IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BRUCE M. BAKERMAN,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 1844-N
v.	)	
	)	
SIDNEY FRANK IMPORTING CO., INC., ESTATE OF SIDNEY E. FRANK, LEE R. EINSIDLER, JOHN R. FRANK. STUART W. MOSELMAN, WILLIAM F. THOMPSON, and THOMAS BRUNO,	)	
	)	
Defendants,	)	
	)	
and GREY GOOSE BOTTLING CO., L.L.C.,	)	
	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Date Submitted: August 31, 2006
Date Decided: October 10, 2006
Date Revised: October 16, 2006

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CHANDLER, Chancellor

In 2000, a company's chief legal counsel was granted a membership interest in a non-wholly owned subsidiary. Four years later, the company negotiated a multi-billion dollar sale of it and its subsidiary's assets to a third party that required the unanimous consent of the subsidiary's members. After receipt of such consents, the transaction was consummated. One month following the sale, the chief legal counsel to the parent was terminated. He has since brought this lawsuit, claiming among other things that the managers of the subsidiary breached their fiduciary duty by abdicating nearly all of the consideration paid by the third party acquiror to the subisidiary's parent. In addition, he alleges that his consent as a member of the subsidiary was coerced.

Before me is defendants' motion to dismiss the complaint. For the reasons set forth below, the motion is granted in part and denied in part. Part I of this Opinion sets out the factual background that gave rise to this lawsuit. Part II delineates plaintiff's claims, defendants' responses to those claims, and the standard to be applied at this stage of the proceedings. Part III examines and applies the legal principles governing each claim. This Part concludes that two claims, for tortious interference with contract and for unjust enrichment, must be dismissed. The remaining claims—direct and derivative claims related to fiduciary breaches and to contractual breaches—all survive

the defendants' challenge at this stage. Finally, Part IV summarizes the conclusions.

I. FACTUAL BACKGROUND

As required, the facts are drawn from the complaint, the documents it incorporates, and facts not subject to reasonable dispute.[1]

A. The Makings of a Superpremium Vodka

Sidney Frank began working in the liquor business for his in-laws in the 1940's and for thirty years sold Scotch all over the world. After a falling out with the family in 1972, Sidney Frank formed Sidney Frank Importing Co. ("SFIC"). SFIC purchased the U.S. rights to a brandy and a then little-known German sipping liqueur called Jägermeister and plodded on until the mid-1980's, when Frank discovered a bar in New Orleans that served shots of chilled Jägermeister. Promoting chilled shots of Jägermeister in college bars, and sending out teams of models to college barrooms to sell and dispense the shots and other merchandise, SFIC began enjoying a period of relative success and created a network of solid relationships with major liquor distributors throughout the country that would later prove very useful.

[1] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) (on a motion to dismiss, trial court may properly take judicial notice of matters that are not subject to reasonable dispute).

SFIC was not alone in creating sensations in the liquor market. In 1979, a Swedish distillery repackaged its vodka into a clear Swedish medicine bottle with crisp blue lettering. With the help of an original and hugely popular ad campaign, Absolut launched vodka from a well drink to a hip drink. Over fifteen years later, following on a more recent trend in the mid-1990's of superpremium vodkas offered in frosted bottles, Sidney Frank decided to launch his own superpremium vodka.

In the late 1990's, however, SFIC was merely a liquor distribution company, which had built its fortune as the U.S. distributor of Jägermeister. SFIC enlisted the help of H. Mounier ("Mounier"), a company already engaged in liquor production in the Cognac region of France. Mounier concocted and developed the formulas and production processes for Grey Goose Vodka, using water that had been filtered through champagne limestone from the Gentè Springs of Cognac, France. SFIC developed a distinctive bottle that was frosted and taller than the rest, with a cutaway of geese in flight, and the French flag.

Mounier, as the exclusive manufacturer of Grey Goose Vodka, began full-scale production in 1997. SFIC, in turn, imported and distributed Grey Goose Vodka, primarily in the United States, the only major market at the time. During 1997, the first year of production, SFIC sold only about 45,000

cases of Grey Goose Vodka. In 1998, Grey Goose Vodka received the number one vodka rating from the Beverage Testing Institute, a company that produces Consumer Reports-style rankings of alcoholic beverages. By 1999, sales were up to 190,000 cases. SFIC continued to market Grey Goose Vodka as one of the best vodkas in the world, and as a result of the ensuing success, Mounier began producing flavored versions of the vodka, including orange, citrus, and vanilla variations.

B. Problems with Mounier and the Creation of the LLC and SAS

Throughout this time period, SFIC and Mounier operated without any written contract between them. Mounier considered its relationship with SFIC to be a partnership, while SFIC claimed sole rights to the formulas and production processes for Grey Goose Vodka. In September 1999, Mounier's corporate parent filed for bankruptcy protection in France.

In November 1999, Sidney Frank hired Bakerman to serve as his special assistant at SFIC. Several months later, Sidney Frank promoted Bakerman, a licensed attorney, to the position of SFIC's Chief Legal Counsel. Shortly after joining SFIC, Bakerman developed a strategy that would protect and enhance SFIC's and Sidney Frank's interests in Grey Goose Vodka, while also minimizing their potential tax and other liability exposure.

On May 22, 2000, Bakerman, Sidney Frank and Lee Einsidler (collectively, the "Founding Members"), formed Grey Goose LLC (the "LLC"). The LLC served as the holding company for a second company formed in July 2000, Grey Goose Bottling France S.A.S. ("SAS"), which would acquire Mounier's interests in the formulas and productions processes for Grey Goose Vodka. The Founding Members intended for the LLC and SAS to generate their own significant profits from the production and sale of vodka.

The SAS bylaws charged management to the individual managers of the LLC; any transfer, assignment or other action with respect to the intellectual property rights of SAS, however, required the approval of the LLC itself. On August 2, 2000, the Founding Members approved the issuance of membership units in the LLC as follows:

Member	Units	Ownership %
SFIC	100	50%
Sidney Frank	25	12.5%
Eugene Frank	15	7.5%
Bruce Bakerman	10	5%
Thomas Bruno	10	5%
Lee Einsidler	10	5%
John Frank	10	5%
Stuart Moselman	10	5%
William Thompson	10	5%
Total:	200 units	100%

According to the LLC's Articles of Organization, the members received their ownership interests due to "their individual efforts and work in organizing the [LLC]," which represented "full and satisfactory consideration for their respective Membership Interests." On more than one occasion, Bakerman communicated to Sidney Frank and Lee Einsidler that he had a potential conflict of interest in obtaining a membership interest in the LLC. Independent legal counsel, White & Case LLP, advised SFIC and the LLC throughout the formation of the LLC and did not object to Bakerman's membership in the LLC.

The LLC's Operating Agreement contained several important riders, the most important of which required the unanimous written consent by the members for, among other things, any sale of all or substantially all of the LLC's business or assets.

During the next few years, SAS operated as a subsidiary of SFIC (controlled through the LLC). SAS obtained the trademark and trade dress of Grey Goose Vodka in approximately 40 countries. Finally resolving the dispute with Mounier in 2002, SAS secured complete control of the production process and rights in the formula for Grey Goose Vodka. SAS further received significant controls over Mounier's actual production of the vodka. With the dispute resolved, SAS entered into numerous distributorship

agreements for Grey Goose Vodka in countries throughout the world, including Australia, China, Hong Kong, Greece, Italy, Russia, and the United Kingdom.

C. Exponential Growth and the Bacardi Sale

Sales of Grey Goose Vodka increased exponentially between 1999 and 2004. In 1999, SFIC sold approximately 190,000 cases of the vodka. In 2003 SAS sold more than 2.3 million cases of Grey Goose Vodka. SFIC estimated that SAS would sell nearly 3 million cases in 2004. SAS sold most of its production to SFIC for distribution in the United States. Plaintiff alleges that the transfer price (from SAS to SFIC) sorely undervalued the cases of vodka. SAS received only a few dollars per case from SFIC, but SFIC received as much as $72 per case from its arm's-length sales of the vodka in various international markets. Nonetheless, even with these allegedly depressed transfer prices on the bulk of its sales, SAS had annualized net income of approximately $2.5 million as of June 2004.

The success of Grey Goose Vodka and other superpremium vodkas did not go unnoticed by the larger spirits companies. After a period of confidential negotiations, SFIC signed a letter of intent on March 2, 2004, to sell the Grey Goose Vodka business to Bacardi, the world's largest privately held spirits company. The negotiations proceeded over the course of the next

three months and were largely handled by SFIC executives and outside counsel, to the exclusion of Bakerman.

D. The Allocation and Bakerman's Consent

Only in early June was Bakerman informed of the imminent sale to Bacardi. On June 17, Bakerman asked William Presti, an SFIC officer and in-house counsel who had participated in the Bacardi negotiations, about the purchase price allocation. Presti responded that he believed that one-third of the proceeds would be allocated to each of the three entities. While such a symmetrical allocation may have been the earliest plan, a number of factors favored an allocation advantageous to SFIC.

