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Case Number 5,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AIBAR HUATUCO, M.D.,	)	
	)	
Plaintiff Below, Appellant,	)	
	)	
v.	)	No. 5, 2014
	)	
SATELLITE HEALTHCARE	)	On Appeal from
	)	Court of Chancery
and	)	C.A. No. 8465-VCG
	)	
SATELLITE DIALYSIS OF TRACY, LLC	)	
	)	
Defendants Below, Appellees.	)	

ANSWERING BRIEF OF APPELLEES SATELLITE HEALTHCARE AND SATELLITE DIALYSIS OF TRACY, LLC

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NATURE OF PROCEEDINGS

On April 8, 2013, Plaintiff Aibar Huatuco ("Plaintiff") filed a Complaint (the "Complaint") in the Delaware Court of Chancery against Defendants Satellite Healthcare ("Satellite") and Satellite Dialysis of Tracy, LLC (the "Company," together with Satellite, "Defendants"). The sole claim asserted in the Complaint was for judicial dissolution of the Company pursuant to 6 *Del. C.* § 18-802 ("Section 18-802").[1]

On May 31, 2013, pursuant to Court of Chancery Rule 12(b)(6), Defendants filed a Motion to Dismiss (the "Motion") the Complaint for failure to state a claim upon which relief may be granted and lack of standing. The parties thereafter briefed the Motion, and oral argument was held on September 24, 2013.

The Court of Chancery issued a Memorandum Opinion (the "Opinion" or "Op. at __") and Order on December 9, 2013 granting the Motion. The Court summarized its holding as follows:

> Here, the parties agreed to reject all default provisions, and expressly limited members' rights to those provided in the LLC Agreement. That Agreement strictly limits member rights of withdrawal, and does not provide for judicial dissolution. Nonetheless, the Plaintiff seeks a judicial dissolution under Section 18-802 of the LLC Act, pointing to a member deadlock in the conduct of the business. The Defendants have moved to dismiss. Because the right to judicial dissolution is a

[1] Section 18-802 of the Limited Liability Company Act (the "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."

> default right which the parties may eschew by contract, and because they have done so here, the Defendants' Motion must be granted.

Op. at 2 (footnote omitted).

On January 7, 2014, Plaintiff commenced this appeal of the Court of Chancery's decision granting Defendants' Motion. On February 27, 2014, Plaintiff filed his Opening Brief (the "Opening Brief" or "OB at __"). This is Defendants' Answering Brief.

SUMMARY OF ARGUMENT[2]

1. Denied. The Court of Chancery correctly construed the plain and unambiguous language of the LLC Agreement, which provided that "[e]xcept as otherwise required by applicable law, the Members shall only have the power to exercise any and all rights expressly granted to the Members pursuant to the terms of this Agreement." A38. The LLC Agreement did not expressly grant the Members the right to seek a judicial dissolution.

2. Denied. This issue was not raised below and is not properly presented for review on appeal. Moreover, the Court of Chancery correctly determined that "the right to judicial dissolution is a default right which the parties may eschew by contract." Op. at 2, 11-12.

3. Denied. This issue was not raised below and is not properly presented for review on appeal. As noted in response to Summary of Argument No. 2 above, the right to seek a judicial dissolution is not a mandatory provision of the Act. Op. at 11-12.

4. Denied. The Court of Chancery construed the plain and unambiguous language of the LLC Agreement, and correctly determined that Plaintiff "does not have a right to seek a dissolution under" Section 18-802. Op. at 17.

[2] Plaintiff's "Summary of Argument" contains six (6) arguments, but the "Argument" section of Plaintiff's Opening Brief contains only three (3) Arguments, which do not correlate in substance or order with the "Summary of Argument."

5. Denied. The Court of Chancery construed the plain and unambiguous language of the LLC Agreement and correctly determined that Plaintiff "does not have a right to seek a dissolution under" Section 18-802. Op. at 17.

6. Denied. The Court of Chancery properly rejected Plaintiff's assertion that it would be "inequitable" to enforce the terms of the LLC Agreement, and correctly determined that there was no "compelling equitable reason to grant a judicial dissolution remedy that the parties have bargained to forgo." Op. at 14-16.

COUNTERSTATEMENT OF FACTS

The Complaint and the Statement of Facts contained in Plaintiff's Opening Brief contain numerous factual allegations regarding the parties' alleged conduct and certain loan agreements. As noted in the Opinion, Plaintiff conceded that such factual allegations are not relevant to the discrete legal issue raised in the Motion:

> [t]he parties agree that this Motion to Dismiss is not reliant on the underlying facts alleged in the Complaint. Rather, the parties submit that whether the Plaintiff is entitled to judicial dissolution is governed by the interplay of 6 *Del. C.* § 18-802 and certain provisions in the LLC Agreement.

Op. at 6-7.[3] The few background facts alleged in the Complaint that are potentially relevant to the legal issue presented on appeal are summarized below.[4]

A. The Parties.

The Company is a Delaware limited liability company, which conducts operations in California. A6 ¶¶ 4-5. Satellite is a California nonprofit public benefit corporation and its main business office is located in San Jose, California. A6 ¶ 3. Plaintiff, a California resident, is a nephrologist. A6 ¶ 2.

