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

KEVIN MCGOVERN and JON KOSLOW, on their own behalf and derivatively on behalf of KX Industries, L.P., a Delaware Limited Partnership,	)	
Plaintiffs,	)	
v.	)	C.A. No. 1296-N
GENERAL HOLDING, INC., CON HOLDING, L.P., KOSLOW TECHNOLOGIES CORPORATION, and EVAN KOSLOW,	)	
Defendants,	)	
and	)	
KX INDUSTRIES, L.P.,	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

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Daniel A. Dreisbach, Esquire, Elizabeth C. Tucker, Esquire, Daniel M. Silver, Esquire, RICHARDS LAYTON & FINGER, Wilmington, Delaware; Lawrence Portnoy, Esquire, William J. Harrington, Esquire, Elliot Moskowitz, Esquire, Ryan J. Hayward, Esquire, Esquire, DAVIS POLK & WARDWELL, New York, New York, *Attorneys for Plaintiffs Kevin McGovern and Jon Koslow, on their own behalf and derivatively on behalf of KX Industries, L.P.*

Kenneth J. Nachbar, Esquire, Samuel T. Hirzel, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; Gregory L. Diskant, Esquire, Erik Haas, Esquire, Jeffrey I.D. Lewis, Esquire, Thomas W. Pippert, Esquire, PATTERSON, BELKNAP, WEBB & TYLER LLP, *Attorneys for Defendants Con Holding, L.P., General Holding, Inc., Koslow Technologies Corporation and Evan E. Koslow.*

STRINE, Vice Chancellor.

This is a fight between a successful scientist and inventor, defendant Evan Koslow, and his two business partners, plaintiff Jon Koslow, Evan's late brother,[1] and plaintiff Kevin McGovern, who served as business and legal advisors to Evan for many years. Each of the antagonists owns an equity interest in a Delaware limited partnership known as KX Industries, L.P. or "KXI." Evan has by far the biggest stake in KXI, owning approximately 90% of its equity, and serves as its chief executive officer, chief inventor, and functions as its general partner, through a wholly-owned subsidiary. Jon and Kevin respectively own 7.75% and 2.68%, or a total of approximately 10%, of KXI as limited partners and have served as business advisors to Evan for many years.

This lawsuit has its origins in Evan's decision to try to squeeze out Jon and Kevin from KXI in early 2005. After causing KXI to invest millions of dollars inventing and trying to commercialize various new products — the "New Technologies" — Evan up and announced to Jon and Kevin in February 2005 that he had recently discovered that KXI actually did not and could not control the rights to those New Technologies. Rather, those rights belonged to defendant Koslow Technologies Corporation ("KT"). KT is a holding company wholly-owned by Evan that has had only one unpaid employee, Evan himself, since 1997. KT did not fund one dime of the research that generated the New Technologies Evan now claims it owns. KXI bore all the costs and risks of that inventive activity.

Evan's discovery of KXI's lack of control over the New Technologies appears to have emerged because of his desire to squeeze out Jon and Kevin from sharing the upside

[1] Sadly, Jon died on April 28, 2005, after completion of post-trial briefing.

in these New Technologies. On the table was a proposal for KXI to sell its most traditional business, which involved the production of extruded carbon-block water filters made using a proprietary technology known as the "ISF Process" and which I will call the "Legacy Business," and to use the resulting capital to pursue the various New Technologies it had been developing. In particular, KXI was intent on commercializing a product that could be used in the developing world to filter drinking water and thereby reduce the incidence of terrible waterborne diseases — the so-called "World Filter." Jon and Kevin had invested a great deal of human capital in helping KXI with the World Filter idea, and a joint venture agreement had been inked whereby they would work together with KXI to exploit that idea.

For reasons that the record does not reveal, Evan began to get greedy. Fixing upon the notion that he had now discovered that KT controlled the New Technologies, Evan began considering a plan whereby KXI would sell off its traditional business, Jon and Kevin would receive a one-time payment of around $10 million, and then Evan would be free to pursue all the New Technologies KXI had created through KT, free and clear of any ownership interest by Jon and Kevin. In documents he authored, Evan estimated the possible value of the New Technologies to be as much as $6 billion and the valuation of World Filter at more than $1.1 billion.[2]

When it became clear that Evan would not back off the notion that KT, and not KXI, had the right to exploit the New Technologies, Jon and Kevin brought this action.

[2] JX 1127, 1251. Another internal KXI document estimates the practical market for World Filter to be greater than $2 billion. JX 1249.

They sought Evan's removal as general partner on the grounds that he had breached his fiduciary duties by usurping for KT economic rights and opportunities fairly belonging to KXI. After years of having KXI invest millions of dollars in the New Technologies, Evan could not, in the view of Jon and Kevin, turn around and claim that these Technologies belonged exclusively to KT.

In defense of himself, Evan has raised a bewildering array of contradictory and confusing arguments, which are consistent only in the singular sense that they are designed to allow Evan to claim all the New Technologies for himself, to the exclusion of KXI and its limited partners, Jon and Kevin. After considering the testimony at trial and the voluminous documentary evidence, I come to the regrettable, but firm, conclusion that Evan's testimony cannot be credited. Concomitantly, I find that Evan breached his fiduciary and contractual duties to KXI by attempting to usurp the value of the New Technologies it had created for himself. For years, Evan put KXI's capital at risk to create these New Technologies, thereby diverting cash flow from the Legacy Business that might have been distributed to the equity owners. For him now to claim that those Technologies actually belong to KT and not KXI comes with no small degree of hubris, as he led everyone at KXI and KXI's clients and business contacts to believe that KXI controlled those Technologies. Indeed, Evan utilized the resources of KXI, including its own patent attorney, to secure patents in the New Technologies for KT, rather than KXI. Having lulled everyone, including Jon and Kevin, into believing that KT was simply a patent holding entity for KXI, Evan is in no equitable position to call "gotcha" and to deny KXI its rightful ownership and control of the New Technologies that its human and

financial capital solely created. That is especially so when Evan received nearly $900,000 each year (on a post-tax basis, no less!) to be KXI's chief inventor and general partner, roles in which his principal duties were fostering the creation of the New Technologies.

As a remedy for Evan's misconduct, I remove him as general partner and appoint a receiver to sell KXI. Before KXI's sale, the intellectual property rights to the New Technologies shall be transferred from KT to KXI. To ensure that Evan does not disrupt the sale process, he shall be precluded from bidding and shall be bound not to compete with KXI for a period of three years. Because Jon and Kevin were promised a greater stake in World Filter than in the rest of the New Technologies, the World Filter technologies shall be placed in KX Strategies LLC, the joint venture vehicle between KXI and them, to guarantee that they receive the appropriate share of the proceeds attributable to that product line.

Lastly, because Evan's breach of his fiduciary and contractual duties puts him well outside the permissible bounds of indemnity, Evan must reimburse KXI for the fees he has caused it to advance to him to defend this litigation. Relatedly, Jon and Kevin's litigation of this suit has clearly conferred a benefit on KXI and it shall bear their reasonable fees and costs.

I. The Parties

The plaintiffs in this case are Jon Koslow and Kevin McGovern. They sue individually and on behalf of nominal defendant, KXI. Jon and Kevin have sued Evan Koslow, the 90% owner of KXI for breach of fiduciary duty; breach of the KXI Limited Partnership Agreement; and for breaching other legal duties. Because Evan used an indirect wholly-owned subsidiary, defendant Con Holding L.P., to be KXI's General Partner, Jon and Kevin have sued both Con Holding and its owners, defendants General Holding, Inc. and KT. Likewise, Jon and Kevin sued KT because it is the corporation which Evan claims controls the New Technologies. For the sake of clarity, I rarely discuss General Holding or Con Holding, which are simply instrumentalities of Evan.

By way of context, it is useful to describe the relationship among Evan, Jon, and Kevin before the rift. Evan and Jon were extremely close, even for brothers. Both are gifted intellectually, but Evan is a scientist and Jon was a lawyer who spent most of his career doing financial consulting. Evan was the more successful economically, and Jon suffered frequent health problems. One senses that Evan, at times, involved Jon in his business as a means of helping Jon. But one also senses that there was a very strong bond between the brothers and that Evan valued Jon's business counsel.

Kevin McGovern is a lawyer whose counsel and friendship Evan also came to value. Eventually, Kevin became an equity owner of KXI, whom Evan regarded as a "partner." From the period 1997 to early 2005, Evan, Jon, and Kevin were very close, meeting frequently to talk about the direction of KXI and working together harmoniously.

II. Factual Background

There have been two key eras in KXI's history and the differences in those eras do much to explain how the current dispute arose. During the first era, Evan owned only a slight majority of KXI and went to great (and furtive) lengths to ensure that KXI's other owner, an affiliate of Exxon, did not obtain ownership of intellectual property beyond a narrow category relating to what I call KXI's Legacy Business. During the second era, Exxon was out of the picture and 90% of KXI was owned by Evan, with his trusted brother Jon and trusted friend Kevin as his only other equity partners. In that second period, Evan began to run KXI like a sole proprietorship, causing it to pursue the wide-ranging research and development program that eventually resulted in the development of the New Technologies. During that period, Evan eliminated all employees, any R & D activity at KT, and ran all his inventive activity through KXI.

I now describe the two eras.

A. Evan Forms KXI As A Joint Venture With Exxon

KXI was formed by Evan and Exxon Chemical Company in 1989. This partnership was structured between Con Holding, L.P., which is solely owned by Evan, and Enjay Inc., a wholly-owned subsidiary of Exxon. KXI was intended to exploit technology that Evan had developed that was useful, in simple terms, for the manufacturing of products that would help separate substances within liquids from the liquid itself. For example, a filter that separates pollutants from water is a separation technology. In particular, Evan had developed at KT, which had been functioning as an entity since 1976 and had several employees, something he called the "ISF Process." The

ISF Process is defined in the KXI Limited Partnership Agreement simply as an "in-situ fiberizing process." But the related patent application offers greater detail describing it as a method to create "fiberized composite materials and consolidated force point bonded composite materials."[3] The patent application also explains how the ISF Process generally works: "Particulate binder material is mixed with primary material. The binder material is then caused to form in-situ fibers or forced point bonds under proper conditions of heat, pressure and shear."[4] When that ISF Process is applied to separations products it is referred to as "ISF Technology." ISF Technology is defined in the LPA as "all . . . technology pertaining to separations products based on the ISF Process."[5]

The foundation of KXI, therefore, was the exploitation of the ISF Technology to make separations products. Exxon was "the money" and contributed $3.6 million in cash in exchange for a 49% share in KXI through its wholly-owned subsidiary, Enjay. Evan was to contribute the ISF Technology in exchange for a 51% interest and the right to act as CEO and general partner through Con Holding.