First, any portion of the purchase price allocated to SAS would be subject to a host of taxes under French law, including a French transfer tax, which would be higher than U.S. taxes and would reduce the overall proceeds obtained from the sale.

Second, Sidney Frank himself, the controlling shareholder of SFIC, which in turn controlled the LLC and SAS, would receive $0.70 on the dollar for proceeds to SFIC but only $0.475 on the dollar for proceeds to the LLC.

Third, two LLC members, Bakerman and Linda Rodman,[2] held shares only in the LLC and did not hold any shares in SFIC. All the other members of the LLC either owned equity in SFIC previously, or had received equity in SFIC pursuant to SFIC's "Stock Warrant Plan for Key Employees" (the "Warrant Plan"). Therefore, while allocations to the LLC would have to be shared with these two LLC members, allocations to SFIC could exclude these two LLC members.

On June 18, 2004, one day after Presti discussed the allocation with Bakerman, and shortly before the scheduled public announcement of the Bacardi sale, Lee Einsidler, on behalf of defendants, asked Bakerman, as a member of the LLC, to sign a unanimous written consent of the members. The consent would authorize the LLC to sell all of SAS's interests in the Grey Goose Vodka product line to Bacardi. After reviewing the consent, Bakerman repeatedly asked for, and eventually received, what was identified as the current draft of the Asset Purchase Agreement between SFIC, the LLC, SAS, and Bacardi (the "APA"). Under the draft APA, the cash portion of the purchase price would be allocated among the sellers as follows:

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[2] Linda Rodman is the daughter of the late Eugene Frank, and the sister of John Frank. Rodman acquired her 3.75% interest in the LLC from her father's estate. She never held an equity interest in SFIC, however. Am. Compl. ¶¶ 77-78.

1. $2.24 billion to SFIC for "[t]rademark for US, Canada and other markets and production know-how, recipes, formulas and any other production related intangible";
2. $200,000 to SAS for "[t]rademark for France and some other countries";
3. $5.5 million to SAS for the Production Facility in France;
4. $5.4 million to SAS for machinery and other assets in France; and
5. undetermined amounts to SFIC and SAS for inventory.

In addition, under the draft APA, SAS was to receive only about $11 million of the approximately $2.25 billion cash purchase price—less than 0.49% of the purchase price.

Bakerman did not think that the allocation reflected the true value of the LLC and SAS. Bakerman proposed to Einsidler, John Frank, and Moselman that SAS's allocation should be greatly increased. When this proposal was roundly rejected, Bakerman responded that he would not sign the consent due to the apparent misallocation of the purchase price. Bakerman then attempted to contact Sidney Frank, who was out of the SFIC office that day. Einsidler, however, intervened and instructed him not to call Sidney Frank.

Einsidler brought Bakerman into an office for a meeting with several SFIC executives, including Moselman and John Frank. The executives repeatedly asserted that SAS had received its fair share of the purchase price allocation under the draft APA.

Einsidler then convened a private meeting with the SFIC executives. After that meeting, Einsidler told Bakerman that "the lawyers" believed that: (a) Bakerman had a "major conflict of interest" based upon his dual role as SFIC's in-house legal counsel and as a member of the LLC; and (b) Einsidler could act on behalf of the LLC, with or without Bakerman's consent to the transaction. Einsidler then delivered an ultimatum to Bakerman. He stated that Bakerman had less than half an hour to make one of three choices:

a. Bakerman could sign the consent, keep his employment at SFIC, and receive $700,000 (similar to the bonuses that all SFIC employees would receive upon the closing of the sale with Bacardi);
b. Bakerman could sign the consent, resign his employment at SFIC, and receive $1,000,000 in severance from SFIC; or
c. Bakerman could refuse to sign the consent, have his employment terminated by SFIC, and be sued by SFIC.

Einsidler added that if Bakerman failed to choose one of these three options within the allotted time, then the third option would be chosen for him.

Bakerman initially responded that he would sign the consent with an express caveat related to his disagreement over the purchase price allocation. Einsidler promptly rejected that proposal, stating that the lawyers required the consent to be signed as drafted.

Bakerman returned to meet with Einsidler and the other SFIC executives, and told them that he needed to keep his job and, therefore, would sign the consent if they really wanted him to stay at SFIC. Bakerman and

each of the defendants who were members of the LLC signed the consent. It is unclear whether Rodman ever signed the consent.

Two days later, on June 20, 2004, Bacardi announced the agreement to acquire Grey Goose Vodka. On June 25, 2004, SFIC, the LLC, SAS, and Bacardi signed the APA, pursuant to which Bacardi agreed to pay approximately $2.25 billion in cash, plus up to $300 million through an earn-out arrangement, to purchase the assets related to the Grey Goose Vodka line. The sale to Bacardi closed formally on August 3, 2004.

Three weeks later, on August 24, 2004, Einsidler informed Bakerman that he was being immediately terminated as an SFIC employee because he allegedly had been very unprofessional on the day that he signed the consent. Einsidler requested that Bakerman sign a comprehensive release in conjunction with his termination. Bakerman refused to sign such a release, and Einsidler asked a security officer to escort Bakerman from the SFIC offices.

Following the termination, Einsidler called Bakerman on two occasions to persuade Bakerman to sign the release. During the second call, Einsidler told Bakerman that his refusal to sign the release must mean that he was planning to sue defendants. Bakerman did nothing to disabuse him of that notion. Einsidler was, in fact, correct.

Approximately sixteen months after his termination, and eighteen months after the Bacardi transaction was announced, Bakerman filed a complaint in this Court against defendants on December 15, 2005. Bakerman asserted both direct claims on his own behalf and derivative claims on behalf of the LLC challenging the transfer pricing paid by SFIC to the LLC, the allocation of the Bacardi transaction proceeds, and the alleged coercion that resulted in Bakerman's signing the consent.

On March 13, 2006, defendants moved to dismiss the complaint. Among the myriad defenses presented, defendants argued that Bakerman's original interest in the LLC was void due to a conflict of interest that was never correctly consented to by Sidney Frank and SFIC.

Bakerman exercised his right to amend the complaint,[3] and filed his first amended complaint on April 27, 2006 (the "Amended Complaint"). Among certain additions and clarifications, the Amended Complaint addressed Bakerman's alleged acquisition of consent from Sidney Frank and SFIC. The Amended Complaint describes how "[o]n more than one occasion, Bakerman communicated to Sidney Frank and Lee Einsidler that he had a potential conflict of interest in obtaining a membership interest in [the LLC]." Defendant Sidney Frank, however, had passed away in early January 2006,

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[3] Ct. Ch. R. 15(a).

after the original complaint had been filed, but months before the filing of the Amended Complaint.

II. CONTENTIONS

The Amended Complaint includes five claims: two derivative claims and three putative direct claims. The defendants move to dismiss on a number of grounds.

A. Derivative Claims

Count I alleges breaches of fiduciary duty against the defendants as members and managers of the LLC. Count V alleges that the defendants have been unjustly enriched at the LLC's expense.

B. Direct Claims

Count II alleges that defendants breached the LLC's Operating Agreement by depriving Bakerman of the benefit of the LLC Operating Agreement's unanimous consent requirement, by failing to inform Bakerman's decision and by obtaining the consent through coercion and economic duress.

Count III alleges that defendants tortiously interfered with Bakerman's contractual relations, as established by the LLC's Operating Agreement. Specifically, defendants misallocated the purchase price, did not disclose the justification for the misallocation to Bakerman, did not disclose to Bakerman

their conflicted interests, and deprived Bakerman of his contractual entitlement to give informed and volitional consent to the transaction through the use of coercion, threat of litigation, and economic duress.

Count IV alleges that defendants breached the implied covenant of good faith and fair dealing by engaging in the actions that formed the bases of Counts II and III, and by additionally executing the Bacardi transaction, despite having knowledge of the deceptive and coercive nature of the consent obtained.

C. Defendants' Contentions

In respect to each claim, defendants move under Rule 12(b)(6) to dismiss for failure to state a claim. In more general attacks, defendants argue the following: First, the complaint is barred by the doctrine of laches, and the amended complaint is barred by Bakerman's unreasonable delay in amending the complaint until after Sidney Frank's death. Second, the individual and direct claims are in fact derivative in nature. Third, Bakerman's demand futility allegations fail to meet a heightened burden of pleading. Fourth, Bakerman is not an adequate derivative representative.

D. Legal Standard

The standards governing a motion to dismiss for failure to state a claim are well settled: (i) all well-pleaded factual allegations are accepted as true;

(ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[4]

III. ANALYSIS

A. Defendants' Rule 23.1 Motion: Was Demand on the Managers Excused?

Bakerman seeks to assert multiple derivative claims on behalf of the LLC. Bakerman concedes that demand was not made on the LLC's current managers, Einsidler and Thompson. The Court must therefore determine whether demand is excused.

