IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TRAVELCENTERS OF AMERICA LLC	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3751-CC
	)	
TIMOTHY E. BROG, E^2 INVESTMENT PARTNERS LLC, LOCKSMITH VALUE OPPORTUNITY FUND LP, THE EDWARD ANDREWS GROUP INC. AND PEMBRIDGE VALUE ADVISORS LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: November 21, 2008
Date Decided: December 5, 2008

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CHANDLER, Chancellor

The issue before the Court is whether defendants, shareholders of a Delaware LLC, are contractually obligated to indemnify the company for costs related to an unsuccessful proposal to nominate two persons for election to the board of directors. Before the Court are two motions: a motion for judgment on the pleadings, filed by three of the defendants, and a motion for partial summary judgment, filed by plaintiff. For the reasons set forth below, I am granting judgment on the pleadings in favor of defendants. Accordingly, plaintiff is not entitled to the relief it seeks, and I need not reach the issues presented in the motion for partial summary judgment.

I. BACKGROUND

Plaintiff TravelCenters of America LLC ("TravelCenters") is a Delaware Limited Liability Company ("LLC") with its headquarters in Westlake, Ohio and is the largest full service travel center company in the United States.[1] On May 8, 2008, plaintiff brought this action seeking indemnification from defendants Timothy E. Brog, E^2 Investment Partners LLC ("E^2"), Locksmith Value Opportunity Fund LP ("Locksmith"), The Edward Andrews Group Inc., and Pembridge Value Advisors LLC ("Pembridge"). Each of the defendants owned TravelCenters stock at the time of the alleged breaches for which indemnification is sought.

[1] Compl. ¶ 4. Unless otherwise noted, the facts are drawn from the complaint and presumed true for purposes of the motion for judgment on the pleadings.

On December 31, 2007, defendants submitted notice[2] to TravelCenters purporting to nominate Timothy E. Brog and Jeffrey S. Wald for election to the TravelCenters Board of Directors at the 2008 annual meeting (the "Notice"). Section 9.7 of the TravelCenters Amended and Restated Limited Liability Company Agreement (the "LLC Agreement") details the notice procedures a shareholder must follow to nominate a person for election to the TravelCenters Board of Directors. On February 1, 2008, TravelCenters commenced an action in this Court seeking a declaration that the Notice violated the LLC Agreement and requesting attorneys' fees and costs (the "Declaratory Judgment Action"). On April 2, 2008, TravelCenters filed a Second Amended Complaint that deleted the request for attorneys' fees and costs.

Following a one day trial on April 4, 2008, this Court found that the Notice violated § 9.7 in several respects.[3] The Court found, for example, that the Notice violated § 9.7 because: (1) the Notice failed to identify Lawrence E. Golub as a participant in the Notice; (2) the Notice failed to identify Golub as a party to an understanding pursuant to which a nominee for election as a director of TravelCenters was proposed; (3) the Notice failed to disclose Golub's beneficial interest and that of his affiliates; (4) the Notice failed to disclose Brog's earlier

[2] Defendants argue that only E^2 submitted the notice. Because of the resolution of the present motions, the Court need not reach the issue of which defendants are responsible for submission of the notice.

[3] *TravelCenters of Am. LLC v. Brog*, C.A. No. 3516-CC, tr. at 255 (Del. Ch. Apr. 4, 2008).

violation of the federal securities laws; and (5) the Notice failed to adequately disclose the principal occupation and employment of Wald during the past five years.[4] Additionally, as of the date of the notice, E^2 did not hold a certificate for the shares it owned or attach a copy of such certificate to the Notice.[5] Accordingly, I held that the Notice was "invalid and insufficient under Section 9.7 of the LLC [A]greement and therefore [of] no force or effect."[6]

On May 8, 2008, TravelCenters commenced this action seeking indemnification of its costs and fees associated with the Declaratory Judgment Action and the present action pursuant to § 10.3 of the LLC Agreement.[7] Section 10.3 provides that each shareholder, as defined, will indemnify TravelCenters from and against all costs and expenses, including reasonable attorneys' and other professional fees, arising from such shareholder's breach of any provision of the LLC Agreement.[8] On September 9, 2008, E^2, Locksmith, and Pembridge moved

