IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ERIC PHILLIPS, Plaintiff and Counterclaim-Defendant, v. STEPHEN HOVE and FIREHOUSE GALLERY, LLC, a Florida limited liability company, Defendants and Counterclaim-Plaintiffs, and GnB, LLC, a Delaware limited liability company, Nominal Defendant.	)	C.A. No. 3644-VCL
FIREHOUSE GALLERY, LLC, Third-Party Plaintiff, v. WICKS' END, INC., a Delaware corporation, Third-Party Defendant.	)	

MEMORANDUM OPINION

Date Submitted: July 19, 2011
Date Decided: September 22, 2011

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LASTER, Vice Chancellor.

This post-trial opinion determines the voting membership of GnB, LLC ("GnB" or the "Company"), a Delaware limited liability company. The parties dispute whether Firehouse Gallery, LLC ("Firehouse"), a Florida limited liability company, is a voting member of GnB. If it is, then GnB is deadlocked. If Firehouse is only an assignee, then plaintiff Eric Phillips controls GnB. The parties also dispute whether GnB (i) possesses an exclusive license to use the first-tier, generic domain name candles.com, (ii) holds an option to purchase candles.com, and (iii) owns other assorted domain names relating to the candles business. If GnB owns these assets, then the entity has value. If not, then GnB possesses little more than legal claims against its current and former principals.

After a hard slog through cryptic documents and conflicting testimony, I find that Firehouse and Phillips each hold a 50% voting membership interest. GnB owns the exclusive license and option to purchase candles.com. It also owns the other domain names. Phillips and defendant Steven Hove, the current principal of Firehouse, each breached their fiduciary duty of loyalty to GnB and must account for the profits and personal benefits they received. Hove is not otherwise liable to GnB or Phillips. Because all of the litigants regrettably engaged in misconduct that could support fee-shifting, the doctrine of unclean hands applies with particular salience. All parties will bear their own fees and costs. Because GnB is deadlocked, I will appoint a receiver to dissolve the entity and wind-up its affairs.

I. FACTUAL BACKGROUND

This case was tried on March 28-30, 2011. Four witnesses testified. Each exhibited serious credibility problems. The documentary record was equally unsettling.

GnB has no written operating agreement, and the governing contract is little more than a term sheet. Serious challenges were raised to the accuracy of other corporate documents, many of which appear to have been prepared months after the fact and backdated to create a paper trail. Having weighed the parties' testimony, evaluated their demeanor, and considered the documentary evidence, I make the following factual findings.

A. Phillips Starts A Candle Business.

In 1997, Phillips and a housemate formed Wicks' End, Inc., a Delaware corporation, to sell candles online using the domain name wicksend.com. Within months, Phillips' housemate exited the business, leaving Phillips as the sole stockholder in Wicks' End. Approximately a year later, Phillips acquired candles.com. Phillips paid approximately $12,000 for the domain around 1997. Today, it could be worth $2-4 million.

Phillips grew his candle business slowly. He did not seek outside investment, and it took six or seven years for Wicks' End to generate a profit. After turning the corner, the business remained consistently profitable. In 2005, Wicks' End had revenues of approximately $150,000.

B. Schifino Approaches Phillips.

Sometime in 2005, former defendant and current non-party David S. Schifino reached out to Phillips. The two were not particularly close and had not spoken in years. They met in 1992, when Phillips was working at his first job after college and asked his landlord if he knew anyone who might share a two bedroom apartment. The landlord

introduced Phillips to Schifino, who was in his final year of college. After graduation, both moved on.

Phillips next ran into Schifino at a college reunion. After that, they did not speak again until what Phillips described as "a phone call many years later" in what was "probably the 2005 time frame." Tr. 23-24. Phillips could not recall whether he saw Schifino at his five- or ten-year reunion, but thought it was probably his five-year reunion and that he had not yet started his candle business. Philips also could not recall who initially called whom in 2005. Based on the totality of the evidence, I think it likely that Phillips saw Schifino at his ten-year reunion, in approximately 2001, after Phillips had started his candle business and acquired candles.com. Four years later, when Schifino hungered for an online retail opportunity, he recalled his old roommate with the top-tier domain name.

The catalyst was Schifino's relationship with Hove, a serial entrepreneur who started as a Florida real estate developer. In 1997, Hove co-founded Modern Business Associates, an employee leasing firm, where Schifino joined the management team. In 1998, Hove asked Schifino to oversee Modern Business Associates and moved on to co-found a new internet business – eSmokes.com – that sold tobacco products online. In 1999, after getting eSmokes off the ground, Hove asked Schifino to look after that company, while Hove moved on to co-found NewHomes.com, an online real estate business. Hove then re-located to Silicon Valley where he focused on internet and technology investing.

In 2004, after enjoying some success, eSmokes hit a regulatory wall. The Jenkins Act, 15 U.S.C. §§ 375–78, requires out-of-state sellers of tobacco products to file a monthly report with the tobacco tax administrator of each state into which the seller ships cigarettes to non-distributors, identifying the name, address, and quantity of cigarettes purchased by each non-distributor state resident. *See* 15 U.S.C. § 376. In the mid-2000s, the City of New York led various state and local governments in suing eSmokes and other internet tobacco retailers for failing to comply with the Jenkins Act.[1] Hove returned to Florida to help manage the litigation crisis. In part to avoid litigating in New York, eSmokes filed for bankruptcy in Tampa, Florida. The case settled, and Hove credited the bankruptcy filing with giving him leverage in settlement discussions. During the same period, Hove successfully sold NewHomes.com for what he described as a significant amount.

With eSmokes knocked out, Schifino needed a new business opportunity, ideally a promising e-commerce concept that would capture Hove's interest and a piece of his NewHomes.com proceeds. An internet candle business built on candles.com fit the bill, so Schifino reached out to Phillips.

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[1]*See, e.g.*, *City of N.Y. v. eSmokes, Inc.*, 2006 WL 722009 (S.D.N.Y. Mar. 22, 2006), *aff'd in part, rev'd in part sub nom. City of N.Y. v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008), *rev'd sub nom. Hemi Gp., LLC v. City of N.Y.*, 130 S.Ct. 983 (2010).

Schifino demonstrated at trial that he talks a good game. Phillips testified that during their initial calls, Schifino "asked a lot of questions and thought that [it] was fascinating that I was involved in candles.com." Tr. 24. Schifino told Phillips that

> he had the resources, he invested in companies, . . . and . . . he also brought his knowledge, especially of accounting and whatnot. And he was, you know, a financial person, and so he brought that background. But he also said that he has a team. You know, his sister was into marketing; his father and the family, they were all attorneys. He had a lot of connections, and he said he could help us. He also said he was involved in a company called e-Smokes, and that had pretty much shut down; and there were people, including Anil [Singh] and Scott [Welker], that could potentially help us with candles.com.

Tr. 25. Schifino told Phillips that "he could bring a team of people and money, and he thought that he could help to take candles.com to the next level." Tr. 26.

During the same period, Schifino pitched Hove. Hove liked the concept, and in December 2005, Schifino drafted a term sheet for a Schifino-Hove investment vehicle to loan Wicks' End $500,000 in the form of a convertible note. Under the term sheet, Wicks' End would not be permitted to "raise money at a future date at a lower valuation without written consent from [Schifino-Hove]," and "[Schifino-Hove] will have the right of first refusal for additional capital raises." JX 260. Wicks' End also would "grant [Schifino-Hove] a security interest in the Domain Name Candles.com and all other Project Entity assets." *Id.* In reviewing the term sheet, Hove commented that it "does a good job of getting our foot in the door" and asked, "will he [Phillips] go for the security interest in the Domain?" JX 289.

The security interest mattered to Schifino and Hove because it gave them a path to control of candles.com. If Phillips "went for it," then Schifino and Hove could levy on candles.com if Wicks' End defaulted on the note. Without additional capital, default was quite likely, because $500,000 did not offer much runway for scaling up an e-commerce business. And when Wicks' End needed additional capital, Schifino and Hove would have the inside track.

C. The Discussions Shift To A Joint Venture.

As Schifino's discussions with Phillips continued, Hove and Schifino became more excited about candles.com. Soon they were talking about taking the company public. Hove commented, "I am all about taking it public. Binoculars.com, a specialty on-line retailer was just listed in Entrepreneur Top 100 list, Candles.com would blow that business away." JX 288 at 2.

But Phillips would not bite on a minority investment. With discussions stalling, Schifino floated a new idea in late 2006: creating a company that would sell candles using a license for candles.com. Phillips liked this approach so long as the new company would be "owned equally between [Schifino] and myself, 50/50." Tr. 31. Phillips envisioned a partnership that would combine his practical expertise in online candle marketing with Schifino's purported financial savvy and wherewithal. Schifino's vision remained the same: make an initial investment of $500,000 in the form of a loan, then obtain control when the money ran out and GnB needed more capital.

Over the next few months, Schifino and Phillips negotiated the terms of their joint venture. Their efforts resulted in a four-page document, which they executed on

February 20, 2007. JX 14 (the "GnB Agreement"). Each nominally had access to counsel. Schifino consulted with David M. Lipshutz, the attorney who originally formed Wicks' End. Schifino consulted with his father, William S. Schifino, Sr. of Williams Schifino Mangione & Steady, P.A. ("Williams Schifino"), a Florida law firm where Schifino's brothers are also partners. To avoid confusion, I will refer to William S. Schifino, Sr. as "Attorney Schifino." Although Lipshutz and Attorney Schifino saw the GnB Agreement before Phillips and Schifino signed it, they gave it only a quick review and clean-up because of the principals' eagerness to sign.

