IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THOMAS KELLY, Plaintiff, v. ERIC L. BLUM, JOSEPH A. BREEN, JR., JOSEPH KESTENBAUM, MBC INVESTMENT, L.P., MBC LENDER, LLC, MBC ACQUISITION, LLC, ELB CAPITAL MANAGEMENT, LLC and ELB MEDIA ENTERPRISES, L.P., Defendants, and MARCONI BROADCASTING CO., LLC, Nominal Defendant.	)	Civil Action No. 4516-VCP

MEMORANDUM OPINION

Submitted: November 10, 2009
Decided: February 24, 2010

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PARSONS, Vice Chancellor.

Plaintiff brings this action on his own behalf and on behalf of Marconi Broadcasting Company, LLC ("Marconi" or the "Company"). The action challenges a merger (the "Merger") between Marconi and MBC Acquisition, LLC ("MBC Acquisition"), a wholly-owned subsidiary of ELB Capital Management, LLC ("ELB") created to enable the Merger.[1] The operative opening pleading is Plaintiff's Amended and Supplemental Verified Complaint ("Complaint"). The Complaint seeks a declaratory judgment that, among other things, the Merger is void and also accuses Defendants of breaching various contractual and fiduciary duties, breaching the implied contractual covenant of good faith and fair dealing, and defamation.

This action is currently before the Court on two motions. First, Plaintiff has moved for partial summary judgment declaring the Merger invalid for failure to comply with certain notice provisions of the LLC agreement and restoring him to his position as a member and manager of Marconi. Second, Defendants have brought a Rule 12(b)(6) motion to dismiss each of the eight counts alleged in the Complaint.

Because I find that the Marconi LLC agreement permitted and authorized mergers, such as the one at issue here, and that the Merger was not void for failure to comply with the notice requirements established in that agreement, I hold that Plaintiff lacks standing to sue derivatively because his membership interest in Marconi dissipated at the time of the Merger. Thus, to the extent Plaintiff's claims are brought on behalf of the Company,

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[1] The surviving entity is another ELB subsidiary, which I will refer to as "Marconi" or "New Marconi."

they are dismissed. As to his direct claims, Plaintiff voluntarily withdrew Counts I and V in his correspondence with the Court; additionally, I grant Defendants' motion to dismiss Counts III, IV, and VII for the reasons set forth in this Opinion. I deny the motion to dismiss, however, as to Count VIII, alleging defamation, and Counts II and VI, which allege, respectively, breach of fiduciary duties owed to Plaintiff and aiding and abetting breach of fiduciary duties.

As to Counts II and VI, I also note that, even though contracting parties to an LLC agreement have the freedom to expand, restrict, or eliminate fiduciary duties owed by managers to the LLC and its members and by members to each other, in the absence of a provision explicitly altering such duties, an LLC's managers and controlling members in a manager-managed LLC owe the traditional fiduciary duties that directors and controlling shareholders in a corporation would. In this case, I find that Marconi's LLC agreement does not explicitly alter those default fiduciary duties and that, consequently, Marconi's managers and controlling members owe Plaintiff the traditional duties of loyalty and care.

The LLC agreement does contain, however, an exculpation clause limiting the monetary liability of Marconi's managers for breaches of fiduciary duty to those instances where such managers "willfully" violate their duty of loyalty or care. The agreement also allows the Company to enter affiliated transactions provided the managers proceed at arm's length. In doing so, the LLC agreement arguably precludes application of the traditional entire fairness standard under the duty of loyalty by

exculpating managers from liability for anything less than willfully violating their fiduciary duties to Plaintiff.

In the end, after examining the Complaint in the pro-plaintiff manner required in the context of a 12(b)(6) motion to dismiss, I find that Plaintiff has alleged facts that, if proven, could support a finding that Marconi's managers and controlling members breached their fiduciary duties by willfully engaging in a non-arm's length, unfair, self-dealing transaction aimed at squeezing Plaintiff out of his interest in Marconi and that ELB aided and abetted that breach.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Thomas Kelly, resides in Pennsylvania and is the founder and former member, manager, and president of Marconi, a Delaware limited liability company. Kelly purports to bring this action directly on behalf of himself and derivatively on behalf of Marconi, which also is named in the Complaint as a nominal Defendant.

Defendant Eric Blum is the chairman and founder of ELB. Joseph Breen, ELB's CFO, and Joseph Kestenbaum, ELB's President and CEO, also are named as Defendants. Additionally, at the time of the Merger, Blum and Breen served as the Class A Managers of Marconi and Kestenbaum served as the Class C Manager.

Defendants MBC Investment, L.P. ("MBC Investment") and ELB Media Enterprises, L.P. ("ELB Media") are limited partnerships organized in Delaware and Pennsylvania, respectively. Defendants MBC Lender, LLC ("MBC Lender") and ELB are Pennsylvania limited liability companies, and Defendants MBC Acquisition and

Marconi are Delaware limited liability companies. Further, MBC Lender, MBC Acquisition, ELB Media, and MBC Investment are all wholly-owned subsidiaries of ELB.[2]

B. Facts

The following summary is drawn from the largely undisputed record on Kelly's motion for partial summary judgment on Count VII and from the Complaint. I accept facts relevant to the motion for summary judgment as true because the parties do not contest either the terms of the applicable agreements or the facts leading up to the alleged Merger on April 17, 2009. Unless otherwise noted, facts pertinent to Defendants' motion to dismiss are taken from the Complaint and related documents with inferences drawn in the "plaintiff-friendly manner" required in that procedural context.[3]

1. 2006-07 transactions

Kelly formed Marconi on August 10, 2006 to seek and acquire radio broadcast rights and licenses. On November 6, Marconi, through Kelly, entered into an asset purchase agreement with Urban Radio One, L.L.C. whereby Marconi purchased for $5 million a broadcast tower and FCC license that entitles it to broadcast on 1340 AM in

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[2] Compl. ¶¶ 24, 51, 94.

[3] *Sample v. Morgan,* 935 A.2d 1046, 1048 (Del. Ch. 2007) (citing *Outokumpu Eng'g Enter., Inc. v. Kvaerner EnviroPower, Inc.,* 685 A.2d 724, 727 (Del. Super. 1996)).

the Greater Philadelphia area under the call sign WHAT AM ("WHAT").[4] The transaction closed on January 12, 2007.

Marconi's purchase of WHAT was funded by both MBC Investment, which invested $2.5 million in senior debt and $2.5 million in preferred equity, and Kelly, who invested $1 million in exchange for a common equity interest.[5] Specifically, under the Securities Purchase Agreement executed on January 12, 2007 ("SPA"), MBC Investment contributed $2.5 million in return for 40,000 Class A Preferred Units in Marconi and Kelly contributed $1 million in return for 60,000 Class B common membership units.[6] In Marconi's first amended LLC Agreement ("2007 LLC Agreement"), executed concurrently with the SPA, MBC Investment, as the Class A Preferred member, was granted a Preferred Return of 12.5% per annum, compounded quarterly, on the average daily balance of the Class A member's Unreturned Capital Contribution.[7] The remaining portion of MBC Investment's contribution came in the form of $2.5 million in senior debt

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[4] WHAT began broadcasting in 1925 and currently features various hosted programs and music by singers such as Harry Connick Jr., Queen Latifa, Michael Bublé, Tony Bennett, Frank Sinatra, Natalie Cole, and Rod Stewart. About WHAT-AM 1340, http://www.am1340what.com/page.php?page_id=23656 (last visited Jan. 4, 2010).

[5] Blum and ELB initially represented to Kelly that they would fund Marconi's purchase and operation of the WHAT investment with $6.5 million, in addition to the $1 million contributed by Kelly.

[6] Compl. Ex. A, the SPA.

[7] Defs.' Op. Br. ("DOB") Ex. 1, 2007 LLC Agreement. Similarly, I refer to Plaintiff's Answering Brief in Opposition to Defendants Motion to Dismiss and Opening Brief in Support of Plaintiff's Motion for Partial Summary Judgment as "PAB" and Defendants' Reply Brief as "DRB."

loaned on a five-year basis at 10% interest per annum through a Loan and Security Agreement ("2007 Loan Agreement").[8] Following the purchase of WHAT, Marconi retained $750,000 in cash to fund its operations.

Less than three months after its subsidiary entered these agreements, however, ELB sought to divest itself of the Marconi investment. Specifically, Robert Wisniewski, an ELB managing director, wrote to Kelly on March 25, 2007 suggesting that Marconi look for a solution to its funding difficulties that did not involve ELB: "Something that would reduce or eliminate [ELB's] exposure while substantially reducing your cost of capital should be the goal. I would think <u>you need more of a patient equity partner</u>."[9] At that time, Marconi's "cost of capital" included interest on MBC Investment's $2.5 million loan, a $10,000 quarterly management fee Marconi paid to FB Capital Partners, L.P, an ELB affiliate, and the 12.5% per annum Preferred Return.[10] Due at least partly to these costs, by the end of March 2007, Marconi did not have sufficient cash flow to maintain operations.

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[8] Compl. Ex. C, the 2007 Loan Agreement.

[9] Compl. ¶ 39 (emphasis in Complaint).