Court of Chancery Rule 23.1 imposes on a plaintiff prosecuting a derivative action a pleading burden that is "more onerous" than the burden a plaintiff must satisfy when confronted with a motion to dismiss under Court of Chancery Rule 12(b)(6).[5] Rule 23.1 requires a plaintiff to "allege with particularity … the reasons … for not making" a demand.[6] In considering a motion to dismiss under Rule 23.1, the Court must accept the well-pled

[4] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-7 (Del. 2002)).
[5] Ct. Ch. R. 23.1; *Levine v. Smith*, 591 A.2d 194, 207 (Del. 1991), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).
[6] Ct. Ch. R. 23.1.

allegations of the amended complaint as true.[7] Conclusory allegations, however, will not be accepted as true.[8]

Inquiry into whether demand is excused proceeds in this circumstance under the familiar test set forth by the Supreme Court in *Aronson v. Lewis.*[9] Under the two-pronged *Aronson* test, demand will be excused if the derivative complaint pleads particularized facts creating a reasonable doubt that "(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[10]

Disinterested "means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally . . . . Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[11]

1. Were Einsidler and Thompson Interested Managers?

Bakerman alleges that demand is excused because Einsidler and Thompson are interested in the allocation due to their holdings in SFIC,

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[7] *Grobow v. Perot*, 539 A.2d 180, 186 (Del. 1988).
[8] *Id.* at 187; *see also Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993).
[9] 473 A.2d 805 (Del. 1984).
[10] *Id.* at 814-15.
[11] *In re J.P. Morgan Chase & Co.*, 2005 WL 1076069, at *8 (Del. Ch. Apr. 29, 2005) (quoting *Aronson*, 473 A.2d at 812, 816), *aff'd*, 2006 WL 585606 (Del. Mar. 8, 2006); *see also Rales*, 634 A.2d at 936.

because they are beholden to SFIC and Sidney Frank, and because there is reasonable doubt that the transaction was the product of a valid exercise of business judgment.

Bakerman presents several particularized facts allegedly demonstrating Einsidler and Thompson's interest in misallocating the Bacardi proceeds to SFIC: (i) Einsidler and Thompson each owned a significant equity interest in SFIC; (ii) two other LLC members, Bakerman and Rodman, did not have any equity interest in SFIC and therefore did not stand to profit from any allocation to SFIC; (iii) wrongfully shifting proceeds to SFIC allowed defendants to avoid payment of French taxes, which would be owed on any proceeds distributed to SAS, and thereby reduce the overall profits to defendants; (v) and at a minimum, Einsidler and Thompson respectively received $70 million and $46 million from the Bacardi transaction. Alone, such benefits would clearly be significant enough "in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the shareholders without being influenced by her overriding personal interest."[12]

Defendants argue that Einsidler and Thompson's large holdings in SFIC are rendered immaterial in light of their larger holdings in the LLC.

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[12] *Orman v. Cullman*, 794 A.2d 5, 23 (footnotes omitted).

The Amended Complaint notes that Einsidler and Thompson each possessed a 5% interest in the LLC. Their shares in SFIC appear smaller: dividing the portion of the proceeds Einsidler and Thompson received by the $2.24 billion allocated to SFIC reveals that Einsidler's and Thompson's interests in SFIC, as alleged by Bakerman, are at least 3.125% and 2.054%, respectively. For every dollar allocated to SFIC, it appears that Einsidler and Thompson received at least $0.03125 and $0.02054; for every dollar allocated to the LLC, Einsidler and Thompson received $0.05. Defendants argue that weighing Einsidler's and Thompson's interests demonstrates that their incentives were perfectly aligned with the LLC in respect to the allocation.

In certain limited circumstances, this Court has declined to weigh interests on one side of the table against interests on the other side of the table when conducting an analysis of independence at the pleading stage. In *Siegman v. Tri-Star Pictures, Inc.*, then-Vice Chancellor Jacobs refused to analyze whether the holdings of certain Tri-Star Pictures directors in Coca-Cola were insignificant in view of their allegedly more substantial holdings in Tri-Star.[13] Because the directors' Coca-Cola holdings resulted in their receipt of benefits from the challenged transaction not available to all Tri-Star

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[13] 1989 WL 48746, at *11 (Del. Ch. May 5, 1989), *rev'd on other grounds*, 634 A.2d 319 (Del. 1989).

stockholders, a reasonable doubt was created for demand excusal purposes.[14] In *Harbor Finance Partners v. Huzienga*, Vice Chancellor Strine similarly refused to weigh the holdings of a Republic director in Republic against his holdings in AutoNation, citing *Siegman*.[15] Both cases distinguish between the burden a plaintiff bears to plead reasonable doubt as to director disinterest under Rule 23.1 and its ultimate burden to demonstrate director interest later in the litigation through admissible evidence.[16]

At this stage, I decline to engage in a weighing analysis to determine the disinterestedness of Einsidler and Thompson for a number of reasons. Bakerman has pled a significant and material benefit that accrued to the LLC's managers through the allocation of consideration to SFIC at the expense of the LLC. Further, allocations to the LLC were subject to certain

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[14] *Id.*

[15] *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 888 (Del. Ch. 1999).

[16] *Siegman*, 1989 WL 48746, at *10; *Huzienga,* 751 A.2d at 888. Vice Chancellor Strine noted that while the Court would not compare shareholdings but would look to the materiality of the director's holdings in the corporation across the table, a weighing analysis could be relevant in situations where directors address a transaction that has different effects on two classes of the corporation's own stock. *Id.* at 888 n.28.

> In those situations, the directors often own both classes of stock because corporations want to align the directors' interests with those of all the company's stockholders. Our case law has long recognized that necessity requires directorial action in these circumstances and that such ownership interests do not necessarily strip directors of their disinterested status.

Id. (quoting *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1147-48 (Del. 1990)); *see also Solomon v. Armstrong*, 747 A.2d 1098, 1117-18, 1124 (Del. Ch. 1999); *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 595 (Del. Ch. 1986) (weighing controlling shareholder's interests in preferred and common stock of corporation to conclude that based on shareholdings alone, he did not have a self-interest to favor common over preferred); *Freedman v. Rest. Assocs. Indus.*, 1987 WL 14323, at *10 (Del. Ch. Oct. 16, 1987).

taxes; these taxes might have diminished the value of an allocation to the LLC, and Einsidler and Thompson's beneficiary 5% interests in such allocation. Finally, discovery might show that Einsidler and Thompson had SFIC holdings greater than 3.125% and 2.054%, as the Amended Complaint suggests. In other words, it is too early and the facts are not as clear as necessary to engage in such a weighing analysis. Bakerman has therefore met his burden at this stage in demonstrating the futility of demand.

2. Were Einsidler and Thompson Independent of Sidney Frank?

Turning to the independence facet of *Aronson*'s first prong, Bakerman alleges that Einsidler and Thompson were beholden to Sidney Frank. In the demand-futility context, to raise a question concerning the independence of a particular board member or LLC manager, a plaintiff "must allege particularized facts manifesting 'a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling.'"[17] This lack of independence can be shown when a plaintiff pleads facts that establish "that the directors are 'beholden' to [the controlling person] or so under their influence that their discretion would be sterilized."[18]

[17] *Aronson*, 473 A.2d at 816 (citation omitted).
[18] *Rales*, 634 A.2d at 936; *see also Friedman v. Beningson*, 1995 WL 716762, at *9 (Del. Ch. Dec. 4, 1995) ("The requirement that directors exercise independent judgment, (insofar

Reasonable doubt surrounds the independence of the managers, raising a specter that their discretion was sterilized. The Amended Complaint alleges many particularized facts regarding the managers' independence, including: (i) SFIC and Sidney Frank were collectively controlling shareholders of the LLC, holding a 50% interest and 12.5% interest respectively; (ii) Sidney Frank controlled SFIC as founder, Chairman, CEO, and a 70% shareholder, and appointed and employed all of its directors and officers (including Einsidler and Thompson); (iii) SFIC was a party to and interested in the Bacardi transaction, and would receive all consideration allocated away from the LLC; (iv) Sidney Frank was interested in the transaction because he would receive $0.70 for every dollar allocated to SFIC, but only $0.50 for every dollar allocated to the LLC; and (v) as a result of the Bacardi transaction, Sidney Frank received approximately $1.6 billion.

These allegations create a reasonable doubt whether Einsidler and Thompson could make judgments independent of the interests of Sidney

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as it is a distinct prerequisite to business judgment review from a requirement that directors exercise financially disinterested judgment), directs a court to an inquiry into all of the circumstances that are alleged to have inappropriately affected the exercise of board power. This inquiry may include the subject whether some or all directors are 'beholden' to or under the control, domination or strong influence of a party with a material financial interest in the transaction under attack, which interest is adverse to that of the corporation.").