Paragraph 1 of the GnB Agreement called for Phillips and Schifino

> to form a new company ("Newco") for the purposes of conducting a retail and wholesale candle distribution business. Newco will be formed in the state of Delaware as an LLC and will initially be equally owned by Phillips, and Schifino's investment entity ("Schifino Investment Entity"). Newco's operating agreement will provide for two (2) classes of membership interests, voting membership interests and nonvoting membership interests. Phillips and Schifino will own voting membership interests. Any other members of Newco will own nonvoting membership interests. Phillips and Schifino will initially own voting interests and an option plan will be adopted to cover the non voting shares.

JX 14, ¶ 1 (the "Ownership Provision"). Everyone agrees that "Newco" is GnB.

Paragraph 2 described the funding that Newco would receive:

> The Schifino Investment Entity will loan up to $500,000 to Newco. The first installment, which will be for $200,000 will be advanced within thirty (30) days of the execution of this agreement. The loans will be evidenced by five (5) year promissory notes, which shall bear interest at the rate of four percent (4%) per annum. The Schifino Investment Entity will continue to loan funds on "as needed" basis up to $500,000. The Schifino Investment Entity will loan funds in excess of

> the first $200,000 loan on an "as needed" basis up to $500,000, in each instance within 10 days after Newco notifies it in writing of that need. To be clearly defined in the promissory note.

JX 14, ¶ 2. Later paragraphs detailed specific uses for the funds:

- $50,000 to Phillips "in consideration for all of the assets (including inventory) used in the retail and wholesale candle business by Wicks End." *Id.* ¶ 5.
- $5,000 per month to Wicks' End for three months. *Id.* ¶ 6.
- Salary of $55,000 for Phillips as Vice President of Purchasing. *Id.* ¶ 8.
- Salary of $80,000 for Scott Welker, the former president of eSmokes, to serve as president of GnB. *Id.* ¶ 9.

These obligations called for spending $200,000 of the $500,000 investment in year one. GnB also would "assume the current financial obligation of Wicks End to Phillips and family for $160,000." *Id.* ¶ 7.

Sections 3 and 4 of the Agreement defined Newco's rights in candles.com. Section 3 provided for Newco to "enter into a purchase agreement with Phillips whereby Newco will agree to acquire the domain name 'Candles.com' from Phillips for $2,000,000." JX 14, ¶ 3 (the "Domain Purchase Right"). The funds would be payable

> a) at any time within five (5) years from the date of this Agreement subject to Section 4, or
>
> b) payable upon the sale of Newco, or any other entity which shall be an outgrowth of Newco and which Schifino and Phillips shall both be principles [sic], or a public offering pursuant to a registration statement filed with the Securities and Exchange Commission of Newco or any other entity which shall be an outgrowth of Newco and which Schifino and Phillips shall both be principles [sic].

Id. Paragraph 3 further provided that "[u]ntil the domain name is purchased or this Agreement is otherwise terminated, Newco will have an exclusive license for the use of the domain name." *Id.* (the "Exclusive Domain License"). For the first five years, the license would be royalty free. *Id.* After that point, "a licensing fee equal to five (5.00%) percent of the net revenue (defined as gross revenue less returns) of Newco, but not less than $100,000 per year, shall be payable to Phillips for the continued use of the domain name." *Id.* Phillips had the right to terminate the Exclusive Domain License "[i]n the event that Newco shall cease doing business or become bankrupt (to be defined more completely in final licensing documentation)." *Id.* (the "Termination Right"). If Phillips exercised his Termination Right, then "Newco shall have no further right to purchase or use the domain name." *Id.*

Somewhat redundantly, the first sentence of paragraph 4 called for GnB to receive an option to purchase candles.com. It stated that "Newco will receive from Phillips a five (5) year option to purchase the domain name, Candles.com, for $2,000,000." JX 14, ¶ 4. Lipshutz noted the ambiguity in an email to Phillips, Schifino, and Attorney Schifino: "I am not sure what Section 4 adds to Section 3. The first sentence of Section 4 seems duplicative/contrary to Section 3, but I did not edit it out. Let's get this thing signed. The operative documents . . . will clarify the drafting." JX 72. The balance of paragraph 4 imposed a contractual obligation on Phillips to accept follow-on financing:

> If Newco, or any other entity which shall be an outgrowth of Newco and which Schifino and Phillips shall both be principles [sic], during the five (5) year period, is able to raise $2,000,000 through a financing, either borrowing the funds or obtaining the same in a private placement of shares, *the*

> *parties hereto will use their best efforts to consummate such a financing, acknowledging that any sale of equity will result in a dilution of their ownership on a pro rata basis.*

JX 14, ¶ 4 (emphasis added).

Like the 2005 term sheet, the GnB Agreement was designed to give Schifino a path to control of candles.com. It called for the same $500,000 note and gave Schifino the inside track on a future capital raise. On the latter issue, the GnB Agreement went beyond the 2005 term sheet by imposing a contractual obligation on Phillips to accept a dilutive financing. Schifino would not be bothered by pro rata dilution because he would be the one raising the new money and would either participate or be allied with the new investors. The governance mechanism in the GnB Agreement anticipated this scenario. Paragraph 10 contemplated that GnB would have a five-member board with three appointed by Phillips and two by Schifino. Paragraph 11 called for Schifino and Phillips to place their membership interests in a voting trust and provided that "any decisions they do not agree on going forward will be decided by the board of directors." JX 14, ¶ 11. But the same paragraph provided that the trust would terminate "in the event that both the entire proceeds of sale ($2,000,000) of the domain name are paid to Phillips, and a non family investor [sic] in Newco . . . obtains more than twenty (20%) percent voting control." *Id.* Freed of the voting trust, Schifino's post-dilution 40% and the new 20% would establish a new control block.

The effectiveness of the GnB Agreement was conditioned on the completion of ten start-up tasks, including the execution of various ancillary agreements. The parties gave themselves thirty days to finish the tasks.

D. Dysfunction And Conflict

A brief honeymoon period followed the signing of the GnB Agreement. Phillips organized Wicks' End's inventory and shipped it to Schifino in Tampa. Welker came on board as President, and Anil Singh, also a former eSmokes employee, joined as GnB's technology consultant. Although Schifino had no official title or position, he acted as GnB's *de facto* chief financial officer.

Unfortunately, Phillips soon found himself disagreeing vehemently with the decisions made by Schifino and his ex-eSmokes team. Over Phillips' strong objection, Schifino decided that GnB would build an e-commerce software platform from scratch. Phillips wanted to lease software from a third party for less than $100 per month, as he had done at Wicks' End. GnB went ahead with the costly and time-consuming software development effort, which forced GnB to spend tens of thousands of dollars of its start-up capital and delayed the commencement of operations. I suspect that Schifino followed this course because it was in his interest for GnB to need more capital.

Phillips and the Schifino team also locked horns over the user interface for the candles.com website. Phillips felt he could contribute, but Schifino, Welker, and Singh shut Phillips out of the process. Schifino insisted that Welker and Singh were the experts, and that Phillips needed to leave the website design to them. Although Schifino eventually promised that Phillips could comment on the site before launch, he broke that promise, and Phillips first saw the site after it went live. Phillips immediately identified serious problems, including that the site accepted credit card payments without proper security measures.

Schifino, Welker, and Singh likewise denied Phillips access to the back end of the website, which aggregates data on customers, orders, and inventory. Phillips asked for the password several times, but Welker and Singh refused to give it to him without Schifino's permission. At trial, Schifino claimed that he tried to get the password for Phillips. On cross-examination, Schifino admitted that he could have gotten the password at a moment's notice and that he never gave it to Phillips. Tellingly, the password was "nvr4erc." JX 8.

Phillips also struggled to obtain financial information. Phillips asked Schifino to use an online accounting program that Phillips could access easily from Atlanta. Schifino insisted on using QuickBooks, installed locally on his computer. When Schifino learned that Phillips was having trouble accessing his system remotely, he blithely suggested that Phillips travel to Tampa whenever he wanted to look at the books. Schifino did not send accounting information to Phillips until December 2007, when he emailed the QuickBooks file in response to demands from Phillips' lawyer. Even then, Schifino did not provide the password that would enable Phillips to open the file.

Perhaps most gallingly, Phillips learned that the title "Vice President of Purchasing" did not, in fact, mean that he did any purchasing. Phillips was the only member of management with experience in the candles market, "had all the vendor relationships," and "knew the industry." Tr. 66-67. But Schifino decided that Welker would handle purchasing exclusively. Phillips was even forbidden from going to a major trade show he had attended annually for over ten years. Welker went instead.

Phillips originally blamed Welker for each of these decisions, believing Welker was running the company. As tensions mounted, Phillips became hostile. In June, he instructed Welker on his personal view about how the company should be run:

> Lets get a couple things straight right now! I am a 50% owner of the company, I am a director of the company, and I am the sole founder of the company. I put 10+ years of my sweat, blood, tears, and extreme sacrifices into the company! David and I, are 50/50 owners of the company and have hired you as an employee to act as CEO . . . . When I call you as a 50% owner and director of the company and I ask to see the [user interface] a week before launch, after everyone else including Renee has seen it, I expect to be given access . . . . I should NOT have to get my attorney involved.

JX 52. In reality, as Phillips learned during this litigation, Schifino exercised behind-the-scenes control. Welker had to obtain clearance from Schifino for all company spending and any significant business decisions. After learning of their dispute, Schifino instructed Welker not to respond to any emails or calls from Phillips.

Exacerbating Phillips' frustration was a lack of progress on the formal agreements. The 30-day deadline came and went, and Phillips and Schifino executed an addendum extending the deadline to May 30. When May 30 arrived with still no progress, Schifino convinced Phillips to execute a second addendum providing that the GnB Agreement would be binding and no longer "conditioned on the execution of the actual documentation memorializing such agreements." JX 14. Once this addendum was signed, Schifino paid no attention to the formal agreements. He later emailed Phillips that he was "not even going to look at the voting trust . . . ." JX 85.