[3] In his Court of Chancery Answering Brief, Plaintiff acknowledged that he "agrees with the Defendants that the facts of the deadlock between the two members of the Company are irrelevant to the legal issues presented in the Defendants' motion to dismiss." A142.

[4] The Counterstatement of Facts is derived from the Complaint's factual allegations and its exhibits. Solely for purposes of the Motion, Defendants accepted the Complaint's well-pled factual allegations as true.

B. Satellite And Plaintiff Form The Company.

In or about August 2007, Satellite and Plaintiff formed the Company for the purpose of developing, owning, and operating dialysis facilities in San Joaquin County, California. A8-9 ¶¶ 15, 17. Satellite and Plaintiff entered into the LLC Agreement on or about August 15, 2007. A8 ¶ 15; A35-86.[5] The Company's certificate of formation (the "Certificate of Formation") was filed with the Delaware Secretary of State in October 2007. A88.[6] No amendments to the Certificate of Formation have been filed. A8-9 ¶ 16.

Satellite and Plaintiff are both members of the Company and each holds a 50% Membership Interest. A9 ¶ 18. The members' rights are set forth in the LLC Agreement. Section 2.2 of the LLC Agreement provides, in pertinent part, that ***"[e]xcept as otherwise required by applicable law, the Members shall only have the power to exercise any and all rights expressly granted to the Members pursuant to the terms of this Agreement."*** A38 (emphasis added).

C. Satellite Is The Manager Of The Company.

Under the LLC Agreement, Satellite is the manager of the Company. A9 ¶ 20; A64. Except for those powers expressly reserved to the members, the LLC Agreement generally provides that "all powers of the [Company] shall be exercised

[5] A copy of the LLC Agreement (A35-86) was attached as Exhibit A to the Complaint.

[6] A copy of the Certificate of Formation (A88) was attached as Exhibit B to the Complaint.

by or under the authority of, and the business and affairs of the [Company] shall be managed under the direction of" Satellite, as the Company's manager. A41-42.

With respect to those powers reserved to the members, the LLC Agreement provides that, except as otherwise provided, "the vote, consent or approval of a Majority-in-Interest of the Members shall constitute the action and approval of the Members." A38. A "Majority-in-Interest of the Members" is defined to mean "any one or more Members who, in the aggregate, possess Percentage Interests in the [Company] of more than fifty percent (50%)." A64; A10 ¶ 25.

Section 3.4 of the LLC Agreement provides exceptions to the general rule of Majority-in-Interest Member voting, specifically mandating that the consent of a "Super Majority-in-Interest" of the Company's members is required as to certain matters, including the following:

> Section 3.4.10 To take any other action expressly reserved to a Super Majority in Interest vote otherwise set forth herein.
>
> Section 3.4.11 Do any act in contravention of this Agreement. …
>
> Section 3.4.14 . . . authorize the merger or dissolution of [the Company].
>
> Section 3.4.15 Liquidate or dissolve the [Company] ….

A40-41. A "Super Majority-in-Interest of the Members" is defined to mean "any one or more Members who, in the aggregate, possess Percentage Interests in the [Company] of more than seventy-five percent (75%)." A66; A10 ¶ 27.

D. The LLC Agreement's Dissolution Provisions.

Section 8.1 of the LLC Agreement provides that the Company "shall be dissolved" upon the first to occur of the following events:

> (i) the approval of a Super Majority-in-Interest of the Members to dissolve the [Company]; (ii) the sale or other disposition of all or substantially all of the [Company's] assets and distribution to the Members of the net proceeds thereof; or (iii) upon the happening of any other event of dissolution specified in the Certificate of Formation or this Agreement.

A48. Section 8.1 does not mention any other events causing dissolution, including judicial dissolution under Section 18-802. Nor are other events of dissolution specified anywhere else in the LLC Agreement. *See generally* A35-86. [7] The Certificate of Formation likewise does not provide for any other events causing dissolution. A88; A32 ¶ 121 ("... the Certificate of Formation and the LLC Agreement do not specify another event of dissolution").

E. Plaintiff Seeks Judicial Dissolution Based Upon An Alleged "Deadlock."

On April 8, 2013, Plaintiff filed his Complaint seeking judicial dissolution of the Company under Section 18-802. A5-33. Plaintiff asserted that he was entitled to a judicial dissolution because there was a "deadlock" between Plaintiff and Satellite, arising from alleged breaches of the LLC Agreement by Satellite,

[7] The LLC Agreement contains a definition of "Dissolution Event," which also does not reference judicial dissolution. A62. Section 8.2 of the LLC Agreement provides that "[t]he occurrence of a Dissolution Event with respect to a Member or Manager shall not cause or require the LLC to dissolve, notwithstanding any provision of the Act or any other laws applicable to the LLC to the contrary." A48.

which rendered it "not reasonably practicable" for the Company to "carry on its business in conformity to its limited liability company agreement." A5. As explained below, it was unnecessary for the Court to address whether a "deadlock" existed because Plaintiff did not possess the right to seek a judicial dissolution.

ARGUMENT

I. Consistent With Delaware Precedent, The Parties To An LLC Agreement Have A Right To Modify Or Eliminate The Default Statutory Right To Seek A Judicial Dissolution.

A. Question Presented

Can the parties to an LLC agreement agree to modify or eliminate the default statutory right to seek a judicial dissolution, and was this issue presented below?