[10] Under the 2007 LLC Agreement, Marconi was precluded from making any distributions, including the Preferred Return, (1) when there was insufficient Operating Cash Flow or (2) when such a distribution would result in a breach of the 2007 Loan Agreement. 2007 LLC Agreement § 6.1(c).

In July, Blum informed Kelly that ELB was planning to sell Marconi "to the highest bidder as soon as possible to get back" its senior loan and equity investment.[11] Wisniewski confirmed this two weeks later when he told Kelly that "[o]ur objective here is to at least get our investment and accrued distribution/interest back and hopefully your equity."[12] Blum later told Kelly that Marconi would be on the market unless Kelly could raise capital to cure payment defaults and satisfy Blum that there was adequate capital to run the station. Yet, Blum also told Kelly not to "contact any brokers."[13] In August, Marconi had insufficient cash flow to pay the Preferred Return, interest payments, and management fees, and, as a result, Kelly was forced to contribute an additional $100,000 to Marconi, which was credited to his capital account.[14]

2. 2008 transactions

On March 3, 2008, due largely to the continued lack of cash flow, Marconi entered into a Loan and Security Agreement with MBC Lender ("2008 Loan Agreement"), whereby MBC Lender loaned Marconi $2 million at 12.5% interest with a monthly monitoring fee of $2,000.[15] As part of this transaction, the Members of Marconi

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11 Compl. ¶ 44.

12 *Id.* ¶ 45.

13 *Id.* ¶ 46.

14 "Kelly did not receive any additional . . . membership units for this capital contribution." *Id.* ¶ 48.

15 Compl. Ex. D, the 2008 Loan Agreement. The 2008 loan received seniority over the 2007 Loan Agreement.

executed a second amended LLC Agreement ("2008 LLC Agreement" or "Agreement").[16] Through this Agreement, Marconi provided MBC Investment with 104,000 Class A common membership units and issued 36,000 Class C common membership units to MBC Lender. Pertinently, the 2008 LLC Agreement also required that all actions of Marconi be approved by managers holding a majority of the voting power and established a hierarchy under which Class A Managers held 24%, the Class B Manager held 25%, and Class C Managers held 51% of the voting power.[17] The 2008 LLC Agreement also provided that Marconi could not enter any merger, conversion, or consolidation agreements without the prior written approval of the Class A Member or Managers and the Class C Member or Managers.[18]

As part of the 2008 Loan Agreement, MBC Lender, Marconi, and Kelly also executed a Pledge and Security Agreement ("PSA"), under which Marconi pledged all of its assets to MBC Lender as security for the 2008 Loan Agreement.[19] As of the date of the Complaint, neither Kelly nor Marconi had received a notice of default under the 2007 Loan Agreement, the 2008 Loan Agreement, or the PSA.

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[16] Compl. Ex. B, the 2008 LLC Agreement.

[17] *Id*. §§ 7.3(a), 7.3(c).

[18] *Id*. § 7.6(a).

[19] Compl. Ex. E, the PSA.

In May 2008, Blum wrote Kelly to inform him that Marconi must again "explore a sale as well as all other means of making the station financially viable."[20] A special meeting of Marconi's board of Managers convened on September 26, 2008, but no notice was sent to Kelly until two days before the meeting and the notice did not identify the purpose of the meeting. A few minutes before the meeting, Blum and Kestenbaum informed Kelly that he was being terminated as President of Marconi. At the meeting, Blum, Breen, and Kestenbaum, the Class A and Class C Managers, voted to terminate Kelly. As the only remaining Manager of Marconi, Kelly opposed the motion. After his termination, Kelly could not access Marconi's offices and was no longer provided with regular financial reporting, though he did remain a member of Marconi's board.[21] When Kelly asked Blum what would happen to Marconi, Blum stated that "we will be introducing new plans in the hope of rescuing our debt and preferred capital and perhaps your common stock investment as well. You should be a gentleman about this and not interfere."[22]

3. 2009 merger and its aftermath

Beginning in the first quarter of 2009, ELB again sought to sell Marconi. As part of these efforts, ELB retained BIA Advisory Services, LLC to estimate Marconi's fair

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[20] Compl. ¶ 61.

[21] The last financial statement Kelly received before termination (for the month ending August 31, 2008) indicated that Marconi had a total current asset balance of approximately $780,000.

[22] Compl. ¶ 15.

market value "in an asset sale, in a start-up scenario."[23] The BIA report concluded that, as of January 1, 2009, Marconi had a maximum fair market value of approximately $2.6 million.[24]

During a Marconi board meeting held on March 18,[25] Blum proposed the $7 million Merger through which MBC Acquisition would be merged into Marconi, with New Marconi being the surviving entity.[26] The $7 million purchase price included: (1) $2 million in cash, (2) the assumption of the $2.5 million term loan extended by MBC Investment in 2007, and (3) the issuance of $2.5 million in face amount of Class A

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[23] Compl. ¶ 73.

[24] DOB Ex. 2. Generally, the Court "may not consider matters outside the pleadings when assessing a motion to dismiss for failure to state a claim" *Schuss v. Penfield P'rs, L.P.,* 2008 WL 2433842, at *4 (Del. Ch. June 13, 2008); *see also Vanderbilt Income & Growth Assoc., LLC v. Arvida/JMB Managers, Inc.,* 691 A.2d 609, 613 (Del. 1996). There are two exceptions to this general rule, however: First, when the document is "integral to a plaintiff's claim and incorporated into the complaint as well as facts subject to judicial notice," *Schuss*, 2008 WL 2433842, at *4; and second, "when the document is not being relied upon to prove the truth of its contents." *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *9 (Del. Ch. Dec. 23, 2008).

Because the Complaint avers that ELB retained BIA Advisory Services, LLC to estimate Marconi's fair market value, the BIA report arguably is incorporated into the Complaint. In any case, I do not rely on the BIA report in rendering this decision.

[25] Kelly received an email notifying him of a March 18 Marconi board meeting on March 16 at 10:50 a.m. Pl.'s Ex. 1. Kelly did not receive the terms of the proposed merger, however, until March 18 at 3:37 p.m., approximately 53 minutes before the 4:30 p.m. board meeting. Pl.'s Exs. 2, 3. These facts are not disputed.

[26] Compl. Ex. F ("Merger Proposal"); Compl. Ex. G ("Written Approval of Merger").

Preferred Units of New Marconi, based on the conversion of Marconi's Class A Preferred Capital Interest. The Merger also would extinguish the Class A Preferred Return and convert each of the existing Class A, B, and C common interests into the right to receive $1 per class.

The outstanding senior debt owed to MBC Lender was to be repaid from the cash proceeds of the purchase price. Additional working capital necessary to continue New Marconi operations was to be provided from a $3 million senior secured term loan from MBC Lender II, L.P., a wholly-owned subsidiary of ELB, and $1.25 million in equity financing from an affiliate of ELB Capital in exchange for the issuance of Class B membership units in New Marconi.

Several weeks after the March 18, 2009 meeting, the Members of Marconi affiliated with Defendants signed a written consent approving the Merger. Because they had not obtained Kelly's consent, on April 8, representatives of Marconi and the acting Members delivered a document entitled Written Action of the Members of Marconi Broadcasting Company, LLC ("Written Consent") to Kelly by fax and email. The same document was delivered to Kelly via FedEx overnight delivery on April 9.[27] On April 17, 2009 at 9:22 a.m., the Merger was consummated by the filing of a Certificate of Merger with the Delaware Secretary of State. Additionally, on June 9, as a result of the

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[27] Kelly does not contest the receipt of these documents. Compl. ¶¶ 82, 86, 87.

Merger, an application regarding the *pro forma* transfer of control of Marconi was filed with the FCC; the FCC approved this transfer on June 18, 2009.[28]

4. Facts pertaining to Kelly's claim for defamation against Blum

In this action, Kelly also seeks damages for several allegedly defamatory statements made by Blum. Specifically, Kelly points to four statements: First, during a July 2007 meeting of Blum, Kelly, Wisniewski, and two others, Blum stated that his investment with Kelly and Marconi was a failure and that the failed investment was the result of Kelly's inability to effectively manage a radio station; second, in July 2007, Blum told Frank Boyle that Kelly was incompetent and could not manage Marconi properly;[29] third, during an August 26, 2007 meeting in Blum's office, Blum told prospective purchasers of Marconi and others present that Kelly made poor management decisions and did not know what he was doing in running a radio station; and finally, during a June 2009 meeting, Blum "beat up" Kelly and his work at Marconi.

C. Procedural History

Kelly filed his initial complaint at 4:20 p.m. on April 17, 2009, approximately seven hours after the Merger became effective. He filed an Amended and Supplemental Verified Complaint on June 15. On July 15, 2009, Defendants moved to dismiss Kelly's claims for failure to state a claim upon which relief could be granted. Two months later, on September 14, Kelly moved for partial summary judgment on his claim for a

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[28] Compl. Ex. J.; Arg. Tr. 8-9 (June 19, 2009).

[29] The Complaint does not identity Frank Boyle further or explain his relationship to any of the parties.

declaratory judgment that the Merger was void. The parties briefed these motions and I heard argument on them on October 2, 2009. Thereafter, the parties filed supplemental submissions addressing certain legal issues that arose late in the proceedings.