E. GnB Falls Apart.

In June, Phillips became so frustrated that he threatened to re-point candles.com to wicksend.com. Schifino viewed this as an effort to "sabotag[e] the domain and limit[] access to GNBLLC." JX 4. He told Phillips, "You can not hold the domain name hostage over the company." *Id.*

With Schifino and Phillips at odds and the deal documents dead, Lipshutz and Attorney Schifino began discussing whether Schifino could buy out Phillips. This would have achieved Schifino's goal of obtaining control of candles.com, but it meant finding $2 million to exercise the option plus an additional amount to purchase Phillips' equity. Phillips was not an easy sell. He had owned candles.com for nearly a decade, and selling candles over the internet had become part of his identity.

As an alternative to an immediate buyout, Schifino tried to convince Phillips that GnB should raise additional short-term capital. Phillips refused to approve any new money unless the raise was coupled with a buy-out. By this point, Phillips understood that any new investor would insist on control. Feeling burned already, Phillips had no intention of giving up his rights as a 50% member.

By September, Phillips and Schifino were exchanging hostile email screeds. By October, their emails were adorned with profanity and personal attacks. That same month, GnB ran out of money. Phillips was outraged. He (unrealistically) expected that $500,000 in start-up capital would "carry us through at least 3 years, (I recall it being 3-5 years and not 2-3 years) and certainly NOT 7 months." JX 234. Phillips blamed Welker and demanded that he be fired. Schifino agreed and made Welker the scapegoat, telling

Phillips, "[I] did not blow through [$]500,000 the president of the company did." JX 101, at 2. Schifino fired Welker on October 17, the day Welker returned from his honeymoon.

F. Phillips And Schifino Each Turn To Hove.

As the crisis mounted, Phillips and Schifino each turned to Hove. Phillips met Hove during the months leading up to the execution of the GnB Agreement, when he twice visited Schifino in Tampa. Each time, Phillips stayed at Hove's beachfront condominium. Hove joined Schifino and Phillips for meals, asked lots of questions about the candles business, and offered his advice. On Phillips' second trip to Tampa, Hove took Phillips to a ZZ Top concert.

Unbeknownst to Phillips, Hove provided 100% of the funding for Schifino's investment in GnB. According to an agreement dated February 13, 2007, Hove agreed to loan up to $500,000 to Firehouse so that Firehouse could loan the money on the same terms to GnB. *See* JX 91 (the "Firehouse Agreement"). As long as Hove funded the full amount, he would receive a 49% interest in Firehouse, and Schifino would own the remaining 51%. If Hove funded less than the full $500,000, then his interest in Firehouse would step down proportionately.

Hove and Schifino kept their arrangement secret. Phillips did not learn about Firehouse until October, at the earliest, eight months after signing the GnB Agreement. Phillips only knew that the GnB Agreement referred to a "Schifino Investment Entity."

In September, unburdened by any knowledge of Hove's pre-existing investment, Phillips contacted Hove to explore whether Hove might be interested in buying him out.

Phillips remembered Hove from their interactions in Tampa as someone interested in the internet candle business, who appeared financially capable, and – most importantly – who had a good relationship with Schifino.

In October, Schifino also reached out to Hove. Schifino had no misapprehensions about who actually had skin in the game. Having fired Welker and enduring daily conflict with Phillips, Schifino wanted out. He told Hove to take over the company "since [Hove had] the most experience with the internet world and [he was] the one at risk [$]500,000." JX 116 at 2.

Schifino also began preparing for litigation. On October 12, 2007, Attorney Schifino emailed Phillips' counsel: "If the company cannot move forward, litigation will be necessary to force Eric to put a board in place to save the company." Dkt. 37, Ex. T. On October 23, Schifino wrote Phillips, "see you in court." JX 101.

To shore up potential litigation positions, the Williams Schifino firm began creating and backdating documents. The new documents identified Firehouse, not Schifino, as the member of GnB. The distinction was critical for the defendants. As discussed below, the GnB Agreement does not make clear whether Schifino invested in GnB personally or through the Schifino Investment Entity. *See* Part II.A, *infra*. The lay-drafted GnB Agreement also does not address whether Schifino could invest personally and then transfer his interests to the Schifino Investment Entity, with the latter admitted automatically as a member. If a court found that Schifino was the original member and could not freely transfer his interests, then the Schifino Investment Entity (*i.e.*, Firehouse) would be an assignee lacking voting rights. *See* 6 *Del. C.* §§ 18-301 (admission of

members) and 18-702 (assignment of LLC interests). This would leave Phillips in control of GnB as its only voting member. Likewise, if Schifino held the GnB voting interests personally and transferred them to Hove, then Hove would be an assignee lacking voting rights. *Id.* Phillips again would control GnB as its only voting member. By contrast, if Firehouse was the voting member of GnB, then Schifino's transactions with Hove could take place at the Firehouse level without jeopardizing their 50% voting interest in GnB.

On the same day in October, Schifino signed ten promissory notes, each documenting a loan from Hove *to Firehouse*: one for $100,000 dated February 23, another for $100,000 dated May 25, and eight for $25,000 dated July 3, 13, 20, and 27 and August 3, 14, 17 and 24. The notary stamp on each note reflects an actual signing date of October 17, 2007.

The Williams Schifino firm also prepared minutes purportedly documenting GnB's initial formational meeting on February 12, 2007. The minutes recited that both Phillips and Schifino, *as a representative of Firehouse*, were present in person. The minutes bore signature lines for both Phillips and Schifino, but only Schifino signed.

Notwithstanding the recital in the minutes about Phillips' presence at the meeting, Schifino served verified interrogatory responses stating that Phillips was *not* present. In his deposition, Schifino tried to reconcile the minutes and his interrogatory response by testifying that "[p]hysically [Phillips] was not present," but he was present "by phone." Schifino Dep. at 171-72.

At trial, Schifino reversed course and testified that he was "100 percent sure" that Phillips was physically present at the meeting. Tr. 479. Schifino explained that after his deposition, he found form resolutions to open a GnB bank account, which Phillips signed during his stay in Tampa from February 7-9. Inspired by the resolutions, Schifino testified that he and Phillips met in person on February 9, that the minutes must have been typed on February 12, and that whoever prepared them mistakenly entered the wrong date. Tr. 470.

Schifino could not recall, however, whether the Williams Schifino firm prepared the minutes. To refresh his recollection, Phillips' counsel called Schifino's attention to the document footer. Within the span of a few minutes, Schifino went from not being able to recognize the stamp to relying on it to underpin his testimony.

> Q. I'll ask you, there is a little number there at the bottom left-hand corner of the page with a document stamp. Does that in any way help you identify who might have prepared these minutes?
>
> A. No.
>
> Q. Is that a stamp that's something that is familiar to perhaps your father's law firm?
>
> A. It could be. I don't - -
>
> Q. You don't recognize it?
>
> A. Yeah.

Tr. 471. Minutes later, Schifino recognized the stamp and used it to justify his new-found recollection of the meeting date.

> THE COURT: Why are you able to say with a high degree of confidence that this was typed up on February 12th?

THE WITNESS: Because I remember because the day we opened up the bank account was on February 9th, that he and I both signed [the bank's form resolution] at the bank. *We had to have the meeting in order to open up the bank account. And so, therefore, we had to have the articles, corporate docs, those things on February 9th.*

THE COURT: I'm distinguishing between the act of the meeting . . . and the creation of this document, the minutes, which you seem to say was typed up on February 12th. And I'm focusing on the latter. Why are you confident that this was typed up and prepared on February 12th?

THE WITNESS: Because I know that through that first 30 days, that I was trying to get everything in place. And I wouldn't let, you know, the typing up of these minute meetings slip by without having them typed up. I just know I wouldn't do that.

THE COURT: . . . But I'm curious as to why you can be so confident that February 12th was the date that these minutes were prepared and typed up if you don't know who prepared them.

THE WITNESS: Again, I believe the law firm – because it has a data stamp on it, it would be the law firm.

Tr. 475-76 (emphasis added).

The document number in the data stamp indicates that the purported February 12 minutes were prepared in October. The internal document number automatically generated by the Williams Schifino firm's file management software ends with "196685v1." JX 267. Of the numerous documents in the record bearing data stamps from the William Schifino firm, I have the most reliable evidence as to date of creation for a draft of the GnB Agreement that was emailed on February 16, 2007, JX 72, and a draft GnB operating agreement that was emailed on July 20, 2007, JX 183. The second

document number is approximately 10,000 higher than the first, suggesting that the Williams Schifino firm generated new documents at a 2,000-per-month clip. The document numbers in the data stamps on the promissory notes notarized on October 17, 2007, match this pace.

Oddly, the document number in the data stamp on the minutes that Schifino swore were typed up on February 12 is over 200 documents *higher* than the stamps on the notes notarized on October 17. This strongly suggests that the meeting minutes were created in late October 2007, around the time Schifino began anticipating litigation, and not on February 12, as Schifino testified. The purported February 12 minutes bear the *same* document stamp as minutes of a purported organizational meeting for Firehouse that ostensibly took place on January 10, 2007, suggesting that the two sets of minutes were prepared at the same later date to backfill gaps in the documentary record. JX 34, 267.

The contents of the purported February 12 minutes similarly suggest that they were prepared long after the fact. Among other things, they recite that a copy of a proposed operating agreement for GnB was "presented to the meeting," and that it was "RESOLVED, that the . . . Operating Agreement be . . . approved, ratified and adopted by the Members." JX 267. At trial, Schifino testified that the minutes were mistaken because "the operating agreement was not adopted." Tr. 473. He nevertheless maintained that the draft agreement was presented by Attorney Schifino during the meeting. Tr. 497. Schifino could not explain why Attorney Schifino first sent a draft operating agreement to Lipshutz ***on July 20, 2007***, and described it as "the form that I have used in the past for Delaware LLC's." JX 183. Attorney Schifino made no

reference to having presented the same document to Phillips and Schifino at a meeting in February.