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[4] *Id.* tr. at 256-61.
[5] *Id.* tr. at 261-63.
[6] *Id.* tr. at 256-57.
[7] On the same day, TravelCenters sent a letter to defendants demanding reimbursement of its costs, fees, and expenses associated with the Declaratory Judgment Action.
[8] Section 10.3 provides in full:

> To the fullest extent permitted by law, each Shareholder will indemnify and hold harmless the Company (and any Subsidiaries or Affiliates thereof), from and against all costs, expenses, penalties, fines or other amounts, including, without limitation, reasonable attorneys' and other professional fees, whether third party or internal, arising from such Shareholder's breach of any provision of this Agreement or any Bylaws, including without limitation, Sections 8.1 through 8.2 of Article VIII, and shall pay such indemnitee such amounts on demand, together with interest on such amounts, which interest will accrue at the lesser of 15% per

for judgment on the pleadings, and all defendants moved to stay discovery.[9] On September 26, 2008, TravelCenters moved for partial summary judgment.

II. Analysis

A. Legal Standard for Judgment on the Pleadings

Under Rule 12(c), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."[10] In defending a motion for judgment on the pleadings, the nonmoving party is entitled to the same benefits as a plaintiff defending a motion under Rule 12(b)(6).[11] Thus, the Court should grant judgment on the pleadings only when, accepting as true all of the nonmoving party's well-pleaded factual allegations and making all reasonable inferences in favor of the nonmoving party, "there is no material fact in dispute and the moving party is entitled to judgment as a matter of law."[12] Of course, the "court is not required to accept every strained interpretation of the allegations proposed by the plaintiff"[13] or accept as true mere conclusory

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annum compounded and the maximum amount permitted by law, from the date such costs or the like are incurred until the receipt or repayment by the indemnitee.

[9] I granted the motion to stay discovery in a November 21, 2008 letter opinion.

[10] Ct. Ch. R. 12(c).

[11] *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993); *In re Seneca Invs. LLC*, C.A. No. 3624-CC, 2008 WL 4329230, at *2 (Sept. 23, 2008); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 499-500 (Del. Ch. 2000).

[12] *Interactive Corp. v. Vivendi Univ., S.A.*, C.A. No. 20260, 2004 WL 1572932, at *8 (Del. Ch. June 30, 2004) (*revised* July 6, 2004) (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 1992 WL 181718, at *1 (Del. Ch. July 28, 1992), *rev'd on other grounds*, 624 A.2d 1199 (Del. 1993)).

[13] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

allegations.[14] In deciding the motion for judgment on the pleadings, I can consider documents incorporated into the complaint and may dismiss the claim "if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law."[15]

B. Interpretation of Section 9.7

It is well settled that Limited Liability Companies are primarily creatures of contract, and in this case, the LLC Agreement is the contract.[16] TravelCenters brings this action under § 10.3 of the LLC Agreement, which provides that a shareholder must indemnify TravelCenters for any "costs, expenses, penalties, fines or other amounts, including, without limitation, reasonable attorneys' and other professional fees . . . arising from such Shareholder's breach of any provision of [the LLC] Agreement." Thus, to recover under § 10.3, TravelCenters must show that defendants breached a provision of the LLC Agreement. TravelCenters alleges that defendants breached the LLC Agreement because the Notice did not comply with § 9.7.

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[14] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006); *Interactive Corp.*, 2004 WL 1572932, at *8.
[15] *Malpiede*, 780 A.2d at 1083. *See In re Tyson Foods, Inc.*, C.A. No. 1106-CC, 2007 WL 2351071, at *2 (Del. Ch. Aug. 15, 2007).
[16] *TravelCenters of Am., LLC v. Brog*, C.A. No. 3516-CC, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008).

Section 9.7 details the notice procedures a shareholder must follow to nominate a person for election to the TravelCenters Board of Directors. Specifically, § 9.7(a) provides that:

> (1) Nominations of persons for election to the Board of Directors and the proposal of business to be considered by the Shareholders may be made at an annual meeting of Shareholders . . . (ii) by any Shareholder of the Company who was a Shareholder of record both at the time of giving of notice provided for in this Section 9.7 and at the time of the annual meeting, who is entitled to vote at the meeting and present in person or by proxy at the meeting to answer questions concerning the nomination or business, and who complies with the notice procedures set forth in this Section 9.7.
>
> (2) For nominations or other business to be properly brought before an annual meeting by a Shareholder pursuant to clause (ii) of Section 9.7(a)(1), the Shareholder must have given timely notice thereof in writing to the Secretary of the Company . . . . To be timely, a Shareholder's notice shall . . . .