D. Kelly's Contentions

Kelly asserted eight counts against various Defendants in his Complaint. Count I seeks to enjoin the transfer or assignment of Marconi's FCC license to ELB Media.[30] Count II asserts a claim for damages for breach of the fiduciary duties of loyalty and care by Blum, Breen, Kestenbaum, MBC Investment, and MBC Lender. Count III seeks damages for breach of an implied covenant of good faith and fair dealing under the 2008 LLC Agreement and the PSA by MBC Investment and MBC Lender for: (i) voting in favor of the Merger, (ii) not seeking alternatives to the Merger, and (iii) entering into an affiliated or self-interested transaction or indebtedness.[31] Count IV seeks damages for MBC Investment's breach of the SPA, claiming that MBC Investment: (i) breached its representations and warranties, (ii) permitted affiliated transactions, (iii) permitted nonpermitted indebtedness, and (iv) paid or accepted the Preferred Return when Marconi was experiencing a negative cash flow or when doing so would cause Marconi to breach

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[30] After Defendants argued in their opening brief that Count I is moot, Kelly withdrew his claim for injunctive relief. *See* PAB 16 n.5. Therefore, Count I is no longer at issue.

[31] Count III of the Complaint also alleged that MBC Investment and MBC Lender breached their implied covenants by paying the Preferred Return when Marconi was experiencing a negative cash flow and by allowing Marconi to agree to interest rate structures well above market rates. Compl. ¶ 109. But Kelly withdrew both of these claims; therefore, they are dismissed. T. Tr. 45-46.

the 2007 Loan Agreement. Count V seeks damages for MBC Investment's breach of sections 9.1, 9.2, and 9.8 of the 2007 Loan Agreement.[32] Count VI seeks damages against ELB for aiding and abetting the breaches of fiduciary duty alleged in Count II. Count VII seeks a declaratory judgment that: (i) the Merger was invalid, void, voidable, or unenforceable; (ii) Kelly owns 25% of all Marconi property, rights, and interests as they existed on April 16, 2009; (iii) Kelly is a 25% owner of Marconi; (iv) the 2008 Loan Agreement was a self-interested transaction; and (v) the 2008 LLC Agreement did not permit or authorize the Merger. Finally, Count VIII seeks damages against Blum for defamation.

Kelly purports to assert Counts II and VI derivatively on behalf of Marconi. Kelly also claims to assert those two counts, as well as the remaining counts, directly.

II. ANALYSIS

A. Kelly's Motion for Partial Summary Judgment

Under Court of Chancery Rule 56, summary judgment will be granted where the record, including the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[33] In determining whether this burden is met, the Court must view inferences drawn from the evidence in

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[32] As with Count I, Kelly ultimately withdrew Count V. *See* Pl.'s Letter to the Court, filed Nov. 10, 2009. Consequently, Count V is also dismissed.

[33] *Viking Pump, Inc. v. Century Indem. Co.*, 2009 WL 3297559, at *6 (Del. Ch. Oct. 14, 2009); *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007).

the light most favorable to the nonmoving party.[34] Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[35] The Court also "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[36]

Kelly moved for partial summary judgment only on his claim for a declaratory judgment that the Merger is void either (1) because he did not receive adequate notice as required by the 2008 LLC Agreement or (2) because the Merger closed too early. Thus, resolution of Kelly's motion for partial summary judgment requires consideration of whether Marconi complied with the written consent requirements prescribed in the 2008 LLC Agreement.

1. Is the Merger void for improper notice?

Kelly contends the Merger is void because he did not receive adequate notice of its approval by written action, as required by the 2008 LLC Agreement, and because the Merger closed before the notice period required by that Agreement elapsed. According to Kelly, the 2008 LLC Agreement required written approval and consent by the Class A and C Members or Managers before any merger could be consummated and it required

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34 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

35 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

36 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie,* 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

notice to be delivered to Members who did not execute a written consent no less than five business days prior to all actions taken based on that written consent. Kelly argues that he did not receive the Written Consent in the manner specified by the 2008 LLC Agreement because the document was not mailed to him and that, even if he did properly receive the Written Consent, he did not receive it until Thursday, April 9, 2009, and, therefore, under the terms of the Agreement, the Merger could not have closed before Monday, April 20.[37]

Defendants offer four arguments in response. First, Defendants argue that the Merger was authorized at a meeting of Marconi's board held on March 18, 2009, approximately one month before the Merger, and that no written consent was necessary under the 2008 LLC Agreement to authorize the Merger. Second, Defendants claim that even if notice was required, the Written Consent was executed and delivered by a majority of the Members in compliance with the 2008 LLC Agreement. Third, Defendants contend that even if delivery of the Written Consent technically was somehow inadequate, Defendants substantially complied with the applicable requirements. Finally, Defendants suggest that Kelly waived his right to challenge the validity of the Merger because even though he attended the March 18 meeting and received the Written Consent on April 8, by fax and email, and April 9, by commercial

[37] Among other things, Kelly argues in this regard that the Court should hold Good Friday to be a nonbusiness day.

overnight delivery, he did not object to the Merger at any time prior to filing his Complaint on the afternoon of April 17.

For the reasons set forth in this section, I find that the Class A and C Members or Managers complied with the written consent requirements specified in the 2008 LLC Agreement and that, therefore, the Merger was not void for failure to comply with that Agreement.[38]

Generally, in Delaware, a merger of an LLC must be approved "by members who own more than 50 percent of the then current percentage or other interest in the profits" of that company.[39] Because LLCs are creatures of contract,[40] however, parties may impose additional requirements for a merger, as they did in this case through the 2008 LLC Agreement. Consequently, to determine whether the Merger was effectuated properly, I begin with an examination of that Agreement's relevant terms.

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38 In making this determination, I do not affirmatively hold that the Merger was valid, but only that it was *not invalid* for failure to comply with the 2008 LLC Agreement.

Additionally, because I find that the Merger was not void for improper notice and presume the validity of the Merger as of the morning of April 17, 2009, I need not address Defendants' alternative arguments regarding the validity of the vote taken at the March 18 Marconi board meeting or Kelly's alleged waiver of his right to challenge the Merger. Defendants' argument regarding substantial compliance is discussed *infra* at notes 51-53 and accompanying text.

39 6 *Del. C.* § 18-209(b).

40 *Julian v. Julian*, 2009 WL 2937121, at *7 (Del. Ch. Sept. 9, 2009) (citing 6 *Del. C.* § 18-201(d)).

The 2008 LLC Agreement expressly provides that Marconi may consummate a merger agreement only if it obtains the "prior written approval of the Class A Member or the Class A Managers and the Class C Member or the Class C Managers."[41] In pertinent part, Section 7.16 of the 2008 LLC Agreement describes the requirements for obtaining written consent of the Members:

> On any matter that is to be voted on, consented to or approved by members, the Members may take such action without a meeting and without a vote if a consent or consents in writing, setting forth the action so taken, shall be signed by the Members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all Members entitled to vote thereon were present and voted; provided, however that **any such consent that is not executed by any Member must be delivered to such Member no less than five (5) business days prior to the effective date of such consent**.[42]

Neither side contends that this provision is ambiguous; nor do I find it to be so.[43]

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[41] 2008 LLC Agreement § 7.6(a).

[42] Emphasis added. Section 7.8 imposes similar notice requirements for any actions "to be voted on, consented to or approved by the Board of Managers."

[43] As with all contracts, when interpreting the 2008 LLC Agreement, the Court seeks to give full effect to the parties' intent as expressed in that document. *See Nw. Nat'l Ins. Co. v. Esmark, Inc.,* 672 A.2d 41, 43 (Del. 1996) ("Contracts must be construed as a whole, to give full effect to the intentions of the parties."). "A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law" and, accordingly, "the court looks to the most objective indicia of that intent: the words found in the written instrument." *HIFN, Inc. v. Intel Corp.,* 2007 WL 2801393, at *9 (Del. Ch. May 2, 2007) (citing *Reardon v. Exch. Furniture Store, Inc.,* 188 A. 704, 707 (Del. 1936)); *Sassano v. CIBC World Mkts. Corp.,* 948 A.2d 453, 462 (Del. Ch. 2008).

A clause in the 2008 LLC Agreement will be deemed ambiguous only if its language is susceptible to two or more reasonable interpretations. *See Concord*

Thus, I find that the 2008 LLC Agreement requires that any merger involving Marconi must be approved in writing by the Class A and C Members or Managers. Written consents provide one way of satisfying that requirement. If a Member does not sign a written consent, however, the written consents of the other Members must be delivered to the Members who did not execute the consent no less than five business days before the effective date of that merger.

Kelly contends that the delivery of written consents under Section 7.16 must conform to the notice requirements specified in Section 13.2. There may be some ambiguity, however, as to whether the LLC Agreement's requirements for "Notices," as laid out in Section 13.2, apply to "delivery" of "consent[s]." Indeed, Section 7.16 does not indicate that a "consent" is a "notice to be given under [the 2008 LLC] Agreement," as that phrase is used in Section 13.2. Though such a distinction may provide an additional basis for denying Plaintiff's motion for partial summary judgment,[44] I need not reach that issue here because, as I discuss below, Defendants' delivery of the Written Consent via confirmed fax on April 8 and overnight commercial delivery on April 9

Steel, Inc. v. Wilm. Steel Processing Co., 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009) (citing *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del. 1992)). In this action, while the meaning of business day, as used in the Agreement, arguably may be ambiguous, *see infra* note 49, I find that the remainder of the Agreement is not.

