proto-Auto's business model additionally requires trust

---

[258] *See e.g.*, *id.* (finding deadlock where the operating agreement required significant cooperation from the board's managing members to accomplish almost any issue facing the company, and where such cooperation was not forthcoming); *Silver Leaf*, 2005 WL 2045641, at *11 (finding deadlock where there was an "impasse [between the members] that prevent[ed] the effective management of the LLC").

[259] On matters where the Member Parties may have to reach consensus—such as the budgetary issues—there has been some cooperation. Hazell has successfully limited Proto-Auto's expenses, and he and Charsley agreed on revised prices for Proto-Auto's parts.

[260] *See Haley*, 864 A.2d at 94 (explaining that joint ventures are premised upon a mutually beneficial agreement between two or more parties to combine their "skills, property, and knowledge, [and] actively manag[e] the business") (citations omitted).

between the Member Parties: they are located on different continents, and the Member Party responsible for housing and managing Proto-Auto is also its sole customer. Although the Member Parties' conflict may technically not amount to member deadlock, deep concern is warranted as to whether they are any longer capable of working together cooperatively to attain the prolonged success envisioned in the Operating Agreement.[261]

Thus, the Member Parties' frustration with one another informs whether there is still a business to operate. Concern over Proto-Auto's future and viability, however, is tempered by the fact that the Operating Agreement contains a means by which the Member Parties may work around their difficulties: the deadlock procedure.[262] This provision may not provide a precise or ideal remedy for Lola's discontent with Hazell and Krohn Racing, but it likely provides a path for Lola to exit the business if it so chooses.[263]

---

[261] The deterioration in the Member Parties' relationship is evidenced by petty incidents such as Hazell's decision to withhold testing and race data and Lola's request to Multimatic to retain Chassis 8; it is also demonstrated by the frustration and resentment seen in the Member Parties' communications over the last two years. The Court's concern is, however, perhaps best exemplified by similar sentiment expressed in the marketplace. *See supra* note 143. Krohn, too, has expressed similar misgivings. JX 178 (recognizing that the "entity will fail without our collective attempts to solve the issues").

[262] *See supra* note 246; *see also Haley* 864 A.2d at 95 ("[T]he presence of a reasonable exit mechanism bears on the propriety of ordering dissolution under 6 *Del. C.* § 18-802. When the agreement itself provides a fair opportunity for the dissenting member who disfavors the inertial status quo to exit and receive the fair market value of her interest, it is at least arguable that the limited liability company may still proceed to operate practicably under its contractual charter because the charter itself provides an equitable way to break the impasse.")

[263] As hard as it may be to believe, the Member Parties never reached "deadlock" within the sense of the Operating Agreement regarding Hazell's status.

There is an additional concern that may overshadow other considerations: that the difficult state of relations between the Member Parties was brought about in large part by Lola—the party seeking dissolution.[264] Although Lola had some reason to be concerned about the imbalance and the accounting uncertainties when Birrane first raised those issues with Hazell in August 2008, Hazell shortly thereafter undertook good faith efforts to remedy both problems; indeed, as stated before, the imbalance was repaid by December 2008.

Despite Hazell's efforts, Lola amplified—and then raised grievances that went well beyond—the two original issues. The record demonstrates that, by the fall of 2008, Lola was growing increasingly uneasy with the size of its investment in Proto-Auto and the venture's profitability.[265] Birrane brought these

---

[264] *Cf. Turchi v. Salaman*, 1990 WL 27531, at *8 (Del. Ch. Mar. 14, 1990) ("It is settled law that one party to a contract may not maintain an action for another's breach of contract or condition where either that breach was induced by the first party or occasioned by the first party's failure to perform.").

[265] *See supra* notes 35-38 & accompanying text. At this time, Lola was in the process of refocusing its business, as evidenced by the resignation of Manwaring in the spring of 2008. It is not surprising that many of the problems Lola took up with Hazell seemingly emerged after Manwaring left Lola. *See* Manwaring Dep. 89, 92 ("I have a high regard for Jeff and whilst I was there I thought he was doing a good job . . . [u]p until the time I left I thought he was doing a reasonable job."). It appears that Lola's frustration formed as its own business efforts intensified. Indeed, Manwaring was soon replaced by Brundle, who specializes in business turnarounds. Tr. (Brundle) 227-29 (describing how he joined Lola after completing a turnaround with Aston Martin). Brundle testified that he saw a "significant opportunity" with Lola, which he believed was "ready for its next stage of growth." *Id.* at 228. Brundle of course took immediate issue with Hazell's management and marketing efforts. *Id.* at 250 ("It would appear that there is no vision, there is no strategy for the business at all from a business perspective."). Brundle also took issue with the concept of Krohn Racing as something of a Proto-Auto works team—but this development again was foreseeable from the Operating Agreement and even envisioned by Manwaring. *See supra* note 161 & accompanying text.