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's granting of a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6).[8] Questions not fairly presented to the trial court, however, are waived on appeal. Del. Sup. Ct. R. 8. This Court will only consider questions not fairly presented to the trial court "when the interests of justice so require." *Id*.

C. Merits of Argument

1. Plaintiff Did Not Fairly Present His Statutory Construction Argument Below.

On pages 9-16 of his Opening Brief, Plaintiff raises a statutory construction argument for the first time. Plaintiff asserts that the Court of Chancery erred because Section 18-802 cannot be construed to permit members to contractually

[8] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

modify their default right to seek judicial dissolution. Plaintiff also contends that the holding in *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch.), that members can contractually modify their default right to seek judicial dissolution under Section 18-802, was incorrect.

Plaintiff asserts that he "***believes*** that this issue was preserved in connection with the Motion to Dismiss." OB at 8 (emphasis added). Plaintiff is incorrect. Plaintiff did not argue below that *R & R Capital* was wrongly decided or that Section 18-802's default right could not be modified contractually. Instead, Plaintiff argued that *R & R Capital* was distinguishable, and that the language of the LLC Agreement in this case did not effect a contractual modification of the right to seek judicial dissolution. *See, e.g.*, A149-150, A302 (arguing *R & R Capital* was distinguishable); A144-48 (asserting that the parties' contractual language did not modify the default rule under Section 18-802). Plaintiff's citations to Defendants' Reply Brief below (A228) and page 11 of the Court of Chancery's Opinion also reveal no argument that *R & R Capital* was wrongly decided or that Section 18-802 could not be modified contractually. It is telling that none of the cases cited on pages 11-13 of the Opening Brief in support of Plaintiff's statutory construction argument was cited by Plaintiff in the Court of

Chancery. The record makes clear that Plaintiff's statutory construction argument was not preserved for appeal.[9]

2. The Interests Of Justice Exception Does Not Apply.

Recognizing that his statutory construction argument was not raised below, Plaintiff alternatively asserts -- without citing any authority -- that the Delaware Supreme Court "nevertheless" should consider this argument in "the interests of justice." OB at 8. Plaintiff, however, does not come close to establishing the requisite "plain error" by the Court of Chancery sufficient to raise this issue for the first time on appeal.[10] To the contrary, as explained herein, the determination that the default statutory right to seek a judicial dissolution could be modified by contract was consistent with the other Delaware cases that have addressed the issue.

Moreover, Plaintiff had the opportunity to raise his statutory construction argument in the Court of Chancery, but instead elected to argue that *R & R Capital* was distinguishable and the parties' contractual language did not modify Section

[9] *See Clark v. Clark*, 47 A.3d 513, 517 (Del. 2012) ("After examining both record citations, we find that the issue was not fairly presented below and therefore not preserved for appeal.").

[10] *See Smith v. Delaware State Univ.*, 47 A.3d 472, 479-80 (Del. 2012).

18-802. Plaintiff cannot rely on the interests of justice exception to save him from that strategic decision.[11]

3. Even if the Court Considers Plaintiff's Statutory Construction Argument, It Lacks Merit.

Plaintiff's statutory construction argument also fails substantively. Plaintiff argues that the right to seek judicial dissolution cannot be modified contractually because Section 18-801(a)(5) does not expressly permit contractual modification. OB at 10-13. Plaintiff, however, focuses on the wrong statutory provision. Section 18-801(a) provides only that a limited liability company "is dissolved" upon the first to occur of several non-exclusive events.[12] One of those events is the "entry of a decree of judicial dissolution" under Section 18-802. 6 *Del. C.* § 18-801(a)(5).

The "unless otherwise provided" language in Sections 18-801(a)(3) and 18-801(a)(4) that Plaintiff relies upon (OB at 12-13) simply recognizes that the parties to a LLC agreement may agree that certain of the enumerated events in Section 18-801 will not necessarily result in a dissolution. Both this Court and the Court of

[11] *See Smith*, 47 A.3d at 479-80 (holding interests of justice did not require review where appellant failed to argue certain elements of a claim for libel were not required in the first place but instead argued that adequate proof had been made on those elements); *Robinson v. State*, 3 A.3d 257, 261 (Del. 2010).

[12] *See In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013) ("'the plain meaning of the statutory language controls.'").

Chancery have concluded that such language (*i.e.*, "unless otherwise provided") is not necessary to permit contractual modification of statutory default rules.[13]

By its express terms, Section 18-801 (including Section 18-801(a)(5)) provides ***when*** the limited liability company "is dissolved." Section 18-801 does not provide members with the default right to seek judicial dissolution. Section 18-802 addresses that right. *See* 6 *Del. C.* § 18-802 (permitting Court of Chancery to grant judicial dissolution "[o]n application by or for a member or manager").

Accordingly, the appropriate inquiry is whether the right to seek judicial dissolution ***under Section 18-802*** can be modified by contract. Section 18-802 is a non-mandatory, default provision of the Act, which vests subject matter jurisdiction in the Court of Chancery to enter a decree of judicial dissolution.[14] Section 18-802 uses permissive language: "[o]n application by or for a member . . . the Court of Chancery ***may*** decree dissolution . . ." 6 *Del. C.* § 18-802 (emphasis added).[15] Section 18-802 does not contain any language prohibiting members from contractually modifying their default right to apply for judicial dissolution.