[44] If "consent[s]" are not subject to the Section 13.2 notice requirements, Defendants presumably could comply with Section 7.16 by "deliver[ing]" the Written Consent to Kelly by any reasonable delivery method. Under that interpretation, Defendants unquestionably complied with Section 7.16 when, on April 8, 2009, they delivered the Written Consent to Kelly via email and confirmed fax.

comply with the requirements of Section 13.2. Thus, Kelly's challenge to the validity of the Merger for failure to comply with that section is without merit.

Section 13.2 details the requirements for sending notices under the Agreement, requiring that such notices "be made in writing and sent by express, registered, or certified mail, . . . facsimile (in which case a confirmed copy shall be sent on the same date by first class mail), or commercial delivery service."[45] This section also provides the addresses where notices shall be sent and states that such notices

> shall be deemed delivered . . . as of the date delivered if delivered by a commercial delivery service or by confirmed fax, or as of the date on which the same was deposited in a regularly maintained receptacle for the deposit of United States mail, if sent by express, registered or certified mail.[46]

Kelly argues that Defendants did not comply with the 2008 LLC Agreement because they did not provide notice by mail as required by Subsection 13.2(a)(B), and, thus, the Merger is void. In particular, Kelly contends that none of the methods of delivery Defendants used meet the notice requirement because he never had a copy of the Written Consent delivered by any form of United States mail. There is no merit to this contention. Kelly's position not only ignores the purpose of Subsection 13.2(a)(B), which is to identify the addresses of Members where notices are to be delivered, but also would nullify the unambiguous portions of Section 13.2 that explicitly allow for delivery of notice by confirmed fax and commercial delivery service, as well as by mail. The

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[45] 2008 LLC Agreement § 13.2(a).

[46] *Id*. § 13.2(c).

record shows that, even though Kelly did not receive a copy of the Written Consent by mail, he did receive a copy by commercial delivery service on April 9.[47]

Still, Kelly argues that even if Defendants validly delivered the Written Consent on April 9, the 2008 LLC Agreement requires that such written consents be delivered no less than five business days before the Merger and that, as a result, the earliest date the Merger could have become effective was April 20. Kelly supports this claim by arguing that, in addition to Saturdays and Sundays, which are generally recognized in the United States as nonbusiness days, Friday, April 10, 2009—Good Friday—was not a business day because it was a legal holiday in Delaware.[48] Without more information regarding the meaning of "business day" as used in the 2008 LLC Agreement, however, I cannot determine whether the parties intended Good Friday to be excluded as a nonbusiness day.[49] Nevertheless, even if I exclude Good Friday from the five-business day

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47 Because I find that the 2008 LLC Agreement allows for delivery of notice by confirmed fax and commercial delivery, as well as by mail, I need not address Defendants' further argument that the combination of email, fax, and overnight delivery they used is the functional equivalent of regular mail. *See* DRB 5.

48 *See* 1 *Del. C.* § 501.

49 Black's Law Dictionary defines "business day" as "[a] day that most institutions are open for business, usu. a day on which banks and major stock exchanges are open, excluding Saturdays and Sundays." BLACK'S LAW DICTIONARY 424 (8th ed. 2004). NASDAQ, AMEX, and the New York Stock Exchange are closed on Good Friday and it is a legal holiday in the state of Delaware. Several large United States banks, including Bank of America, Wells Fargo, and JP Morgan Chase, however, are only closed on federal public holidays, which do not include Good Friday. Consequently, without more information it is difficult to ascertain whether the parties intended Good Friday to be excluded as a nonbusiness day. In that sense, therefore, the 2008 LLC Agreement is arguably ambiguous. For

calculation, Kelly's argument still fails. Kelly received the Written Consent no later than Thursday, April 9.[50] A cursory review of the 2009 calendar shows April 9 is exactly five business days prior to Friday, April 17, 2009, the effective date of the Merger, if I exclude Good Friday. Thus, the Written Consent was properly delivered to Kelly by commercial delivery no less than five business days prior to the effective date of the Merger.

Additionally, though I find that delivery on April 9, 2009 meets the five business day requirement, Defendants' fax of the Written Consent to Kelly on April 8, 2009 provides a separate and independent basis for my conclusion as a matter of law based on the undisputed facts in this action that Kelly received timely delivery of the Written Consent to the Merger. Kelly received a copy of the Written Consent by fax on April 8 and a confirmation copy by FedEx overnight delivery on April 9. Though Section 13.2 of the 2008 LLC Agreement states that the confirmation copy should be sent on the same day as the fax "by first class mail," Kelly's sending the confirmation copy on April 8 by overnight commercial delivery service constitutes substantial compliance with the Agreement and supports the conclusion that Kelly received notice of the Written Consent

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purposes of the pending summary judgment motion, however, I need not resolve that potential ambiguity because I find Kelly received adequate notice of the Written Consent even if, as Kelly contends, Good Friday is excluded as a nonbusiness day.

50 Section 13.2(c) of the 2008 LLC Agreement provides that any notice shall be deemed "delivered, given and received for all purposes as of the date delivered if delivered by a commercial delivery service or by confirmed fax."

by confirmed fax on that date,[51] which is at least six business days before the Merger.[52] To hold otherwise would exalt form over substance and produce an unnecessarily harsh result where the purpose of Section 13.2 clearly has been met.[53]

In summary, this analysis shows that Marconi's board complied with the requirements for notice and written actions by the Members established in the 2008 LLC Agreement. I, therefore, deny Kelly's motion for partial summary judgment and hold

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51 *See supra* note 50.

52 "When confronted with less than literal compliance with a notice provision, courts have required that a party substantially comply with the notice provision. The requirement of substantial compliance is an attempt to avoid 'harsh results . . . where the purpose of these [notice] requirements has been met.'" *Gildor v. Optical Solutions, Inc.*, 2006 WL 4782348, at *7 (Del. Ch. June 5, 2006) (quoting *Colson v. Bureau of Labor and Indus.,* 831 P.2d 706, 709 (Or. Ct. App. 1992)); *see also Corp. Prop. Assocs. 6 v. Hallwood Gp. Inc.*, 792 A.2d 993, 1000 (Del. Ch. 2002), *rev'd on other grounds*, 817 A.2d 777 (Del. 2003) (noting that the parties' conduct indicated that substantial compliance with a contractual notice provision would suffice where literal compliance was impossible). Even though *Optical Solutions* dealt with a situation where literal compliance was impossible because the stockholder agreement at issue did not include the necessary addresses, the case nevertheless provides support for finding substantial compliance here. Substantial compliance is "that which, despite deviations from contract requirements, provides the important and essential benefits of the contract." *Gildor*, 2006 WL 4782348, at *7 (quoting 17A Am. Jur. 2d Contracts § 619 (2005)). In this case, Defendants' decision to fax the Written Consent on April 8, 2009 and send a confirmation copy by overnight courier substantially complied with the purpose (and essential benefit) of allowing notice by confirmed fax: Timely receipt of the notice.

Additionally, my finding of substantial compliance is bolstered by the fact that Section 7.16 required only that the Written Consent be delivered to Kelly, and did not explicitly require compliance with the notice requirements of Section 13.2. *See supra* note 44 and accompanying text.

53 *Gildor*, 2006 WL 4782348, at *7.

that the Merger is not void for improper notice. Thus, I presume that the Merger otherwise was properly consummated on April 17 and, by the terms of that Merger, Kelly's Class B Common Interest was converted into the right to receive $1.00 when the Merger became effective at 9:22 a.m. on that date.

B. Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted

Courts will only grant a motion to dismiss under Rule 12(b)(6) for failure to state a claim when "it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts that can be inferred from the pleadings."[54] While all facts alleged in the pleadings and inferences that reasonably can be drawn from them are accepted as true, the court need not accept inferences or factual conclusions unsupported by specific allegations of facts. That is, only reasonable inferences need be drawn in the nonmovant's favor.[55] Consequently, "a complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks. But, if a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted."[56]

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[54] *Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *2 (Del. Ch. July 19, 2005); *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *4 (Del. Ch. Nov. 30, 2007).

[55] *See Hendry v. Hendry,* 2006 WL 1565254, at *10 (Del. Ch. May 26, 2006) ("[A] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiff's favor unless they are reasonable inferences.").

[56] *Desimone v. Barrows,* 924 A.2d 908, 929 (Del. Ch. 2007).

By the terms of the Merger, discussed in Part I.B.3, Kelly was no longer a Member of Marconi when he commenced this action. While an LLC member who is directly injured retains the right to bring a direct action for injuries affecting her legal rights even after she ceases to be a member, a plaintiff "must be a member or an assignee of a limited liability company interest at the time of bringing" any derivative action on behalf of the LLC.[57] Consequently, I first must determine the extent to which Kelly's claims are direct, derivative (in which case they must be dismissed), or both and then

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[57] 6 *Del. C.* § 18-1002. In light of this section, a merger that eliminates a plaintiff's membership in an LLC must also negate her standing to bring a derivative claim. *See, e.g., Lewis v. Ward*, 852 A.2d 896, 900-01 (Del. 2004).

