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Case Number 5,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF ON APPEAL

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Dated: April 14, 2014

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ARGUMENT

A. A Member Cannot Contract Away the Statutory Remedy of Judicial Dissolution.

Defendants assert in their Answering Brief that: (1) Huatuco did not raise before the Chancery Court a statutory construction argument regarding his right to seek the statutory remedy of judicial dissolution; (2) this Court should construe the language of Section 18-802 without reference to Section 18-801's language to determine the legislature's intent regarding whether judicial dissolution is permissive and waivable; and (3) the General Assembly was satisfied with the ruling in *R & R Capital v. Buck and Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. 2008) that a party could contract way its right to seek judicial dissolution since the General Assembly did not amend Delaware's Limited Liability Company Act (the "Act") after *R & R Capital* was decided. Huatuco respectfully files this Reply Brief to address the fallacies of Defendants' assertions.[1]

1. The issue of Huatuco being entitled as a matter of statutory law to apply for judicial dissolution regardless of what is stated in the LLC Agreement was raised before the lower court and alternatively, this Court should consider this issue under the interests of justice exception to Supreme Court Rule 8.

[1] Huatuco would also like to correct a mistake in his Opening Brief. In the Opening Brief, he references section 1101, but the full section is actually 18-1101. *See* O.B. at 14 and 16.

The first argument in Huatuco's Brief in Opposition to Defendants' Motion to Dismiss was that as a member of the LLC, Huatuco had standing to apply for judicial dissolution and does not have to contract for the ability to seek judicial dissolution since the Act provides for that remedy "without qualification". *See* A144. In that Brief, Huatuco reviewed the statutory language concerning his right to seek that remedy and specifically relied on the Chancery Court's construction of statutory language in *Lola Cars International Limited v. Krohn Racing, LLC*, 2009 WL 4052681 (Del. Ch. 2009). *See* A145-A146. Contrary to the Defendants' argument in their Answering Brief (at p.11), Huatuco's first argument in the Chancery Court was not dependant on distinguishing the holding in *R & R Capital*[2]; but rather, cited *R & R Capital* with favor for its analysis of the standing of a member to seek judicial dissolution under the Act. (A145)

Unquestionably, the issue of the statutory construction of Sections 18-801 and 18-802 was raised before the Chancery Court by both Huatuco and the Defendants. The Chancery Court had a full opportunity to evaluate this legal issue and then erroneously endorsed the legal interpretation of these Sections favored in *R & R Capital* and rejected the reasoning in *Lola Cars* as not "persuasive".

[2] Before the Chancery Court, Huatuco did distinguish the holding in *R & R Capital* in his second argument in his Brief in Opposition to Defendants' Motion to Dismiss with regard to whether the language in the LLC Agreement could even be construed as a waiver and juxtaposed the clear, distinct and express waiver language in *R & R Capital* with the obscure and obtuse language in the LLC Agreement. *See* A148-A149.

(Opinion at 11-13). On this *de novo* appeal, this Court must make its own analysis of the General Assembly's intent when it construes these Sections and is not required to give deference to the lower court's views. *See State v. Cephas*, 637 A.2d 20, 23 (Del. 1994)(stating whether the lower court erred as a matter of law in formulating or applying legal precepts in interpreting a statute is reviewed *de novo*).

Even if this Court accepts Defendants' argument that the issue was not raised in the lower court, this Court should nevertheless consider it now under the "interest of justice" exception in Rule 8. Defendants contend that under Rule 8 this Court cannot consider the issue that a member cannot contract away his ability to apply for judicial dissolution under the Act because there was not a "plain error"[3] in the lower court's determination. Although Huatuco does not concede that the Chancery Court's order was not "plainly erroneous," Defendants misconstrue the proper standard under Rule 8 for considering a legal issue involving a motion to dismiss[4]. For Rule 8 purposes the "plain error" standard only applies to when there was a mistake during the lower court proceeding at trial, usually in connection with

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[3] "Under Delaware law, plain error occurs when an 'error [is] so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process ... [and is a] material defec[t] which [is] apparent on the face of the record [and is] basic, serious and fundamental.... '" *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002)(finding plain error where charges violated the multiplicity doctrine of the Double Jeopardy Clauses of the U.S. and Delaware Constitutions).