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[13] *See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291, 295-96 (Del. 1999); *R & R Capital, LLC*, 2008 WL 3846318, at *5.

[14] *See Elf Atochem*, 727 A.2d at 292 (explaining that the Act's mandatory provisions are "likely to be those intended to protect third parties, not necessarily the contracting members") (internal footnote and citations omitted).

[15] Plaintiff recognizes that the "inclusion of the word 'may' connotes . . . voluntary and not mandatory" language. OB at 15.

Plaintiff's suggestion that this Court essentially rewrite the statute to engraft such a prohibition should be rejected as contrary to both the fundamental policy of the Act and principles of statutory construction.[16] If the General Assembly intended to prohibit members from contractually modifying the default right to seek judicial dissolution, "it could have proscribed such an option." *Elf Atochem*, 727 A.2d at 296.

Further supporting the conclusion that Section 18-802 may be contractually modified is this Court's holding in *Elf Atochem* that Section 18-110(a) can be modified contractually. *Elf Atochem*, 727 A.2d at 295. Using language similar to that in Section 18-802, Section 18-110(a) provides, in pertinent part, that "***[u]pon application of any member or manager, the Court of Chancery may*** hear and determine the validity of any admission, election . . ." 6 *Del. C.* § 18-110(a) (emphasis added). In *Elf Atochem*, this Court held that "because the policy of the Act is to give the maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements, the parties may contract to avoid the

[16] *See* 6 *Del. C.* § 18-1101(b); *Elf Atochem*, 727 A.2d at 290 ("The Act can be characterized as a 'flexible statute' because it generally permits members to engage in private ordering with substantial freedom of contract to govern their relationship, provided they do not contravene any mandatory provisions of the Act."); *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) ("The courts may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature.").

applicability of [Section 18-110(a)]."[17] The same logic applies with respect to modifying the statutory right to seek a judicial dissolution (Section 18-802), and this Court should construe Section 18-802 consistently with its prior interpretation of Section 18-110(a).[18]

Relying upon *Elf Atochem* and in furtherance of the Act's express public policy in favor of maximizing the parties' freedom of contract, the Court of Chancery previously held that Section 18-802 can be contractually modified. *R & R Capital, LLC*, 2008 WL 3846318, at *6. As support for its holding, the Court of Chancery reasoned that "the Act does not expressly say that [Section 18-802] cannot be supplanted by agreement," "[Section 18-802] employ[s] permissive rather than mandatory language, and most importantly, none of the rights conferred by [Section 18-802] is designed to protect third parties." *Id.* The Court also opined that there are legitimate business reasons why members may desire to contractually modify the right to seek judicial dissolution, supporting the conclusion that Section 18-802 is a non-mandatory provision of the Act. *Id.* at

[17] *Elf Atochem*, 727 A.2d at 295 (reasoning the parties had contractually modified Section 18-110(a) by including an exclusive arbitration provision in their operating agreement).

[18] *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1245 (Del. 1985) ("A statute is passed by the General Assembly as a whole and not in parts or sections. Consequently, each part or section should be read in light of every other part or section to produce an harmonious whole.") (citations omitted).

*7.[19] Defendants note that *R & R Capital* was decided over five years ago, but the General Assembly has not amended the statute, signaling its satisfaction with the Court of Chancery's holding that the members may modify by contract the default statutory right to seek a judicial dissolution.[20]

Finally, contrary to Plaintiff's argument, concluding that Section 18-802 may be contractually modified does not lead to a conflict with Section 18-801(a)(5). If members contractually forgo their right to seek judicial dissolution, it simply means that the company "is dissolved" upon the first to occur of the events enumerated in Section 18-801(a) other than judicial dissolution.

[19] Plaintiff's citation to *Lola Cars International Limited v. Krohn Racing, LLC*, 2009 WL 4052681 (Del. Ch.) does not support his argument. *See* OB at 10. In *Lola Cars*, the Court of Chancery assumed that Section 18-802 could be modified contractually, but concluded that the contractual language at issue did not preclude the parties from seeking judicial dissolution. 2009 WL 4052681, at *7.

[20] *See One-Pie Invs., LLC v. Jackson*, 43 A.3d 911, 915 & n.12 (Del. 2012) (explaining that where the General Assembly leaves a statute materially unchanged after a particular interpretation of the statute has been placed by a court, "it is presumed that the legislature has acquiesced in that interpretation") (citations omitted).

II. The Court Of Chancery Correctly Concluded That, Under The Terms Of The LLC Agreement, Plaintiff Did Not Have The Right To Seek A Judicial Dissolution.

A. Question Presented

Did the Court of Chancery correctly conclude that, under the terms of the LLC Agreement, Plaintiff did not have the right to seek judicial dissolution under Section 18-802?

B. Standard of Review

This Court reviews *de novo* the Court of Chancery's granting of a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6).[21]

C. Merits of the Argument

1. The Court Of Chancery Correctly Concluded That The Plain Language Of the LLC Agreement Contractually Modified The Application Of Section 18-802.