Kelly contends, however, that, even assuming a valid Merger, his derivative claims may nevertheless be excused from the general standing rule of 6 *Del. C.* § 18-1002 because "analogous corporate law decisions recognize exceptions to the standing requirements following a merger where the minority stockholder challenges the merger and claims it resulted from a breach of fiduciary duty." *See* Pl.'s Letter to the Court, filed Nov. 10, 2009. Kelly cites two cases in support of this contention: *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348 (Del. 1988) and *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243 (Del. 1999). Neither case, however, supports Kelly's argument. Indeed, both *Kramer* and *Parnes* stand for the proposition that "in order to state a *direct* claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price." 722 A.2d at 1245 (emphasis added).

As *Kramer* makes clear, in Delaware, one who is a stockholder or LLC member before a merger only may maintain a derivative suit following that merger "(i) if the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of the standing to bring a derivative action" or "(ii) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise." *Kramer*, 546 A.2d at 354 (citing *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984)). As Kelly has alleged neither of those situations here, he does not have standing to maintain a derivative suit on behalf of Marconi and all such claims must be dismissed.

examine his direct claims, if any, to establish whether he has alleged facts sufficient to survive Defendants' motion to dismiss.

1. Are Kelly's claims derivative or direct?

Though few Delaware cases deal specifically with the distinction between derivative and direct claims in the LLC context, Sections 18-1001 to 18-1004 of the Delaware Limited Liability Company Act ("LLC Act")[58] were modeled, in significant part, on the corporate derivative suit. Consequently, "case law governing corporate derivative suits is equally applicable to suits on behalf of an LLC," and I look to corporate case law to determine the proper method for distinguishing between derivative actions brought on behalf of Marconi and Kelly's direct claims.[59]

The distinction between the rights of an LLC and the individual rights of its members is often quite narrow.[60] Though several early Delaware cases addressing this

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[58] 6 *Del. C.* §§ 18-101 to 18-1109.

[59] *VGS, Inc. v. Castiel,* 2003 WL 723285, at *11 (Del. Ch. Feb. 28, 2003) (noting that 6 *Del. C.* § 18-1001 originated "from the well-developed body of Delaware law governing derivative suits by stockholders of a corporation.").

[60] *See Kramer*, 546 A.2d at 351-52 ("Despite these clear theoretical distinctions between derivative and individual causes of action, 'the line of distinction between derivative suits and those brought for the enforcement of personal rights asserted on behalf of a class of stockholders is often a narrow one . . . .'") (quoting *Abelow v. Symonds,* 156 A.2d 416, 420 (Del. Ch. 1959)).

Though narrow, this distinction is important because of the ramifications of characterizing a claim as derivative, including additional standing and demand requirements and the fact that any recovery in a derivative suit inures to the benefit of the corporation or LLC. The ramifications are acute in this case because any of Kelly's derivative claims must be dismissed. *See* 6 *Del. C.* § 18-1002; *supra* note 57 and accompanying text.

distinction relied largely on the "amorphous and confusing concept of 'special injury,'" the Delaware Supreme Court expressly disavowed use of that concept in *Tooley*.[61] In *Tooley*, the Court stated that determining whether a claim is derivative or direct depends solely upon two questions: First, "who suffered the alleged harm," the LLC or its members, and second, "who would receive the benefit of any recovery or other remedy," the LLC or its members, individually.[62] In answering these questions, the Court looks to the nature of the wrong alleged, not merely at the form of words used in the complaint.[63]

2. Breach of fiduciary duties

In the second count of the Complaint, Kelly claims that, by virtue of their status as Members or Managers of Marconi, Defendants Blum, Breen, Kestenbaum, MBC Investment, and MBC Lender each "owed various fiduciary duties to Kelly as the minority equity owner."[64] Kelly further avers that these Defendants violated their duties

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61 *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035-36 (Del. 2004) (expressly disapproving of "special injury" test as used in previous cases, *e.g.*, *Elster v. Am. Airlines, Inc.*, 100 A.2d 219, 222-23 (Del. Ch. 1953)).

62 *See id.* at 1033-35.

63 Specifically, the Court evaluates whether the nature of the alleged injury is such that it falls directly on the LLC as a whole and only secondarily on an individual member as a function of and in proportion to his pro rata investment in the LLC, in which case the claim would be derivative, or whether the injury inflicts direct harm on the rights of the member as an individual. *See In re Syncor Int'l Corp. S'holders Litig.,* 857 A.2d 994, 997 (Del. Ch. 2004); *Tooley*, 845 A.2d at 1033; *see also In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 371 n.112 (Del. Ch. 2008).

64 Compl. ¶¶ 103-07.

of loyalty and care to him by entering into a self-interested Merger on terms that were unfair to Kelly.[65]

Defendants counter that they did not owe Kelly a fiduciary duty of loyalty because any fiduciary duties of members or managers of an LLC must be expressly set forth in the LLC agreement and Section 7.5 of the 2008 LLC Agreement, entitled "Duties," only imposes duties akin to the duty of care. Defendants further argue that, even if they did somehow breach some form of fiduciary duties, Kelly's claim merely questions the adequacy of consideration Marconi received in the Merger, a claim that is solely derivative. In this regard, I find that, under the 2008 LLC Agreement, the Managers of Marconi did owe Kelly traditional fiduciary duties and that, therefore, he has standing to bring a direct claim for breach of those duties.

The basic approach of the LLC Act is to "provide members with broad discretion in drafting the [LLC] Agreement and to furnish default provisions when the members' agreement is silent."[66] In the case of fiduciary duties, the LLC Act permits LLC

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[65] Compl. ¶ 105. As "the obligation to act in good faith" in the corporate context is not "an independent fiduciary duty that stands on the same footing as the duties of care and loyalty," but is instead "'a subsidiary element,' i.e., a condition, 'of the fundamental duty of loyalty,'" any of Kelly's claims for breach of "the [fiduciary] duty of good faith" are subsumed in my discussion of the duty of loyalty and breach of fiduciary duties generally. *See Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006) (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)). This does not include, however, the implied contractual covenant of good faith and fair dealing associated with all LLC agreements. *See* 6 *Del. C.* § 1101(c); *infra* Part II.B.3.

[66] *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999).

contracting parties to expand, restrict, or eliminate duties, including fiduciary duties, owed by members and managers to each other and to the LLC.[67] Section 18-1101(c) does not specify a statutory default provision as do other sections of the LLC Act;[68] rather, it implies that some default fiduciary duties may exist "at law or in equity," inviting Delaware courts to make an important policy decision and determine the default level of those duties.

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[67] In full, 6 *Del. C.* § 18-1101(c) states:

> To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

Indeed, the LLC Act expressly provides that it is the policy of the Act "to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." 6 *Del. C.* § 18-1101(b). Thus, the LLC Act grants LLC members significant discretion and wide latitude in the ordering of their relationships, "including the flexibility to limit or eliminate fiduciary duties." *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *8 n.33 (Del. Ch. Apr. 20, 2009). Because of this statutorily-granted discretion, investors in the LLC context should be "on notice that fiduciary duties may be altered" and that they should, therefore, read carefully the LLC agreement before becoming members. *See Miller v. Am. Real Estate P'rs, L.P.*, 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001) ("In large measure, the DRULPA [and LLC Act] reflect[] the doctrine of *caveat emptor*, as is fitting given that investors in limited partnerships [and LLCs] have countless other investment opportunities available to them that involve less risk and/or more legal protection.").

[68] *See, e.g.*, 6 *Del. C.* §§ 18-107, 18-204(b), 18-209(b), 18-301(d), 18-402, 18-403, 18-503, 18-605, 18-704(b), and 18-803(a).

Accepting that invitation, Delaware cases interpreting Section 18-1101(c) have concluded that, despite the wide latitude of freedom of contract afforded to contracting parties in the LLC context, "in the absence of a contrary provision in the LLC agreement," LLC managers and members owe "traditional fiduciary duties of loyalty and care" to each other and to the company.[69] Thus, unless the LLC agreement in a manager-managed LLC explicitly expands, restricts, or eliminates traditional fiduciary duties, managers owe those duties to the LLC and its members and controlling members owe those duties to minority members.[70] Therefore, I must determine whether the 2008 LLC Agreement expanded, restricted, or eliminated the default fiduciary duties the Managers

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69 *See, e.g.*, *Bay Ctr. Apartments*, 2009 WL 1124451, at *8 n.33 (citing *Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149-50 (Del. Ch. 2006)); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 153 (Del. Ch. 2004); *VGS, Inc. v. Castiel*, 2000 WL 1277372, at *4-5 (Del. Ch. Aug. 31, 2000), *aff'd*, 781 A.3d 696 (Del. 2001)); *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *27 (Del. Ch. Sept. 14, 2007) (interpreting a virtually identical provision of the Delaware Revised Uniform Limited Partnership Act ("DRULPA")) ("In the 2004 amendments to DRULPA, however, the Legislature made clear that absent contractual modification of fiduciary duties, a limited partnership formed under Delaware law is presumed to incorporate those duties in its governance structure."); *but see Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008) ("In the context of limited liability companies, which are creatures not of the state but of contract, those duties or obligations must be found in the LLC agreement or some other contract."). The agreement at issue in *Fisk Ventures*, however, stated that "no member shall have any duty to any Member of the Company except as expressly set forth herein or in other written agreements." No clause of that nature is present in the 2008 LLC Agreement.