KXI was formally created through a 1989 KXI Limited Partnership Agreement (the "Partnership Agreement") between Enjay, the "Initial Limited Partner," and Con Holding. In the Partnership Agreement, KXI's purposes are stated as follows:

> (i) developing and marketing proprietary separations products utilizing the ISF Technology developed by the General Partner and to be further

[3] JX 2219 ("U.S. Patent Application Serial No. 314,651"). In lay terms, Evan described the ISF Process as mixing powdered or granular materials with thermoplastic binders and then applying heat and pressure to that mixture to form a solid substance in a continuous extrusion process. Tr. 1025-26, 987-88.
[4] *Id.*
[5] KXI Limited Partnership Agreement (hereinafter the "LPA" for citation purposes) Art. II.

> developed by the Partnership; and (ii) performing all other things necessary or expedient to carry out the foregoing.[6]

To secure KXI the intellectual property rights it needed, § 3.01(a) of the Partnership Agreement required that Evan's entity KTC enter into an agreement with KXI granting

> an exclusive, worldwide, royalty-free and irrevocable license to [KXI] . . . which license encompasses *all of the General Partner's right, title and interest in and to the ISF Technology and all future developments and applications thereof* . . . it being the intention of the Partners that the General Partner will contribute to the capital of the Partnership all property of whatever nature whatsoever that it and its affiliate own which is encompassed in the ownership, development and commercial production of the ISF Technology.[7]

Thus, Evan's initial capital contribution (through his affiliates) was to be the ISF Technology and "all future developments and applications thereof." Section 1.05 of the Partnership Agreement helped secured KXI's ownership rights by providing that "all property acquired by the Partnership shall be deemed to be owned by the Partnership, such ownership being subject to the other terms and provisions of this Agreement. Each Partner hereby expressly waives the right to require partition of any Partnership property or any part thereof."[8]

The partners recognized that Evan might engage in technology development activities that were beyond the scope of the purposes set forth in the Partnership Agreement. During the first three years of KXI, Evan was permitted to use KXI assets for non-KXI purposes "to the extent that there is excess capacity available and to the

[6] LPA § 1.02.
[7] *Id.* at § 3.01(a) (emphasis added).
[8] *Id.* at § 1.05.

extent that such use will not interfere with the operations of the partnership."[9] But if Evan used KXI's assets in that manner, he was bound to account fully for his use of KXI's resources and to reimburse KXI fully for that use.[10] Moreover, if he came upon "potential applications of the ISF Process outside the scope of the Agreement" — i.e., applications that did not involve separations products — Evan was bound to "promptly notify" Exxon, which would then have sixty days to determine whether it was interested in pursuing the "exploitation of such new application" with Evan.[11] In that event, Evan and Exxon would "negotiate the terms of such exploitation."[12]

At the end of the three year period, the Partnership Agreement prohibited Evan from using KXI's resources for his own purposes, thereby requiring him to use KXI's resources only for its own benefit.[13]

B. The 1989 License Agreement

By its own terms, the Partnership Agreement only requires that KXI receive a license from KT for KT's interest, i.e., Evan's interest, in the ISF Technology and "all future developments and applications thereof . . . ."[14] As will be seen, Evan largely premises his defense of this action on a license agreement (the "1989 License Agreement") that he caused KXI and KT to enter into on December 18, 1989. Although Evan claims that Kevin crafted the 1989 License Agreement, that self-serving claim is

[9] *Id.* at § 6.02(d).
[10] *Id.*
[11] *Id.* at § 6.07.
[12] *Id.*
[13] *Id.* at § 6.02(d).
[14] *Id.* § 3.01(a).

not believable. The record evidence strongly supports the conclusion that the 1989 License Agreement was crafted with Evan's input by Garold Bramblett, an intellectual property attorney who had done work for KT.

The 1989 License Agreement has two operative provisions. The first is uncontroversial and largely tracks § 3.01 of the Partnership Agreement: "[KT] grants to KX [Industries] an exclusive, worldwide, royalty-free and irrevocable license, with rights to sublicense, under all of its patents, patent rights and technical information within the definition of ISF Technology as set forth in the [Partnership Agreement]."[15] That is, what § 1 of the 1989 License Agreement does is give KXI full licensing rights to all the ISF Technology owned by KT.

What is more controversial is § 2 of the License Agreement. That section states:

> In the event KX [Industries] shall make any improvements, patentable or not, which are based upon the ISF Technology but which are not within the scope of the grant of exclusive rights made to KX [Industries] under Paragraph 1, then KX [Industries] shall disclose such improvements to [KT] and KX [Industries] agrees to assign its right, title and interest in said improvements to [KT].[16]

By its express terms, the Partnership Agreement required that Exxon give prior written approval to any contracts, between the affiliates of KXI and KT, including between the general partner and KXI.[17] From the record before me, I conclude that Evan did not obtain Exxon's prior written consent to the 1989 License Agreement. Indeed, it appears that he and Bramblett removed signature lines for Exxon from drafts of the 1989 License

[15] 1989 License Agreement § 1.
[16] *Id.* at § 2.
[17] LPA § 6.01(b)(vii).

Agreement.[18] Notably, the very day that the 1989 License Agreement was signed, Exxon sent Evan a detailed letter providing various authorizations contemplated by the Partnership Agreement. The License Agreement is not mentioned. At trial, Evan also conceded that he never received Exxon's prior written approval.[19]

At some point, however, Exxon appears to have learned of the 1989 License Agreement. I said "appears" because the record is, for understandable reasons, largely devoid of any testimonial evidence regarding Exxon's long-past dealings with Evan regarding KXI. What is clear from the paper record is that Exxon demanded that the economic fruits of R & D conducted at KXI after the initial three-year period belong to KXI and not to Evan. As to most categories, Exxon demanded that KXI receive patent rights in technologies developed at KXI. Even as to the development of technologies that neither used the ISF Process nor involved separations, Exxon took the position that if they were developed at KXI, then KXI had to receive a free and exclusive license to exploit those technologies. Moreover, I find it probable that Exxon's concerns about these issues were fueled by its discovery that Evan had caused KXI to enter into the 1989 License Agreement, which contained provisions inconsistent with the Partnership Agreement. That discovery likely contributed to the back-and-forth between Evan and Exxon regarding KXI's rights to new technologies developed at KXI.[20]

That haggling reflects the unstable relationship between Evan and Exxon. Under the Partnership Agreement, Exxon had the right to buy out Evan after four years or in

[18] JX 1002, 1003.
[19] Tr. at 961, 1030.
[20] JX 1004.

1993.[21] As the end of the first three years approached, Evan and Exxon were feeling each other out and seeing whether they would remain partners or go their separate ways. The tug-and-pull between them seems to have in no small part resulted from differing understandings and desires regarding the extent to which KXI would expand into areas other than the Legacy Business. It is likely that Exxon did not much trust Evan after learning after-the-fact of the 1989 License Agreement and kept a close eye on him.

In this regard, I find Evan's trial testimony regarding Exxon's knowledge of the 1989 License Agreement unbelievable. At his earlier deposition, he had little recall of his interactions with Exxon regarding the 1989 License Agreement, including when Exxon learned of that Agreement and its reaction when it did. The best evidence of Exxon's reaction is from the 1992 draft License Agreement it signed — and which it believed it had reached agreement on with Evan. In that draft, it is expressly stated that because the 1989 License Agreement did not contemplate non-ISF/separations and non-ISF/non-separations technologies, there needed to be a specific provision for the granting of "certain rights to patents, patent rights, technical information and improvements thereof" from KT to KXI.[22] That is, Exxon believed that the ownership of non-separations products based on the ISF Process was not settled. Also in the record is earlier correspondence from Exxon in 1990, including a draft version of the license agreement between KT and an Exxon entity regarding non-separation uses of the ISF Process.[23]

[21] LPA § 8.02(b).
[22] JX 2006.
[23] JX 2005.

This also suggests that no agreement regarding such uses had been reached between the parties as of that time.

Although one cannot be certain, it is probable that these differences of opinion were an important factor inspiring Evan to make the strategic choice to buy out Exxon. When combined with Exxon's reluctance to provide capital that Evan desired for KXI or to allow KXI to obtain outside capital, Exxon's expectation that KXI would benefit from all the technologies it created led Evan to want to strike out on his own, free from the constraints of a major co-investor.

In 1997, Evan acted on that desire. With the aid of both Jon and Kevin, Evan bought out Exxon's then 60% share for $7.4 million. In exchange for their assistance as well as payments for equity in KXI offered to them by Evan, Jon and Kevin acquired 7.75% and 2.68% of KXI respectively, leaving Evan as the approximately 90% owner.

In contemplation of the Exxon buyout, the Partnership Agreement was amended to provide for a material enhancement in Evan's personal compensation from KXI. As of that time, Evan's compensation from KXI had been unspecified and Exxon had consented to paying him $100,000 annually for the time he devoted to KXI. The amendments granted him a salary of $165,000 annually to be KXI's chief inventor.[24] Even more lucrative were the annual "Service Fees" of $500,000 to $750,000 annually that Evan's personal vehicle, Con Holding, was to receive for acting as General Partner. This Service Fee was subject to a tax gross-up, meaning that the amount awarded was the post-tax amount enjoyed by Evan because Con Holding was an "S Corporation." From

[24] JX 1173.

1997 through 2004, Evan awarded himself the full $750,000 each year, plus tax gross-ups, and his salary as chief inventor increased from $165,000 to over $207,000.