Frank and SFIC. Delaware courts have found a lack of independence in similar circumstances.[19]

3. Was the Challenged Decision the Product of a Valid Exercise of Business Judgment?

Under *Aronson*'s second prong, demand is also excused if the complaint raises a reasonable doubt that the challenged decision was the product of a valid exercise of business judgment.[20] Absent particularized allegations to the contrary, the managers of an LLC are presumed to have acted on an informed basis and in the honest belief that the decisions were in furtherance of the best interests of the LLC and its members.[21] The burden is on the party challenging the decision to establish facts rebutting the presumption;[22] typically such showing of facts must be tantamount to

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[19] *Beam v. Stewart*, 833 A.2d 961, 978 (Del. Ch. 2003) (finding executive employee of one of Martha Stewart's companies beholden to Stewart); *California Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *9-10 (Del. Ch. Dec. 18, 2002) (explaining that interested director was superior of one non-interested director and owned company that employed another non-interested director's son); *In re The Limited*, 2002 WL 537692, at *5 (Del. Ch. Mar. 27, 2002) (noting that compensation from one's principal employment is typically of great consequence to the employee); *Rales*, 634 A.2d at 937 (finding no independence where non-interested directors employed by and could be removed by Rales brothers); *Kahn v. Tremont Corp.*, 1994 WL 162613, at *2 (Del. Ch. Apr. 21, 1994) (finding demand futility where complaint specifically alleged that controlling shareholder employed a majority of the directors at various of his entities).

[20] *Aronson*, 473 A.2d at 812.

[21] *See Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *7 (Del. Ch. Mar. 7, 2006) (elucidating a similar presumption in respect to directors of a corporation).

[22] *Aronson*, 473 A.2d at 812.

corporate waste to satisfy the second prong of the demand futility analysis.[23] Courts focus on "the substance of the transaction and the process by which the board approved it."[24] Additionally, a court will consider factors such as whether the directors (i) informed themselves of material information; (ii) considered expert opinion; (iii) provided board members with adequate and timely notice of the transaction and its purpose before the board meeting; or (iv) adequately inquired into the reasons for or terms of the transaction.[25]

The Amended Complaint alleges particularized facts that the allocation was severely misallocated and that defendants did not employ the traditional processes (or any processes) that would have entitled them to the business judgment rule's protections. In respect to the process, Bakerman has pled particularized facts alleging that defendants failed to (i) obtain an independent expert appraisal to determine the value of SAS's assets, (ii) appoint a special committee to assess the fairness of the transaction or its terms, (iii) obtain sufficient information and data to assess the proposed allocation, (iv) bargain for the best possible result for the LLC, or (v) consider Bakerman's opinion that the allocation did not reflect the value of the LLC's assets.[26]

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[23] *See Tremont Corp.*, 1994 WL 162613, at *6 ("The test for this second stage is thus necessarily high, similar to the legal test for waste.").
[24] *Caruana v. Saligman*, 1990 WL 212304, at *4 (Del. Ch. Dec. 21, 1990).
[25] *Ash v. McCall*, 2000 WL 1370341, at *10 (Del. Ch. Sept. 15, 2000).
[26] Am. Compl., ¶¶ 103-104.

In respect to the adequacy of the $11 million allocated in total to the LLC and SAS, Bakerman has pled facts including: (i) the total allocation to SAS was insufficient even to cover its liabilities; (ii) the $5.5 million allocated for an SAS production facility in France was less than the $7.5 million loan used to build it only two years earlier; (iii) the $200,000 allocated for SAS's international trademarks was less than even the legal costs incurred to obtain such marks; and (iv) SFIC was paid for the trademark and distribution rights in the international market that SAS in fact controlled. Receiving only 0.49% of $2.25 billion appears to be a questionable abdication by a non-wholly owned subsidiary to the will of SFIC that is quite dubious given its insufficiency to even cover its own liabilities. Furthermore, the high value of SAS's contractual rights to the recipes, formulas, and production processes until 2013 was verified by a later transaction. After Bacardi correctly expressed concern that Mounier could assert ownership of the residual rights to those assets, SFIC purchased Mounier's residual interest for $15 million. SAS was not compensated at all for its contractual rights in the recipes, formulas, and production processes, but the residual interest in these rights alone was valued in an arms-length bargain at $15 million. In light of these well-pleaded facts and accepting them as true as I must, the allocation of only $11 million to SAS appears so one sided that no business person of

ordinary, sound judgment could reasonably conclude that it constituted adequate consideration.[27] The allegations in the Amended Complaint thus create (additionally) a reasonable doubt as to whether approval of the Bacardi transaction was the product of a valid exercise of business judgment by the managers. For this additional reason, I conclude that Bakerman has met his burden of demonstrating the futility of demand.

B. Bakerman's Adequacy as Derivative Representative

Defendants next argue that plaintiff Bakerman is an inadequate derivative representative of the LLC because his position as SFIC's former chief legal counsel and his alleged violation of New York Disciplinary Rule 5-104(a) ("DR 5-104(a)") both impugn his integrity and void his interest in the LLC. Further, defendants insist Bakerman is not an adequate representative because the lawsuit is not supported by the other LLC members. Bakerman responds that he satisfies all factors required of a derivative representative, that a determination of whether a violation of DR 5-104(a) occurred is both inapposite and improper in either this Court or at this stage of the pleadings, and that opposition to the lawsuit by other members is irrelevant in these circumstances.

[27] *Brehm*, 746 A.2d at 263.

A plaintiff seeking to maintain derivative claims must satisfy the adequacy requirements implicit in Court of Chancery Rule 23.1.[28] "[A] derivative plaintiff serves in a fiduciary capacity as representative of persons whose interests are in plaintiff's hands and the redress of whose injuries is dependent upon her diligence, wisdom and integrity."[29] In a challenge to a particular plaintiff's adequacy, however, the burden rests with the defendant.[30] "The defendant must show a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders."[31]

A number of factors may be considered in determining whether a plaintiff is deemed "adequate" for these purposes:

(1) economic antagonisms between the representative and the class;

(2) the remedy sought by plaintiff in the derivative litigation;

(3) indications that the named plaintiff was not the driving force behind the litigation;

(4) plaintiff's unfamiliarity with the litigation;

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[28] *See, e.g., Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983). The analysis of Bakerman's capacity to serve as a derivative plaintiff will, in this instance, be the same as the analysis of the propriety of his service as class representative. *See, e.g., In re Fuqua Indus. S'holder Litig.*, 752 A.2d 126, 129 n.2 (Del. Ch. 1999) ("[A]nalysis of adequacy requirements is generally the same under Rules 23 and 23.1 as cases decided under Rule 23(a)(4), *i.e.*, the adequacy requirement of Rule 23, may be used in analyzing the adequacy requirements of Rule 23.1." (citations omitted)).

[29] *In re Fuqua Indus.*, 752 A.2d at 129 (citing *Katz v. Plant Indus., Inc.*, 1981 WL 15148, at *1 (Del. Ch. Oct. 27, 1981)).

[30] *See Emerald Partners v. Berlin*, 564 A.2d 670, 674 (Del. Ch. 1989).

[31] *Id.*; *see also Canadian Commercial Workers Indus. Pension Plan*, 2006 WL 456786, at *8.

(5) other litigation pending between plaintiff and defendants;

(6) the relative magnitude of plaintiff's personal interests as compared to her interest in the derivative action itself;

(7) plaintiff's vindictiveness toward defendants; and

(8) the degree of support plaintiff was receiving from the shareholders she purported to represent.[32]

This list, however, is not exhaustive.[33] "Typically, the elements are intertwined or interrelated, and it is frequently a combination of factors which leads a court to conclude that the plaintiff does not fulfill the requirements of 23.1."[34] It is possible that the inadequacy of a plaintiff may be demonstrated by a "strong showing of only one factor [; however,] that factor must involve some conflict of interest between the derivative plaintiff and the class."[35]

"The ethical considerations which bar an attorney from acting as counsel against his former client also preclude him from acting as a class or

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[32] *In re Fuqua Indus.*, 752 A.2d at 130.

[33] *See Katz*, 1981 WL 15148, at *2 (explaining that the factors are "[a]mong the elements which the courts have evaluated").

[34] *Id.*, at *2 (quoting *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980)); *see also In re Fuqua Indus.*, 752 A.2d at 130 n.5.

[35] *In re Fuqua Indus.*, 752 A.2d at 130; *see also Canadian Commercial*, 2006 WL 456786, at *8 (explaining that "economic" conflicts are often the primary consideration); *Youngman*, 457 A.2d at 379 (noting exception that "fact that the plaintiff may have interests which go beyond the interests of the class, but are at least co-extensives with the class interest, will not defeat his serving as a representative of the class"). The Court in Youngman also explained that "purely hypothetical, potential or remote conflicts of interests never disable the individual plaintiff." *Id*. (citation omitted).

derivative plaintiff against his former client."[36] When a general counsel's former representation of his corporate employer involves issues that are "substantially related" to the claims he seeks to assert derivatively against his former client, he may be disqualified.[37]

To determine whether matters are "substantially related" for purposes of a conflict of interest with a former client the Court must evaluate: the nature and scope of the prior representation at issue; the nature and scope of the present lawsuit against the former client; and whether during the course of the previous representation the client may have disclosed confidential information that could be used against the former client in the current lawsuit.[38] Matters may be substantially related if they involve the same transaction or legal dispute or there is substantial risk that confidential information obtained in the former representation could materially advance the client's position in the current matter. The former client is not required to reveal specific details of the information shared with the attorney; rather, the

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[36] *Ercklentz v. Inverness Mgmt. Corp.*, 1984 WL 8251, at *4 (Del. Ch. Oct. 18, 1984) (citing *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972); *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983)).