[4] Defendants also contend the same as to Huatuco's reference to Section 12.13 of the Agreement.

evidence, and no objection was made at the time the mistake occurred. *See Tucker v. State,* 564 A.2d 1110, 1117-1118 (Del. 1989)(quoting *Wainwright v. State*, 504 A.2d 1096,1100 (Del. 1986)) (stating "[a] party who fails 'to raise timely objections to evidence in the trial court [risks] losing the right to raise evidentiary issues on appeal' in the absence of plain error affecting substantial rights"); D.R.E. 103(d) (allowing the appellate court to take notice of "plain errors affecting substantial rights" of the parties on appeal, even though the error was not brought to the attention of the trial court).

Even when legal issues were not raised before the lower court, this Court has considered such legal issues in the interests of justice regardless of whether there was a "plain error" when: (1) the issue is outcome-determinative and may have significant implications for future cases; or (2) the Supreme Court's consideration of the issue will promote judicial economy. *Sandt v. Del. Solid Waste Auth.,* 640 A.2d 1030, 1034 (Del.1994)); *See also Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. 2013) (holding that the Supreme Court would address issue of whether knowing silence was sufficient for reformation although it was not fairly presented to vice chancellor as the issue was outcome determinative and case law was contradictory); *Levey v. Brownstone Asset Management, LP*, 76 A.3d 764, 773-774 (Del. 2013) (determining arguments even though not presented before the Chancery Court as "[h]ad the arguments

previously discussed been advanced, we have no doubt that the Court of Chancery would have declined to bar the action on the ground of laches by analogy to the statute of limitations."); *Blinder, Robinson & Co. v. Bruton,* 552 A.2d 466, 474 (Del.1989)(finding the "[i]nterests of justice" required appellate consideration of propriety of penalty imposed on securities broker-dealer even though dealer did not raise penalty issue in court of chancery given the importance of this issue).

Here, whether the remedy of judicial dissolution can be waived in this case is outcome determinative, since if judicial dissolution cannot be waived, the Defendants' Motion must fail. Moreover, this issue will have a significant effect on how all limited liability company agreements in Delaware are drafted, as well as cases in the future regarding such waivers. Accordingly, the issue is properly before this Court.

2. A member cannot contract away the ability to apply for judicial dissolution under Section 18-801 or Section 18-802.

Defendants contend that Section 18-802 solely governs whether the right to apply for the statutory remedy of judicial dissolution can be contracted away by the members and that this Court should only evaluate that Section in deciding this appeal. Defendants are wrong in both regards.

Sections 18-801 and 18-802 must be read together and not independently. *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.,* 492 A.2d 1242, 1245

(Del. 1985) (stating "[a] statute is passed by the General Assembly as a whole and not in parts or sections"). Section 18-802 states:

> On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.

Section 18-802 is essentially a jurisdiction provision. Any reading of Section 18-802 alone does not provide for what happens if the Court of Chancery enters the decree of dissolution.

However, Section 18-801 proscribes what happens if the Chancery Court exercises its discretion under Section 18-802 and enters such a decree. Under Section 18-801(a), the limited liability company is dissolved and its affairs shall be wound up upon the first to occur of several events, including the entry of a decree of judicial dissolution by the Chancery Court under § 18-802. *See* 6 Del. C. §18-801(a)(5). As these two sections must be read together, the determination of whether the General Assembly intended for the rights of a member to apply for the remedy of judicial dissolution to be contracted away in an limited liability company agreement requires a review by this Court of the interplay of both Sections as discussed in Huatuco's Opening Brief.

Moreover, parties to a limited liability company agreement also cannot modify or eliminate the default statutory right to seek judicial dissolution under Section 18-802 of the Act. Section 18-802 grants the Chancery Court with

jurisdiction to determine an application for judicial dissolution. There is no language in Section 18-802 that permits the parties to deprive the Chancery Court of jurisdiction to enter a decree if a limited liability company agreement states to the contrary, *i.e.* it does not provide "unless otherwise provided in a limited liability company agreement". Additionally, the General Assembly's inclusion of "may" in §18-802 simply reflects the legislature's grant to the Chancery Court of the power to exercise its discretion to determine whether to permit the remedy of judicial dissolution once that court has been requested to act.[5] *See Haley v. Talcott*, 864 A.2d 86, 93 (Del. Ch. 2004)(explaining the "remedy of dissolution" remains discretionary). The "may" in Section 18-802 does not make the statutory right of the member to apply for this remedy permissive or waivable.