C. Exxon Departs And KXI Becomes The Vehicle For All Of Evan's R & D Efforts

Once Exxon was bought out, Evan began using KXI as the vehicle through which he conducted all of his activities as an inventor. Although the provisions of the Partnership Agreement setting forth its purpose as solely "the business of developing propriety separations products utilizing ISF Technology . . . and . . . performing all other things necessary or expedient to carry out the foregoing"[25] remained, Evan ignored those provisions and set KXI on the path towards a much broader scope of R & D activities that focused well beyond the Legacy Business.

Not coincidentally, by the time of the Exxon buy-out, KT's own R & D capacity was, in Evan's words, "nil."[26] Free and clear of Exxon, Evan geared up in 1998 to begin looking at non-ISF technologies in earnest for the first time in many years. He did that searching at KXI, using its employees, facilities, and funds. KT did nothing and had no employees or research facilities — it was a mere shell. In fact, former KT employees became employees of KXI after the buy-out. All R & D was funded by KXI or by third-parties who had contracts with KXI.

By the current century, KXI had a broad-gauged and aggressive R & D program to develop what I call the New Technologies. Evan was the driving force behind that program and crafted many KXI business plans and marketing documents reflecting that

[25] LPA § 1.02.
[26] Evan Koslow Dep. 156-160.

program. The Legacy Business consisting of a carbon-block water filter made using the ISF Process remained critical to KXI. The Legacy Business made KXI a world leader in the production of extruded activated carbon water filters and the first manufacturer of many of the water filters found in American homes.[27] The revenues from the Legacy Business provided capital for the broader R & D program Evan had conceived and was implementing.

That broader R & D program involved several New Technologies, including:

The World Filter

- The World Filter, KXI's proverbial golden egg, seems to have been the catalyst for the nasty dispute between the partners. It is an innovative and one-of-a-kind generation of water filters created "to bring pure water to the world."[28] The World Filter products basically are water filters comprised of three layers that uniquely prevent microbiological threats from passing into drinking water and that amazingly only cost one penny per day per household to use. Designed to exceed the EPA's criteria for any water quality, and the only filter certified by the California Department of Health Services, the World Filter's intended consumers are the millions of impoverished people living in regions throughout the world where clean drinking water is not available and where waterborne infectious diseases, such as typhoid, cholera,

[27] JX 1434.
[28] The description of the World Filter is taken from an internal KXI confidential World Filter presentation given to potential investors and partners. JX 1434.

trichiasis, and schistosomiasis, claim millions of lives a year. One example of World Filter's potential use was its capability to decontaminate dirty river water of bacteria, cysts, and live viruses. In addition to what KXI touted as its "revolutionary" and "unparalleled microbiological" function and incredibly economical cost,[29] the World Filter has a failsafe feature that shuts the filter down when it needs to be replaced, which importantly prevents people from continuing to rely on the World Filter when it no longer properly functions.

PLEKX Technology

- PLEKX is a type of filtration media used for both air and water with many applications, including medical/surgical products, chemical/biological protection devices such as gas masks, and odor absorption. The technology consists of a three-layer composite containing a high concentration of adsorbents. PLEKX has yielded sales for KXI and was anticipated to have strong growth potential with estimated sales of approximately $5 million in 2005.[30]

Nanofiber Technology

- Nanofiber technology, fibers between 50-400 nanometers or nanons in diameter, is another potentially lucrative New Technology because of the wide range of commercial applications. When used in areas such as

[29] JX 1417, 1434.
[30] JX 1249.

paper coatings and paints or as reinforcing fibers in plastics and building products, the nanofiber technologies KXI is working on were estimated by it to be worth tens of millions of dollars.[31] When developed as nanofiber foam, nanofiber technology may have uses as acoustic panels and thermal insulators. KXI discussed its nanofiber technology initiatives with several companies, including Mead Westvaco. Mead Westvaco projected sales of more than $90 million worldwide on a non-exclusive basis.[32]

The Flat Diaper

- KXI also engaged in an attempt to create a so-called "flat," i.e., very thin, diaper with Procter & Gamble. Although Procter & Gamble left the project, KXI continued efforts to develop an extremely thin laminate diaper that unlike contemporary diapers would expand only to "accommodate the liquid insult."[33] This New Technology is believed to have great commercial potential for adults with a need for hygiene products.

During the post-Exxon era, KXI developed a strong management team that supplemented Evan's inventive creativity. Don Caufield eventually became the President and CFO of KXI. Larry Walters was hired as KXI's general counsel. More than forty scientists and technicians were employed by KXI to work on its R & D program. An in-

[31] JX 1249, 1251.
[32] JX 1319.
[33] JX 1435.

house team, including a subordinate lawyer of Walters', Shirley Ma, who worked as KXI's in-house patent counsel, worked with outside counsel to ensure protection for the intellectual property that was being generated. As we shall see, the manner in which they proceeded raises questions, but the fact that KXI funded their work and that of outside counsel is not.

Increasingly, Caufield took over the management of KXI's Legacy Business, freeing Evan to concentrate on pushing the R & D program for the New Technologies in his role as "chief inventor."[34] The breadth of that program is outlined in multiple documents that Evan himself prepared for KXI, which set forth the firm's capacious R & D agenda.

By the year 2004, that agenda had succeeded to the point where KXI believed itself to be at a strategic crossroads. KXI was generating sales of approximately $32 million annually, with the Legacy Business contributing 95% of the revenues.

Although the Legacy Business was successful, Evan perceived the New Technologies to have the most potential for growth. In particular, Evan discussed with Jon and Kevin the global potential for World Filter. If KXI could in fact create a low cost filter that would help rid water in the developing world of viral, bacterial, and chemical contaminants, as well as waterborne cysts, and thereby prevent waterborne diseases like typhoid and cholera, Evan, Jon, and Kevin perceived that billions of dollars in revenues could be made.

[34] Caufield Dep. 10, 57. As KXI's in-house counsel stated, "[Evan] is the chief inventor, the chief technologist. He clearly is the man who seems to know just about everything about the business." Walters Dep. 97.

The three of them began to ponder a strategy where KXI would monetize its investment in the Legacy Business, by selling it, and then plough the resulting proceeds back into the New Technologies. As part of that strategy, the three of them began negotiating the formation of a specific joint venture vehicle for the exploitation of the World Filter concept, KX Strategies LLC or "KXS," which was to have the exclusive worldwide rights to distribute and market the World Filter. The reason for that was that Jon and Kevin had devoted a considerable amount of time and energy into marketing that concept and looking for partners that would help KXI introduce that technology into key markets, such as Brazil, China, India, and Peru. As compensation for their work on launching World Filter, Kevin and Jon were to receive a 3.15% interest and a 1.85% interest in KXS respectively, with KXI owning the other 95%. Moreover, Jon and Kevin were to receive $16,750 and $7,500 respectively each month to spend certain percentages of time on the World Filter each month.

During this period, KXI frequently engaged in discussions with third-parties about the New Technologies. In these presentations, KXI touted the value of the New Technologies and represented to the third-parties that it owned the New Technologies. For example, presentations made to Nestle[35] and Mead Westvaco,[36] internal company documents (some prepared by Evan),[37] internal communications drafted by patent employees,[38] and draft term sheets prepared for KXI and third-parties[39] all reference that

[35] JX 1011, 1432.
[36] JX 1027.
[37] JX 1125.
[38] JX 2034, 2036.

KXI was the designer, developer, owner, or patent-holder of technologies such as the World Filter, microbiological interception technologies, PLEKX, nanofiber, lube oil filters, and the flat diaper.[40] Any reasonable third-party would have read the materials and understood them as representing that KXI controlled the rights to the New Technologies.

In keeping with the broadening of KXI's focus and the potential to sell off the Legacy Business, Evan devised a plan in late 2004 to divide KXI into four divisions: one each for World Filter, Nanofiber, KX R&D, and KX Legacy.[41] KXI planned to hire new employees and Kevin and Jon worked with headhunters to locate someone to head the Nanofiber Division and to serve as CEO of the new World Filter business. Evan also formalized Caufield's status as the key manager for the Legacy Business in October 2004 by sending a memorandum to all the KXI employees indicating that Caufield was the new President and CFO of KXI and that with Caufield assuming responsibility for the operations of the company, Evan would "focus upon an enlarged science and technology program" — that is, Evan would focus on the agenda to exploit the New Technologies.[42]

In December 2004, in a document circulated internally and drafted by Evan entitled "Plan for the Development of Future Businesses," Evan outlined a broad plan for KXI's future. In that document, Evan did not mention KT. Instead, he led all recipients to believe that the New Technologies belonged to KXI and were its to exploit, and went

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[39] JX 1304.
[40] JX 1078, 2036.
[41] JX 1399.
[42] JX 1445.

on to outline his ideas for doing just that. In fact, Evan even discusses the potential sale of the Legacy Business in these terms: "It is important in any sale of [the Legacy Business] to avoid curtailing, or hampering unduly, the ability of KX Industries to operate in these diverse areas and using all of the technologies retained after the . . . sale."[43]

As of the end of 2004, therefore, the future of KXI seemed bright, with its three equity owners in alignment. Through Kevin's intercession, KXI retained Goldman, Sachs & Co. to be its financial advisor in seeking a sale of the Legacy Business. Non-binding expressions of interest from potential buyers suggested that the value of the Legacy Business was between $65 and $110 million. Meanwhile, Jon and Kevin were heavily engaged in trying to make World Filter a success, and Evan was driving KXI's larger R & D agenda.

D. Evan Decides To Cut Out Jon And Kevin

In early 2005, Evan had a change of heart about continuing to work with Jon and Kevin. The reasons for that are not clear. There is some indication that Evan was under financial pressure because of a pending divorce, pressure that might have led him to consider whether he wanted to share 10% of KXI's future value with Jon and Kevin forever. Contributing to those thoughts might have been the final version of the Strategic Members Agreement for KXS, the entity that was given the worldwide right to exploit World Filter, signed in early 2005 although dated June 2004. That agreement gave Jon and Kevin 5% of World Filter, on top of the value they would receive as owners of KXI.

[43] JX 1078.