[37] *See Ercklentz*, 1984 WL 8251, at *4-5; *see also* Delaware Lawyers' Rules of Professional Conduct ("D.L.R.P.C.") 1.6, 1.9. *Cf. Richardson*, 469 F.2d 1382; *Doe v. A Corp.*, 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd sub nom., Hall v. A Corp.*, 453 F.2d 1375 (2d Cir. 1972).

[38] *Khanna v. McMinn*, 2006 WL 1388744, at *42 (Del. Ch. May 9, 2006).

Court may determine whether information regularly shared in that type of representation creates an unavoidable conflict with the current case.[39]

Specifically, Comment 3 to D.L.R.P.C. 1.9 provides that "[a] conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services." Additionally, "[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation."[40] These principles govern the Court's analysis of whether Bakerman's prior representation of SFIC as its chief legal counsel is substantially related to the matters at issue in the present litigation.

Defendants' assertions fail to demonstrate that Bakerman's former representation of SFIC is substantially related to the current lawsuit. As alleged in the Amended Complaint, Bakerman was specifically excluded from the Bacardi negotiations, and never served as a legal advisor on the

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[39] *Hendry v. Hendry*, 2005 WL 3359078, at *4 (Del. Ch. Dec. 1, 2005) (citing *Sanchez-Caza v. Estate of Whetstone*, 2004 WL 2087922, at *3 (Del. Super. Sept. 16, 2004)); D.L.R.P.C. 1.9 cmt. 3.

[40] D.L.R.P.C. 1.9 cmt. 3.

transaction.[41] Instead, Bakerman's knowledge of the Bacardi transaction was obtained in his capacity as a voting member of the LLC, and only at the eleventh hour.[42] Defendants must proffer evidence that Bakerman served as a legal advisor to SFIC in the Bacardi transaction or substantially related matters. This allegation is not substantiated by the facts as set forth in the Amended Complaint.

This case is different from two cases in which a former legal counsel was disqualified as a derivative lead plaintiff. In *Ercklentz v. Inverness Management Corp.*, this Court granted the defendants' motion to disqualify the plaintiff, who had formerly served as general counsel (and director) of the defendant corporation.[43] In granting the motion to disqualify the plaintiff, the Court found that as general counsel to the defendant corporation, plaintiff negotiated and drafted agreements for those transactions challenged by the lawsuit.[44] Such involvement and knowledge of specific facts gained as general counsel was highly relevant to the matter in question, where plaintiff

[41] Am. Compl., ¶¶ 67-68.

[42] Bakerman learned of a contemplated third/third/third split of the consideration among the different entities, a piece of knowledge possibly relevant to the LLC and its members. It is unclear in what capacity he received this hallway tidbit of information—whether as counsel to SFIC or member of the LLC. Because defendants bear the burden of proof, and because a reasonable interpretation of Bakerman's hallway inquiry is that he was receiving such confidences as a member of the LLC, the hallway conversation will not disqualify Bakerman.

[43] 1984 WL 8251 (Del. Ch. Oct. 18, 1984).

[44] *Id.* at 5-6 (defendant director and shareholder "undoubtedly provided confidential information and received counsel from plaintiff as part of plaintiff's role as general counsel").

alleged that a controlling shareholder had engaged in an ongoing manipulative scheme at the expense of the corporation and its shareholders.[45]

In *Khanna v. McMinn*, this Court granted the defendants' motion to disqualify Khanna as a derivative and class plaintiff.[46] Khanna served as general counsel to nominal defendant Covad during the relevant periods for all the transactions challenged.[47] According to his own testimony, Khanna "owned" corporate governance issues for Covad and had a role to play in such areas.[48] Following Khanna's termination from Covad, he threatened to bring a derivative and class action lawsuit against Covad unless he was rehired and promoted.[49] When his demands were not met, Khanna filed suit along with two other plaintiffs, and alleged breaches of fiduciary duty by certain directors for usurping corporate opportunities and enriching themselves at the company's expense through a series of transactions occurring over a period of at least three years.[50] In disqualifying Khanna, the Court relied on his prior position, his admitted involvement in the subject matter of the litigation, and "the cloud hanging over the litigation created by the tangential and acrimonious employment dispute between Khanna and his former

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[45] *Id.* at 2.
[46] 2006 WL 1388744 (Del. Ch. May 9, 2006).
[47] *Id.* at 42.
[48] *Id.*
[49] *Id.* at 43-44.
[50] *Id.* at 5-10.

employer."[51] Notably, two co-plaintiffs remained following Khanna's disqualification.[52]

Here, Bakerman is not challenging a series of transactions in which he was a key participant, but rather is challenging the allocation in a single transaction from whose negotiations he was actively excluded. Additionally, Bakerman had a role as an LLC member in approving the transactions, distinct from his role as SFIC counsel. Finally, unlike *Khanna*, no co-plaintiffs remain to prosecute this action in the event of Bakerman's disqualification.[53]

Defendants also argue that 95% of the ownership interests of the LLC do not support this lawsuit. A derivative claim may be maintained, however, without the support of a majority of ownership or even the support of the entire minority. Adequacy of representation is judged by how well a shareholder advances the interests of other similarly situated shareholders.[54] If it turns out that Bakerman is the only member disadvantaged by the lower allocation to the LLC, then one could not imagine a better representative than himself to pursue the appropriate remedies on behalf of the LLC. For these

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[51] *Id.* at 44.
[52] *Id.*
[53] This is a reasonable inference given Linda Rodman's connection to the Frank family, and her lack of involvement in this litigation to date. See n.2, *supra*., p. 8.
[54] *See Emerald Partners*, 564 A.2d at 674.

reasons, defendants' motion to disqualify Bakerman as a derivative representative is denied.

C. Bakerman's Derivative Claim for Breach of Fiduciary Duty

Bakerman alleges a breach of fiduciary duty claim against defendants on three separate grounds: (i) their artificial suppression of the transfer pricing in the vodka sales from SAS to SFIC before the Bacardi sale;[55] (ii) their misallocation of the purchase price paid by Bacardi;[56] and (iii) failing to disclose their conflicts of interest related to the allocation.[57] Defendants respond to the first claim thusly: as a knowledgeable member of the LLC and lead counsel to SFIC, Bakerman was aware of the transfer pricing for a period of two years. Because he remained silent despite numerous opportunities to raise the issue, Bakerman acquiesced to the transfer pricing. In response to the second claim, defendants argue simply that Bakerman signed his consent to the transaction as a member of the LLC. Bakerman replies that his alleged consent was the product of coercion. In response to the third claim, defendants argue that as Chief Legal Counsel to SFIC, Bakerman was aware of Einsidler and Thompson's holdings of SFIC shares and options, making disclosure of their conflict of interest unnecessary.

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[55] Am. Compl., ¶¶ 62-63, 115.
[56] *Id.* at ¶¶ 70-79, 115.
[57] *Id.*

1. Did Bakerman Consent to the Bacardi Transaction?

The parties dispute what standard is relevant to determining whether or not Bakerman's consent was coerced. The term "coercion" itself—covering a multitude of situations—is not very meaningful.[58] For the word to have much meaning for purposes of legal analysis, it is necessary in each case that a normative judgment be attached to the concept.[59] Bakerman argues that because his consent effectively ratified the managers' actions, its integrity should be protected in the same manner as a shareholder vote ratifying a board action.[60] Roughly, if some other party causes stockholders to vote in favor of a proposed transaction for some reason other than the merits of that transaction, then the vote has been inequitably coerced.[61] Defendants argue that this doctrine of inequitable coercion is inapposite to the bilateral negotiation that took place between Bakerman and Einsidler. They point to a line of contract cases where the standards for proving coercion are much more difficult to meet.

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[58] *Katz v. Oak Indus. Inc.*, 508 A.2d 873 (Del. Ch. 1986) ("A commonly used word—seemingly specific and concrete when used in everyday speech—may mask troubling ambiguities that upon close examination are seen to derive not simply from casual use but from more fundamental epistemological problems. Few words more perfectly illustrate the deceptive dependability of language than the term 'coercion.'")

[59] *Lacos Land Co. v. Arden Group, Inc.*, 517 A.2d 271 (Del. Ch. 1986).

[60] *See Williams v. Geier*, 671 A.2d 1368, 1382 (Del. 1996).