70 Having been granted great contractual freedom by the LLC Act, drafters of and parties to an LLC agreement should be expected to provide parties and anyone interpreting the agreement with clear and unambiguous provisions when they desire to expand, restrict, or eliminate the operation of traditional fiduciary duties.

(Blum, Breen, and Kestenbaum) and controlling Members (MBC Investment and MBC Lender) owed to Kelly, and whether a breach of any existing duty would support a direct, as opposed to a derivative, claim.[71]

a. Managers' duties to Marconi and Kelly

In large measure, the 2008 LLC Agreement is silent on the issue of duties owed by Managers to the LLC and its Members, with the exception of Sections 7.5 and 7.9. In its entirety, Section 7.5, entitled "Duties," states that

> [t]he Board of Managers shall manage the affairs of the Company in a prudent and businesslike manner and shall devote such time to the Company affairs as they shall, in their discretion exercised in good faith, determine is reasonably necessary for the conduct of such affairs.

In relevant part, Section 7.9, which limits the monetary liability of Managers, states that

> [i]n carrying out their duties hereunder, the Managers shall not be liable for money damages **for breach of fiduciary duty to the Company nor to any Member** for their good faith actions or failure to act . . . but only for their own willful or fraudulent misconduct or willful breach of their contractual or **fiduciary duties** under this Agreement.

(Emphasis added).

I do not read these clauses, individually or collectively, as "explicitly disclaim[ing or limiting] the applicability of default principles of fiduciary duty."[72] Indeed, far from

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[71] "[I]n the alternative entity context, it is frequently impossible to decide fiduciary duty claims without close examination and interpretation of the governing instrument of the entity giving rise to what would be, under default law, a fiduciary relationship." *Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149-50 (Del. Ch. 2006).

[72] *Bay Ctr. Apartments*, 2009 WL 1124451, at *8.

limiting such duties, Section 7.9 suggests that the parties intended traditional fiduciary duties to apply. Additionally, Section 7.5 does not limit the Managers' duties so much as place control of Marconi's affairs in the board of Managers, rather than the Members, allowing each Manager the discretion to determine the amount of time she must devote to running Marconi.[73]

Because no clause in the 2008 LLC Agreement explicitly restricts or eliminates the default applicability of fiduciary duties, I find that Blum, Breen, and Kestenbaum, as Managers of Marconi, were required to treat Kelly in accordance with such traditional fiduciary duties. Furthermore, if the allegations in Kelly's Complaint are true, then Blum, Breen, and Kestenbaum entered the Merger largely intending to profit from a "premeditated scheme to squeeze Kelly out of Marconi and seize control of the FCC license" held by Marconi—actions that support a claim for breach of the duty of

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73 *See also* 2008 LLC Agreement § 7.1 ("[t]he powers of the Company shall be exercised by and under the authority of, and the business and affairs of the Company shall be managed under the direction of, a group of managers."). Pertinent to my interpretation of these clauses is the fact that the LLC at issue, Marconi, is a manager-managed LLC where the Class A and Class C Members (MBC Investment and MBC Lender, respectively) have power to appoint Managers holding majority control to the board, which, in turn, has power to direct the affairs of Marconi. Manager-managed LLCs are, in many ways, analogous to corporations, whereas member-managed LLCs may be more analogous to a partnership. Thus, while some cases have looked to the law of limited partnerships when dealing with member-managed LLCs, *see, e.g.*, *Bay Ctr. Apartments*, 2009 WL 1124451, at *8 n.33; *Douzinas*, 888 A.2d at 1149-50; *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *11 (Del. Ch. Aug. 18, 2005), it is often more appropriate to analogize to corporations when dealing with manager-managed LLCs.

loyalty.[74] Thus, drawing reasonable inferences in Kelly's favor, I find that his Complaint alleges sufficient facts to support his claim that the Managers breached these duties by entering into a Merger designed solely to eliminate Kelly's interest in Marconi.

1. LLC Agreement exculpatory provision

Even though Kelly alleged facts that, if true, are sufficient to show that Blum, Breen, and Kestenbaum may have breached their fiduciary duties, those Defendants still might avoid liability because the 2008 LLC Agreement contains an exculpatory provision limiting the monetary liability of Managers. Section 18-1101(e) of the LLC Act permits members, in their LLC agreement, to limit or eliminate a manager's or member's liability for "breach of contract and breach of duties (including fiduciary duties)," except for liability arising from a "bad faith violation of the implied contractual covenant of good faith and fair dealing."[75] While somewhat analogous to 8 *Del. C.* § 102(b)(7), which authorizes a corporation to adopt provisions limiting liability for a director's breach of the duty of care,[76] Section 18-1101(e) goes further by allowing broad exculpation of *all* liabilities for breach of fiduciary duties—including the duty of loyalty.[77]

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[74] *See* Compl. ¶¶ 1-2, 92; *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983).

[75] 6 *Del. C.* § 18-1101(e).

[76] *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 65 (Del. 2006).

[77] *See Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008); *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1063 (Del. Ch. Feb. 14, 2006) (citing 6 *Del. C.* §§ 17-1101(d), 18-1101(c)). In Section 18-1101(e) of the LLC Act, just as in Section 18-1101(c), the General Assembly upheld freedom to contract in the LLC context

Here, Section 7.9 of the 2008 LLC Agreement eliminates the Managers' monetary liability for all conduct except "willful or fraudulent misconduct or willful breach of . . . contractual or fiduciary duties under this Agreement." Although the default duties of loyalty and care remain, this provision requires more than application of a standard like entire fairness and requires that Kelly allege facts showing scienter.[78] That is, under Section 7.9, liability attaches only where a Manager willfully breaches his fiduciary duties. In those cases, such as this one, where managers are contractually exculpated from liability for certain conduct, "a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts."[79] Thus, I next consider whether Kelly's Complaint alleges facts that, if true, would support a finding of a *willful* breach of the Managers' contractual or fiduciary duties.

Defendants argue that willfulness must rise to the level of "actual, specific or evil intent to harm someone or acting recklessly and outside the bounds of reason," and cite

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by allowing such entities to limit or eliminate all *liability* of members, managers, or others arising from breach of fiduciary duty.

[78] *Weinberger*, 457 A.2d at 710 ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.").

[79] *Wood*, 953 A.2d at 141 (quoting *Guttman v. Huang,* 823 A.2d 492, 501 (Del. Ch. 2003) (emphasis in original)).

two cases in support of this definition.[80] Neither case, however, provides a definition of "willfulness" that applies here and Defendants have failed to demonstrate why their proffered definition should be used.[81] For instance, Black's Law Dictionary defines "willful" as "[v]oluntary and intentional, but not necessarily malicious"[82] and willful is defined under the Delaware Uniform Trade Secrets Act as "awareness, either actual or constructive, of one's conduct and a realization of its probable consequences."[83]

Even under Defendants' proffered standard, however, their motion to dismiss Count II must be denied because Kelly alleges facts suggesting that a significant level of mistrust and rancor towards Kelly existed among the other Managers, particularly Blum, and that these Managers actually and specifically intended to extinguish Kelly's

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80 DRB 19 (citing *Austin v. Fisher Scientific Co.*, 1993 WL 189452, at *2 (Del. Super. Apr. 22, 1993); *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *13 (Del. Ch. Sept. 3, 1996)).

81 *Austin* deals with unemployment compensation and "just cause" for discharge of employees, which arises from a "willful or wanton act in violation" of the employer's interests, the employee's duties, or the employee's expected standard of conduct. *Austin*, 1993 WL 189452, at *2 (citing 19 *Del. C.* § 3315).

As to *Cincinnati Bell*, Defendants mistakenly quote the definition of "gross negligence"—*i.e.,* acting "outside the bounds of reason"—as applicable to "willful," which is not defined in that case. *Cincinnati Bell*, 1996 WL 506906, at *12-14.

82 BLACK'S LAW DICTIONARY 1630 (8th ed. 2004).

83 *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *28 (Del. Ch. Jan. 29, 2010) (citing *Nucar Consulting, Inc. v. Doyle,* 2005 WL 820706, at *5 (Del. Ch. Apr. 5, 2005), *aff'd,* 913 A.2d 569 (Del. 2006)).

membership interest in Marconi, knowing that such action would harm Kelly.[84] Because these allegations, if true, support Kelly's claim that Defendants' willful self-dealing led to an unfair Merger that was not an arm's length transaction, I deny the motion to dismiss Count II as to the Managers, Blum, Breen, and Kestenbaum.

b. Members' duties to Kelly

The question remains, however, whether Defendants MBC Investment and MBC Lender owed fiduciary duties to Kelly as controlling Members of Marconi and whether Kelly adequately has alleged breach of those duties.

As with LLC managers, "in the absence of provisions in the LLC agreement explicitly disclaiming the applicability of default principles of fiduciary duty," controlling members in a manager-managed LLC owe minority members "the traditional fiduciary duties" that controlling shareholders owe minority shareholders.[85] Controlling shareholders—typically defined as shareholders who have voting power to elect directors, cause a break-up of the company, merge the company with another, or otherwise materially alter the nature of the corporation and the public shareholder's interests[86]—owe certain fiduciary duties to minority shareholders.[87] Specifically, and

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[84] Compl. ¶¶ 44-47, 61-91.