Furthermore, Jon and Kevin, in particular the latter, were increasingly active in the business side of KXI through the World Filter initiative. One gets the impression from the record that this rankled Evan. Although he valued Jon and Kevin as advisors, Evan saw himself as the creative force behind KXI and believed Jon and Kevin should be grateful for whatever they received from him. Evan believed that the New Technologies his team at KXI had developed were extremely valuable — with the potential to be worth billions of dollars — and he began exploring possibilities for pursuing them without Jon and Kevin.[44]

Consistent with his inventive streak, Evan conjured up a pretext for claiming that KXI was not what its employees, investors, and third-party business contacts had been led to believe. At a meeting in early February between Kevin and Evan, Evan told Kevin that he and KXI's general counsel, Larry Walters, had "come upon" an old License Agreement, dated December 18, 1989, between KXI and KT that required that patents for new technology developed by KXI be assigned to KT.[45] Under that 1989 License Agreement, Evan claimed for the first time that all the New Technologies developed by or under development at KXI, with the exception of the Legacy Business and certain of

[44] Overall, the potential market for these non-legacy technologies was valued in May 2005 to be $6 billion. JX 1249. In an internal KXI valuation prepared by Evan, the technologies are valued at hundreds of millions of dollars. JX 1015, 1016.

[45] McGovern Dep. 335-36; JX 1001. I largely credit McGovern's version of events and do not believe Evan's. The record as a whole reveals Evan's notion that the original Partnership Agreement and the 1989 License Agreement "made him do it" to be a contrivance to excuse his selfish plans. In that regard, the lack of evidence that key KXI officers like Caufield and Walters viewed the 1989 License Agreement as important is just one, albeit an important, factor. Evan's own February 13, 2005 email, soon to be discussed also is consistent with McGovern's version of events.

the filtration products marketed by KXI under the PLEKX name, were owned by KT and not KXI.

Shortly thereafter, Evan sent an email to his brother Jon explaining the "defect" in KXI's ownership of the New Technologies.[46] In the February 13 email, in which he also copied Walters and Caufield, Evan wrote:

> I mentioned to Kevin today that during our preparation for the Legacy Sale, we reviewed the original Partnership Agreement and that there are defects in the ownership of certain technology rights at KX. This defect does not affect the sale of Legacy, and therefore, is not a problem for [Goldman Sachs]. Instead, it is a problem relating to later technologies. Larry, Don and I think it can be mitigated to an incomplete degree.
>
> Without going into major detail, the original KX Partnership Agreement only allowed KX to develop the ISF Technology for Filters and Separations all of which were defined. In addition, if KX developed any technologies outside of filtration and separations or ISF Technology, they were to be entirely assigned to KT Corporation . . . .
>
> We think the original license can be interpreted to allow the World Filter and PLEKX to be licensed to KX. The case for PLEKX looks good and the case for WF is a bit more difficult. However, the case for technologies that are neither ISF-Technology based and not filters or separation processes is probably clear and they can not be read on the current license.
>
> We can not rewrite the license as this would be a major transfer of assets. Under essentially all scenarios, there would be a major tax problem.[47]

Jon and Kevin both claim to have been shocked to receive this e-mail. According to them, they had either not known about, or failed to focus upon, the 1989 License Agreement when they first became limited partners of KXI. Rather, the license they focused upon was the one referenced in § 3.10(a) of the Partnership Agreement, which by

[46] JX 1439.
[47] Pl. Ex. 8 (Email from Evan Koslow dated Feb. 13, 2005).

its own terms only required Evan to assign the ISF Technology to KXI.[48] In the transactional documents by which they became limited partners, there was no reference to the 1989 License Agreement.[49] But Jon and Kevin also had to admit during the litigation that their files regarding KXI contained copies of the 1989 License Agreement.

That reality, however, is not nearly as important as Evan claims. Evan himself told Kevin that he had "come upon" the 1989 License Agreement in early 2005,[50] suggesting that it was never considered an operative document at KXI during the post-Exxon era. Indeed, Evan's use of that Agreement surprised KXI President Caufield and General Counsel Walters, who always had believed that KXI had the right to exploit the New Technologies it had developed.

A few days after the February 13 email, Evan, Jon, Kevin, Walters, and Caufield attended a meeting at Heidricks & Struggles to discuss the hiring of a CEO for the World Filter business and to interview candidates. At some point during this meeting, Jon tried to speak to his brother about the tax issue mentioned in Evan's February 13 email and shared his viewpoint that perhaps the tax issue was not a true impediment. Kevin also joined in that conversation. At that point, Evan had a tantrum. He began screaming that he owned the New Technologies and that he did not want to discuss the subject further.[51] In what could only have been an unintentionally hilarious moment, Evan — who is not in

[48] Tr. at 67-68.
[49] JX 1136, 1137, 1174, 1175.
[50] McGovern Dep. 335-36.
[51] Tr. at 179-84, 489-90, 723, 1168-69.

the least bit physically intimidating — began waving a water bottle menacingly at Kevin while continuing his rant. As the English would say, "handbags at six paces."

Evan followed up the rancorous meeting by developing plans to squeeze Jon and Kevin out of the upside of the New Technologies. Simultaneous with his revelation that he had discovered that KXI could not own many of the New Technologies it had paid to develop, Evan was developing proposals to capitalize on the value of those Technologies for himself, using KT as his vehicle. In a February 22 document, Evan outlined "Post Sale New Business Development Options" for KT.[52]

The document is revelatory. It covers all of the New Technologies that were the subject of the business and R & D plans Evan had previously created for and circulated within KXI for KXI. But in this options memorandum, instead of those Technologies belonging to KXI, Evan pitched them as being owned by KT. Unwittingly, the document itself illustrates the fungibility of KXI and KT to Evan. Although this memorandum includes as its first page a summary page that bears KT letterhead, the rest of the document maintains a header from KXI from May 2003! That the options memo looks strikingly like documents Evan had previously created for KXI is not coincidental. Evan, in fact, appears to have taken a pre-existing KXI document outlining the New Technologies and changed it to a KT document. But Evan failed to remove the page headers, which state "KX Industries, L.P." and "13 May 2003" at the top of each page.[53]

[52] JX 1251.
[53] *Id.*

In the part of that memorandum that was clearly written in early 2005, Evan then outlines his expectation that the Legacy Business of KXI could result in net proceeds of $90 million. From those proceeds, Evan expected to distribute $10 million "to non-KT Corporation partners currently having minority ownership in KX Industries"[54] — i.e., Jon and Kevin. In other words, Evan planned to distribute to Jon and Kevin their pro rata share of the proceeds from the sale of KXI's Legacy Business and claim that the New Technologies were owned solely by KT. Not coincidentally, the memorandum also reflects Evan's optimistic view of the value of the New Technologies, indicating that the "total potential markets for the products contemplated may be as high as $6 billion, with $2 billion in sales considered during the next ten years."[55]

After Evan's February 13 meeting, Jon and Kevin consulted counsel at Davis Polk & Wardwell. Davis Polk sent Evan a memorandum outlining their concerns about Evan's claim that he alone, through KT, controlled the New Technologies. Evan did not react well to the memo. He emailed Jon stating that if Jon and Kevin did not back away from their position then he would consider it a "permanent breach of [their] relationship"[56] and no longer would consider Jon his brother. Around this same time, Kevin learned from Goldman Sachs that Evan was seeking to pursue transactions with third-parties, such as Honeywell, whereby the New Technologies would be exploited without participation by KXI. This was consistent with Evan's desire to squeeze out Jon

[54] *Id.*
[55] *Id.*
[56] JX 1439.

and Kevin and to leave them with a goodbye kiss in the form only of a pro rata share of the proceeds from a sale of the Legacy Business.

Soon thereafter, Jon and Kevin filed this lawsuit.

III. The Claims That Require Resolution

The pleadings in this case raise a plethora of claims and counterclaims, many of which are duplicative and many of which were abandoned. In particular, Evan dropped certain defenses and his counterclaims by failing to devote any of his post-trial briefing to them. For reasons that this opinion makes implicitly clear, those counterclaims have no merit and Evan is not in a position to be playing offense.

For their part, Jon and Kevin have proliferated legal theories centering on the same conduct by Evan that they claim is wrongful. Because one rarely gets an easier opportunity to prevail than by proceeding against a fiduciary for violating his duty of loyalty, I concentrate my analysis on the fiduciary duty claims against Evan.[57] Because those claims are meritorious, as are certain claims that Evan breached the KXI Partnership Agreement, I need not dilate on the various tort rubrics under which Jon and Kevin also seek to hold Evan accountable.[58]

Rather, the more efficient fashion in which to proceed is to consider the various ways in which Jon and Kevin claim that Evan breached his fiduciary and contractual duties to KXI. The primary way is clear — they claim that Evan's attempt to usurp the

[57] *Cf. Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs.*, 854 A.2d 121, 156 (Del. Ch. 2004) (explaining that when a court considers claims of breach of fiduciary duties and various common law and equitable fraud claims "the standards that a fiduciary faces are tougher than the common law and equitable fraud standards . . .").

[58] For example, Jon and Kevin have pled common law fraud and conversion claims.

value of all the New Technologies KXI developed at its own expense is an outrageous act of fiduciary infidelity. As a consequence for that serious breach, they seek Evan's removal and injunctive and declaratory relief vesting in KXI the intellectual property rights in the New Technologies.

IV. Legal Analysis

Determining whether Evan breached his fiduciary duties to KXI and breached the KXI Partnership Agreement by attempting to usurp the value of the New Technologies is not a difficult task — he clearly did. What is more difficult is addressing the silly and confusing excuses he advances for his disloyalty.

By the end of trial, Evan's central excuse was that the 1989 License Agreement made him do it. Evan admitted he had a "fiduciary problem"[59] explaining at trial that "there is this problem . . . because the [1989 License Agreement] actually puts me in this fiduciary problem."[60] That Agreement, which he unilaterally caused to be signed between KT and KXI, allegedly forced him to assign the New Technologies to KT. He simply had no choice or he would violate his fiduciary duties to himself at KT.

To be understated, that contention is self-serving nonsense. In the following pages, I will explain in as economical a way as I can why Evan's fictional account of events does not excuse his infidelity to KXI.