[61] *See, e.g., Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1061 (Del. Ch. 1987) (holding corporation's self tender to be impermissibly coercive); *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 112-15 (Del. Ch. 1986) (same).

a. The Inequitable Coercion Doctrine is Inapplicable

I agree with defendants that the inequitable coercion doctrine is inapplicable here, as it has been developed solely in cases dealing with diffuse shareholders. For example, in *Lacos Land Co. v. Arden Group, Inc.*, then-Chancellor Allen evaluated the integrity of a shareholder vote authorizing a proposed recapitalization.[62] The result of the recapitalization would have been to grant control of the corporation to the then-CEO, by effectively increasing the CEO's voting power from approximately 20% to 67% through the issuance of supervoting stock. In disclosures, shareholders were unmistakably told that unless they approved the recapitalization, the CEO would oppose transactions "which could be determined by the Board of Directors to be in the best interests of all of the stockholders."[63] The Chancellor found such a threat to undermine the structure of the shareholder vote to the point that it no longer satisfied the mandate of 8 *Del. C.* § 242(b) requiring shareholder consent to charter amendments.[64] Similarly, in *Eisenberg v. Chicago Milwaukee Corp.*, then-Vice Chancellor Jacobs found that a self-tender was inequitably coercive when a proxy statement seeking shareholder approval disclosed plans to delist the company's preferred stock,

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[62] 517 A.2d 271.
[63] *Id.* at 278.
[64] *Id.* at 279.

the board adopted a "no-dividend" policy, and timed the tender offer with a four-year low market price for the preferred stock.[65]

These cases in which the doctrine has developed are premised on the proposition that "proxy voting has become the dominant mode of shareholder decision making in publicly held corporations."[66] This premise does not apply to a member of a closely held LLC. Unlike diffuse shareholders, Bakerman was not inhibited by the costs of collective action. He sat across the table from Einsidler on two occasions in the span of half an hour. The inequitable coercion doctrine is simply unhelpful, analytically, for adjudicating such negotiations and arguments. Instead, there is a well-developed body of law meant to govern negotiations between parties, which I will use to address Bakerman's coercion allegations. Before proceeding to that analysis, however, it is worth examining a certain aspect in which the negotiations here differ from an arm's length bargain reached across a negotiating table.

b. Thompson and Einsidler Owed Bakerman a Duty to Disclose all Material Facts Bearing on the Decision at Issue

Einsidler was a manager of the LLC owing certain duties to members of the LLC such as Bakerman. When fiduciaries communicate with their

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[65] 537 A.2d 1051, 1061-1062 (Del. Ch. 1987).
[66] *Stroud v. Grace*, 606 A.2d 75, 86 (Del. 1992).

beneficiaries in the context of asking the beneficiary to make a discretionary decision—such as whether to consent to a sale of substantially all the assets of an LLC—the fiduciary has a duty to disclose all material facts bearing on the decision at issue.[67] "An omitted fact is material if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote. To prevail on a claim of material omission, therefore, a plaintiff must demonstrate a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable stockholder. There must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available."[68]

If Bakerman was unaware of Einsidler and Thompson's large holdings in SFIC, then Einsidler and Thompson owed Bakerman a duty to disclose such conflict of interest when they were urging him to consent to the allocation. Such conflict of interest clearly would have altered Bakerman's perception of Einsidler and Thompson's counsel that the allocation was indeed fair. Defendants argue that Bakerman nowhere alleges that he was

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[67] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 137 (Del. 1997) ("Delaware law of the fiduciary duties of directors … establishes a general duty of directors to disclose to stockholders all material information reasonably available when seeking stockholder action.")

[68] *Id*. at 143.

unfamiliar with the managers' relative interests in SFIC, for whom he was Chief Legal Counsel, and in the LLC, which he asserts he created. By virtue of his position within SFIC, Bakerman would have, or should have, known the actual amounts that the managers stood to gain from the Bacardi transaction. Drawing all reasonable inferences in favor of Bakerman, however, the Amended Complaint avers that he was unaware of the managers' holdings in SFIC. Possibly he was not involved in establishing the Warrant Plan because he was not a participant, and Sidney Frank delegated the details to someone who would not be as disappointed at being excluded from the plan as Bakerman likely was. Discovery should uncover what Bakerman knew of the Warrant Plan and Einsidler and Thompson's holdings in SFIC, at the time he signed the consent to the transaction. Therefore, I will not at this stage dismiss Bakerman's claim of a breach of fiduciary duty for failure to disclose the managers' conflicts of interest.

A material omission in the context of asking Bakerman to consent to a sale of substantially all the assets of the LLC could vitiate his consent, thereby ending the analysis of the effect of his consent. Nonetheless, appreciating that Bakerman's supposed ignorance of the managers' interests might be a reasonable inference that is simultaneously improbable, I proceed to examine whether or not Bakerman was wrongfully coerced to give his

consent. This examination will be subject, as defendants urge, to the well-developed set of standards governing products of bilateral contract negotiations.

c. Was Bakerman Coerced?

A party alleging actionable coercion or duress must plead (i) a wrongful act; (ii) which overcomes the will of the aggrieved party; and (iii) that he has no adequate legal remedy to protect himself.[69] The "wrongful act" is often the use of or threat to inflict immediate physical harm. This state, like many others, has broadened this element to include a wider range of wrongful acts, including economic duress.[70] Nevertheless, under the second element, the wrongful act "must be of such a nature as to actually over-ride the judgment and will of the other party…."[71] "The test for determining whether the duress produced the assent is a subjective one that focuses on the state of mind of the 'victim' of the duress."[72] The third prong focuses on whether the coercive conduct creates or takes advantage of an exigent circumstance such that the

[69] *Cianci v. JEM Enter., Inc.*, 2000 WL 1234647, at *9 (Del. Ch. Aug. 22, 2000).
[70] *See, e.g., Fowler v. Mumford*, 102 A.2d 535 (Del. Super. 1954) (recognizing "economic duress" as a basis to find coercion in the procurement of a contract); *Hanna Sys., Inc. v. Capano Group, L.P.*, C.A. No. 7408, slip op. (Del. Ch. Nov. 29, 1985) (same); *E.I. DuPont de Nemours and Co. v. Custom Blending Int'l, Inc.*, C.A. No. 16295, slip op. (Del. Ch. Nov. 24, 1998) (same).
[71] *Fluharty v. Fluharty*, 193 A. 838, 840 (Del. Super. 1937).
[72] *Hanna Sys., Inc. v. Capano Group, L.P.*, C.A. No. 7408, mem. op. at 7 (Del. Ch. Nov. 29, 1985) (citing Restatement (Second) of Contracts § 175, cmt. c. (1981)).

victim could not reasonably be expected to resist and seek legal relief to protect his interests.[73]

i. Was There a Wrongful Act?

Bakerman does not allege a threat of physical harm, but alleges two forms of economic duress: a threat to file a lawsuit against Bakerman and a threat to terminate his employment.

Threats of litigation constitute "wrongful acts" for purposes of a claim of coercion or duress, if such threats were made without a good faith belief that a viable cause of action existed.[74] Defendants offer one justification for the threat to litigate: Bakerman's purported violation of DR 5-104(a) four years earlier (by accepting a 5% membership in Grey Goose LLC) justified their threatened law suit against him if he were to exercise his rights as a member and refuse to consent. Whether that threat was made in good faith raises factual issues that may not be resolved at this juncture. The Amended Complaint alleges facts that would provide no good faith basis to threaten a lawsuit: (i) Bakerman acquired his interest in the LLC on fair and reasonable

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[73] This prong is an outgrowth of the principle that the victim must have no reasonable alternative to accepting the bargain. *See* Restatement (Second) of Contracts, § 175(a) (1981).

[74] *See Weber v. Kirchner*, 2003 WL 23190392, at *2 (Del. Ch. Dec. 31, 2003); *Edge of the Woods v. Wilmington Savs. Fund Soc'y, FSB*, 2001 WL 946521, at *5 (Del. Super. Aug. 16, 2001); *Way Road Dev. Co. v. Snavely*, C.A. No. 89C-DE-48, mem. op. at 9 (Del. Super. Jan. 31, 1992) ("As a general rule, a threat to enforce a legal right or to take legal measures by the filing of a civil lawsuit, cannot constitute duress so long as the party threatening filing the lawsuit did so in a good faith belief that a viable cause of action existed.").

terms, which were identical to the terms on which defendants acquired their own interests in the LLC;[75] (ii) those terms were fully disclosed in writing to SFIC in a manner that could be reasonably understood by SFIC;[76] and (iii) the potential conflict of interest was disclosed to SFIC.[77] Furthermore, it is unclear whether such a violation, without more, would support rescission of his interest in the LLC even if Bakerman had violated DR 5-104(a).[78] Finally, the timing of such threat—nearly four years after the alleged violation of DR 5-104(a)—only lends itself to the explanation that the threat was a bad faith attempt to elicit Bakerman's consent to the allocation of the purchase price. These allegations, when assumed to be true and viewed in the light most favorable to Bakerman, support a reasonable inference that defendants committed a wrongful act through a bad faith threat of litigation.[79]

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[75] Am. Compl., ¶¶ 38-40.
[76] *Id.* at ¶¶41-42.
[77] *Id.* at ¶ 42.
[78] *See, e.g., Schafrann v. N.V. Famka, Inc.*, 787 N.Y.S.2d 315, 316 (N.Y. App. Div. 2005) (dismissing client's malpractice claim where attorney accepted 10% partnership interest in violation of DR 5-104(a), but had otherwise disclosed conflict to client and client had consulted a disinterested third party). As *Schafrann* explained, "defendant's malpractice claim rests solely on an alleged violation of the Disciplinary Rules which, without more, does not support a malpractice claim." *Id. But see Schlanger v. Flaton*, 631 N.Y.S.2d 293 (N.Y. App. Div. 1995) (affirming rescission of attorney's interest in client's four corporations where attorney obtained such interests in violation of DR 5-104(a)).
[79] Defendants point out that Bakerman did not object during the June 18 meeting to the characterization that he was conflicted. Drawing all reasonable inferences in favor of Bakerman, however, the Amended Complaint suggests that Einsidler and the SFIC lawyers did not have a DR 5-104(a) conflict in mind, but rather some broader interpretation of the duties of a general counsel requiring him to abdicate his interests entirely when his interests as an LLC member diverged from those of his employer. Bakerman cannot be

Bakerman additionally contends that defendants' threat to terminate his employment constituted a wrongful act. Although Delaware possibly recognizes a covenant of good faith and fair dealing in at-will employment,[80] New York does not.[81] In New York, however, an employer's threat to terminate an at-will employee in order to obtain a release of claims is subjected to a standard apparently more stringent than ordinary contract principles.[82] Seven factors are considered: 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented or consulted with an attorney, 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law, and 7) whether

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expected to correct the SFIC lawyers of their erroneous understanding of "conflict of interest," provide them with an only slightly more plausible theory (DR 5-104(a)), and then remind them of the facts making this latter theory an empty threat—all in a span of thirty minutes, and without the benefit of his own counsel.