I find that no meeting took place on February 12. I find instead that the minutes were prepared in mid-October, contemporaneously with the ten Firehouse notes. For similar reasons, I suspect that the GnB membership certifications for Firehouse and Phillips also were prepared in mid-October. Regrettably, Schifino's unreliable and protean testimony about the February 12 minutes typified his performance at trial. I have concluded that Schifino's testimony cannot be relied on unless corroborated by other evidence.

G. Hove Takes Over Operations And Seeks To Acquire 100% Of GnB.

With Phillips and Schifino each seeking his assistance, Hove saw a chance to own 100% of GnB. While continuing to discuss a buyout with Phillips, Hove paid $5,000 to Schifino in November 2007 for the right to buy out Schifino, documented as an option to purchase his 51% interest in Firehouse. Hove also took over GnB's operations. Phillips responded positively, telling Hove, "I sure wish David S. had brought you in from the beginning. I am sure it would have made a HUGE difference." JX 61.

In late November 2007, apparently at the instigation of his counsel, Hove finally decided to tell Phillips that he already owned "a minority vested interest in [F]irehouse with an option to buy out [Schifino's] majority." JX 26. Phillips did not object or claim fraud. Phillips liked Hove and viewed him as a far better partner than Schifino. They began making plans for a big holiday sales push.

Effective January 2, 2008, Hove exercised his option to purchase Schifino's interest in Firehouse, structured as an assignment of Schifino's interest in Firehouse to Candles.com LLC, Hove's new holding company. Hove paid Schifino $35,000 in cash and issued him a five-year balloon note for $465,000, secured by the majority interest in Firehouse that Schifino sold Hove. The Williams Schifino firm went through a second round of creating and backdating corporate documents that included five additional promissory notes: one for $100,000 dated February 19, 2007, another for $100,000 dated March 8, a third for $50,000 dated July 30, a fourth for $75,000 dated August 20, and a fifth for a $25,000 tranche dated September 17. The notary stamp for each reflects an actual signing date of January 2, 2008. Some of the documents associated with the January 2008 transfer may have been prepared even later, because December 2008 emails reflect Hove and Schifino discussing how the Williams Schifino firm should memorialize their transaction from eleven months before. *See* JX 262.

H. The Parties Resort To The Courts.

In March 2008, Hove's attorney faxed a nearly final buyout agreement to Phillips for his signature, and Hove told Phillips to "if you have any small issues, you know, make the changes." Tr. 692. Phillips made extensive changes, signed the agreement, and sent it to Hove. Hove rejected the new terms.

Phillips responded by filing this litigation. As originally framed, the complaint sought an order compelling Schifino to work with Phillips to seat a board – precisely the same cause of action that Attorney Schifino threatened in October 2007. The Court set a scheduling conference for April 10, but Schifino emailed Phillips and asked for an

extension to hire Delaware counsel. Phillips' Delaware counsel responsibly insisted that he agree. The scheduling conference was pushed back to April 15. On April 10, Hove filed a voluntary bankruptcy petition in Florida on behalf of GnB.

I find that Schifino and Hove worked together to coordinate the filing and head off the Delaware litigation. Schifino knew about the bankruptcy and helped prepare schedules for Hove. Prior to the filing of the Delaware action, Hove and GnB had not made any preparations for bankruptcy. Hove admitted that he recalled successfully using bankruptcy in the eSmokes case and simply preferred his home jurisdiction of Florida.

At trial, Hove testified he filed the bankruptcy solely because of pressure from GnB's creditors. I reject his testimony. GnB's principal creditors were Firehouse and members of the Schifino family. *See* JX 200, ¶ 7. As counsel for the United States bankruptcy trustee observed after questioning Hove,

> [m]ost of the creditors, and I mean – by most, I mean the vast majority – appear to be insiders . . . . For instance, of the [$]923,000 in unsecured creditors, [$]500,000 is Firehouse. [$]189,000 is Mr. Hove. [$]150,000 is M&A Holdings. . . . I don't think anyone can dispute that those are insiders. . . .
>
> The rest of it is – and there are others here who might arguably be insiders, including Schifino Corporation, Lee Schifino, [Wiliams Schifino] . . . . So there's very little in the way of real – I mean, true, arm's length vendor debt . . . .

JX 77 at 48; *see id.* at 51 (U.S. trustee observing, "[t]here's no big cash flow issue here because nobody really is owed any money except the insiders"); *id.* at 52 (Hove testifying that there were no "problems with any suppliers" and that "[the] utilities aren't getting turned off and [the] candles aren't melting"). GnB's creditors had not been pursuing

GnB prior to the bankruptcy, nor did they assert claims against GnB after the bankruptcy was dismissed. During the bankruptcy, only the Williams Schifino firm filed a proof of claim.

Hove signed GnB's bankruptcy petition under penalty of perjury in his purported capacity as an "Authorized Individual." JX 79. But Hove was not authorized to file a bankruptcy petition for GnB. GnB was a member-managed LLC whose management was vested in its members. *See* Part II.D, *infra*. Because the members never agreed otherwise, member action required a majority of the voting interest. Phillips held 50% of the voting interests and never approved the bankruptcy.

Later, on May 2, 2008, Hove again acted without authority to set up a bank account for GnB's debtor-in-possession financing. Hove signed under penalty of perjury as a member of GnB, which he was not. JX 240. During his deposition, Hove exacerbated matters by denying that it was his signature:

> Q. Is your – is your handwriting – just to be clear, do you believe that the signature on Line 2 is yours?
>
> A. That signature on Line 2? You mean to the right?
>
> I never signed a document that way either. But who knows. I would say David Schifino filled out this document, put the members in and whatever happened after that, I don't know. But I don't sign my name – if – if this is – *if this is a signature on Page 2, that is absolutely not my signature. No doubt about it.*

Hove Dep. at 98-99 (emphasis added). At trial, Hove admitted that it was his signature. He justified lying under oath because he thought Phillips' lawyer was "a jerk." Tr. 777-78. Schifino also signed the bank forms under penalty of perjury as a member of GnB,

which he was not. According to Schifino's testimony, he never was a member of GnB; Firehouse always was. Furthermore, according to Schifino, he sold all of his remaining interest in Firehouse to Hove in January. In February, Schifino repeatedly told Phillips' lawyers not to bother him about GnB matters because he no longer had any interest in the entity. Yet in May he signed under penalty of perjury claiming he was a member.

Sadly, Phillips responded to his opponents' bad faith tactics by engaging in disreputable practices of his own. Most notably, he transferred a nominal 1% economic interest in GnB, shorn of voting rights, to an acquaintance, Eric Stenson, thereby giving Stenson standing to make applications and present arguments to the bankruptcy court. Phillips promised Stenson if they succeeded in pressuring Hove into a resolution, then Phillips and Stenson would go into business together.

As Stenson testified, gaining standing "enabled me to – for lack of a better word – personally go after and hang Stephen Hove and the debtor down in . . . Florida. And that's exactly what I did . . . ." Tr. 811-12. At Phillips' request, Stenson "took micro issues and really made those the focus of the bankruptcy." *Id.* at 815. As just one example, Stenson attacked Hove for withdrawing $900 from GnB's accounts, despite knowing it was for a legitimate purchase of inventory.

Stenson also helped Phillips invent new theories, including a creative re-visioning of the parties' intent when executing the GnB Agreement. Seizing on the reference in the GnB Agreement to two classes of LLC interests, Stenson cooked up the idea that Schifino received voting interests while Firehouse received non-voting interests.

According to Stenson, this was a position that "Phillips' counsel at the time . . . very much rejected" and that no one else, including Phillips, ever suggested. Tr. 806.

When Hove realized that the bankruptcy filing would not bring Phillips to the settlement table, Hove dismissed the proceeding on April 24, 2009. At trial, Hove claimed he did so because he had his fill of litigation. I again reject his testimony. Before dismissing the bankruptcy case, Hove caused Firehouse to sue Phillips in the United States District Court for the Middle District of Florida so that Hove could have the satisfaction of serving Phillips with process as he walked out of bankruptcy court. The Florida complaint initially alleged violations of the federal securities laws, the Florida Securities Act, common law fraud, and breach of contract against Phillips and GnB. *See Firehouse Gallery, LLC v. Phillips*, No. 8:09-cv-00698-EAK-MAP (M.D. Fla. filed Apr. 14, 2009). Hove subsequently dropped eight of the nine claims, leaving only the common law fraud claim. The case remains pending.

I. The Parties Return To Delaware.

With the bankruptcy dismissed, the Delaware litigation resumed. On October 7, 2009, Phillips filed an amended complaint seeking declaratory relief and damages. On October 21, Phillips filed a second amended complaint. Firehouse and Schifino each answered and asserted counterclaims. Schifino included counterclaims against Phillips arising out of and relating to the GnB Agreement, even though Schifino had assigned to Firehouse "all of his right, title and interest in and to . . . all claims, causes of action, actions, suits and proceedings which [he] ha[d] or may have [had] against either or both

of Wick's End or Phillips." JX 39, ¶ 2. Schifino also filed an action against Phillips in Florida state court.

On June 21, 2010, Phillips and Schifino settled their claims against each other. JX 182. As consideration for the settlement, Schifino purported to release "any and all claims" against Phillips, including those arising out of the GnB Agreement, again apparently ignoring the fact that he had previously assigned them to Firehouse. *Id.* at 2. Schifino falsely represented in the settlement agreement that he had no involvement in the GnB bankruptcy. After trial, Phillips moved to vacate the dismissal and re-introduce Schifino as a defendant in the case. I denied the motion without prejudice, noting that "after this Court issues its post-trial decision, Phillips will be in a position to consider this Court's findings and then determine whether, where, and in what procedural manner to pursue any claims he believes he may have against Schifino." *Phillips v. Hove*, C.A. No. 3644-VCL, at 2 (Del. Ch. May 10, 2011) (ORDER).