There are several key reasons. First, the 1989 License Agreement was moribund in the post-Exxon era and was of dubious importance and validity even before Exxon left

[59] Tr. 887, 890, 1163, 1164, 1166.
[60] Tr. 890-91.

the scene. Second, even if the 1989 License Agreement had some durability, Evan was not free to use KXI's resources to pursue initiatives that would not benefit it and would only benefit KT. Finally, even under Evan's own convoluted interpretation of the 1989 License Agreement, the New Technologies belong to KXI and not KT.

I will now outline these reasons in more detail.

A. The 1989 License Agreement Was Moribund

Evan re-discovered the 1989 License Agreement in early 2005.[61] Given that admission, it comes with ill grace for him to contend that the 1989 License Agreement had been scrupulously administered by KXI over the years.

The record evidence is quite to the contrary. Although admittedly the 1989 License Agreement was mentioned here and there in documents, it played no role in the manner in which KXI conducted its operations after Exxon left the scene. And even before Exxon left the scene, the question of what intellectual property belonged to KXI and what to Evan was a source of discussion and dispute. As noted before, Evan never received Exxon's approval for the 1989 License Agreement and Exxon had a different view of what belonged to KXI than Evan did. That disagreement was part of the inspiration for the parting of the ways between Evan and Exxon.

Once Exxon left, the 1989 License Agreement had no relevance. Evan mothballed KT and converted it into a patent holding company *for KXI*. All of the creative work was done at KXI using KXI's resources. No work was done at KT and KT had no employees

[61] McGovern Dep. 335; *see also* JX 1439 (2/13/05 email indicating that Evan had discovered a problem with KXI's intellectual property rights after review of the original documents from 1989).

other than Evan, and he received no pay from KT. In fact, many KT employees became KXI employees.

Now, it is true that if Jon, Kevin, Caufield, and others had focused on the patents that were being processed in the post-Exxon era, they would have noticed that the patents were almost invariably being placed in KT's name.[62] But none of them focused on that reality because it was not considered relevant. The employees at KXI reasonably believed that KT was simply the holding vehicle in which KXI was placing its patents.

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[62] As I discuss in the text as well, I reject Evan's argument that Jon and Kevin focused upon and believed the 1989 License Agreement had vitality. Evan admits that he never discussed the 1989 License Agreement with Jon or Kevin, never explained his supposed understanding of how it worked to them, and did not tell them his view of it until February 13, 2005 when he contacted Kevin and emailed Jon. Tr. 1092-93. Evan, however, contends that Jon and Kevin must have known about the 1989 License Agreement because it was found in their files during discovery and both served as advisors to Evan before the Exxon buyout.

Both Jon and Kevin, however, disclaim any knowledge of the 1989 License Agreement. Jon testified that he first learned of the separate 1989 License Agreement during this litigation and otherwise has no recollection of that agreement. Tr. at 30-33. When that Agreement was found in Jon's papers during discovery, it was included along with many other documents in a thick binder of documents related to Exxon. JX 2007.

Evan, therefore, focuses on Kevin's knowledge of the 1989 License Agreement. Evan contends Kevin was not only his personal attorney but also KXI's business attorney who was well acquainted with the 1989 License Agreement. Evan alleges that Kevin drafted both that Agreement and the Partnership Agreement. Kevin, who provided legal advice to Evan on issues related to KXI before the Exxon buyout, admits to having negotiated the Partnership Agreement but denies having drafted the 1989 License Agreement. The record does not support that Kevin was the drafter of that License Agreement and I credit Kevin's testimony that he was not. Moreover, most of Kevin's direct involvement in any KXI legal matters occurred well before the Exxon buy-out. Another attorney, Garold Bramblett, now deceased, served as patent counsel for KT and worked with Evan on the 1989 License Agreement. JX 1465 (1997 letter from Bramblett to Exxon stating he was intellectual property counsel to KT and KX).

After the Exxon buy-out, lawyers at Kevin's firm did work on patent matters for KXI, which KXI paid for. Some of that work involved securing patents on the New Technologies for KT. But that is immaterial as the patent lawyer at Kevin's firm believed, as did all who worked for and with KXI, that KT was a patent holding vehicle for KXI.

In sum, although there is some evidence in the record that Kevin came across the 1989 License Agreement at some point, there is no suggestion in the record he drafted it or gave it any real attention. As I have noted, Evan's testimony that the 1989 License Agreement was viable as of the period that the New Technologies were created is not credible.

Obviously, they could have been more careful, and so could Jon and Kevin. But the perception that Evan consistently fostered was that KXI was the entity that controlled the New Technologies and stood to benefit from them. Indeed, the very effort to secure the intellectual property rights for the New Technologies was led by KXI. KXI had its own patent attorney, Shirley Ma, who worked with outside counsel to protect the New Technologies.

The fact that the patents were assigned to KT appears to have drawn no notice from key KXI employees like Caufield and Walters for an obvious reason: they were continually told by Evan in written communications that these were KXI technologies and opportunities. The very essence of the KXI business strategy was the diversification into the New Technologies. The use of an affiliate of the general partner, Evan, as a holding vehicle simply did not draw anyone's attention, for the rather obvious reason that they could not have conceived that Evan, who was deploying KXI's resources to create the New Technologies, would seek to claim that those Technologies belonged exclusively to himself, rather than to KXI.

Making that point clear are numerous documents created by Shirley Ma, KXI's Patent Counsel, Larry Walters, KXI's General Counsel, and Kevin's colleague, Brian Foley, who acted as KXI's outside patent counsel in recent years. In these documents, Ma, Walters, and Foley consistently use KXI letterhead. They frequently use phrases like "our technology,"[63] "[o]ur U.S. patent portfolio,"[64] and "KX's intellectual property"[65] in

[63] JX 2034.
[64] JX 2036.

clearly referring to the New Technologies. Evan Koslow himself referred to the World Filter in a memo to Kevin and Walters that was copied to Jon and Caufield as "our World Filter,"[66] a clear reference to KXI.

Likewise, KXI also represented to third parties with whom it was seeking to explore new opportunities that it controlled the New Technologies. For example, in late 2004, KXI represented to Mead Westvaco that it owned a "bundle" of intellectual property rights for the nanofiber products that KXI was developing.[67] Evan published articles on New Technologies, including nanofibers and flat diaper, in his capacity as CEO of KXI, representing that they were KXI's Technologies.[68] Likewise, KXI made presentations to Perrier Group and Nestle touting the World Filter as KXI's property.[69] As Evan admitted at trial: "[I]n front of a lay customer, no one has ever heard of KT Corporation. It's just a holding company for patents. So you never mention KT Corporation."[70]

That telling admission comports with the operative reality at KXI itself. None of the key managers at KXI believed that KXI did not ultimately control the New Technologies. They viewed KT as simply the holding company for patents that Evan led them to believe it was.

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[65] JX 2030.
[66] JX 1133.
[67] JX 1441, 1023, 1442.
[68] JX 1371, 1435.
[69] JX 1131, 1434.
[70] Tr. 1149-50.

That assumption was perfectly rational, as was Jon's and Kevin's assumption that KXI would control the economic benefits that could be realized from the New Technologies. Making that clear was Evan's own admission that he never told Kevin or Jon before February 13, 2005 that KXI did not own the World Filter or its other New Technologies.[71] Evan also admitted that he never told the partners that KT owned the patents.[72] Evan attributed his failure to inform them to his "policy" which was "to always share with the partners."[73]

In other words, Evan led everyone at KXI to believe that KXI would control and benefit from the New Technologies that were being developed at the company. That includes Jon and Kevin. Regardless of whether a dusty copy of a dubious 1989 License Agreement that Evan had attempted to foist on Exxon without its prior consent was in a file somewhere, in the post-Exxon era KXI had been run on the notion that its purposes were as broad as its R & D program and that the fruits of that program belonged to it. To the extent that anyone at KXI was aware of KT, they understood that entity to be simply the vehicle that KXI used to hold its patents for KXI's benefit, not the benefit of simply Evan personally.

That understanding was reasonable because it was reinforced at every turn by Evan himself, whose communications within and without KXI all sent that message. That message was utterly inconsistent with any vitality for the moribund 1989 License Agreement, an Agreement that no one at KXI, including Evan, consulted in the post-

[71] Tr. 1092-93.
[72] Tr. 132-34, 895-96; Caufield Dep. 90-91, 196-97; Walters Dep. 185-85, 190-92.
[73] Tr. 891.

Exxon period. For example, KXI President Caufield testified he had no real familiarity with 1989 License Agreement.[74] And the extensive records relating to the activities of KXI's patent employees in securing protection for the New Technologies nowhere refers to that Agreement. Evan's argument that there had been "careful and consistent administration of the 1989 License Agreement for sixteen years" finds no logical basis in the record.[75]

Rather, it was only in early 2005, when Evan was seeking to find a way to justify denying Jon and Kevin a share in the upside from the New Technologies, that he again rediscovered the 1989 License Agreement. Evan then invented the idea that the Agreement required him to ignore the entire procession of KXI's business since Exxon departed, on the notion that the Agreement required that KXI not own the New Technologies despite the fact that it had invested in their creation on the premise that the fruits of that effort belonged to it. Unfortunately for Evan, that invention does not come close to fulfilling its intended function of justifying his attempt to usurp KXI's rights to the New Technologies. My first grader comes home with more plausible excuses for his misbehavior.

B. Evan Breached His Fiduciary Duties And The KXI Partnership Agreement By Causing KXI To Pursue An R & D Agenda From Which It Could Not Benefit

Even if the 1989 License Agreement was operative, Evan would still have breached his fiduciary duties and the KXI Partnership Agreement, and KXI would still have the equitable right to control the New Technologies. In so opining, I assume for the

[74] Caufield Dep. 196-97.
[75] Def. Post-Trial Reply Br. 15.

moment something that is not at all true, which is that the 1989 License Agreement would have assigned all the rights to the New Technologies to KT and not to KXI. Even when making that untrue Evan-friendly assumption, Evan's conduct was unconscionable and unlawful.

Under the Partnership Agreement, Evan had no right to use KXI's resources for his own purposes after the first three years of KXI's existence.[76] Before the expiration of that three-year period, any use by Evan of KXI's resources had to be fully accounted for and reimbursed by him.[77] He made no such accounting or reimbursement to KXI.