The legal issue presented is not complicated. Section 2.2 of the LLC Agreement provides that the members "***shall only have the power to exercise any and all rights expressly granted***" to them by the LLC Agreement, except "as otherwise ***required by applicable law***." A38 (emphases added). It is undisputed that the LLC Agreement does not expressly grant Plaintiff the right to seek a judicial dissolution. In fact, Plaintiff concedes that the "term 'judicial dissolution' is not even mentioned in the LLC Agreement." OB at 18; A144-45.

[21] *Cent. Mortg. Co.*, 27 A.3d at 535.

To prevail, Plaintiff needs to demonstrate that the right to seek a judicial dissolution is ***required*** by applicable law. As previously noted, however, Plaintiff did not even argue in the Court of Chancery that such a right is "required" by Delaware law. In any event, the Court of Chancery correctly determined that the Act does not ***require*** that members retain the right to seek a judicial dissolution:

> [A] right to seek judicial dissolution under [Section 18-802] is not 'required' by law. . . . Permitting waiver of a contractual right to judicial dissolution, or enabling opting out of the statutory right altogether, is consistent with the broad policy of freedom of contract underlying the LLC Act, and comports with the Act's approach of supplying default provisions around which members may contract if they so choose. . . . Here, the LLC Agreement is not silent: rather, Section 2.2 provides that members are entitled *only* to the rights expressed in the LLC Agreement. Since the LLC Agreement does not expressly contain a right to judicial dissolution, the members have effectively opted out of the statutory default contained in [Section 18-802].

Op. at 11-12 (emphasis in original).[22] Accordingly, based on the clear and unambiguous language of the LLC Agreement (and established Delaware law), the Court of Chancery correctly determined that Plaintiff did not have the right to seek a judicial dissolution.

The Court of Chancery further noted that its interpretation was consistent with other provisions of the LLC Agreement:

> The parties specifically considered, and addressed, dissolution and dissolution rights in Sections 8.1 and 3.4 of the LLC Agreement. So

[22] *See also R & R Capital, LLC*, 2008 WL 3846318, at *6 ("Sections 18-802, 18-803, and 18-805 are not mandatory provisions of the LLC Act that cannot be modified by contract.").

> long as the LLC has assets and remains in operation, those sections provide for dissolution only where a super-majority of the members so approve. The parties did not agree to a right to judicial dissolution, and, as I have found above, instead rejected all default rights under the Act unless explicitly provided for in the LLC Agreement or 'otherwise required' by law.

Op. at 11.[23] The LLC Agreement's express requirement that any dissolution must be approved by a Super Majority-in-Interest of the Members Interests would be rendered meaningless if any member could apply unilaterally for a judicial dissolution.[24]

2. Plaintiff's Criticisms Of The Court Of Chancery's Analysis Are Meritless.

Plaintiff first argues that the Court erred in relying on an "un-bolded and un-italicized sentence hidden in the middle of Section 2.2 …." OB at 19. Not surprisingly, Plaintiff cites no authority for the erroneous assertion that contract language is enforceable only if contained in a separate paragraph and highlighted in the agreement.

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[23] Section 3.4 of the LLC Agreement mandates that certain specified actions require the consent of a "Super Majority-in-Interest of the Members" (*i.e.*, greater than 75%). Sections 3.4.14 and 3.4.15 state expressly that dissolution of the Company "shall require the consent of a Super Majority-in-Interest" of the Company's members. A40-41. Section 8.1(i) of the LLC Agreement reinforces this requirement, repeating that "approval of a Super Majority-in-Interest of the Members" is required "to dissolve the [Company]." A48.

[24] *Council of the Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."); *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch.) ("[C]ontracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'") (citations omitted).

Equally deficient is Plaintiff's assertion that Section 2.2 was somehow read out of context and applies only to certain limited economic rights. *Id*. at 19-21. As explained by the Court of Chancery:

> [S]ection 2.1 governs member voting rights, while Section 2.2—'Other Member Rights'—serves as a 'catch-all' addressing miscellaneous other rights associated with membership. While Section 2.2 addresses two kinds of economic rights . . . it also provides more generally that 'the Members shall only have the power to exercise *any and all rights* expressly granted to the Members . . . .' This statement is not qualified by reference to 'economic' rights, but instead applies to 'any and all' rights, that is, both economic and noneconomic, including a right—or lack thereof—to seek judicial dissolution. Further, the provision applies to any and all rights "pursuant to the terms of this Agreement," not, as the Plaintiff would have it, solely to rights under Section 2.2.

Op. at 10-11 (emphasis in original).[25] Accordingly, the Court of Chancery correctly rejected Plaintiff's assertion that Section 2.2 related only to certain of the members' "economic" rights. *Id.*

Plaintiff also asserts that Section 8.2 of the LLC Agreement would be rendered surplusage under the Court's interpretation of Section 2.2. OB at 22-23. Section 8.2, however, simply recognizes that a Dissolution Event (which is defined in the LLC Agreement to include certain occurrences "***with respect to any***

[25] Consistent with this analysis, the Court of Chancery distinguished *Lola Cars*, in which "the LLC agreement contained a nonexclusive provision enumerating the circumstances in which dissolution was permissible." Op. at 13. "By contrast, Section 2.2 of the LLC Agreement here specifically excludes all rights not expressly provided by the Agreement or required by law. Therefore, I do not find the reasoning of *Lola Cars* persuasive here." *Id.*

Member," as distinguished from the Company itself) shall not cause a dissolution of the Company. A48; A62 (emphasis added). The Court of Chancery correctly determined that Section 8.2 is not superfluous "as it is meant to clarify the otherwise ambiguous distinction between events mandating dissolution of the LLC under Section 8.1, and events mandating the dissolution of an individual's membership interest as described in Schedule 4, Paragraph 10." Op. at 12 n.27.