II. LEGAL ANALYSIS

Phillips seeks declarations that (i) Firehouse is not a voting member of GnB but rather an assignee; (ii) he properly terminated the Domain Purchase Right and Exclusive Domain License; and (iii) he did not agree to transfer to GnB additional candle-related domain names. Firehouse and Hove seek contrary declarations and contend that this Court lacks jurisdiction over Hove.

On the damages front, Phillips seeks compensatory damages from Hove and Firehouse for engaging in a civil conspiracy to harm his interests. Phillips asserts derivatively that Hove breached his fiduciary duties to GnB. Firehouse seeks a remedy

for Phillips' and Wicks' End's wrongful use of the GnB domain names since the execution of the GnB Agreement (variously framed as claims for an accounting, conversion, unjust enrichment, and specific performance of the transfer obligation). Firehouse also seeks judicial dissolution of GnB under 6 *Del. C.* §§ 18-802 and 18-804.

Other claims and counterclaims have not been briefed and are therefore waived. As Phillips is not entitled to damages, I need not reach Hove's inventive argument that any damages awarded to Phillips should be offset by the hypothetical value of Phillips' non-cash settlement with Schifino.

A. The Voting Members Of GnB

The parties first seek a declaratory judgment determining the voting members of GnB. In denying an early motion for summary judgment, I found the Ownership Provision ambiguous. *See Phillips v. Schifino*, 2009 WL 5174328, at *1 (Del. Ch. Dec. 18, 2009). It states that GnB will "initially be equally owned by Phillips, and Schifino's investment entity ('Schifino Investment Entity')." JX 14, ¶ 1. It then disregards the concept of an investment entity and calls for "Phillips and Schifino" to own a class of voting interests, with "any other members of Newco" to hold an additional class of non-voting interests. The concept of the "Schifino Investment Entity" reappears in paragraph 2, but only as a provider of debt financing. Schifino signed the GnB Agreement solely in his personal capacity, not on behalf of any entity, and the document does not contain language extending Schifino's rights and obligations to affiliates, successors, or assigns.

At trial, Phillips attempted to harmonize the Ownership Provision's conflicting uses of "Schifino" and "Schifino Investment Entity." He testified that he and Schifino

intended for themselves personally to be voting members of GnB and for Firehouse to be a non-voting member. Sadly, in so testifying, Phillips embraced the fictitious account of GnB's origins that Stenson invented during the course of the Florida bankruptcy.

At trial, Phillips could not convincingly explain why he supposedly insisted on Schifino owning voting interests personally while holding additional non-voting interests indirectly through an entity. Phillips testified that "[i]t was important to me that the two people, the two parties doing the voting and making the decisions on the company, were myself and David individually and not an unknown entity." Tr. 51. He could not offer any reason why it was "important."

Nor can the basic ownership math accommodate Phillips' account. The Ownership Provision called for GnB "initially [to] be equally owned by Phillips, and Schifino's investment entity." JX 14, ¶ 1. Phillips maintained throughout the case that he and Schifino each received *both* 50% of the economics *and* 50% of the votes. But if Schifino owned voting units and his investment entity owned non-voting units, then one of two things had to be true. Either Schifino would own more than a 50% economic interest, comprising his 50% of the voting units plus some incremental non-voting units held through Firehouse, or Schifino would own less than a 50% voting interest, so that his voting units plus some incremental non-voting units held through Firehouse could add up to a 50% economic interest. Schifino could not own both a 50% voting interest and a 50% economic interest if part of his holdings consisted of non-voting units owned through Firehouse. Using the contractual freedom authorized by the LLC Act, a savvy

LLC drafter could have achieved Phillips' counter-intuitive structure, but not in the internally inconsistent manner he described.

To bolster his mathematically impossible account, Phillips pointed to the drafts of the voting trust agreement prepared by his counsel, Lipshutz, after the execution of the GnB Agreement. Each bore a signature line for Schifino personally to sign as a voting member of GnB. Phillips relied on the drafts as evidence that Schifino himself, rather than Firehouse, held a voting membership interest in GnB. Other draft agreements, however, reference Firehouse. The draft LLC agreement that Attorney Schifino emailed to Lipshutz in July 2007 identified Firehouse as the other 50% member of GnB. JX 183. In addition, on October 20, 2007, Lipshutz forwarded to Attorney Schifino a draft agreement documenting the Domain Purchase Right. *See* JX 188; Dkt. 53, Ex. A. It identified the members of GnB as Firehouse and Phillips. The record does not reflect any objection by Lipshutz to Firehouse appearing as the voting member, either after receiving the July 2007 LLC agreement or when sending the October 2007 domain purchase agreement.

I find that the ambiguous Ownership Provision authorized Schifino to invest either in GnB individually *or* through an entity. When negotiating the GnB Agreement, Phillips understood that Schifino could invest through an entity. By e-mail dated January 30, 2007, Phillips asked whether Schifino would be the sole owner of his investment entity, showing that he already understood that Schifino could invest in this manner. JX 35. When Schifino responded that he planned to use an entity that included minority investors, Phillips did not object or question whether the entity would hold voting

interests. Phillips agreed to the two-tier ownership structure not because he wanted the entity to own non-voting shares, but because he was concerned that "if, in the future, we wanted to bring in employees or something like that and wanted to give them stock certificates, . . . it would interrupt the 50/50 split." Tr. 49-50. The inconsistent references to "Schifino" and the "Schifino Investment Entity" resulted from lay efforts to capture the concept that Schifino was the principal on the other side of the deal from Phillips, but that Schifino could invest through an entity that included minority investors.

Despite the ambiguity of the GnB Agreement, I find that Schifino invested in GnB through Firehouse. This fact does not appear to have been communicated clearly to Lipshutz, who originally prepared his draft agreements to reflect Schifino owning his interests personally. When Attorney Schifino sent the draft LLC agreement in July 2007, however, it reflected Firehouse as the other 50% member, and Lipshutz later adopted that view.

In reaching this conclusion, I have considered the troubling and suspicious origin of many Firehouse documents, including the minutes of its purported organizational meeting. I also have considered a temporal oddity in Firehouse's availability as an investment vehicle. According to the Florida Secretary of State, Firehouse was formed on January 8, 2007. It is undisputed that Schifino originally formed the entity to acquire an old firehouse that he hoped to re-develop as an art gallery. After that deal fell through, he "re-purposed" Firehouse as the Hove-Schifino investment vehicle for GnB. The firehouse real estate transaction must have unraveled quickly and definitively for Schifino and Hove to have held their organizational meeting on January 10 (according to

the minutes documenting that event), then executed the Firehouse Agreement on February 13. By contrast, if the decision to use Firehouse was actually made months later, there would have been time for the firehouse deal to fall apart and for Schifino to decide to "re-purpose" the entity.

Ultimately, and despite my doubts about other Firehouse documents, I am persuaded that the Firehouse Agreement was prepared and executed in early February 2007, as it purports to be. The footer of the agreement bears a document number from the Williams Schifino firm's file management system that is consistent with early February preparation. The document also reflects a hand written modification, initialed by Hove and Schifino, calling for a payment to be made on "March 5, 07."

Based on the totality of the evidence, I find that Phillips and Firehouse were the original members of GnB, with each holding a 50% voting interest. All of the subsequent transactions between Schifino and Hove took place at the Firehouse level in the form of transfers of interests in Firehouse. After Schifino confirmed in January 2007 that he planned to invest through an entity that would have minority investors, Phillips did not seek any limitation on transfers of interests in the investment entity. The GnB Agreement does not restrict transfers at the Firehouse level. Nor did the draft GnB operating agreement that was circulated in July 2007. Accordingly, Firehouse remains a member of GnB with a 50% voting interest.

B. The Domain Purchase Right And Exclusive Domain License

The parties next seek a declaratory judgment determining whether GnB continues to hold the Domain Purchase Right and the Exclusive Domain License. Phillips first

exercised the Termination Right shortly after GnB filed for bankruptcy. GnB then obtained a temporary restraining order from the bankruptcy court barring Phillips from exercising the right during the pendency of the bankruptcy proceeding. After Hove dismissed the bankruptcy, Phillips again exercised the Termination Right. Phillips does not rely on his right to terminate in the event GnB "shall cease doing business." He invokes only the bankruptcy trigger.

Under the Bankruptcy Code, the filing of GnB's bankruptcy petition did not, by itself, allow Phillips to exercise the Termination Right. When a bankruptcy petition is filed, the debtor's property "becomes property of the [bankruptcy] estate . . . notwithstanding any provision in an agreement . . . that is conditioned on . . . the commencement of a case under this title." 11 U.S.C. § 541(c)(1)(B).

Separately, the Bankruptcy Code prohibits executory contracts from being terminated because of the commencement of a bankruptcy proceeding:

> Notwithstanding a provision in an executory contract . . . an executory contract . . . may not be terminated . . . , and any right or obligation under such contract . . . may not be terminated . . . , at any time after the commencement of the case solely because of a provision in such contract . . . that is conditioned on . . . the commencement of a case under this title.