Although it arguably could have been the case that KXI could have, in pursuing projects for its own benefit, inadvertently hit upon technologies the rights to which it would then assign to Evan under the 1989 License Agreement, there is no plausible case that the 1989 License Agreement authorized Evan, in his capacity as general partner, CEO, and chief inventor of KXI, to cause KXI to establish and implement an R & D program, the costs of which would be borne by it, but the benefits of which would belong to KT.

Nothing in the Partnership Agreement or the 1989 License Agreement remotely sanctions such an unusual arrangement, which departs from the common law expectation that a fiduciary inventor will assign patents to the fiduciary's employer.[78] From the time

[76] LPA § 6.02(d).
[77] *Id.*
[78] *E.g.*, *Gasser v. Infanti Int'l, Inc.*, 353 F. Supp. 2d 342, 352 (E.D.N.Y. 2005) ("an officer or director of a corporation generally has a fiduciary duty to assign patents to that corporation"); *Great Lakes Press Corp. v. Froom*, 695 F. Supp. 1440, 1446 (W.D.N.Y. 1987) (same); *Golden Eagle/Satellite Archery, Inc. v. Epling*, 244 A.D.2d 959, 959-60 (N.Y. App. Div. 1997) (holding

Exxon left, the proceeds from the Legacy Business had been largely directed by KXI into the development of New Technologies. This was a conscious business decision — outlined in business and R & D plans authored by Evan himself — to develop technologies that Evan now says had to be assigned to KT. It is difficult to conceive of a more outrageously disloyal act than the execution of a business plan by an entity that would involve its investment of capital in initiatives from which it could not profit.

Reinforcing the impropriety of Evan's behavior are the financial costs to KXI of its business plan. These included:

- The substantial payments to Evan himself for his efforts as KXI's chief inventor, for which he received compensation that cost KXI (because of the tax gross-up) over $1.4 million annually. Indeed, KXI paid other management to run its operations and Evan's principal function was to run the R & D program, a reality made clear in 2004 when Evan made Caufield President and CEO of KXI so that Evan could focus on KXI's "enlarged science and technology program."[79]
- Tens of millions of dollars in actual cost to develop the New Technologies.
- Paying all the costs of securing patents for the New Technologies.[80]

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that CEO and President was precluded from retaining patents procured while employed because of his "fiduciary duty to act in the best interest of [the company] and not deprive it of any corporate opportunity").

[79] JX 1445.

[80] A conservative estimate is that KXI spent at least $13.621 million on R & D for the New Technologies between 2001 and 2004. These expenditures included all patent expenses, such as

If Evan truly believed that KXI was limited to pursuing extension of the Legacy Business and could not pursue the New Technologies, his fiduciary and contractual duties to KXI were clear. KXI should have invested only in the Legacy Business and if that Business was stable, KXI should have returned excess cash flow to its investors, including Jon and Kevin.

What Evan could not cause KXI to do was to pursue a business strategy that could only benefit himself personally, to the exclusion of KXI and its other investors. Under Delaware law, a general partner and its representative must manage the partnership in the best interests of the partnership and deal fairly with the limited partners.[81] Unless an agreement between the partners makes clear that the partners intended to preempt fundamental fiduciary duties, a general partner is obligated to act fairly and prove fairness when making self-interested decisions.[82] If Evan is correct in his view that KXI could not benefit from the New Technologies and only his wholly-owned company KT would benefit, it was clearly wrongful and disloyal for him to cause KXI to develop them.

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the litigation, filing, and maintenance of patents and retention of patent counsel, for at least the past ten years. Caufield Dep. 14. The amount expended is likely much higher as this estimate, which was calculated well after the expenditures had been made, was undertaken only when required as part of the preparations for the sale of the Legacy Business.

[81] *E.g.*, *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002); *In re Boston Celtics, Ltd. P'ship S'holders Litig.*, 1999 WL 641902, at *4 (Del. Ch. Aug. 6, 1999); *Boxer v. Husky*, 429 A.2d 995, 997 (Del. Ch. 1981) ("The duty of the general partner in a limited partnership to exercise the utmost good faith, fairness, and loyalty is . . . required both by statute and common law.").

[82] *E.g.*, *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *5 (Del. Ch. Sept. 10, 1999); *see also Gotham Partners*, 817 A.2d at 167-68 (suggesting that there may be limits on the ability of parties to a limited partnership agreement to completely eliminate the fiduciary duties the general partner would otherwise owe to the other partners).

Similarly, behavior of that kind clearly violated the Partnership Agreement itself. Under Delaware law, "property acquired with partnership funds is partnership property"[83] unless the Partnership Agreement explicitly provides otherwise, which in this case the Agreement does not. In fact, § 1.05 of the Partnership Agreement reiterates that "all property acquired by the Partnership shall be deemed to be owned by the partnership . . . Each partner hereby expressly waives the right to require partition of the any Partnership property or any part thereof . . . ."

Moreover, § 6.02(d) of the Partnership Agreement provides that the resources of the partnership may be used only for partnership purposes and not for the personal benefit of any of the partners. Evan's use of KXI resources to fund the research and development of the New Technologies and their underlying patents, which he then assigned to KT and claims to solely own, violated § 6.02(d)'s prohibition on the use of partnership resources for personal benefit.[84]

C. Even If The 1989 License Agreement Is Operative, Which It Is Not,The New Technologies Belong To KXI

As discussed earlier, the 1989 License Agreement has very suspicious origins, and Evan admits to having crafted it without Exxon's prior involvement. Although Jon and

[83] 6 *Del. C.* § 1508(b) (1999), 6 *Del C.* § 17-1105 (2004) (explaining that since the Delaware Revised Uniform Limited Partnership Act does not specifically address the issue of partnership property, the earlier partnership statute's provision on partnership property governs).

[84] Evan's conduct also conflicts with §§ 3.04 and 3.05 of the LPA providing that distributions may be made only in proportion to the units owned: "[A]ll allocations among the Partners of . . . Partnership assets . . . will be made to the Partners in the proportion that the number of Partnership Units owned by each Partner bears to the total number of Partnership Units issued and outstanding." Evan's assignment of the patents underlying the New Technologies that were developed solely with the resources of KXI was a breach of the LPA because partnership assets were removed improperly and were allocated solely to him.

Kevin have advanced colorable arguments that the 1989 License Agreement was invalid from the start, because it was substantively inconsistent with the Partnership Agreement[85] and executed without the required prior approval of Exxon,[86] I choose not to delve into that old history. The New Technologies at issue were developed after Exxon left the scene, and even before then, it was clear that Exxon did not believe that Evan could use KXI for whatever he chose, and then claim ownership of the results for himself. Indeed, the Partnership Agreement denied Evan the right to use KXI's resources for non-KXI purposes after three years.

In an excess of caution, however, I will address why Evan loses even if the 1989 License Agreement is in effect and even if was permissible for him to have KXI implement a business plan for the benefit of KT only. These are powerful counterfactual assumptions and it is telling that Evan does not even win under that scenario.

The provision of the 1989 License Agreement that Evan hinges KT's rights upon is the second paragraph, which contains the so-called grant-back provision to KT. It purports to require KXI to assign all right, title, and interest to KT for "any

[85] Evan's interpretation of the grant-back provision of the 1989 License Agreement is inconsistent with the general license in § 3.01 of the LPA. The general license described in § 3.01(a) is the General Partner's initial capital contribution to KXI, which was an exclusive royalty-free license of all the General Partner's rights to ISF Technology and all future developments and applications, but the grant-back conflicts with that broad license by requiring KXI to "assign its right, title and interest" in any "improvements, patentable or not, which are based upon ISF Technology" to KT. It is unclear how Evan could unilaterally alter his initial capital contribution to KXI and otherwise narrow § 3.01 of the LPA. The limited partners also argue with some force that no consideration was provided for the grant-back provision in the 1989 License Agreement. KT was required to give a license to the legacy technology as an initial capital contribution to KXI but KT did not provide any other consideration for the grant-back.

[86] Section 6.01(b) of the LPA requires that the General Partner obtain "prior written consent of the Initial Limited Partner" before entering contracts with any other Partners or their affiliates.

improvements, . . . which are based upon the ISF Technology" under the first paragraph of the 1989 License Agreement. That is, the grant-back provision from KXI to KT applies only to "improvements . . . based upon the ISF Technology." Thus, even if the 1989 License Agreement is somehow valid and enforceable, if an improvement is not based on ISF Technology then the grant-back provision of the 1989 License Agreement is irrelevant and does not apply resulting in KXI's retention of "improvements."

Because Evan's attempt to usurp the New Technologies turned so heavily on the KXI Partnership Agreement and 1989 License Agreement, it was obvious that a key question would be what technologies were based upon the ISF Technology and what technologies were used for separations products. For some time in the litigation, Evan pushed the point that the New Technologies could not belong to KXI because the KXI Partnership Agreement stated that its purpose was "developing and marketing proprietary separations products utilizing the ISF Technology developed by the General Partner and to be further developed by the Partnership"[87] and all things necessary to carry out that purpose.

Therefore, even though Evan had caused KXI to pursue a broad range of initiatives not including the ISF Technology or even separations, Evan argued in his pre-trial brief that the limited business purpose of KXI obligated KXI to assign to KT ownership of improvements made at KXI outside that narrow purpose of using the ISF Process for separations products. In fact, Evan made what is fairly called a broad "oops" argument premised on the notion that the narrow purposes clause of the KXI Partnership

[87] LPA § 1.02

Agreement rendered KXI unable to have undertaken the broad business strategy based on the development of the New Technologies Evan had created for it in the post-Exxon era.[88] In other words, from 1997 to the present Evan had caused KXI to conduct business that KXI was, he discovered in 2005, prohibited to undertake! Consistent with this bizarre theory, Evan appears to have approached discovery into the relationship of the New Technologies to the ISF Technology with the mindset that he was best served, as a selfish matter, by seeking to keep the universe of technologies related to the ISF Technology narrow, because that would minimize what KXI would control.