[80] *Reiver v. Murdoch & Walsh, P.A.*, 625 F. Supp. 998, 1014 (D. Del. 1985) (holding that threats of termination of an at-will employee to obtain a release of already accrued benefits could form the basis of an action predicated on economic duress).

[81] *Robertazzi v. Cunningham*, 294 A.D.2d 418, 419 (N.Y.A.D. 2 Dept. 2002) ("it is well established that there is no implied obligation of good faith and fair dealing in an employment at will"). In addition to Bakerman's residence and SFIC's doing business in New York, their employment relationship was centered in New York; New York law will therefore apply in determining the wrongful nature of threats made in New York to terminate such an employment relationship. *See Restatement (Second) of Conflicts*, § 145.

[82] *Bormann v. AT&T Comm., Inc.*, 875 F.2d 399, 403 (2d Cir. 1989).

an employer encourages or discourages an employee to consult an attorney.[83] As Einsidler and the lawyers argued that Bakerman's consent to the transaction was unnecessary in light of his conflict of interest, continued pursuit of Bakerman's consent was effectively an attempt to secure a release of claims that arose in the context of both Bakerman's holdings in the LLC and his employment for the SFIC.

Under New York law, Einsidler's threat to terminate Bakerman in order to obtain his consent arguably constituted a wrongful act. Several factors raise sufficient question as to the voluntariness of the consent in the context of the threat to employment: Bakerman was only given a half hour to examine the consent and purchase agreement,[84] he was given no role in crafting the consent, he was arguably entitled to the $700,000 even without signing the consent, and he was not represented by nor encouraged to consult counsel.[85]

At this stage, the threat of litigation and termination of employment have been sufficiently pled to satisfy the wrongful act element of a claim of economic duress.

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[83] *Id.*; *EEOC v. Am. Express Publ'g Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988).

[84] *Am. Express*, 681 F. Supp. at 220 ("Three days, while not conclusive as to involuntariness, is sufficiently short to create a question on the subject.").

[85] Einsidler's response to Bakerman's request to speak with Sidney Frank could be viewed as discouraging Bakerman from consulting anyone during his thirty-minute deliberation period.

ii. Was Bakerman's Will Over-Ridden?

As stated earlier, the second element of a claim of economic duress requires that the wrongful act "must be of such a nature as to actually over-ride the judgment and will of the other party…."[86] "The test for determining whether the duress produced the assent is a subjective one that focuses on the state of mind of the 'victim' of the duress."[87] Defendants secretly negotiated with Bacardi for months and waited to seek Bakerman's consent to the transaction until shortly before the public announcement of the sale.[88] After finally revealing the transaction and a draft of its proposed terms to Bakerman, defendants did not provide any substantive information to support the allocation. Before discovery into the events surrounding the eleventh hour ultimatum, and at this stage where all reasonable inferences must be made in favor of plaintiff, it is reasonable to believe that Bakerman's will was overcome.

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[86] *Fluharty*, 193 A. at 840.
[87] *Hanna*, at 7.
[88] Am. Compl., ¶¶ 67-69; 80. *See Hanna*, 1985 WL 21128, at *4 (finding that unreasonable delay in seeking consent until shortly before the transaction contributed to overcoming party's will). According to the Amended Complaint, defendants intentionally surprised Bakerman on the eve of a multi-billion dollar transaction that might disintegrate unless he signed the consent.

iii. Did Bakerman Have Adequate Legal Remedy to Protect Himself?

The final element of economic duress focuses on whether the coercive conduct creates or takes advantage of an exigent circumstance such that the victim could not reasonably be expected to resist and seek legal relief to protect his interests. Of particular note, therefore, is the manner in which the consent was requested, and the short time Bakerman was given to decide. Viewed in the light most favorable to Bakerman, Einsidler laid out a trap for Bakerman. The allocation was hidden from Bakerman until the eleventh hour,[89] he received an ultimatum threatening a lawsuit and employment termination, and he was given only 30 minutes to decide. Further, he was not permitted to speak with Sidney Frank; nor was he given adequate time or privacy to confer with counsel. Viewing the facts as pled in the light most favorable to Bakerman, his consent was coerced and does not preclude a claim for breach of the duty of loyalty.[90]

2. Did Bakerman Acquiesce?

In addition to alleging that Bakerman's consent to the Bacardi transaction bars his claims, defendants additionally argue that Bakerman's

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[89] Bakerman was likely lulled by the misinformation of an allocation by thirds, delivered by Peltz in the SFIC hallways a day earlier.

[90] At this point, there is no need to address Bakerman's alternative argument, that even if his consent had been given freely, it would only have the effect of shifting the burden of proof onto him in the entire fairness analysis.

acceptance of pecuniary benefits flowing from the transaction bars his claims under the doctrines of ratification and acquiescence. "Acquiescence arises where a complainant has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved."[91] Similarly, "[r]atification results if the party who executed the contract under duress accepts the benefits flowing from it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to annul or void it."[92]

a. In Respect to the Transfer Pricing?

It is unclear whether defendants properly challenged Bakerman's breach of fiduciary duty claim alleging defendants' artificial suppression of the transfer pricing in the vodka sales from SAS to SFIC during the years before the Bacardi transaction.[93] Regardless, drawing all reasonable inferences from the allegations in the Amended Complaint in favor of

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[91] *Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *24 (Del. Ch. Mar. 13, 2000) citing *NTC Group, Inc. v. West Point-Pepperell, Inc.*, C.A. No. 10665, slip op. (Del. Ch. Oct. 17, 1990).
[92] *Cianci*, 2000 WL 1234647, at *12.
[93] This issue was not directly addressed by defendants in their opening brief, and only footnoted in their reply brief. Defs.' Reply Br. at 15 n.11.

plaintiff, Bakerman was unaware of the transfer pricing and therefore did not acquiesce or ratify it.

According to the Amended Complaint, in 2003 SAS sold more than 2.3 million cases of Grey Goose Vodka, the majority of which was to SFIC at an unreasonably steep discount (the transfer price). Bakerman was terminated in August 2004. Although Bakerman's ignorance is not specifically pled, it is an inference that will be granted for the time being, keeping in mind that further discovery should quickly resolve what exactly Bakerman knew about the transfer pricing.

b. In Respect to the Allocation?

Defendants assert that Bakerman acquiesced in or ratified the purchase price allocation by accepting an employee bonus following the Bacardi sale and by waiting eighteen months to bring this lawsuit. Drawing all reasonable inferences in favor of plaintiff, however, Bakerman did not acquiesce in or ratify the purchase price allocation. Bakerman, like all SFIC employees, received a substantial employee bonus following the Bacardi sale. That bonus resulted from his SFIC employment and was unrelated to the purchase price allocation or his membership interest in the LLC.[94] Bakerman has never

[94] Am. Compl., ¶ 109.

received any distributions or other monetary payments for his membership interest.