Finally, Plaintiff asserts that the Court of Chancery's interpretation of Section 2.2 was flawed because "applicable law ***provides*** for judicial dissolution." OB at 21 (emphasis added). The issue, however, is not whether applicable law "provides" for judicial dissolution, but whether providing the Members with the right to seek a judicial dissolution "is ***required*** by applicable law." Op. at 9-12 (emphasis added). As previously addressed, Delaware law contains no such requirement.

3. The Court Of Chancery Correctly Rejected Plaintiff's Explicit Waiver Argument.

Plaintiff also asserts that the language in Section 2.2 is "insufficient" to establish an intent to "waive" the default right to seek a judicial dissolution. OB at 23-25. Plaintiff contends that, in addition to limiting the members' rights to those expressly granted in the LLC Agreement, the parties were required to separately and expressly waive the default right to judicial dissolution. This Court, however,

has rejected the argument that a contract must contain an explicit waiver provision to modify a default statutory right:

> That argument, however, misunderstands the clarity required for an effective waiver. The waiving contract need not contain an explicit disclaimer of partition rights [default provisions under 25 *Del. C.* §§ 721, 724, 729, 733]. Rather, the contract need only contain a procedure for the co-owners to sell their interests that is inconsistent with the later maintenance of a partition action. When a contract provides an exit mechanism that is subject to certain conditions, and the filing of a partition action would allow an exiting party to escape those conditions, the exiting party's decision to sign the contract constitutes a waiver of the statutory right of partition.

Libeau v. Fox, 892 A.2d 1068, 1071 (Del. 2006). Similarly, in *Elf Atochem*, this Court held that the members had eliminated their statutory right to file an action in the Court of Chancery pursuant 18-110(a) -- even though the Agreement contained no express waiver of that default right. *Elf Atochem*, 727 A.2d at 295.

Consistent with Delaware law, the Court of Chancery correctly concluded that the "relevant inquiry is whether the members here did opt out of the statutory default . . . or whether the LLC Agreement is silent on judicial dissolution such that the statutory default applies." Op. at 12-13. Here, the LLC Agreement sets forth a limited set of dissolution events (not including a judicial dissolution), provides that a member's rights are limited to those granted in the LLC Agreement, and requires Super Majority-in-Interest approval to dissolve the Company. Plaintiff's assertion that he has the right to seek a judicial dissolution

cannot be reconciled with the clear and unambiguous language of the LLC Agreement.

Plaintiff's assertion that the waiver of the default right must be "clear" (OB at 24-25 (citing cases)) is unavailing. Here, the Court of Chancery carefully reviewed the LLC Agreement and determined that "it is ***clear*** to me that judicial dissolution is not available to the Plaintiff here." Op. at 11 (emphasis added). The LLC Agreement is not ambiguous on this issue.

None of the cases cited by Plaintiff (OB at 24-25) holds that a contract must contain language expressly "waiving" certain rights not contained in the Agreement. Plaintiff's reliance on *R & R Capital* is similarly misplaced given that the agreements in that case identified "the entry of a decree of judicial dissolution under Section 18-802 of the Act" as an "event[] that shall cause dissolution" -- but also contained a provision waiving the right to seek a judicial dissolution. 2008 WL 3846318, at *3; Op. at 11. As recognized by the Court of Chancery in this case, the analysis in *R & R Capital*, which simply attempted to resolve "an apparent tension" between the two contractual provisions in that case, was "unremarkable and impose[d] no positive burden on the moving parties to demonstrate anything other than that a binding and unambiguous contract exists between these parties, which contract rejects judicial dissolution." Op. at 11-13.

4. Plaintiff's New Arguments In Support Of His Contractual Interpretation Argument Are Barred By Rule 8 And Are Substantively Deficient.

Plaintiff also proffers two new arguments on appeal in support of his proposed contractual interpretation. He contends that Section 12.13 of the LLC Agreement "specifically preserved and granted the members the right to seek any remedy at law or equity to which the member was lawfully entitled." OB at 21. He also contends that the Court of Chancery erred by holding that Plaintiff was a sophisticated party. OB at 26. These arguments were not raised below, and should be rejected for that reason alone. *See* Del. Sup. Ct. R. 8. The arguments also fail substantively as explained below.

a. Plaintiff's New Section 12.13 Argument Lacks Merit.

Section 12.13 is a standard "cumulative remedies" provision, stating that remedies "***under this Agreement*** are cumulative and do not exclude any other remedies to which any person may be lawfully entitled . . . ." A55 (emphasis added). As Plaintiff expressly recognizes in his Opening Brief, the issue presented is whether Plaintiff can "contract away the statutory ***right*** to apply for judicial dissolution." OB at 8 (emphasis added). Thus, the relevant question is whether Plaintiff has the right to pursue the claim for judicial dissolution -- not what remedies (cumulative or otherwise) might be available with regard to such a claim

if viable. Section 12.13, which addresses "***remedies*** to which any person may be lawfully entitled," is irrelevant to the legal issue presented. A55.