The examples of provisions cited by Defendants are also provisions that give Delaware Courts subject-matter jurisdiction to decide certain claims. *See Elf Atochem North America, Inc. v. Jaffari,* 727 A.2d 286, 292 and 295 (Del.Supr. 1999)(stating "[i]n vesting the Court of Chancery with jurisdiction, the Act ... assured that the Court of Chancery has jurisdiction it might not otherwise have because it is a court of limited jurisdiction that requires traditional equitable relief or specific legislation to act...." and that "[s]uch a grant of jurisdiction may have been constitutionally necessary if the claims do not fall within the traditional

[5] In this regard that the "may" is different from the "may" in Section 18-109(d). O.B., p. 15.

equity jurisdiction.") A determination in a contract by parties to a contract of where a case can be brought does not conflict with the jurisdiction provisions of the Act. These provisions simply give the Delaware Courts jurisdiction should the parties decide to bring a case in Delaware.[6] Accordingly, it would be unnecessary for the General Assembly to include language that an agreement could provide otherwise in connection with these provisions.

Here, however, not permitting a member to seek the entry of a judicial dissolution decree based on language in a contract directly contradicts with the purpose of Section 18-801(a)(5), which is to provide for the dissolution of the company upon the entry of the decree by the Chancery Court pursuant to Section 18-802. *See In re Adoption of Swanson,* 623 A.2d 1095, 1096–97 (Del. 1993)(explaining that the court's role is limited to application of the literal meaning of a statute). Section 18-801(a) lists events when a dissolution will occur and separately lists the entry of a decree of judicial dissolution [(a)(5)] from the events specifically listed in a limited liability company agreement [(a)(2)] and even the affirmative vote or consent of the members [(a)(3)]. If the right to apply for a decree of judicial dissolution can be contractually eliminated, the legislative mandate of Section 18-801(a)(5) would be nullified, or at least rendered

[6] There may be a question of whether a foreign jurisdiction's court can enter a decree of judicial dissolution of a Delaware limited liability company, but that question is not before this Court.

unnecessary because of the provisions of Section 18-801(a)(2) would be sufficient to merely limit the events to those listed in the agreement.[7] As the General Assembly intends all provisions of a statute to have meaning and a statute should not be interpreted to render any provision unnecessary or absurd, the legislative intent for judicial dissolution to not be waivable by contract is clearly illustrated here.[8] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982). Accordingly, in this *de novo* review, this Court should determine that the Chancery Court erred as a matter of law in applying legal precepts in its interpretations of the legislative intent of these sections.

3. The General Assembly not amending the statute after *R & R Capital v. Buck and Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. 2008) is of no moment in this Court's interpretation of the Act.

The Defendants' argument that the General Assembly has endorsed the waiver of the right to apply for judicial dissolution by not amending the Act since *R & R Capital v. Buck and Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. 2008) is unavailing. First, *R & R Capital* is not only an unpublished Chancery Court decision; but also, not a binding decision of the highest appellate court in Delaware, this Supreme Court. *See U.S. v. Powell*, 379 U.S. 48, 55 (1964)(stating

[7] 6 Del.C. §18-801(a)(2) provides "Upon the happening of events specified in a limited liability company agreement".

[8] That the legislature did not intend to allow for the contracting away of the right to apply for the remedy of judicial dissolution is especially clear here considering that the language is included in several subsections within Section 18-801. *See Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982). This is not the case for the provisions cited by Defendants.

that four decisions of lower courts neither represented "settled judicial construction, nor one which we s[h]ould be justified in presuming Congress, by its silence, impliedly approved"); *Cook v. Patient Edu, LLC*, 465 Mass. 548, 555, 989 N.E.2d 847,852 (Mass. 2013)(holding the court does not draw conclusions concerning the intent of the legislature based on the failure to enact a subsequent amendment to the provision in question). Additionally, the passage of five years without such an amendment is still relatively recent period considering that there has not been another case about this specific topic until now.

Accordingly, the fact that the General Assembly has not amended Section 18-801 or 18-802 since the decision in *R & R Capital* is of no consequence to this Court's interpretation of those provisions. Indeed, it is just as likely that the General Assembly is waiting for this Supreme Court to address the issue and correct this erroneous interpretation so that it did not need to act. *See U.S v. Craft*, 535 U.S. 274, 287 (2002)("congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction"); *Brecht v. Abrahamson,* 507 U.S. 619 (1993) (explaining that generally the Supreme Court is reluctant to draw inferences from the legislature's failure to act).