Whether that was the reason or not, when discovery proceeded, Evan in fact took the position that the New Technologies were unrelated to the ISF Technology and resisted responding to requests to link the patents he assigned to KT to specific R & D.[89] When asked in an interrogatory about the technologies and business concepts being developed at KXI, Evan listed several New Technologies, including World Filter, anti-microbiological coatings, lubricating oil filters, nanofiber-enhanced engine air intake filter medium, activated carbon electrodes, nanofiber using wet mechanical-chemical process, and diaper and adult hygiene cores.[90] When asked later to explain the relationship between each of those New Technologies and the ISF Technology, Evan responded that with the exception of PLEKX, there is "no relationship between ISF Technology and the other technologies and business concepts" listed in the earlier

[88] *E.g.*, Def. Pre-Trial Reply Br. 3; Def. Post-Trial Br. 12-13.
[89] JX 1153.
[90] JX 1153 ("Interrogatory No. 1").

interrogatory.[91] That is, Evan stated that the New Technologies were not related to ISF Technology. For this reason, the grant-back provision in the 1989 License Agreement is irrelevant to this dispute and cannot serve as a justification or defense for Evan's assignment of assets and patents to KT. When there is no relationship between a New Technology and the ISF Technology, that means even more clearly that the New Technology was not "based upon," i.e., the starting point or line for an action or undertaking,[92] the ISF Technology.

As to PLEKX, the interrogatories stated that "there is a superficial relationship" between PLEKX and the ISF Technology.[93] There also is testimony from Evan that PLEKX is not based upon ISF Technology. Evan stated that "PLEKX which was — had always been thought of as an ISF Technology really wasn't"[94] and that "PLEKX was not an ISF Technology."[95] If the non-legacy technologies in dispute are not even "related" or have no "relationship" to ISF Technology, then the grant-back provision in the 1989 License Agreement is inapplicable. Because the grant-back is inapplicable, Evan has no justification for his assignment of New Technologies to KT rather than KXI. Thus, even when we assume there is a valid and enforceable License Agreement, Evan's assignment

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[91] *Id.*
[92] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 133 (1988).
[93] JX 1153; Evan Koslow Dep. 188, 194.
[94] Evan Koslow Dep. 184.
[95] Evan Koslow Dep. 188; *see also* Tr. at 862-64, 884-85. Evan's convenient flexibility on the relationship between PLEKX and ISF Technology is illustrated also in his February 13, 2005 email to his brother Jon in which he implies PLEKX could be licensed to KXI. In that email, Evan maintains that "the original license can be interpreted to allow the World Filter and PLEKX to be licensed to KX" and that "the case for PLEKX" in particular "looks good." JX 1007.

of New Technologies to KT was a breach of his fiduciary duties to the limited partners and to KXI.

At trial and in his post-trial briefs, Evan made a variety of confusing and unconvincing arguments seeking to reconcile his discovery responses that the New Technologies were not related to the ISF Technology with his lawyer's arguments that those Technologies had to be assigned to KT because they were based upon the ISF Technology. For example, Evan argued that whether various technologies are or are not related to the ISF Technology is "irrelevant" to whether a patent improvement is "based upon the ISF Technology."[96] To clarify this statement, Evan offered as an example the microbiological interception chemistry stating:

> The MB interception chemistry is not "the ISF Technology" (or "the ISF Process"). It is also not "related" to the Technology or Process. The technical complexities of the chemistry have no relation to the technical complexities of extruding a separations product. Yet the experimentation for MB interception chemistry started in the field of ISF Technology, and the chemistry is applicable in that field and in other fields.[97]

This makes no sense. Whether something has a relationship with ISF Technology or, in this case whether the New Technologies are related to ISF Technology, encompasses and connotes something broader than the phrase "based upon," which implies a more substantial and direct kind of relationship. Evan now seems to interpret "based upon the ISF Technology" so broadly that everything KXI has worked on could be considered "based upon the ISF Technology" in some way because ISF Technology serves as the technological foundation of KXI's Legacy Business and all its later R & D activities

[96] Def. Post-Trial Reply Br. 13-14.
[97] Def. Post-Trial Reply Br. 14.

arose in some manner out of the that Business. But that is clearly an unreasonably broad construction of the 1989 License Agreement and is an obvious attempt to run away from his discovery responses, which dispositively indicate that the New Technologies are not based upon the ISF Technology.

Consistent with Evan's ever-shifting concept of reality, he "invented" for the first time in his pre-trial brief an excuse for claiming that the World Filter belonged to KT, not KXI. Interestingly, this idea was grounded in the notion that the KXI had originally tried to develop a "three-layer" World Filter using the ISF Technology. That effort did not work. If it had worked, Evan admits that KXI would own the World Filter because it would have been an ISF-based separations product. As it turns out, Evan claims that the "two-layer" version of World Filter that KXI successfully developed does not involve the ISF Technology.[98] Because the successful version of the World Filter, although not based on the ISF Technology, could hypothetically be used in a product manufactured with the ISF Process, Evan maintains that the successful version belongs to KT. Under this new dual use theory Evan articulated at trial and then in his post-trial briefs, Evan contends that the grant-back provision to KT includes blended technologies. Thus, if he can conceive of a way to use a specific technology, such as the technology in the two-layer World Filter, in connection with or on a product made with the ISF Process even when that specific technology has no relationship to ISF, then that specific technology belongs to KT.

[98] Evan Koslow Dep. 194.

To evidence the seriousness with which Evan supposedly takes his fiduciary duties, Evan admitted for the first time in his post-trial briefs that he should not have spent some of KXI's resources on the two-layer version of the World Filter during the period (which he estimates at only sixty days) in which he did not clearly explain to Jon and Kevin that the two-layer version was not an ISF Technology with the scope of the 1989 License Agreement. Accordingly, Evan offers to rectify that sixty-day "oversight" by stating that KXI "should be made whole by [KT]."[99] That is, although the version of World Filter that works has no relationship to ISF Technology, Evan claims that it belongs to KT because World Filter could potentially work with a product that involves the ISF Technology. That is recently-minted gobbledygook.

In written discovery and in his deposition, Evan was asked extensive questions about World Filter. Nowhere did he discuss the two-layer and three-layer versions of the product. Rather, Evan rolled out his claim that the one version of the World Filter — the one that he proclaims to work — belonged to KT for the first time in his pre-trial brief. That was improper to say the least. And in any event, his new thesis is convoluted and bizarre, as illustrated by this trial testimony:[100]

> EVAN KOSLOW: Let's use World Filter. World Filter was originally patented as a 3-layer composite made by PLEKX, which is an ISF Technology. But the patent is not that product. The patent is for chemistry applied to a microporous structure. That microporous structure could be the ISF PLEKX construction, or it could be a microporous structure composed by a completely third party, non-licensed, non — it's not our technology . . . . The ISF Construction with that chemistry comes right

[99] Def. Post-Trial Reply Br. 34.
[100] This is but a brief excerpt from the lengthy trial testimony in which Evan offers confusing excuses to justify his position.

back to KX Industries. We call that the three-layer ticket. But the two layer, which is made on a paper machine — and we don't own that technology — does not come back to KX, because that is not our technology. That chemistry, when applied to some third party, remains outside KX Industries and remains the property of KT Corporation.

THE COURT: This is — I mean, this is a very spliced kind of thing. If it were purely — in that situation, the two-layer technology had — the one that you say is outside of KX, if that had been developed at KX, then it would have stayed at KX, except for the dual usage?

EVAN KOSLOW: It was not patented in that fashion. We couldn't get a patent like that. That is open-domain technology. The only patent we have in World Filter is for chemistry applied to any microporous structure. If we claimed it for ISF use only, every competitor would simply implement it on a paper machine and would take it away from us.

THE COURT: That's not what I'm saying. If you claimed it for only non-ISF use, it would stayed at KX.

EVAN KOSLOW: You are absolutely right, Your Honor.[101]

* * *

EVAN KOSLOW: Well, I invented this technology twice. Many people think the three-layer could be made to work, but –

THE COURT: Right. What you are saying is you have something that you tried to use with the ISF Process. It didn't work. You are now saying KT has the ability to go — despite all this marketing by KX around this filter, when that doesn't work you can abandon KX and go to KT, because you are using non-ISF with this same patent. What is the — what is the idea that you are matching with this non-ISF technology?

EVAN KOSLOW : Okay . . . . What I did in 2004 is I went to the partners and said, "We are having trouble with the three-layer. We are going to two layers. It's going to be produced by a paper mill . . . . I said to them, "It's not a problem. KX will make the paper, anyway. We will oversee the production. It will stay within KX. KX will manufacture it. You will all

[101] Tr. 833-34.

> share in the manufacturing margin. No problem. Didn't look like a problem.[102]

In the end, Evan is justly stuck with his original discovery answers. According to those answers, none of the New Technologies are "based upon the ISF Technology." Therefore, they were never subject to being assigned to KT under the 1989 License Agreement. All of the New Technologies were developed by KXI and KXI is entitled to control them.

D. Did Evan Pay Himself Excessively As General Partner?

Beginning in 1999, Evan awarded himself the maximum service fees permitted under the Third Amendment to the KXI Partnership Agreement, $750,000 a year. Evan also paid himself a "tax gross-up" of more than $535,000 a year with the exception of 2001 when the gross-up was $345,432.[103] Because of Evan's breach of his fiduciary duties, Jon and Kevin object to Kevin's award of the maximum service fees each year and allege that the gross-up was improper under the Partnership Agreement or its amendments. I do not agree.

Although Evan clearly breached his fiduciary and contractual duties by assigning to KT rather than KXI the patents and intellectual property rights underlying the New Technologies, the proper remedy for that misconduct is not a forfeiture of Evan's past compensation. Rather, as I describe in the next section, the return of the New

[102] Tr. at 852-53. Throughout his papers, Evan maintains that he generously and fairly considered the interests of the limited partners by permitting KXI to have informal and unlicensed access to KT patents — an implicit admission that he led everyone at KXI to believe it controlled the New Technologies. As an example, Evan cites his overtures to share the two-layer World Filter with KXI while claiming that the two-layer World Filter belongs to KT.
[103] JX 1153 ("Con Holding Response to Interrogatory No. 20").