Moreover, by its express terms, Section 12.13 refers only to "remedies under [the LLC] Agreement." A55. Pursuant to the terms of the LLC Agreement, the members do not have the right to seek a judicial dissolution. Certainly, Plaintiff cannot bootstrap the "remedies" provision to create new rights that contradict the terms of the LLC Agreement.[26]

b. Plaintiff's "Unsophisticated Party" Argument Lacks Merit.

In its Opinion, the Court noted the unremarkable proposition that "[s]ophisticated parties entering unambiguous LLC agreements are presumed to understand the consequences of the language they have chosen, and are bound thereby, lest contract rights be subject to endless second-guessing and opportunistic revision." Op. at 13 (footnote omitted). Based solely on this sentence, Plaintiff contends that the Court of Chancery committed reversible error by suggesting that Plaintiff was a "sophisticated party." OB at 26. This belated argument is meritless.

[26] *See E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) (particular portion of agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall plan).

As a preliminary matter, neither the Court of Chancery's analysis nor its decision was dependent on a determination whether Plaintiff should be deemed a "sophisticated party."[27] Also, neither Plaintiff's Complaint nor his papers below alleged that he was an unsophisticated party or that the LLC Agreement was somehow unconscionable. Plaintiff's newly-minted argument that the LLC Agreement is "one-sided" also ignores that most of the contract provisions apply equally to all members and that many actions require consent of a Super-Majority of the Members (meaning that Satellite cannot act without Plaintiff's consent).[28] A40-41 § 3.4. Although he coyly asserts the LLC Agreement lacks a provision stating that all parties were separately represented by counsel (OB at 26-27), Plaintiff did not allege below (or in this Court) that he lacked legal representation -- and any such representation would be false.[29]

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[27] *See Lewis v. State*, 977 A.2d 898, 2009 WL 2469254, at *3 (Del. 2009) (TABLE) (concluding error was harmless where same result would have obtained under different legal analysis); *White v. Panic*, 783 A.2d 543, 550 (Del. 2001) (concluding lower court's potential legal error was harmless where this Court reviews the legal issue *de novo*).

[28] As Satellite and Plaintiff each owns only a 50% Membership Interest, even matters needing only consent by a "Majority-in-Interest" of the Membership Interests requires the agreement of both Satellite ***and Plaintiff***. A10; A38; A64.

[29] Section 12.8's conflict waiver, which Plaintiff references, states that only the Company and Satellite (not Plaintiff) shared the same counsel. *See* A53.

None of the non-Delaware cases that Plaintiff cites supports his argument that the LLC Agreement should not be enforced according to its plain language.[30] Under Delaware law, contractual provisions will be held unenforceable on grounds of unconscionability only where they are "so one-sided as to be oppressive."[31] Here, the contractual modification of members' rights, including the right to seek judicial dissolution under Section 18-802, applied to ***both Satellite and Plaintiff equally*** and there is no allegation that Plaintiff could not have refused to enter into the LLC Agreement. A finding of unconscionability is inappropriate.[32]

Moreover, Plaintiff did not argue below that he failed to understand the terms of the LLC Agreement. Contrary to Plaintiff's assertion, medical doctors

[30] *Reilley v. Richards*, 632 N.E.2d 507, 508 (Ohio 1994) (unsophisticated party not required to discover existence of floodplain); *McGeorge v. Van Benschoten*, 1988 WL 163063, at *7 (D. Ariz.) (sophistication an issue for laches defense); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, 181 (Ill. Ct. App. 2005) (sophistication an issue for negligent misrepresentation claim); *Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889, 894 (Minn. Ct. App. 1993) (sophistication an issue for justifiable reliance element of fiduciary duty to disclose under Minnesota law).

[31] *Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co.*, 2002 WL 1558382, at *11 (Del. Ch.).

[32] *Id.* ("The application of the doctrine of unconscionability is clearly inappropriate here. Nothing prevented Progressive from refusing to contract with DuPont if it did not have the leverage to forge an agreement on terms it believed were favorable. . . . Likewise, it has failed to identify shockingly unfair terms that warrant having the court intervene on its behalf . . .").

(especially those who co-own and operate a nephrology practice) are not assumed to be unsophisticated individuals.[33]

[33] *See Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 2009 WL 3531791, at *32 (Del. Super. Ct.) ("[Dr.] Sternberg is an experienced physician and is not an unsophisticated individual. There is no overreaching or improper leverage shown here for the Court to conclude that the [by-law] provision is so one-sided as to be unconscionable as a matter of law."), *aff'd*, 15 A.3d 1225 (Del. 2011).

III. The Court Of Chancery Correctly Determined That Plaintiff Could Not Avoid His Contractual Obligations By Asserting That Enforcement Of The LLC Agreement Would Be Inequitable.

A. Question Presented

Did the Court of Chancery correctly determine that Plaintiff could not avoid his contractual obligations by asserting that enforcement of the LLC Agreement would be inequitable?

B. Standard of Review

This Court reviews *de novo* the Court of Chancery's granting of a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6).[34]

C. Merits of the Argument

Plaintiff asserts that enforcement of the LLC Agreement's limitation of rights would be "against public policy" and leave him "without any equitable remedy to his plight." OB at 30 (citations omitted). Plaintiff's argument fails for several independent reasons.