issues to Hazell's attention in late October 2008—he criticized Hazell's performance, complained of outstanding invoices from Krohn Racing, and demanded that Hazell take steps to make the venture more profitable.[266] It was at this moment that the Member Parties' relationship began to decline. In his response to Birrane, Hazell was clearly agitated—his tone became more combative and he blamed Lola for several of Proto-Auto's early problems.[267]

Matters worsened. Dawson began to raise more serious concerns regarding the Member Parties' relationship, expectations, and strategic direction.[268] Lola was, however, by and large powerless to assert greater control over the venture given the division of responsibilities established by the Operating Agreement. Perhaps realizing this, Dawson questioned Proto-Auto's continued viability in a down economy and then suggested, for the first time, the possibility of dissolution or buy-out.[269] When that proposition failed to attract much interest, Lola ratcheted up its earlier complaints while much more seriously questioning Hazell's competency, loyalty, and character.[270] Birrane brought Lola's allegations to Krohn's attention and proposed—quite strongly—that Hazell be removed as Proto-Auto's chief executive and replaced with a Lola employee.[271] The breadth of

---

[266] *See supra* note 38 & accompanying text.
[267] *See supra* note 39 & accompanying text.
[268] *See supra* notes 41-42 & accompanying text.
[269] *See supra* notes 43-44 & accompanying text.
[270] *See supra* notes 47-50, 52-56 & accompanying text.
[271] *See supra* note 51 & accompanying text.

Lola's grievances and the vigor with which they were pursued further strained the Member Parties' already-deteriorating relationship.

These allegations formed the core of Lola's lawsuit. Critically, Lola failed to prove its claims at trial.[272] Lola's most troubling allegation—that parts were lost or stolen due to Hazell's gross negligence—foundered on the rocks of Phillips' review, which confirmed that the accounting problems were related to discrepancies between the different recording systems, and had little to do with the improper movement of physical parts. Several of Lola's less serious complaints, like those allegations regarding the roll hoop and parts trailer, involved decisions previously approved of by Manwaring,[273] while others pertained to aspects of the business that were contemplated by the Member Parties when they established Proto-Auto—most notably the works team issue and Hazell's position as Proto-Auto's sales authority.[274]

---

[272] The Court does not question the sincerity of Birrane's current belief that Hazell and Krohn malignantly sought out a joint venture with Lola as a means of acquiring a Daytona prototype vehicle and its parts on the cheap. *See supra* note 74. It is rather that this perceived plot was not at all proven at trial. Instead, it appears that Lola simply ended up stuck in a business relationship that had not worked out to its liking. When Lola sought a change in control, it found a business partner unwilling to rewrite the Operating Agreement absent evidence of real misconduct by the chief executive. Unfortunately for Lola, in the absence of such misconduct, Krohn Racing has no obligation to change the terms of the Operating Agreement so as to make the arrangement more beneficial for its partner.

[273] *See supra* notes 93-94, 173 & accompanying text.

[274] *See supra* notes 161-62 & accompanying text.

If Lola had proven at least some of those claims, judicial dissolution might very well be appropriate.[275] But without such success, Lola's frustration amounts to little more than disappointment with how Proto-Auto is structured and managed and how Proto-Auto is attempting to expand its market presence.[276] Unfortunately for Lola, it agreed to this arrangement when it partnered with Krohn Racing. Given its overzealous role in escalating this dispute, the Court will leave it to Lola to assess whether to exercise the deadlock procedure contained within the Operating Agreement—a provision that provides a no less reasonable means by which the Member Parties may disentangle themselves than dissolution.[277]

The Court concludes by emphasizing that a party to a limited liability company agreement may not seek judicial dissolution simply as a means of freeing

---

[275] Lola, of course, survived a motion to dismiss its claim for dissolution. The Court concluded that Lola had sufficiently stated a claim for dissolution in its first-filed complaint. *See Lola Cars Int'l Ltd.*, 2009 WL 4052681, at *7. If Hazell, in fact, committed fiduciary misconduct as broadly and as deeply as Lola alleged, given his entrenchment and Krohn Racing's reluctance to have him replaced, Lola might have achieved the end of Proto-Auto.

[276] Throughout his testimony, Brundle maintained that Proto-Auto has strayed from its mandate. Tr. (Brundle) 264 (explaining that he, Turnbull, and Birrane met with Krohn in the winter and spring of 2008 "to talk specifically about the operation of the CEO and how to get the business back onto a level in line with its mandate effectively"). Brundle is wrong. Lola has failed to prove its claims at trial; there has been no breach of fiduciary duty and any breach of the Operating Agreement was immaterial and, in any event, cured. This is not to say that Lola was not genuinely frustrated with how Hazell has managed Proto-Auto—there is, however, nothing about Hazell's stewardship that presented grounds for either liability or dissolution. Lola agreed that Hazell would manage Proto-Auto—absent wrongdoing or the exercise of other remedies available under the Operating Agreement, it must live with its commitment.