Bakerman has not acquiesced in the purchase price allocation by inaction. Traditionally, the doctrine of acquiescence has included an additional showing that the plaintiff, by words or deeds, has acknowledged the legitimacy of the defendant's conduct.[95] An essential element of acquiescence is "that the acquiescing party shows unequivocal approval of the transaction."[96] Here, Bakerman did not show unequivocal approval of the allocation, as he vigorously objected to the allocation, even as he was allegedly coerced into consenting. Moreover, he repeatedly refused to sign a comprehensive release shortly after the transaction.[97]

D. Unjust Enrichment

Bakerman broadly alleges that as a result of defendants' wrongful and unjustified conduct, they have been unjustly enriched at the LLC's expense. Unjust enrichment is the "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental

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[95] *See Clements v. Rogers*, 790 A.2d 1222, 1238 (Del. Ch. 2001) (citing *Frank v. Wilson & Co., Inc.*, 9 A.2d 82, 87 (Del. Ch. 1939), *aff'd*, 32 A.2d 277 (Del. 1943)).
[96] *In re Best Lock S'holder Litig.*, 845 A.2d 1057, 1080-81 (Del. Ch. 2001).
[97] Einsidler acknowledged Bakerman's lack of acquiescence by interpreting Bakerman's refusal to sign a release as indicating that Bakerman was going to sue defendants. Am. Compl., ¶ 112.

principles of justice or equity or good conscience."[98] The elements of unjust enrichment are (i) an enrichment, (ii) an impoverishment, (iii) a relation between the enrichment and impoverishment, (iv) the absence of justification, and (v) the absence of a remedy provided by law.[99] Courts developed unjust enrichment as a theory of recovery to remedy the absence of a formal contract.[100] Therefore, claims of unjust enrichment may survive a motion to dismiss when the validity of the contract is in doubt or uncertain.[101] When the complaint alleges an express, enforceable contract that controls the parties' relationship, however, a claim for unjust enrichment will be dismissed.[102] This is the case even when the enforceable contract gives rise to a fiduciary relationship between the parties.[103]

Here, the relationship between the LLC and the defendants was expressly governed by the LLC's Operating Agreement and the fiduciary duties that arose from such an agreement. Bakerman argues unavailingly that

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[98] *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999).
[99] *Id.*
[100] *ID Biomedical Corp. v. TM Technologies, Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995).
[101] *See, e.g., Student Fin. Corp. v. Royal Indem. Co.*, 2004 WL 609329, at *7 (D. Del. Mar. 23, 2004) (rejecting motion to dismiss unjust enrichment claim where complaint alleged underlying contract was invalid and subject to rescission because of fraudulent conduct and omissions).
[102] *Rossdeutscher v. Viacom, Inc.*, 768 A.2d 8, 24 (Del. 2001) (applying New York law, terms of contingent value rights controlled); *ID Biomedical.*, 1995 WL 130743, at *15 (applying Delaware law).
[103] *Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 2130607, at *8 (Del. Ch. Aug. 26, 2005) (partnership agreement and fiduciary duties between managers and unitholders controlled, to the exclusion of unjust enrichment claim).

the LLC's rights to the allocation are governed by the APA. Count I (defendants' breach of fiduciary duty) and Count II (defendants' breach of contract), however, allege both a contract (the Operating Agreement) and fiduciary duties that governed both the substance of the allocation and the manner in which it was approved. Therefore, Bakerman's claim of unjust enrichment is dismissed.

E. Tooley Analysis

Defendants argue that Bakerman's individual causes of action are derivative in nature. The distinction between derivative and direct claims has only academic import at this stage because demand is presently excused and because Bakerman remains a member of the LLC[104] and an adequate representative of the class. Nonetheless, acknowledging that this issue may arise again after discovery and that defendants have pressed it on this motion, I turn to it briefly.

Whether a claim is derivative or direct depends solely upon two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders individually); and (2) who would receive the benefit of the recovery or other remedy (the corporation or the stockholders,

[104] A derivative claim may only be brought by a shareholder who continues to hold the shares of the corporation on whose behalf the shareholder is suing. *See* Ct. Ch. R. 23.1. *See also Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

individually)?"[105] In applying this test, the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint.[106]

Bakerman's contract and good faith and fair dealing claims are direct claims because they allege that defendants deprived Bakerman of his voting rights under the LLC's Operating Agreement, and because Bakerman would receive the benefit of any recovery. The deprivation of Bakerman's right to freely consent to the transaction is a harm unique to Bakerman that allegedly benefited certain controlling members of the LLC.[107] Consequently, Bakerman would be the eventual sole recipient of the remedy. For these reasons, Counts II and IV will be treated as direct claims.

F. Breach of Contract

Bakerman has pled a claim for breach of contract. Under the notice pleading standard,[108] he need only allege the existence of a contract, the breach of an obligation imposed by that contract, and the resultant damage.[109] Bakerman has satisfied the notice pleading burden by alleging that: (i) the Operating Agreement is a contract between the managers and members of the

[105] *Tooley*, 845 A.2d at 1033.
[106] *In re Syncor Int'l Corp. S'holders Litig.*, 857 A.2d 994, 997 (Del. Ch. 2004).
[107] *See Gentile v. Rossette*, 2006 WL 2388934, at *7 (Del. 2006) (finding public shareholders directly harmed by dilution of voting power redistributed to controlling shareholder).
[108] *See* Ct. Ch. R. 8(a)(1).
[109] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

LLC, including Bakerman and defendants;[110] (ii) defendants breached the Operating Agreement by obtaining Bakerman's consent through economic duress;[111] and (iii) Bakerman suffered substantial damages as a result.[112]

G. Breach of the Implied Covenant of Good Faith and Fair Dealing

Bakerman has adequately stated a claim for breach of the implied covenant of good faith and fair dealing. In Delaware, an implied covenant of good faith and fair dealing inheres in every contract.[113] The implied covenant is a "judicial convention designed to protect the spirit of the agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain."[114] Courts will find a breach of an implied covenant when it is "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith had they thought to negotiate with respect to that matter."[115]

"[I]n order to plead successfully a breach of an implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied

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[110] Am. Compl., ¶ 122.
[111] *Id.* at ¶¶ 123-124.
[112] *Id.* at ¶ 125.
[113] *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999).
[114] *Id.*
[115] *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998).

contractual obligation, a breach of that obligation by the defendants, and resulting damage to the plaintiff."[116] Bakerman claims that the implied contractual obligation arises from the Operating Agreement's requirement that members of the LLC unanimously approve certain fundamental transactions. Bakerman alleges that defendants have violated the implied contractual obligation by: (i) misallocating the transaction proceeds to serve their own self interests at Bakerman's expense; (ii) failing to disclose material information necessary to allow Bakerman to make an informed decision regarding the consent; (iii) depriving Bakerman of his right to give volitional consent to the transaction without coercion and duress; and (iv) executing the Bacardi transaction with knowledge of the coercive nature of the consent. These allegations are largely duplicative of earlier allegations of breaches of the duty of loyalty, the so-called duty of disclosure, and the Operating Agreement. Nonetheless, Bakerman may, after discovery, be able to show some independent breach of the duty of good faith and fair dealing that falls outside the ambit of these previously pled breaches.[117] For that reason, I decline at this stage of the matter to dismiss Count IV of the Amended Complaint.

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[116] *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).
[117] *See Bonham v. HBW Holdings, Inc.*, 2005 WL 3589419, at *10-11 (Del. Ch. Dec. 23, 2005).

H. Laches

The Amended Complaint is not barred by laches. A claim is barred by the doctrine of laches if the plaintiff, having learned of his claim, unreasonably delayed in asserting his rights and the defendants were prejudiced by the plaintiffs' failure to assert their claim in a timely manner.[118] Bakerman likely became aware of his legal options in the months following June 2004, and filed this lawsuit in December 2005. Following the filing of defendants' first motion to dismiss that attacked Bakerman's alleged conflict of interest, Bakerman filed the Amended Complaint that described communications with Sidney Frank and Lee Einsidler about such conflict. In the meantime, defendant Sidney Frank died in early January 2006, after the original complaint had been filed, but months before the filing of the Amended Complaint.

According to defendants, the delay in filing the original complaint has deprived them of a crucial witness regarding the communications alleged in the Amended Complaint. Defendants misconstrue the Amended Complaint—Bakerman does not allege a one-on-one conversation with Sidney Frank, but discussions that involved both Sidney Frank and Lee Einsidler. Further, the less than eighteen-month delay was a reasonable delay necessary to ascertain

[118] *Steele v. Ratledge*, 2002 WL 31260990, at * 2 (Del. Ch. Sept. 20, 2002).

the merits of Bakerman's claims and to retain counsel paid on a contingency basis. Finally, nothing suggests that Bakerman waited on the sidelines for Sidney Frank's death—Bakerman filed the original complaint in December 2005, nearly a month before Sidney Frank passed away. Bakerman amended the original complaint in order to respond to specific arguments raised by defendants in their first motion to dismiss. For these reasons, I conclude that the Amended Complaint is not barred by laches.

I. Tortious Interference

Bakerman cannot state a claim for tortious interference because the defendants are parties to the contract with which they allegedly interfered.[119] SFIC, Bruno, Sidney Frank, Einsidler, John Frank, Thompson, and Moselman, as members of the LLC, were parties to the Operating Agreement. They cannot be liable for tortiously interfering with their own agreement. Therefore, Count III must be dismissed.

IV. CONCLUSION

Bakerman's claims for unjust enrichment (Count V) and tortious interference (Count III) are hereby dismissed. For the reasons set forth above, however, I deny defendants' motion to dismiss Bakerman's remaining claims.

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[119] *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 590 (Del. Ch. 1994) ("It is rudimentary that a party to a contract cannot be liable both for breach of that contract and for inducing that breach."); *see also Winicki v. City of Olean*, 611 N.Y.S.2d 379 (N.Y. App. Div. 1994).

Counsel shall confer and submit a form of order implementing this decision. Counsel shall further confer and agree upon a scheduling order to move this case forward in an expeditious fashion.