B. Huatuco Did Not Waive or Contract Away The Ability to Apply for Judicial Dissolution.

1. An explicit waiver is necessary.

Defendants contend that an explicit waiver is not necessary based on *Libeau v. Fox*, 892 A.2d 1068 (Del. 2006) and *Elf Atochem North America, Inc. v. Jaffari,* 727 A.2d 286 (Del. 1999). However, these cases actually emphasize the need for an explicit waiver.

The Court in *Libeau v. Fox*, 892 A.2d 1068 (Del. 2006)[9] found an explicit waiver in the contract as there was clear and specific language that would make partition inconsistent with the agreement between the parties. *See Libeau v. Fox*, 880 A.2d 1049, 1050 (Del. Ch. 2005)(stating there was "very specific and clear language limiting the ability of any one of the Housemates to sell her individual interest in the Beach House."); *See also In re Appraisal of Ford Holdings, Inc. Preferred Stock,* 698 A.2d 973, 979 (Del.Ch.1997)(stating to ensure that the statutory right to partition is not arbitrarily lost, Delaware requires that any

[9] The exit mechanism in *Libeau* was also reasonable. *See Libeau v. Fox*, 880 A.2d 1049, 1051 (Del. Ch. 2005) (noting that the agreement at issue "provides a *rational* exit mechanism for any single Housemate who desires to sell her interest.")(emphasis added). Here, there is no reasonable exit mechanism for Huatuco even if he were to give up his interest and lose his investment as he was required to guaranty the bank debts of the Company. *See Haley v. Talcott*, 864 A.2d 86, 88 (Del.Ch. 2004)(stating "[w]ithout relief from the guaranty, [plaintiff] would remain personally liable for the mortgage debt of the LLC, even after his exit. Because [plaintiff] would be left liable for the debt of an entity over which he had no further control, I find that the exit provision specified in the LLC Agreement and urged by [defendant] is not sufficient to provide an adequate remedy to [plaintiff] under these circumstances.")

contractual relinquishment of the partition right be "by clear affirmative words or actions.")

Likewise, in *Elf Atochem North America, Inc. v. Jaffari,* 727 A.2d 286 (Del. 1999) the provisions in the agreement at issue explicitly stated that claims arising out of the agreement be resolved exclusively by arbitration.[10] The *Elf* Court noted that:

> the parties contracted as clearly as practicable when they relegated to California in Section 13.7 "any" dispute "arising out of, under or in connection with [the] Agreement or the transactions contemplated by [the] Agreement...." Likewise, in Section 13.8: "*[n]o action* at law or in equity based upon *any claim arising out of or related to*" the Agreement may be brought, except in California, and then only to enforce arbitration in California.

727 A.2d at 295 (footnotes omitted). Accordingly, in both of the cases cited by Defendants there was a clear and explicit procedure that was inconsistent with a statutory right.

Here, there is no clear and explicit language in this LLC Agreement from which Huatuco or any other person could have reasonably understood that he was giving up his right as a member to apply for judicial dissolution. Instead, Defendants are asking this Court to agree that their fabrication of a waiver of an important statutory remedy by plucking a sentence out of context from the middle

[10] It should be noted that the Court in *Elf* considered the importance of arbitration clauses in making its decision. 727 A.2d at 295.

of a paragraph in the LLC Agreement that neither addresses waivers nor judicial dissolution and that it is somehow clear and explicit. The Defendants sole basis for this Court to accept such alchemy is that the court below thought it was "clear". *See* Answering Brief, page 24. However, in reviewing this LLC Agreement on Defendants' Motion to Dismiss Huatuco's Complaint, this Court must exercise *de novo* review of the LLC Agreement's language and give no deference to the lower court's conclusion.