11 U.S.C. § 365(e)(1)(B). "[A] contract is executory if each side must render performance, on account of an existing legal duty or to fulfill a condition, to obtain the benefit of the other party's performance." *In re Riodizio, Inc.*, 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997). The Domain Purchase Agreement and the Exclusive Domain License were both executory contracts. The Domain Purchase Agreement obligated GnB to pay

$2 million in return for Phillips' obligation to transfer candles.com to GnB, and the Exclusive Domain License obligated GnB to pay licensing fees to Phillips beginning in year six in return for Phillips continuing to allow GnB to use candles.com.[2]

Under the Bankruptcy Code, when a bankruptcy case is dismissed, the property of the estate is "revest[ed] . . . in the entity in which such property was vested immediately *before* the commencement of the case under this title." 11 U.S.C. § 349(b)(3) (emphasis added). "Unless the court indicates otherwise, the general effect of an order of dismissal is to restore the *status quo ante*. It is as though the bankruptcy case never had been brought." *In re Lewis & Coulter, Inc.*, 159 B.R. 188, 190 (Bankr. W.D. Pa. 1993); *see also id.* ("The purpose of Section 349 is 'to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.'" (citing H.R. Rep. No. 595, 95th Cong., 1st Sess., 338 (1977))). This Court has held squarely that *ipso facto* provisions, like the Termination Right, do not become enforceable after the dismissal of a bankruptcy petition. *See Milford Power Co. v. PDC Milford Power, LLC*, 866 A.2d 738, 749-62 (Del. Ch. 2004) (rejecting reasoning of *Chrysler Fin. Corp. v. Fruit of the Loom, Inc.*, 1993 WL 19659, at *4 (Del. Super. Jan. 12, 1993)).

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[2] *See, e.g.*, *In re Abitibibowater Inc.*, 418 B.R. 815, 828-31 (Bankr. D. Del. 2009) (holding that call agreement to purchase shares was executory contract); *In re Kellstrom Indus., Inc.*, 286 B.R. 833, 834-35 (Bankr. D. Del. 2002) (analyzing right of first refusal as option and holding it was an executory contract); *In re Access Beyond Techs., Inc.*, 237 B.R. 32, 43-44 (Bankr. D. Del. 1999) (holding patent license was executory contract).

Immediately prior to the filing of the bankruptcy petition, GnB held the Domain Purchase Option and Exclusive Domain License. When the petition was filed, those rights did not become terminable by Phillips under the terms of the Bankruptcy Code. When the bankruptcy case was dismissed, GnB and its assets were returned to the pre-bankruptcy *status quo*. Therefore, neither the bankruptcy nor its dismissal enabled Phillips to terminate the option, and GnB continues to hold the Domain Purchase Option and Exclusive Domain License.

C. Other Domain Names

The parties seek a third declaratory judgment determining who owns various domain names in addition to candles.com. The GnB Agreement provided for GnB to "pay $50,000 to Wicks End and/or Phillips . . . in consideration for all of the assets (including inventory) used in the retail and wholesale candle business by Wicks End." JX 14, ¶ 5. The parties have stipulated to a list of domain names that were pointed at wicksend.com. *See* Dkt. 216. Because the additional domain names were pointed at wicksend.com and used to drive traffic to the Wicks' End website, they were "used in the retail and wholesale candle business by Wicks End."

Although much of the GnB Agreement is ambiguous, the phrase "all of the assets" is not. "'All' means 'all,' or if that is not clear, all, when used before a plural noun such as 'assets,' means '[t]he entire or unabated amount or quantity of; the whole extent, substance, or compass of; the whole.'" *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 377 (Del. Ch. 2004). The other domain names were "assets" of GnB. Phillips agreed to transfer them in paragraph 5 of the GnB Agreement. Paragraph 12 of the GnB

Agreement supports this conclusion by providing that after the deal became effective, "Wicks End Inc. will discontinue the retail and wholesale candle business." JX 14, ¶ 12.

Phillips' attempts to create ambiguity do not sway me. He argues that under a traditional plain reading of the phrase "all of the assets," the parenthetical phrase "(including inventory)" becomes redundant because assets normally include inventory. He points out that the exclusions for manufacturing equipment and Allusion's assets are likewise redundant because neither was "used in the retail and wholesale candle business." Both were used in Wicks' End's dormant candle manufacturing business.

Each of these redundancies resulted from an effort by two non-lawyers to draft a clear agreement. Inventory is not really "used" in a business; it is sold by the business. The parenthetical reference to "inventory" therefore adds marginally to the clarity of the provision as a whole. The specific exclusions similarly enhance the clarity of the provision, because the hypothetical reasonable reader of the GnB Agreement need not know that the manufacturing business was defunct, that the Allusions assets were manufacturing assets, or that the manufacturing business did not produce candles for the retail and wholesale business to sell. Neither redundancy creates ambiguity.

Phillips also points out that I previously held, also as a matter of law, that paragraph 5 did not convey title to the domain name candles.com because of the separate provisions governing that domain name in paragraphs 3 and 4. According to Phillips, paragraph 5 therefore cannot convey "all of the assets." To the contrary, if paragraphs 3 and 4 did not specifically address candles.com and provide for the Domain Purchase Right and the Exclusive Domain Option, then candles.com would be an "asset[] used in

the retail and wholesale candle business" and covered by paragraph 5. The GnB Agreement does not address the other domain names, must less with specific provisions like those establishing the rights in candles.com. The phrase "all of the assets" therefore sweeps in the other domain names but does not include candles.com.

Phillips next complains that paragraph 5 contemplates a payment of only $50,000 for the Wicks' End's assets, yet the other domain names collectively have a value ranging from $400,000 to $500,000. In making this argument, Phillips examines only the cash payments he received and contends that each was allocated specifically to a particular type of asset. Phillips ignores that he was issued 50% of the equity in an entity that (i) owned all of those assets and (ii) received $500,000 in the form of an unsecured, five-year balloon loan bearing interest at a rate just above the long-term rate of inflation. When negotiating with Schifino and later Hove over a potential buyout, Phillips reflected a more sophisticated understanding of the consideration he received and valued his equity stake, exclusive of the $2 million agreed-upon payment for candles.com, at between $1 million and $1.5 million.

Because paragraph 5 is clear on its face, I need not consider extrinsic evidence. *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) ("Extrinsic evidence is not used to interpret contract language where that language is plain and clear on its face." (internal quotation marks omitted)). But if I did, Phillips' evidence is unpersuasive. He observes that during their late 2006 discussions, Schifino sent him an email proposing that a new entity would acquire "all the assets from Wicksend, Inc. . . . . [which] includes but is not limited to . . . domain names and

inventory." JX 155. Phillips and Schifino subsequently had a phone call in which they talked about domain names other than candles.com. Phillips emailed Schifino that he needed to determine a fair price for candles.com and think about the other domain names, because this was the first time they had been mentioned. Schifino replied:

> i would be willing to have the new company sign a note payable to you for some amount (be reasonable) you decide the note will be for the purchase of the domain names. if you want to keep the other domain names keep them. now beside having an increase in value and a real company with earnings you would be getting compensated for the domain names. then when the company can afford it it will pay you that #. as far as current customers and or sales that is your contribution to the new compnay but again if you want to keep them keep them again keep it simple.

JX 148 (errors, capitalization, and punctuation as in original). Phillips claims that Schifino agreed in this exchange that the other domain names would not be included. I find that these emails referred to an earlier deal structure in which Phillips would receive a note for the value of candles.com and other domain names (if included). The GnB Agreement as executed reflects a different structure involving a five-year option on candles.com and an asset transfer otherwise conveying all assets used in the retail and wholesale candle business. The earlier email exchange is therefore not persuasive evidence of the scope of paragraph 5.

Phillips also claims that Schifino falsified evidence to support GnB's purported ownership of the domain names by altering GnB's QuickBooks files. In fall 2007, Phillips had become so frustrated at his inability to obtain financial information from Schifino that he had his attorney pursue the matter. After numerous requests, Schifino

eventually responded by sending a copy of GnB's Quickbooks file as it existed on December 20, 2007 (the "2007 File"). During litigation, Schifino produced a more recent version of GnB's Quickbooks file (the "2010 File"). Phillips discovered that the password Schifino provided for the 2010 File also opened the 2007 File.

A comparison of the two files shows that entries on the general ledger were altered. In the 2007 File, the $50,000 payment to Wicks' End under paragraph 5 of the GnB Agreement appeared in a category entitled "Inventory/Fixtures." In the 2010 File, it was moved to a newly created category entitled "Domain Names." In the 2007 File, payments to reimburse Welker for additional domain names that he purchased were listed in the "Goodwill/Assets" category. In the 2010 File, they appeared in the newly created "Domain Names" category.

The treatment of the $50,000 payment in the 2007 file comports with a five-year budget that Schifino sent Phillips by e-mail on March 21, 2007. *See* JX 242. Welker prepared the budget and Schifino revised it. Under a category entitled "Other Costs," the budget allocates the $50,000 payment to "Wicksend 'Existing Inventory.'" JX 242. Three days later, Schifino wrote that "all inventory should flow through gnbllc *that is what the 50,000 was for*." JX 93 (emphasis added).

I agree with Phillips that Schifino or someone acting at his direction modified the QuickBooks file. Given Schifino and Hove's credibility problems and the troubling backdating of documents, one can readily suspect that someone consciously sought to alter the account categories to support the defendants' litigation position on the other domain names. It is equally possible, however, that whoever modified the files

subjectively believed that the domain names had been acquired and that a separate category for domain names would account for those payments more appropriately. The 2010 QuickBooks files reflect other additional and facially innocent categories, such as accounts relating to the GnB bankruptcy proceedings. On this record, I am not convinced that Schifino (or someone acting at his direction) falsified evidence.

I therefore determine that GnB purchased the domain names other than candles.com that were pointed at wicksend.com for the purpose of directing internet traffic to that website. GnB is entitled to specific performance of the transfer obligation.

D. Jurisdiction Over Hove

Despite taking control of GnB's affairs, Hove was not a manager of GnB. The LLC Act defines a manager as "a person who is named as a manager of a limited liability company in, or designated as a manager of a limited liability company pursuant to, a limited liability company agreement or similar instrument under which the limited liability company is formed." 6 *Del. C.* § 18-101(10). If the LLC agreement does not name a manager or provide a procedure for designating a manager, then "the management of a limited liability company shall be vested in its members . . . ." 6 *Del. C.* § 18-402. Unless the LLC agreement specifies otherwise, "the decision of members owning more than 50 percent of the said percentage or other interest in the profits [is] controlling." *Id.* GnB, of course, did not have a written LLC agreement, and the GnB Agreement does not specify that GnB will be managed by managers. The GnB Agreement contemplates a quasi-corporate structure with a board of directors and a president, but it does not harmonize those roles with LLC management concepts.