[277] *Cf. Haley*, 864 A.2d at 97 n.35 (suggesting that it is economically more efficient to order dissolution, "and allow both parties to bid as purchasers, with the assets going to the highest bidder (inside or outside) who presumably will deploy the asset to its most valuable use," than merely leave a disgruntled party to exercise a buy-out provision contained with the company's operating agreement).

itself from what it considers a bad deal.[278] This is so even if the Member Parties' relationship has—as here, due largely to pressure applied by Lola both within and without the litigation context—been badly damaged. Endorsing such a rule would allow for one party—unfairly—to defeat the reasonable expectations of its counterparty.[279] Moreover, the Member Parties in their private ordering effort embraced a provision within the Operating Agreement that allows for disentanglement. Lola may not be in an enviable position.[280] Perhaps it should never have agreed to place Proto-Auto in Georgia and to allow Krohn Racing to select the venture's chief executive. Regardless, it is not for the Court to terminate, or rewrite, the Operating Agreement. Lola's request for dissolution is denied.[281]

---

[278] *See Arrow Inv. Advisers*, 2009 WL 1101682, at *2 (cautioning against application of a "hair-trigger" dissolution standard—one that would set-off merely because the LLC "has not experienced a smooth glide to profitability or because events have not turned out exactly as the LLC's owners originally envisioned . . .").

[279] The Operating Agreement as well reflects some concern for what the Member Parties' call "artificial dispute or deadlock." *See* Op. Agmt. § 10.4 (defining "artificial dispute or deadlock" as a "dispute caused by virtue of either party . . . voting against an issue or proposal in circumstances where the approval of the same is reasonably required to enable [Proto-Auto] to carry on the business properly and efficiently."). Whether Lola has created an "artificial dispute or deadlock" as defined by the Operating Agreement is a question beyond the scope of this memorandum opinion.

[280] It appears as though Lola is hamstrung by the fact that Proto-Auto owns the Grand Am constructor's license, and that the number of licenses available is limited. Without Proto-Auto, Lola cannot manufacture and sell parts for the Daytona prototype race car on its own. *See* JX 303 (Aug. 21, 2009 Email from a Grand Am official to Brundle in which the official explained that "[i]f the constructor license remains with Proto-Auto through any change in corporate structure, then Lola would need to work with one of the other 4 constructors to create an operational agreement and supply cars and parts").

[281] Although the Court has written many—most likely, too many—words in an effort to deal fairly with Lola's complaints, the heart of this matter is not all that complicated. Birrane became disillusioned with the arrangement that had been negotiated with Krohn Racing. He believed that the Operating Agreement's terms had come to favor Krohn Racing. He came to understand

## V. CONCLUSION

The Court finds that Krohn Racing owes Lola interest on the historic loan imbalance; there is also a trade debt owed Lola from Proto-Auto for design work related to the Porsche engine. Lola will be directed to withdraw its request that Chassis 8 remain at Multimatic's facility in Canada and to release all of Proto-Auto's intellectual property. Otherwise, all other requests for relief are denied.

Counsel are requested to confer and to submit an implementing form of order.

---

that Hazell's day-to-day control led to the perception that a works team—or a rough approximation of such an organization—had been created. Manwaring had foreseen this likelihood, but he was on his way out. Dawson—and it is safe to infer that he would not have acted without Birrane's authorization—tested the idea of an amicable split. When that effort was rebuffed, Turnbull started picking at every nit. The attack against Hazell—especially the personal ones directed toward his integrity and competence—increased. Brundle, who openly scoffed at the works team model, had a definite agenda. Lola's team—with some cooperative exceptions—generally attacked every debatable move that Hazell made. Hazell certainly committed mistakes and some of them formed a legitimate basis for concern on the part of Lola. Lola seized upon almost every proverbial mole hill and sought to convert it into a mountain with the foreseeable consequence of creating disharmony that would enhance the likelihood that the venture would come to an end. This was before the vehicle had been given a chance to win, which, of course, it eventually did. Lola later participated in the selection of Phillips to conduct a review. Lola's representatives must have been quite chagrined when Phillips came to a conclusion very similar to the one that the Court has reached: mistakes were made; mistakes were made that should not have been made; but the mistakes could be fixed; the mistakes, more or less, were fixed; and, in general, the mistakes were not the product of inappropriate motivation. In short, if Lola wants to exit Proto-Auto because it cannot agree with Krohn Racing about matters of significance to Proto-Auto, then there is no reason why it should not follow the procedures to which it has agreed for such disentanglement.