It is inappropriate to pluck a sentence out of a multi-sentence paragraph and then argue that the sentence has a meaning outside the context of the paragraph. As former Chancellor Chandler explained in *R & R Capital:*

> Although petitioners emphasize the final sentence, **the gist of the provision read in its entirety** is about venue and preventing members from forming an LLC in Delaware while barring jurisdiction in the state; it has nothing to do with members' broader ability to structure the entity and their substantive rights with respect to it. On the whole, section 18-109 ensures that Delaware retains ultimate jurisdiction over its limited liability companies by providing for service of process through a registered agent in the state and for jurisdiction in the state courts or an arbitration forum.
>
> Petitioners' **out-of-context interpretation of the final sentence of section 18-109(d) is untenable**. If petitioners were correct, the LLC Act would conflict with itself, and the rules of statutory construction caution this Court against such a conclusion. For example, under petitioners' reading, a non-managing member could not waive his or her right to maintain a claim for a breach of fiduciary obligations in the Delaware courts because fiduciary duties are an essential part of an entity's "internal affairs." In spite of this, the LLC Act specifically

> permits the members of limited liability companies to eliminate fiduciary duties. Because section 18-109 can (more reasonably) be construed to avoid this conflict, the Court concludes that section 18-109 does not operate outside its plain language and governs only service of process and venue.

R & R Capital, 2008 WL 3846318, *5 (Del. Ch. 2008) (footnotes omitted and emphasis added).[11] The same is true about the sentence in the middle of the three sentences that make up Section 2.2 of the LLC Agreement, which is relied upon by the Defendants for their out-of-context interpretation. In the context of this *de novo* appeal, this Court should read that singular sentence in the context of the gist of the entire paragraph and view this paragraph for its purpose within the structure of the entire agreement; rather than, in a vacuum as the lower court did and the Defendants suggest.

Additionally, judicial dissolution is not inconsistent with the LLC Agreement in such a manner as to eliminate the need to find an explicit waiver. Section 8.1 of the LLC Agreement provides the Company will be dissolved upon

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[11] In *R & R Capital* the provision expressly stated that a unilateral request for judicial dissolution would cause irreparable harm. The agreements at issue in *R & R Capital* contained the following provision:

> *Waiver of Dissolution Rights.* The Members agree that irreparable damage would occur if any member should bring an action for judicial dissolution of the Company. Accordingly each member accepts the provisions under this Agreement as such Member's sole entitlement on Dissolution of the Company and **waives and renounces** such Member's right to seek a court decree of dissolution or to seek the appointment by a court of a liquidator for the Company.

R & R Capital, 2008 WL 3846318 at *3 (Emphasis added).

the first to occur of certain events, but does not limit it to those events. *See* A48 at §8.1. The addition of judicial dissolution as an event of dissolution is just the addition of another possibility of dissolution; it is not inconsistent with any of the events listed under Section 8.1. Judicial dissolution is also not inconsistent with any other provisions of the LLC Agreement. Further, it is consistent with the structure of Section 18-801(a) of the Act which lists multiple events.

For example, the LLC Agreement's requirement that dissolution be approved by a Super Majority-in-Interest of Members is not rendered meaningless by the right to petition for judicial dissolution. *See* A40 at §3.4. On the contrary, Section 18-801 specifically provides for both a limited liability company agreement to specify what type of events result in dissolution, including super majority voting and consent, along with the entry of a decree for judicial dissolution. *See* Section 18-801(a)(2), (3) & (5) of the Act. These subsections are separate and distinct and dissolution occurs simply when the first of these separate events occurs. Additionally, if the requirement for a Super-Majority was not provided for in the LLC Agreement, then it would be governed by 18-802(a)(3), so it was necessary to include that provision in the LLC Agreement regardless of the option to apply for judicial dissolution.

Accordingly, there is no clear and explicit language or procedure that would illustrate the intent of the parties to contract away the right to apply for judicial

remedy which is a statutorily provided remedy. Thus, this Court in its *de novo* review of the Chancery Court's decision should reverse the dismissal of Huatuco's Complaint by the Chancery Court.

2. The Chancery Court erred in holding that Huatuco was a sophisticated party.

The argument that Huatuco was a sophisticated party that is presumed to understand the consequences of the language used in this LLC Agreement was raised for the first time by the Chancery Court itself in its Opinion and not by the either of the parties to the suit. *See* Opinion, p. 13. As a result, Huatuco never had a chance, prior to this Appeal, to argue that he was not sophisticated for the purposes of entering into contracts and/or that the Chancery Court erred in making the determination that he was a sophisticated party in connection with the Motion to Dismiss.