Because Phillips and Schifino did not agree to the contrary, management remained vested in the members. At most, Phillips and Schifino implicitly consented to Hove taking over for Welker as President.

Because Hove was not officially a manager, he argued in his post-trial briefs that this Court lacks personal jurisdiction over him. Under Delaware law, there are "two bedrock requirements for personal jurisdiction: (1) a statutory basis for service of process; and (2) the requisite 'minimum contacts' with the forum to satisfy constitutional due process." *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *6 (Del. Ch. May 7, 2008). The LLC Act provides that a "manager's . . . serving as such constitutes such person's consent to the appointment of the registered agent of the limited liability company (or, if there is none, the Secretary of State) as such person's agent upon whom service of process may be made." 6 *Del. C.* § 18-109(a). The LLC Act's implied consent statute extends not only to formally designated managers but also to

> a person, whether or not a member of a limited liability company, who, although not a manager as defined in § 18-101(10) of this title, participates materially in the management of the limited liability company; provided however, that the power to elect or otherwise select or to participate in the election or selection of a person to be a manager as defined in § 18-101(10) of this title shall not, by itself, constitute participation in the management of the limited liability company.

Id.

By his own testimony, Hove "took over . . . in all respects" day-to-day operations at GnB in October 2007. Tr. 688. He effectively ran the business from that time forward. He later filed a bankruptcy petition on GnB's behalf, then dismissed it.

Through these acts, Hove participated materially in the management of GnB, thereby satisfying the requirements of Section 18-109(a) and consenting to suit in Delaware for breaches of his duties to GnB. *PT China LLC v. PT Korea LLC*, 2010 WL 761145, at *8 n.44 (Del. Ch. Feb. 26, 2010) ("By accepting a key management position over two Delaware limited liability companies, [the defendant] submitted himself to the jurisdiction of the Delaware courts in suits pertaining to his rights, duties, and obligations as a manager.").

E. Phillips' Claim Of Civil Conspiracy

Phillips seeks damages from Hove on the theory that Schifino and Hove conspired to induce him to enter into the GnB Agreement and deprive him of candles.com. "To make a case for civil conspiracy, a plaintiff must show '(1) a confederation or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damage.'" *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2178520, at *5 (Del. Ch. May 28, 2010) (quoting *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 n.8 (Del. 2005)).

To the extent it rests on the GnB Agreement, Phillips' conspiracy theory founders for want of an unlawful act. Schifino and Hove undoubtedly conspired to obtain control of candles.com, worked together to accomplish that task, and succeeded in inducing Phillips to enter into the GnB Agreement. Their success, however, came by lawful means: Schifino talked Phillips into a deal and out-negotiated him at the bargaining table.

Phillips cites Hove's unauthorized filing of the GnB bankruptcy as a wrongful act in furtherance of the conspiracy. Phillips has argued separately that Hove breached his fiduciary duties by filing the GnB bankruptcy in bad faith, and the claim is evaluated more appropriately under that framework. *See* Part II.F, *infra*. Phillips also contends that Schifino, Hove, and Firehouse "pursued a litigious course of action, from the very start of this dispute, to frustrate Mr. Phillips' claims for relief and slow their progress, in the hope that Mr. Phillips ultimately would be unable to afford to continue on and, therefore, could not impede their attempt to usurp control of GnB and candles.com." Pl's. Post-Trial Opening Br. 33. This claim is more appropriately framed as a request to shift fees under the bad faith exception to the American Rule, and I consider it as such. *See*, Part II.H, *infra*.

The only wrongful act that might give rise to conspiracy liability was Schifino's misrepresentation about his ownership of the Schifino Investment Entity. At the time Schifino and Phillips were negotiating the GnB Agreement, Phillips understood that Schifino planned to invest in GnB through an entity. As their discussions proceeded, Phillips and Lipshutz became curious, and Phillips sent Schifino an e-mail dated January 30, 2007 stating, "My attorney was wondering, are you the sole shareholder of your Investment entity?" JX 35. Schifino responded the next day:

> yes i am 100% owner of the investment entity but you have to understand that i have made a lot of money for people in the past family and friends if i feel comfortable usually allow them the opportunity to invest in my deals through the investment entity for example in this case i commit the 500,000 and if they are comfortable i will allow them to take a piece of the 500,000 it does not matter if they do because i

> have committed the $500,000it is my way of giving back to them for investing in other deals
>
> you should consider the same with your investment entity as i understand the are currently a minority shareholder? or is here a note to them???

JX 36 (errors, capitalization, and punctuation as in original). Based on Schifino's communications with Hove going back to 2005, I find that at the time he wrote this email, Schifino and Hove already had an unwritten agreement that (i) Hove would provide the $500,000 and (ii) they would split the investment entity's equity 51/49.

Schifino had no obligation to volunteer information about his investment entity to Phillips. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987) ("Generally, there is no duty to disclose a material fact or opinion, unless the defendant had a duty to speak."). But once Phillips asked, Schifino had an obligation to answer truthfully. *Id.*; *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) ("[F]raud does not consist merely of overt misrepresentations. It may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak."). Schifino represented falsely that he would be the 100% owner of the entity and that, at most, he might allow a minority investor "to take a piece of the 500,000." At the time, Schifino and Hove already had an understanding that Hove would provide 100% of the capital and own 49% of the entity.

Schifino's false representation was material. Because Schifino was not investing any of his own money, he had a materially different risk profile than Phillips. Schifino would not bear any of the downside risk of the business, and he could readily walk away

if things got bad (as he did). Rather than having a partner, Phillips would be investing with an option holder.

When Phillips learned of Hove's involvement, he could have relied on a theory of fraudulent inducement to void the GnB Agreement. *See* Restatement (Second) of Contracts § 164. Instead, Phillips ratified the agreement by accepting Hove's involvement, working with Hove to maximize holiday sales, and negotiating for Hove to buy his GnB units. Having chosen to proceed notwithstanding Hove's involvement, Phillips cannot now hold Hove liable as a co-conspirator for the fraudulent statement that Phillips chose to disregard. Phillips' claim for civil conspiracy against Hove therefore fails.

F. The Parties' Claims For Breach Of Fiduciary Duty

Unless limited or eliminated in the entity's operating agreement, the member-managers of a Delaware limited liability companies owe traditional fiduciary duties to the LLC and its members. *See* 6 *Del. C.* § 18-1101(c); *William Penn P'ship v. Saliba*, 13 A.3d 749, 756 (Del. 2011). Phillips was a member-manager of GnB and owed fiduciary duties to GnB and its members. By taking on the role of president and asserting control over GnB's operations, Hove assumed fiduciary duties to GnB and its members. "[T]he principle of fiduciary duty, stated most generally, [is] that one who controls property of another may not, without implied or express agreement, intentionally use that property in a way that benefits the holder of the control to the detriment of the property or its beneficial owner." *In re USACafes, L.P. Litig.*, 600 A.2d 43, 48 (Del. Ch. 1991) (Allen, C.). "A person standing in the fiduciary relation of a trustee for another is liable to

account not alone for the bare value of the beneficiary's property which he took and utilized as his own, but as well also for all the gains and profits which he has derived therefrom." *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939).

The evidence at trial established that Hove took control of GnB's cash and inventory and sold products from GnB's inventory through a competing online candles business that he established. Hove admitted doing this, and his actions constitute a breach of his duty of loyalty. The evidence from trial does not permit me to quantify a damages award. I therefore order Hove to account to GnB for the value of the inventory and any cash that he took, as well as the profits Hove earned through his competing online candle business.

The evidence at trial similarly established that Phillips used candles.com for his own benefit during the life of the Exclusive Domain License, thereby misappropriating GnB's principal asset for his own benefit. Phillips also competed with GnB by continuing to operate Wicks' End, despite being obligated under the GnB Agreement to cause Wicks' End to exit the retail and wholesale candle business. Like Hove, Phillips must account to GnB for the profits he earned through Wicks' End and candles.com.

Phillips spent the bulk of his post-trial briefing arguing that Hove acted in bad faith and disloyally by filing the bankruptcy petition. Phillips seeks to recover damages equal to the attorneys' fees and costs that he incurred in the bankruptcy proceeding. I agree that Hove filed the bankruptcy proceeding in bad faith, without authority, and in a disloyal effort to preserve his control over GnB. I decline to award Phillips the relief that

he requests, however, under the maxim that "he who comes into equity must come with clean hands." *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947) (internal quotation marks omitted). By unleashing Stenson, Phillips acted in bad faith, needlessly complicated the bankruptcy proceeding, and drove up the costs of that litigation. He therefore cannot recover his attorneys' fees and costs for the Florida bankruptcy.

G. Judicial Dissolution and Winding Up

Firehouse seeks the judicial dissolution of GnB. Section 18-802 of the LLC Act provides that "[o]n 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." 6 *Del. C.* § 18-802. I have already concluded that Firehouse is a member of GnB and thus has standing to make this application.

This Court has consistently held that in order to obtain judicial dissolution, "there is no need to show that the purpose of the limited liability company has been 'completely frustrated.' The standard is whether it is reasonably practicable for [the LLC] to continue to operate its business in conformity with its LLC Agreement." *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *4 (Del. Ch. Jan. 13, 2009) (footnote omitted).

> When two coequal owners and managers whose mutual agreement is required for any company action are deadlocked as to the future direction and management of the enterprise and the LLC Agreement provides no mechanism by which to break the deadlock, it is not reasonably practicable for the LLC to operate consistently with its operating agreement and a judicial dissolution will be ordered.

Vila v. BVWebTies LLC, 2010 WL 3866098, at *1 (Del. Ch. Oct. 1, 2010).