Section 9.7(a)(2) then describes the requirements that must be met for notice to be proper and timely. In the Declaratory Judgment Action, I held that the Notice did not comply with these requirements and was thus not effective in nominating Brog or Wald. The issue now before the Court is whether the failure to comply with § 9.7 constituted a "breach of any provision" of the LLC Agreement.

Under principles of contract law, there is a distinction between promises and conditions. Promises give rise to a duty to perform, and conditions are events that

must occur before a party is obligated to perform.[17] While the non-performance of a promise or covenant can result in a breach of contract, the non-occurrence of a condition is not considered a breach unless the party promised that the condition would occur.[18] Thus, unless a party was under a duty for a condition to occur, the nonperformance of a condition is not a breach of the agreement.

After careful consideration of the LLC Agreement, I conclude that the provisions of § 9.7 with which the Notice did not comply are conditions to TravelCenters performance and are not promises by shareholders. Section 9.7 establishes prerequisites that must be met in order for a shareholder to properly nominate a person for election as a director. Subsection (a)(1) states that "[n]ominations of persons for election to the Board of Directors . . . may be made . . . by any Shareholder . . . who complies with the notice procedures set forth in this Section 9.7." Immediately following this paragraph, and just before the detailed requirements for proper notice, subsection (a)(2) states that "[f]or nominations or other business to be properly brought . . . the Shareholder must

[17] *See Summit Investors II, L.P. v. Sechrist Indus., Inc.*, C.A. No. 19400, 2002 WL 31260989, at *7 (Del. Ch. Sept. 20, 2002); *Weiss v. Nw. Broad. Inc.*, 140 F. Supp. 2d 336, 345-46 (D. Del. 2001); RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.").

[18] *See Summit Investors*, 2002 WL 31260989, at *7 ("Non-occurrence of a condition is not considered a breach by a party unless he is under a *duty* for that condition to occur."); *Weiss*, 140 F. Supp. 2d at 346 ("The non-occurrence of a condition will prevent the existence of a duty in the other party; but it may not create any remedial rights and duties at all, and it will not unless someone has promised that it shall occur."); RESTATEMENT (SECOND) OF CONTRACTS § 225(3) (1981).

have given timely notice thereof . . . ." Proper notice is thus a *condition* to nominating a person for election as a director. The Notice did not comply with these requirements; accordingly, I held that it was "invalid and of no force and effect."[19]

While acknowledging that it is a condition, plaintiff argues that § 9.7 is also a promise by Shareholders not to submit non-compliant notices. TravelCenters relies on "mandatory" language in § 9.7 to support this argument. For example, § 9.7 specifies that (1) "the proponent Shareholder or Shareholders must submit to the Secretary" a plan for repayment of indebtedness; (2) "such Shareholder's notice shall set forth" certain categories of information; and (3) "[n]o Shareholder may give notice to the Secretary described in this Section 9.7(a)(2) unless such Shareholder holds a Certificate for all shares . . . ."[20] While plaintiff is correct that mandatory words, such as "must" and "shall," appear in § 9.7, their presence does not compel a finding that the notice requirements are promises by shareholders not to submit non-compliant notices. The consequences of not complying with § 9.7 are made clear in the opening paragraph: subsection (a)(1) specifies that a shareholder cannot nominate a person for election as a director without complying with the notice requirements of § 9.7. The detailed notice requirements that follow

[19] *TravelCenters*, C.A. No. 3516-CC, tr. at 263 (Del. Ch. Apr. 4, 2008).
[20] *LLC Agreement* § 9.7(a)-(b). Section 9.7(e)(2) also specifies that "[o]nly such persons who are nominated in accordance with the procedures set for in this Section 9.7 shall be eligible to serve as directors . . . ."

are *conditions* to nomination of a person for election as a director, and notwithstanding the presence of mandatory words, they are not independent promises by shareholders to TravelCenters. The words "must" and "shall" are used to define the notice required to nominate a person for election; that certain requirements "must" or "shall" be satisfied before notice is effective does not mean that shareholders promised that they would fulfill these requirements.[21]