Obviously, the Chancery Court considered this issue to be important and actually ruled on it in its opinion.[12] Although the Defendants seek to preclude Huatuco from raising this highly prejudicial finding on this Appeal, it would be inequitable and contrary to the interest of justice for Huatuco to be denied the right to raise this issue on appeal as it was only raised below by the lower court. *See Reddy v. MBKS Co., Ltd.*, 945 A.2d 1080, 1086 (Del. 2008) (Stating "[b]ecause the

[12] Defendants assert that the decision that Huatuco was a sophisticated party was not the basis of the Court's holding. However, if that were true, then there would have been no reason for the lower court to mention that Huatuco was a sophisticated party in its rational for its ruling.

parties were not heard on this specific issue, it serves the 'interests of justice' for us to consider Reddy's claim, as Supreme Court Rule 8 permits").[13]

Additionally, it was not necessary for Huatuco to raise or plead facts as to his own level of sophistication in connection with a petition for judicial dissolution. This is because such a determination should not have been made on a motion to dismiss stage when no discovery has been taken. Indeed, *Sternberg v. Nanticoke Memorial Hosp., Inc.*, 2009 WL 3531791 (Del.Supr. 2009), which is the only case Defendants cite for the proposition that a medical doctor can be presumed to be a sophisticated party, was decided on a motion for summary judgment where much of the evidence was about that doctor's capacity and sophistication.

3. Judicial dissolution is an available remedy under the LLC Agreement.

Section 12.13 of the LLC Agreement preserves more than just remedies specifically listed in the LLC Agreement. *See* A.B., p. 26. Section 12.13 specifically states that "[t]he remedies under this Agreement are cumulative and *do not exclude any other remedies to which any person may be lawfully entitled, whether at law or in equity, or otherwise.*" (emphasis added). Nevertheless, the bringing of a suit for judicial dissolution is a legal action for a remedy under the

[13] In *Reddy* neither side ever referred to Section 242 nor advocated how Reddy's actions should be characterized with reference to that statute at the Court of Chancery level as the focus of the Chancery proceedings was upon whether Reddy had breached his fiduciary (as distinguished from statutory) duties by adopting the August 2005 resolutions. Likewise, whether Huatuco was sophisticated was not the focus of the Motion to Dismiss.

LLC Agreement and under the Act. Huatuco, as a Member, has the standing and the right to bring a suit to seek the remedy of judicial dissolution against the Company and the other Members pursuant to Section 12.10 of the LLC Agreement.[14]

Further, Rule 8 would not preclude reliance on Section 12.13. Huatuco asserts several times in the Chancery Court proceeding that the LLC Agreement is devoid of any language that supports the Defendants' claim that Huatuco intentionally waived or surrendered his statutory right as a member of a Delaware limited liability company to apply to this Court for judicial dissolution or to request liquidating trustee. It was not necessary for Huatuco to state each provision of the LLC Agreement that would support his argument since the entire LLC Agreement was incorporated as an exhibit to his Complaint.

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[14] Section 12.10 provides in part that:

> Notwithstanding the foregoing, it is expressly agreed that each Member is an intended third party beneficiary of the rights of the LLC and the covenants of the other Members under this Agreement and that each Member shall be entitled to enforce such rights and such covenants in the name and on behalf of the LLC or in its own name and on its own behalf, as it may elect, and the LLC shall not be a necessary party to any action or proceeding, including any arbitration proceeding, that may be brought by any Member for such purpose or to resolve any dispute that may arise between the LLC and any Member hereunder, relating in any way to this Agreement or the performance of any party's obligations hereunder.

See A54.

C. It would be inequitable to read a waiver into the LLC Agreement.

Huatuco's argument about the inequitable nature of reading a waiver in the LLC Agreement is expressed in his Opening Brief and will not be rehashed here. However, Huatuco notes that Defendants do not address the inequitable nature of Huatuco's supposed "remedy," and instead rests on Huatuco having a remedy while ignoring the "attendant consequences" of such. Defendants also attempts to minimize or ignore the one-sided nature of the Agreement. Indeed, Managing Member, *i.e.* Defendant Satellite, is not even bound by the so-called waivers of "any and all rights" of Section 2.2 since it only applies to Members. Hence, Satellite as the Manager could apply for a decree of judicial dissolution under Section 18-802 under the Chancery Court's interpretation of the LLC Agreement and only Huatuco is denied access to that remedy under this one-sided LLC Agreement.

CONCLUSION

For all the foregoing reasons, and the reasons promulgated in Huatuco's Opening Brief, this Court should reverse the lower court's decision to grant the Motion to Dismiss Huatuco's Complaint.

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