First, enforcing the provisions of the LLC Agreement would not violate Delaware public policy. To the contrary, as explained by the Court of Chancery:

> [t]he explicit policy of the LLC Act is to "give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." Permitting judicial dissolution where the parties have agreed to forgo that remedy in the LLC Agreement would frustrate that purpose, and change in a fundamental

[34] *Cent. Mortg. Co.*, 27 A.3d at 535.

> way the relationship for which these parties bargained. This is especially true where several provisions in the LLC Agreement act to prevent one party from unilaterally changing the terms of the other members' investments. Engrafting judicial dissolution rights onto an LLC agreement requiring a super-majority consent to dissolution, where default rights to dissolution under the Act have been rejected, would not preserve the bargain these parties made. Generally, our courts uphold rights bargained for by contract, and only where "a public policy interest even stronger than freedom of contract" must be vindicated will such rights go unenforced.

Op. 14-15 (footnotes omitted).

Second, contrary to Plaintiff's argument, enforcing the provisions of the LLC Agreement would not leave Plaintiff without any remedy or hold him "captive as a member of the Company." OB at 30. As the Court of Chancery explained, under the LLC Agreement, Plaintiff has several potential remedies, including the ability to withdraw without consent (subject to the attendant consequences). Op. at 15. Plaintiff does not dispute the Court of Chancery's analysis; he simply seeks to avoid the consequences of such a withdrawal -- which he now deems inequitable. OB at 30-31. As Chancellor Chandler explained in *R & R Capital*:

> "LLC members rights begin with and typically end with the Operating Agreement." The allure of the limited liability company, however, would be eviscerated if the parties could simply petition this court to renegotiate their agreements when relationships sour.

R & R Capital, 2008 WL 3846318, at *7 (citations omitted) (also noting that members are protected from potential inequitable conduct because "the LLC Act preserves the implied covenant of good faith and fair dealing").

Third, the Court of Chancery recognized that the Plaintiff has a remedy under the LLC Agreement "that would allow him to recover the value of his economic interest in the LLC":

> The Plaintiff contends in his Verified Complaint that the Defendants have committed a large number of breaches amounting to Transfer Events which trigger his contractual right to buy out Satellite. The Defendants concede that breach may trigger such a right, under Schedule 5 to the LLC Agreement. According to the Complaint, however, Satellite contends that *it* is the party entitled to purchase the *Plaintiffs'* interest under the contract. Here, where both the Plaintiff and the Defendants contend that a "Transfer Event" has occurred, triggering each party's rights under the LLC Agreement to purchase the others' interest in the Company, a contract action—and *not* a judicial dissolution action, where those issues will necessarily go unresolved—is the appropriate venue for the parties to vindicate their rights.

Op. at 15-16 (footnotes omitted; emphasis in original). In light of the contractual remedies, the Court of Chancery correctly rejected Plaintiff's request to disregard the terms of the LLC Agreement based on alleged "inequities":

> With these alternatives available, I see no compelling equitable reason to grant a judicial dissolution remedy that the parties have bargained to forgo.

Op. at 16.

Fourth, rather than supporting his "public policy" argument, the cases cited by Plaintiff demonstrate that this Court should enforce the LLC Agreement's

provisions as drafted. In *R & R Capital*, the Court enforced provisions of limited liability company agreements that waived the members' right to seek judicial dissolution. 2008 WL 3846318, at *7-8. Plaintiff's reliance on *Fisk Ventures* and *Haley* is misplaced because in those cases, unlike the LLC Agreement here, the agreements actually provided that judicial dissolution would be an event of dissolution and, in deciding whether to order such a dissolution, the Court of Chancery simply considered whether an alternative exit mechanism existed.[35] Notably, both *Fisk* and *Haley* recognized Delaware's public policy in favor of freedom of contract and the enforceability of limited liability company agreements.[36]

Although attempting to invoke principles of "equity" and "public policy," Plaintiff is really just asking this Court to rewrite the LLC Agreement, and thereby significantly alter the agreed upon terms. Here, the LLC Agreement does not permit Plaintiff to unilaterally cause a dissolution of the Company, but instead requires that any dissolution be approved by a Super Majority-in-Interest of the Members. Plaintiff fails to cite any case in which a Delaware court has granted a

[35] *See Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *3 (Del. Ch.), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE); *Haley v. Talcott*, 864 A.2d 86, 88 & n.2 (Del. Ch. 2004).

[36] *Fisk*, 2009 WL 73957, at *7 (refusing to "redraft the LLC Agreement" to provide a contractual exit mechanism where no such mechanism was "set forth within the four corners of the operating agreement."); *Haley*, 864 A.2d at 96 ("The Delaware LLC Act is grounded on principles of freedom of contract. For that reason, the presence of a reasonable exit mechanism bears on the propriety of ordering judicial dissolution under 6 *Del. C.* § 18-802.").

similar request to rewrite an LLC agreement. As noted above, Delaware law is directly to the contrary.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Chancery should be affirmed in its entirety.

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CERTIFICATE OF SERVICE

I, Matthew D. Stachel, hereby certify that on March 28, 2014, the foregoing document was served electronically via *File & ServeXpress* on the following counsel of record:

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