[85] *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *8 n.33 (Del. Ch. Apr. 20, 2009).

[86] *See Paramount Commc'n Inc. v. QVC Network Inc.*, 637 A.2d 34, 43 (Del. 1994).

[87] *See, e.g., Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006); *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 328 (Del. 1993); *Simons v. Cogan*, 549 A.2d 300, 304 (Del. 1988).

very pertinently to this case, such fiduciary duties include the duty "not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders."[88]

Under the 2008 LLC Agreement and accompanying documents, MBC Investment and MBC Lender had authority to appoint Managers with 24% and 51% of the voting power of the board of Managers, respectively.[89] Additionally, through the Agreement, MBC Investment and MBC Lender held the power to, on their own or through their designated Managers, issue membership units, enter affiliated transactions, sell a material amount of Marconi's assets, enter agreements involving any merger, conversion, consolidation, or business combination, amend the Agreement or Certificate of Formation, and incur any Indebtedness without Kelly's input or approval.[90] Indeed, in this case, the only clear-cut formal approval of the Merger appears to be by the Written Consent of the Members.[91] Thus, in taking that action, MBC Investment and MBC Lender exercised their power as controlling Members of Marconi.

Because the 2008 LLC Agreement is silent as to what duties controlling members owe minority members, I find that MBC Investment and MBC Lender owed Kelly

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[88] *Gentile*, 906 A.2d at 103.

[89] *See supra* note 17 and accompanying text.

[90] *See* 2008 LLC Agreement § 7.6 ("The Company shall not have the right, power or authority to take any of the . . . actions [listed in the accompanying text], directly or indirectly, without the prior written approval of the Class A Member or the Class A Managers and the Class C Member or the Class C Managers.").

[91] *See supra* Part I.B.3.

traditional fiduciary duties, including, among others, the duty not to cause Marconi to enter a transaction that would benefit the controlling Members at the expense of Kelly, Marconi's minority Member. I also find that Kelly has stated facts that, if true, are sufficient to show that MBC Investment and MBC Lender did, with the aid of their appointed Managers, effect the Merger in order to benefit themselves at the expense of Kelly. Thus, Kelly has stated a direct claim that is not subject to any exculpation provision in the Agreement,[92] and I deny Defendants' motion to dismiss Count II of Kelly's Complaint as to MBC Investment and MBC Lender.[93]

3. Breach of implied covenant of good faith and fair dealing

In Count III, Kelly claims that MBC Investment and MBC Lender breached their implied contractual covenant of good faith and fair dealing in several respects as to the 2008 LLC Agreement and the PSA. Defendants seek dismissal of Count III because Kelly failed to identify either the specific implied obligations that purportedly exist in the

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[92] Section 7.9 explicitly eliminates only the Managers' monetary liability; it does not mention a Member's monetary liability. In their briefing and oral argument, the parties did not address whether a controlling Member, effectively acting like a Manager, would enjoy the benefits of the exculpation provided by Section 7.9. Because I do not need to reach that issue on the pending motion to dismiss, I express no opinion regarding it.

[93] Additionally, to the extent Defendants seek to dismiss Kelly's breach of fiduciary duties claims because the 2008 LLC Agreement authorized self-interested transactions, such as the Merger, I find that Kelly has alleged facts sufficient to suggest that the Merger was not "done on an arm's length basis," as required by Section 7.21 of the Agreement. *See* Compl. ¶¶ 44-47, 61-91.

2008 LLC Agreement and PSA or any injury to his contractual interest that resulted from a breach of these implied obligations.

Under the LLC Act, the contracting parties to an LLC agreement may not waive the implied covenant of good faith and fair dealing.[94] This implied covenant "inheres in every contract" and requires that contracting parties "refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party from receiving the fruits of the contract."[95] Nevertheless, the implied covenant is "only rarely invoked successfully" and may not "be invoked to override the express terms of the contract."[96]

To state a claim of breach of the implied covenant of good faith and fair dealing, a party "must allege [1] a specific implied contractual obligation, [2] a breach of that obligation by the defendant, and [3] resulting damage to the plaintiff."[97] Because general allegations of bad faith do not satisfy these elements, to state a cognizable claim a

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94 *See* 6 *Del. C.* § 18-1101(c) (" . . . the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing."); *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec.11, 2008).

95 *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 887 (Del. Ch. 2009) (citing *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)).

96 *Id.* at 888 (citing *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006) ("[I]mposing an obligation on a contracting party through the covenant of good faith and fair dealing is a cautious enterprise and instances should be rare."); *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) ("[W]here the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play.")).

97 *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).

"plaintiff must allege a *specific implied contractual obligation* and allege how the violation of that obligation denied the plaintiff the fruits of the contract."[98]

In this case, Kelly alleged that MBC Investment and MBC Lender breached the implied covenant by voting in favor of the Merger, not seeking additional, further, or different strategic alternatives for the Company, and allowing the Company to enter affiliated or self-interested transactions and affiliated indebtedness. He does not allege, however, any specific implied contractual obligation, how such an implied obligation was breached, or how his contractual interest may have been damaged by such a breach. Additionally, Kelly's claim fails because (1) he had no contractual rights under the PSA,[99] (2) he has not alleged any implied contractual obligation in the 2008 LLC Agreement to seek alternatives for the Company in the context of a merger, and (3) the 2008 LLC Agreement expressly addresses the conduct at issue in Count III establishing the authority and role of Managers[100] and the ability of the Company to enter into affiliated and self-interested transactions.[101] Thus, I grant Defendants' motion to dismiss Count III of Kelly's Complaint because he failed to state a claim "draw[ing] a sufficient

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98 *Kuroda*, 971 A.2d at 888 (emphasis added).

99 The PSA explicitly states that it was made in favor of MBC Lender. The only obligations arising under the PSA are those that Kelly and Marconi incurred as Pledgors. *See* PSA.

100 2008 LLC Agreement §§ 1, 3, 7.

101 *Id*. §§ 1, 7.21.

connection between [any] alleged violations of the implied covenant and a specific implied obligation in the contract."[102]

4. Breach of Securities Purchase Agreement

Kelly next alleges in Count IV that MBC Investment breached the SPA by: "(i) breaching its representations and warranties to the Company; (ii) permitting Affiliated transactions; (iii) permitting non-Permitted Indebtedness; (iv) paying or accepting the Preferred Return when the Company was allegedly experiencing a negative cash flow; and (v) paying or accepting the Preferred Return when it would cause or substantially contribute to a breach of the 2007 Loan Agreement."[103] Kelly claims to be a party to the SPA and, therefore, capable of suing directly for any breach of that agreement. Defendants deny Kelly has any affirmative rights under the SPA on which he may sue and contend his claim lacks support, in any event.

As discussed in Part II.B.1, any derivative claim Kelly attempts to bring in behalf of Marconi arising from MBC Investment's alleged breach of an obligation under the SPA must be dismissed because he lacks standing to sue. Kelly also fails to state a direct claim against MBC Investment for breach of the SPA because Kelly's role under that agreement is solely that of an indemnitor. He received no direct benefit from the SPA and, therefore, cannot sue for any alleged breaches by MBC Investment.

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[102] *See Kuroda*, 971 A.2d at 888-89.

[103] Compl. ¶ 112.

Kelly is a named party in the SPA primarily because he is MBC Investment's indemnitor. Specifically, under the SPA, Kelly made certain representations and warranties and agreed to do certain acts and to indemnify MBC Investment against all misrepresentations or breaches of the SPA by Marconi or himself.[104] All benefits of the SPA, however, inure to either Marconi or MBC Investment—none belong to Kelly.[105] Consequently, Kelly lacks standing to sue MBC Investment directly for breaching any contractual obligation to him personally, and I dismiss Kelly's claims against MBC Investment for alleged breach of the SPA.[106]

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[104] SPA §§ 4.1, 5.1, 5.2.

[105] *See* SPA § 1.1. For example, MBC Investment made representations and warranties to Marconi, not to Kelly. *Id.* § 3.1. Therefore, Kelly cannot allege he received any benefit from those representations and warranties.

[106] Even if Kelly had standing to sue MBC Investment for a direct injury arising from its breach of the SPA, each of the five breaches alleged in Count IV must be dismissed for failure to state a claim.

First, Kelly fails to aver any specific facts supporting his claim that MBC Investment breached its representations and warranties under the SPA, second, Kelly's claim that MBC Investment permitted affiliated transactions prohibited by the SPA must fail because the SPA does not prohibit such transactions, nor has Kelly shown how MBC Investment caused Marconi to enter any affiliated transactions, *see* SPA §§ 2.7, 2.24; third, Kelly has not cited, nor has this Court found, any provision in the SPA dealing with non-Permitted Indebtedness or alleged any facts showing how MBC Investment caused Marconi to issue non-Permitted Indebtedness; fourth, Kelly has not cited any provision in the SPA addressing either the Preferred Return or any prohibition on paying that Return when Marconi was experiencing a negative cash flow, though such a provision does exist in Section 6.1(c) of the 2007 LLC Agreement; and finally, Kelly fails to point to any provision in the SPA prohibiting MBC Investment from accepting the Preferred Return when it would cause or substantially contribute to a breach of the 2007 Loan Agreement.