Summit Investors II, L.P. v. Sechrist Industries, Inc.[22] supports this result. In *Summit* the Court held that notice provisions in the agreement at issue were conditions and not covenants.[23] As evidence, the Court relied on the fact that the counterclaim defendant was under no obligation to exercise its put rights and thus had no obligation to provide any notice whatsoever.[24] The notice provisions at issue in this case are also conditions and not promises or covenants. As in *Summit Investors*, defendants were not under an obligation to provide any notice whatsoever, and TravelCenters did not bargain to receive proper notice "as an end in itself."[25] Rather, the submission of proper notice is simply a condition that must

[21] Indeed, other provisions in the LLC Agreement expressly labeled as conditions use these mandatory words in defining the events that must occur before the condition is satisfied.
[22] C.A. No. 19400, 2002 WL 31260989 (Del. Ch. Sept 20, 2002).
[23] *Id.* at *7.
[24] *Id.*
[25] *Id.*

occur before TravelCenters is obligated to allow a shareholder to nominate a person for election as a director. [26]

Additionally, a common sense reading of the LLC Agreement supports the conclusion that shareholders did not promise that the conditions in § 9.7 would occur. Section 9.7 contains complex and highly technical requirements for submitting proper notice.[27] If TravelCenters shareholders had made a promise to submit proper notice, they could be held *personally liable* to TravelCenters for

[26] TravelCenters argues that § 9.7 is not a condition because, unlike other provisions in the LLC Agreement, it is not expressly labeled as such. No particular words, however, are required for the existence of a condition; moreover, the absence of an express label as a condition does not mean the provision is a promise.

[27] For example, § 9.7(a)(2) describes the requirements for notice to be considered timely:

> To be timely, a Shareholder's notice shall be delivered to the Secretary at the principal executive offices of the Company not later than the close of business on the ninetieth (90th) day nor earlier than the close of business on the one hundred twentieth (120th) day prior to the first anniversary of the date of mailing of the notice for the preceding year's annual meeting; provided that for any nominations or other business to be properly brought before the annual meeting to occur during 2008 (the "Initial Annual Meeting") the Shareholder's notice shall be delivered to the Secretary at the principal executive offices of the Company not later than December 31, 2007 not earlier than December 1, 2007; provided, further, however, that in the event that the date of mailing of the notice for the annual meeting is more than thirty (30) days before or after such anniversary date (or, in the case of the Initial Annual Meeting, before or after April 1, 2008), notice by the Shareholder to be timely must be so delivered not earlier than the close of business on the one hundred twentieth (120th) day prior to the date of mailing of the notice for such annual meeting and not later than the close of business on the later of the ninetieth (90th) day prior to the date of mailing of the notice for such annual meeting or the close of business on the tenth (10th) day following the day on which public announcement of the date of mailing of the notice for such meeting is first made by the Company."

Along with these detailed timing requirements, § 9.7 requires extensive disclosure regarding the proposed nominee and the shareholder attempting to give notice. Not surprisingly, the Notice submitted by defendants failed to comply with all of these requirements.

millions of dollars[28] if they submitted notice and failed to comply with the hyper-technical notice requirements in § 9.7. There is no evidence in the complaint or in the LLC Agreement that supports the position that TravelCenters shareholders made such a promise.

III. CONCLUSION

For the reasons explained above, I conclude that no reasonable reading of the LLC Agreement suggests that the provisions at issue are promises as well as conditions. Because the provisions of § 9.7 with which defendants failed to comply are not promises, submission of the Notice that did not comply with these provisions resulted only in the non-occurrence of a condition and not a "breach of any provision"[29] of the LLC Agreement. Plaintiff will, therefore, be unable to show that defendants breached a provision of the LLC Agreement, a showing required for TravelCenters to recover from defendants under § 10.3. Accordingly, even accepting plaintiff's well-pleaded factual allegations as true and making all reasonable inferences in favor of plaintiff, I conclude that defendants are entitled to judgment as a matter of law. Accordingly, I grant the motion for judgment on the pleadings. Because this ruling is dispositive, plaintiff's motion for partial summary judgment is moot and need not be considered. An Order has been entered consistent with this memorandum opinion.

[28] TravelCenters is seeking in excess of $1.5 million from defendants.
[29] *LLC Agreement* § 10.3.