Technologies is the fitting and proportionate remedy that fairly redresses Evan's wrongs. In addition, the service fee gross-up is specifically provided for in the Third Amendment to the Partnership Agreement. That Amendment defines both the "Service Fee" and "Service Fee Gross-Up"[104] and states "The General Partner may receive Service Fees . . . In addition, the General Partner shall be entitled to a Service Fee Gross-Up."[105] The Third Amendment plainly states that such gross-ups are permitted and how the gross-ups should be calculated.[106] The Third Amendment was adopted before the Exxon buy-out and both Jon and Kevin were well aware that it existed when they joined as limited partners. Although Jon and Kevin may regret the payment of these services fees and the gross-ups, the Partnership Agreement unambiguously permits them. Thus, the service fees and service fee gross-ups Evan awarded himself were permissible under the Partnership Agreement.

E. Did Evan Wrongly Deny Jon And Kevin Their Right To Compensation Under The KXS Consulting Agreement?

The limited partners allege that Evan breached his obligations under the KXS Consulting Agreement and owes them their respective fees. Under the KXS Consulting Agreement signed in 2004,[107] Jon and Kevin claim that they are due certain compensation for the time and effort each expended on helping KXI develop World Filter. That agreement sets out that Jon is to receive $7,500 each month for spending approximately thirty percent of his business time on the World Filter product while Kevin is to receive

[104] JX 1173 at ¶ 1.D.
[105] *Id.* at ¶ 5 (amending § 6.02(b) of the Partnership Agreement).
[106] *Id.* at ¶¶ 1.D., 3(a) (stating that the tax payment distribution is computed at a rate of 44%).
[107] JX 1013.

$16,750 each month for spending approximately sixty percent of his business time. Both limited partners met and exceeded those requirements but once the dispute between the partners surfaced Evan directed that all payment of fees owed be stopped.[108] Thus, Jon and Kevin are due their respective fees for the time they spent on World Filter that remains uncompensated and for the fees they would have received had Evan not wrongly prevented their continued work on the project.[109]

V. What Is The Proper Remedy?

A. KXI Must Be Dissolved

By the end of trial, Evan's position was that KXI should be dissolved because the relationship between himself and Jon and Kevin was dysfunctional. That is one position of Evan's that I actually embrace fully. Jon and Kevin agree that the relationship is dysfunctional and they do not trust that Evan will mend his ways and begin to act as a trustworthy general partner. They seek to supplant Evan with themselves (or at least did so before Jon's regrettable passing) and, as the new general partner, appoint a professional manager to run the business. By contrast, Evan says that the business should

[108] Early in this litigation, Evan claimed that KXI was wrongly included as a party to the KXS Agreement of Members and that he did not review any drafts of it before signing that Agreement. For these reasons, Evan wished to attack the validity of that Agreement. Evan Koslow Dep. 469, 473, 483. But the record proves Evan's position on this issue to be false. There is evidence of correspondence between various parties, including Walters and David Westra, the attorney who represented Kevin in the negotiations of that Agreement, that Evan was involved in negotiating the terms of the Agreement of Members and that Evan had reviewed drafts of the Agreement. JX 1128-1130; Tr. 811-818. Moreover, the written KXS Consulting Agreement documents Evan's awareness that KXI would be the majority owner of KXS. JX 1013.

[109] As the Consulting Agreement expired by its own terms in December 2005, John and Kevin's right to relief of this kind must end as of that date.

be sold, but under conditions that would leave him free to act as a buyer or to compete with any other party who bought KXI.

The Supreme Court has emphasized the capacious remedial discretion of this court to address inequity.[110] Using that discretion, I conclude that none of the parties has advanced a completely acceptable remedy. For their part, Jon and Kevin advanced a remedy that would have placed a 90% owner and the chief inventor of a company dependent on the development of technologies under two lawyers, neither of whom is an experienced CEO. That remedy does not seem a viable way to enhance the economic value of KXI. As important, the implementation of such a remedy would likely result in years of future discord, and is not even viable now given Jon's recent death.

But there are substantial aspects of Jon and Kevin's remedial position that I find should be implemented. Notably, it is clear to me that Evan should be removed immediately as general partner. The KXI Partnership Agreement contemplates removal for "fraud which is material and detrimental to the Partnership or for gross negligence."[111] Although this provision is phrased awkwardly, it is clear that Evan's conduct was in bad faith, worse than grossly negligent, and purposely misleading. Therefore, I believe that the removal provision is easily satisfied.

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[110] *E.g.*, *Gotham Partners, L.P.*, 817 A.2d at 175; *see also Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000) (noting that this Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy"); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (noting "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate").

[111] LPA § 6.05(a).

Consistent, however, with my reluctance to place a 90% owner under substitute management, I find it rational and necessary to order the dissolution and liquidation of KXI as it is impractical for the business to continue given the fractious relations and Jon's recent death.[112] By contrast from Evan, however, I will shape a fair process designed to maximize the sale proceeds, for the advantage of all of KXI's owners. To that end, a receiver will be appointed, from recommendations made by Kevin that are shared with Evan for comment, to lead the dissolution process and oversee the operation of KXI until its affairs are completely wound up.[113] The receiver shall select an investment bank to auction KXI, in whole or in discrete parts, in order to obtain the highest possible value.

The first and most obvious requirement to ensure that the sale process fairly reflects the value of KXI is the issuance of a judicial order requiring that the intellectual property rights to the New Technologies developed by KXI be transferred to KXI by KT for free. The parties shall consult on the most efficient manner in which to structure that result, with Evan realizing that any costs of that process to KXI shall be borne exclusively by him. Furthermore, to ensure that Jon and Kevin receive their fair share of the profits from the World Filter, the World Filter technology (both the two-layer and

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[112] 6 *Del. C.* § 17-802 (2006).

[113] In their claims for relief, Jon and Kevin also ask for an accounting to ensure that the accounts of KXI are accurate and there has been no additional wrongdoing by Evan. In the remedial order, the receiver shall be empowered to review KXI's accounts and to act upon any concerns she harbors regarding whether KXI has been injured by any party and to propose a method to address any such injury in the winding up process. Given the extensive discovery conducted in this case, I am not requiring a full-blown accounting, which could be unduly expensive to KXI, to the detriment of all of its owners.

three-layer versions) will be placed in KXS of which KXI owns 95%. The receiver then will be able to sell KXS along with KXI.

B. Evan Is Barred From Bidding On KXI And Competing With KXI

Next, Evan's misconduct is so serious that he should not be permitted to participate as a buyer or to dissuade other buyers through the threat of competition. Throughout the litigation, Evan has always been free to make Jon and Kevin an offer they could not refuse, and he continues to remain free to tempt them into settlement. But Evan has now been adjudicated to have engaged in a consciously disloyal conduct, designed to advantage himself at the expense of KXI. Evan is in no equitable position to complain of remedial measures designed to ensure that he does not prevent KXI from being sold for fair value.

Given his pervasive involvement in the development of the New Technologies and his almost 90% ownership interest in KXI, Evan's participation as a possible buyer is likely to chill interest from other buyers. Likewise, the possibility that Evan might engage in activities that infringe upon the intellectual property rights of KXI or involve use of its proprietary information is too substantial to risk, and his serious violations of his fiduciary and contractual duties to KXI warrant restraints on his conduct reasonably tailored to prevent that harm. In that connection, the KXI Partnership Agreement contains a provision providing that in the event Evan ceases to act as the CEO of the General Partner, "he" agrees not to "participate in activities which are in direct

competition with [KXI] or its successors for a period of three years."[114] By virtue of his misconduct, Evan has brought about his own entity's removal as General Partner and his own cessation of service as the CEO of the General Partner. Building on that provision, I therefore will put in place an injunction prohibiting Evan from participating in activities which are in direct competition with KXI for three years. This is fitting, as the non-competition period is identical to that set forth in the Partnership Agreement[115] and its scope has been broadened only insofar it tracks KXI's entry into new businesses at the instance of Evan himself. By these measures, buyers will be assured that they can capitalize on the value of all of KXI's assets, including the New Technologies, without fear of improper conduct by Evan. Likewise, Evan's removal will be accompanied by limitations on his ability to participate in the auction process. Evan's access to books and records, and his communications with potential bidders, shall be determined by the receiver in the first instance, and contact with the receiver by Evan shall be channeled through his counsel.

C. The Parties' Fees And Expenses

In the litigation process to date, Evan has caused KXI to bear all of his attorneys' fees and costs. Meanwhile, Jon and Kevin have paid their own way. Jon and Kevin argue that this state of affairs is backwards and should be reversed. I agree.

Because Evan engaged in disloyal conduct in clear violation of his fiduciary and contractual duties to KXI, he is not entitled to indemnity from KXI and he must pay KXI

[114] *Id.* at §10.08(d).
[115] *Id.*

back for the funds he caused it to expend to defend this lawsuit. Section 6.06 of the Partnership Agreement permits indemnification only where the General Partner and its affiliates did not engage in fraud or gross negligence. Evan's misconduct is worse than grossly negligent, as it was intentionally disloyal, and it involved misleading behavior of the kind proscribed by the law of fraud.[116]

By contrast, KXI should bear Jon and Kevin's fees. They have clearly conferred a substantial benefit on KXI by bringing this suit and Delaware law entitles them to receive reimbursement from KXI of their reasonable fees and expenses.[117]

VI. Conclusion

For all the foregoing reasons, I find that Evan breached his fiduciary and contractual duties. He and the defendant entities he controls as personal instrumentalities shall be accountable in the manner described. Moreover, none of Evan's attempted defenses have merit and he has waived his counterclaims, which also clearly lack merit.

Counsel for Jon and Kevin shall present, after notice to Evan as to form, a conforming remedial order within fifteen days.

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[116] Evan is entitled, however, to indemnification under the Partnership Agreement for the reasonable legal fees he incurred solely on the claim that the General Partner received an impermissibly large gross-up of the Service Fees because he prevailed on that claim.

[117] *E.g.*, *United Vanguard Fund v. Takecare, Inc.*, 693 A.2d 1073, 1079 (Del. 1997) (explaining that Delaware courts have long recognized the "common corporate benefit" doctrine as a basis for the reimbursement of attorneys' fees and expenses in corporate litigation).