5. Aiding and abetting breach of fiduciary duties by ELB

In Count VI, Kelly accuses ELB of aiding and abetting the breaches of fiduciary duties alleged in Count II committed by Blum, Breen, Kestenbaum, MBC Investment, and MBC Lender. To state a claim for aiding and abetting a breach of fiduciary duty, the plaintiff must show "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in the breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary."[107]

Defendants contend that Kelly may not maintain a claim for aiding and abetting the alleged breaches because any underlying derivative claims must be dismissed and Kelly failed to state any direct claim for breach of fiduciary duty. In Part II.B.2 *supra*, however, I found that Kelly adequately alleged that Blum, Breen, Kestenbaum, MBC Investment, and MBC Lender owed fiduciary duties to Kelly and that these Managers and Members breached those duties by entering into a Merger designed to eliminate Kelly's interest in Marconi on other than an arm's length basis. Thus, Defendants' contention as to Kelly's direct claims fails.[108] Additionally, because I find that Kelly has sufficiently

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[107] *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007) (citing *Twin Bridges LP v. Draper,* 2007 WL 2744609, at *23 (Del. Ch. Sept. 14, 2007)).

[108] Defendants also seek to dismiss Count VI by cursorily asserting, without any support, that "Delaware law does not recognize a claim for aiding and abetting a breach of contract." DOB 34. Because several Delaware cases explicitly do recognize such a claim, I find this contention unpersuasive. *See, e.g., Globis P'rs*, 2007 WL 4292024, at *15; *In re John Q. Hammons Hotels Inc. S'holder Litig.*,

alleged that ELB knowingly participated in these breaches of fiduciary duty through the actions of its chairman (Blum), CFO (Breen), and CEO and President (Kestenbaum) and two of its wholly-owned subsidiaries, thereby directly harming Kelly, I hold that Kelly has stated a cognizable claim against ELB for aiding and abetting a breach of fiduciary duty. Accordingly, I deny Defendants' motion to dismiss Count VI.

6. Declaratory judgment

In Count VII, Kelly seeks a declaratory judgment that: (i) the Merger was invalid, void, voidable, or unenforceable; (ii) Kelly owns 25% of all Marconi property, rights, and interests as they existed on April 16, 2009; (iii) Kelly is a 25% owner of Marconi; (iv) the 2008 Loan Agreement was a self-interested transaction; and (v) the 2008 LLC Agreement did not permit or authorize the Merger. For the reasons addressed in this section, I grant Defendants' motion to dismiss Count VII in its entirety.

In Part II.A, I determined that the Merger was not invalid for failure to comply with the notice requirements of the 2008 LLC Agreement. As Kelly has not alleged any other basis for invalidating or voiding the Merger, I dismiss his claim for declaratory relief that the Merger was invalid, void, voidable, or unenforceable. Additionally, as Kelly has failed to allege any basis for concluding the Merger was not properly effectuated on April 17, 2009, he also has failed to state a claim for a declaration that he

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2009 WL 3165613, at *17 (Del. Ch. Oct. 2, 2009) (citing *Malpiede v. Townson,* 780 A.2d 1075, 1096 (Del. 2001)).

owns 25% of Marconi or its property, rights, and interests as they existed on April 16, 2009.

In his challenge to the validity of the 2008 Loan Agreement, Kelly attempts to undo a transaction that he apparently now believes had the potential to, and did, eventually, harm his membership interest in Marconi. Pursuant to that Agreement, MBC Lender loaned $2 million to Marconi. In seeking to invalidate the loan, however, Kelly does not allege facts showing that the 2008 Loan Agreement was an impermissible self-interested transaction[109] or that he has any basis to challenge an agreement that was entered with his express permission and consent. Indeed, when the 2008 Loan Agreement was executed, Kelly held a 60% interest in Marconi.[110] Moreover, Kelly approved of the terms and nature of the transaction as demonstrated by the fact that he pledged his membership interest in Marconi to obtain the loan from MBC Lender. Therefore, I also dismiss part four of Count VII for failure to state a claim for declaratory judgment.

The fifth part of Count VII similarly fails to state a claim because Kelly has not shown any basis for this Court to infer that the 2008 LLC Agreement did not permit or authorize the Merger. In fact, in Section 7.6, that Agreement explicitly authorizes

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[109] Kelly does not cite any provision in the 2007 LLC Agreement, which was controlling when the parties entered into the 2008 Loan Agreement, or any other agreement that prohibited "self-interested transactions." Pertinently, Section 7.20 of the 2007 LLC Agreement explicitly allowed for such transactions with affiliates, provided they were "done on an arm's length basis."

[110] *See* 2007 LLC Agreement §§ 1, 7.

mergers involving Marconi, provided both the Class A and Class C Members or Managers consent in writing to such a transaction—which they did in this case.

7. Defamation

Finally, in Count VIII Kelly asserts that Blum defamed him by accusing Kelly, while in the presence of others, of being incompetent, making poor management decisions, and not knowing how to run a radio station or manage Marconi. Kelly contends that such statements are *per se* defamatory because they malign him in his trade or business. In response, Defendants argue that Blum's statements refer to Kelly's incompetence and that, as such, they are statements of opinion and are not defamatory as a matter of law.

To sustain a defamation claim under Delaware law, a plaintiff must show that (1) defendant made an oral or written factual and defamatory statement, (2) regarding the plaintiff, (3) that is published to others by defendant, and (4) that results in injury.[111] While oral defamation, or slander, claims generally require proof of special damages, four categories of slander require no such proof and, as such, are slander *per se*.[112] These categories encompass statements that malign a person in a trade, business or profession,

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[111] *See, e.g.*, *Bray v. L.D. Caulk Dentsply Int'l*, 1999 WL 1225966, at *1 (Del. Super. Oct. 22, 1999).

[112] *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978); *Del. Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243, at *21 (Del. Ch. Oct. 23, 2002).

impute a crime, imply that a person has a loathsome disease, or impute unchastity to a woman.[113]

Each of the allegedly slanderous statements made by Blum dealt with Kelly's work and performance while running WHAT and Marconi. As such, Blum's statements can be said to malign Kelly in his business and profession. Defendants argue, however, that because "communicating that one is incompetent is not defamatory as a matter of law"[114] and making "statements which are critical of an employee's job performance and are uncomplimentary in nature are not defamatory,"[115] Kelly failed to state a claim for defamation based on Blum's statements. In response, Kelly notes that the cases cited in Defendants' briefs rely on *Gertz v. Robert Welch, Inc.*[116] for the proposition that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas."[117] According to Kelly, the continued vitality of this proposition is questionable because the Supreme Court in *Milkovich v. Lorain Journal Co.* stated that it did not think the above-quoted

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113 *Spence*, 396 A.2d at 970.

114 DOB 38 (citing *Miller v. Aramark Healthcare Support Servs.*, 555 F. Supp.2d 463, 474 (D. Del. 2008)).

115 *Id*. (citing *Henry v. Del. Law Sch. of Widener Univ., Inc.*, 1998 WL 15897, at *10 (Del. Ch. Jan. 12, 1998)).

116 418 U.S. 323, 339-40 (1974).

117 *Id*.

passage "was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"[118]

Defendants further suggest that even if the statements in question could be defamatory, the common interest privilege squarely covers statements made by employers to those who have an interest in that information.[119] On this point, Kelly argues that, in a defamation case, a conditional privilege is an affirmative defense that cannot be raised by a defendant in a motion to dismiss under Rule 12(b)(6).[120]

I find Kelly's argument on the latter point persuasive. Assuming the accuracy of the allegations in the Complaint and drawing all inferences in Kelly's favor, Kelly has averred sufficient facts to support a reasonable inference that Blum made factual statements, or statements of opinion relying on a strong factual predicate, defaming Kelly. Thus, I deny Defendants' motion to dismiss Count VIII so that a more complete factual record as to this claim can be established.

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[118] 497 U.S. 1, 18-19 (1990).

[119] DOB 39 (citing *Battista v. Chrysler Corp.*, 454 A.2d 286, 291 (Del. Super. 1982); *Lipson v. Anesthesia Servs., P.A.*, 790 A.2d 1261, 1284 (Del. Super. 2001)).

[120] *See Meades v. Wilm. Hous. Auth.*, 2005 WL 1131112, at *2 n.15 (Del. 2005) (citing *Klein v. Sunbeam,* 94 A.2d 385, 392 (1952) ("In any event, we think the question of qualified privilege is a matter for defense depending upon the facts and circumstances surrounding the making of the publication. . . . Since it is a matter of affirmative defense it may not be raised by a motion to dismiss under Rule 12(b)(6) but should be made a matter of answer to be supported by proof at the trial.")).

III. CONCLUSION

For the foregoing reasons, I deny Plaintiff's motion for partial summary judgment and grant in part and deny in part Defendants' motion to dismiss. In particular, I grant Defendants' motion to dismiss Counts III, IV, and VII and deny their motion as to Counts II, VI, and VIII of the Complaint.[121]

IT IS SO ORDERED.

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[121] As previously noted, Kelly voluntarily withdrew Counts I and V.