Phillips and Firehouse are coequal owners and managers of GnB, and at present their agreement is required for GnB to take any action. *See* 6 *Del. C.* § 18-402. Given the marked animosity between the parties and their inability to agree on basic issues, deadlock clearly exists. The fact that GnB has continued to operate marginally (at least until Phillips re-pointed candles.com) is irrelevant to deadlock, because GnB never operated *in conformity with the parties' agreement*. *Cf. Vila*, 2010 WL 3866098, at *8 ("[A] business is not being operated in accordance with its governing instrument when one fiduciary acts as sole manager in a situation where the agreement of others is required."); *accord In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005).

If deadlock "cannot be remedied through a legal mechanism set forth within the four corners of the operating agreement, dissolution becomes the only remedy available as a matter of law." *Fisk Ventures*, 2009 WL 73957, at *7. A contractual solution precludes judicial dissolution only if it is "reasonable" and thus an "equitable alternative." *See Haley v. Talcott*, 864 A.2d 86, 88, 96-98 (Del. Ch. 2004) (granting judicial dissolution, despite LLC agreement containing exit mechanism, because it would "not [be] equitable to force [the petitioning member] to use the exit mechanism" where the member would remain liable on personal guaranty of entity's mortgage after exit).

Leaving the parties to their contractual dispute resolution mechanism would be ineffective and inequitable. The GnB Agreement provides that "any decisions [the members] do not agree on going forward will be decided by the board of directors." JX 14, ¶ 11. The board is to consist of five directors, three appointed by Phillips and two by

Schifino/Firehouse. *Id.* ¶ 10. Notably, "the designees of each (other than each other) must be approved by the other party." *Id.* The parties have never agreed on the composition of a board, and their mutual antagonism offers little hope of a future accord. Deferring to the contractual mechanism would return the parties to square one and the intolerable *status quo ante* that prompted Phillips originally to file this litigation.

In short, GnB's members are deadlocked with no effective mechanism to break the deadlock. It is, therefore, "not reasonably practicable to carry on the business in conformity with a limited liability company agreement," and dissolution is appropriate. 6 *Del. C.* § 18-802. Section 18-803(a) of the LLC Act provides that when dissolving an LLC this Court, "upon cause shown, may wind up the limited liability company's affairs upon application of any member . . . , and in connection therewith, may appoint a liquidating trustee." 6 *Del. C.* § 18-803(a). Given their history of disputes large and small, I find that the GnB members cannot wind down GnB in an orderly or timely manner. I therefore will appoint a liquidating trustee to dissolve GnB and wind up its affairs. The liquidating trustee

> may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company, all without affecting the liability of members and managers and without imposing liability on a liquidating trustee.

6 *Del. C.* § 18-803(b). The liquidating trustee's tasks will include monetizing the assets that are readily saleable, pursuing those claims and remedies that are available to GnB (including the results of the accountings described above and any other claims that the liquidating trustee may identify), and taking whatever steps are necessary to maximize the value of the Domain Purchase Right and Exclusive Domain License.

H. Phillips' Request to Shift Fees

Phillips asks that the defendants be ordered to pay his fees and expenses in this action under the bad faith exception to the American Rule. "Delaware courts have previously awarded attorneys' fees where (for example) 'parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims.' The bad faith exception is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process." *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005) (footnote omitted).

Sadly, each of GnB's principals (Schifino, Hove, and Phillips) engaged in litigation conduct that could support fee shifting. Although Phillips casts himself as an innocent litigant, he gave highly questionable testimony. Most glaringly, he adopted Stenson's fictitious account about the original understanding of the Ownership Provision. On other occasions, he testified so evasively and hyper-technically that he came very close to lying on the stand. The best example was his trial testimony about whether he currently uses candles.com:

> Q. Are you using candles.com?
>
> A. No.

Q. Not at all?

A. Not as part of Wick's End, no.

Tr. 252. In their answering post-trial brief, the defendants accused Phillips of perjury, and pointed out that both wicksend.com and candles.com currently share the following information:

Domain Name	www.wicksend.com	www.candles.com
Customer Service Address	2022 Weems Road Tucker, GA 30084 Attn: Billing Dept.	2022 Weems Road Tucker, GA 30084
Telephone Number	(770) 840-8230	(770) 840-8230
Fax Number	(866) 334-6448	(866) 334-6448
Toll Free Number	(888) 942-5736	(800) 942-5736
Internet Address	http://www.wicksend.com/ index.php?main_page=contact_us	http://www.candles.com/contacts/

Defs.' Post-Trial Answering Br. 29. Phillips acknowledged at trial that he was still operating wicksend.com, so the non-coincidental list of overlapping addresses, web locations, and contact information strongly suggested that he was also still using candles.com.

Phillips responded to the "brazen accusation" of perjury by filing an affidavit with the following clarification:

> In response to defendants' counsel's questions as to whether I was using candles.com, I responded, "Not as part of Wicks' End, no." . . . That testimony was truthful at trial, and remains truthful today, because Wicks' End does not use candles.com and derives no sales from that domain. At the time of trial, and at all times since then, all business derived

> from candles.com was directed to and earned by The Candle Company, LLC ("TCC"), a Georgia limited liability company I formed in May 2009. Since the time of TCC's formation, all sales and revenues from the candles.com website have been directed to TCC. During the same time period, Wicks' End recognized no revenues from sales generated by the candles.com website.

Phillips Aff. ¶ 3 (June 17, 2011). In other words, Phillips admitted that the initial unqualified "No" in response to "Are you using candles.com?" was false, but contended the subsequent qualification was technically true because he was using a separate entity.

Considering the totality of the record, I decline to shift fees in this matter, and each party will bear its own costs. I hasten to add that I have no reason to ascribe any of the parties' misconduct to current counsel or to infer that current counsel lacked a good faith basis for introducing dubious evidence. To the contrary, I commend current counsel for their professionalism and civility towards each other, notwithstanding their clients' deep-seated enmity.

An order has been entered in accordance with this opinion.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ERIC PHILLIPS, Plaintiff and Counterclaim-Defendant, v. STEPHEN HOVE and FIREHOUSE GALLERY, LLC, a Florida limited liability company, Defendants and Counterclaim-Plaintiffs, and GnB, LLC, a Delaware limited liability company, Nominal Defendant.	)	C.A. No. 3644-VCL
FIREHOUSE GALLERY, LLC, Third-Party Plaintiff, v. WICKS' END, INC., a Delaware corporation, Third-Party Defendant.	)	

ORDER GRANTING DECLARATORY AND OTHER RELIEF IN ACCORDANCE WITH OPINION

WHEREAS, the Court having issued a post-trial Memorandum Opinion dated September 22, 2011 (the "Opinion"), NOW, THEREFORE, IT IS ORDERED as follows:

1. Pursuant to the Delaware Declaratory Judgment Act, 10 *Del. C.* § 6501, *et seq.*, the Court declares the rights of the parties to be as follows:

(a) The members of GnB, LLC (the "Company") are (i) Eric Phillips and (ii) Firehouse Gallery, LLC ("Firehouse"), a Florida limited liability company. Each member holds a 50% voting membership interest in the Company.

(b) The Company possesses the right to acquire the domain name "candles.com" from Phillips in exchange for a payment of $2,000,000 (the "Domain Purchase Right"). The Domain Purchase Right may be exercised at any time before February 20, 2012.

(c) The Company possesses an exclusive license to use the domain name "candles.com" (the "Exclusive Domain License"). Until February 20, 2012, the Exclusive Domain License is royalty free. After February 20, 2012, the royalty for the Exclusive Domain License shall be the greater of (i) $100,000 per annum or (ii) five (5.00%) percent of the net revenue (defined as gross revenue less returns) generated from the use of the Exclusive Domain License.

(d) Phillips may terminate the Domain Purchase Right and the Exclusive Domain License in the event that the Company or its successor shall cease doing business or become bankrupt.

(e) Phillips sold to the Company, and the Company purchased, the following domain names:

wicksend.com	mycandleparty.com
candleholders.com	mycandleparties.com
votive.com	beeswaxtapers.com
votives.com	photocandle.com
mycandles.com	soypillars.com
religiouscandles.com	soyvotives.com
vigilcandle.com	engravedsoap.com
vigilcandles.com	engravedsoaps.com
candlelightvigil.com	wholesaletapers.com

The Company owns equitable title to the foregoing domain names (the "Additional Domain Names"). Phillips shall take all steps necessary to transfer record ownership of the Additional Domain Names to the Company.

(f) Defendant Steven D. Hove is not and has never been a manager of the Company.

2. Judgment is entered against plaintiff Phillips and in favor of defendant Hove on Phillips' claim that Hove engaged in a civil conspiracy to harm his interests.

3. Judgment is entered in favor of the Company and against defendant Hove on plaintiff's claim that Hove breached his fiduciary duty of loyalty to the Company. Hove shall account to the Company for all cash taken from the Company, the value of all inventory taken from the Company, and all profits earned by Hove through his competing on-line candle business from February 20, 2007 through the date of this Order.

4. Judgment is entered in favor of the Company and against counterclaim-defendant Phillips on counterclaim-plaintiff's claim that Phillips breached his fiduciary duty of loyalty to the Company. Phillips shall account to the Company for all profits earned through Wicks' End, Inc. or through the use of candles.com or any of the Additional Domain Names from February 20, 2007 through the date of this Order.

5. The doctrine of unclean hands bars Phillips from recovering any attorneys' fees and costs for this proceeding or in connection with a bankruptcy proceeding filed on behalf of the Company in United States District Court for the Middle District of Florida.

6. The members of the Company are deadlocked, and the deadlock cannot be remedied through the legal mechanism provided for by the parties. Accordingly, the Court shall appoint a liquidating trustee for the Company, with the appointment to be implemented by separate order.

Vice Chancellor
Dated: September 22, 2011