



## **I. INTRODUCTION**

Plaintiff/Counterclaim Defendant Stewart Matthew (“Matthew” or the “Plaintiff”) brings his Second Amended Complaint (the “Complaint”) asserting various claims against former business associates, including his former fellow members and Board of Managers members (“Managers”) of Aeosphere LLC (“Aeosphere”) and two companies with which Aeosphere purportedly had business dealings, Fläkt Woods Group SA (“Fläkt Woods”) and SEMCO LLC (“SEMCO”). All of Matthew’s claims relate to the dissolution of Aeosphere, which he argues was wrongfully undertaken by the other Managers in order to remove him from a cutting-edge and potentially lucrative fragrance business. He further asserts that Fläkt Woods and SEMCO aided and abetted breaches of fiduciary duty and were otherwise complicit in these wrongful actions.

Fläkt Woods and SEMCO move for full dismissal. Each company contends that Matthew fails to demonstrate that it is subject to personal jurisdiction in Delaware. SEMCO also moves for dismissal under Court of Chancery Rule 12(b)(6) for Matthew’s failure to state a claim upon which relief may be granted.

The former members and/or Managers of Aeosphere (besides Matthew)—Christophe Laudamiel (“Laudamiel”), Roberto Capua (“Capua”), and Action 1 srl (“Action 1”)—bring their Amended Counterclaims (the “Counterclaims”) asserting

five counterclaims against Matthew related to actions he took or did not take in his capacity as a Manager or co-Chief Executive Officer (“co-CEO”) of Aeosphere. Matthew moves for dismissal of Count II (breach of the implied covenant of good faith and fair dealing), Count IV (breach of contract), and Count V (unjust enrichment) under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

The Court concludes in this Memorandum Opinion that it does not have personal jurisdiction over Fläkt Woods or SEMCO, and that, even if it had personal jurisdiction over SEMCO, the Complaint fails to state a claim upon which relief may be granted against SEMCO; therefore, Matthew’s claims against Fläkt Woods and SEMCO are dismissed. Counts II, IV, and V of the Counterclaims are also dismissed for failure to state a claim upon which relief may be granted.

## **II. PARTIES**

Plaintiff/Counterclaim Defendant Matthew was a member, Manager, and co-CEO of Aeosphere.<sup>1</sup>

Defendant/Counterclaim Plaintiff Laudamiel was also a member, Manager, and co-CEO of Aeosphere.

Defendant/Counterclaim Plaintiff Action 1, an Italian business entity, was a member of Aeosphere.

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<sup>1</sup> Aeosphere was a Delaware limited liability company.

Defendant/Counterclaim Plaintiff Capua was a Manager of Aeosphere and the majority owner of Action 1.

Defendant Fläkt Woods, a Swiss business entity, provides management services to the Fläkt Woods family of companies. The various Fläkt Woods-related companies are involved in the air climate and air movement industries. According to Matthew, Fläkt Woods collaborated with Aeosphere on multiple projects.

Defendant SEMCO, a Missouri limited liability company, is a member of the Fläkt Woods family of companies. According to Matthew, SEMCO assisted Fläkt Woods with some of the projects on which it collaborated with Aeosphere.

### **III. FLÄKT WOODS'S AND SEMCO'S MOTIONS TO DISMISS**

#### *A. Background<sup>2</sup>*

For the purposes of deciding these motions, only a brief sketch of the allegations comprising the core of the Complaint is necessary because Fläkt Woods's and SEMCO's motions turn on jurisdictional factors and SEMCO's

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<sup>2</sup> Unless otherwise noted, the factual background is drawn from the Complaint, the well-pleaded allegations of which, for present purposes, must be taken as true. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). In certain instances, the Court will rely upon the Amended and Restated Limited Liability Company Agreement of Aeosphere LLC (the "LLC Agreement") and emails sent between Neil Yule of Fläkt Woods and Matthew from April 22, 2010 to April 28, 2010 (the "April Yule Emails") for facts not alleged in the Complaint. Although, as a general rule, the Court is limited to considering only the facts alleged in the complaint when deciding a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court may consider documents both integral to and incorporated into the complaint, and documents not relied upon for the truth of their contents. *Orman v. Cullman*, 794 A.2d 5, 15-16 (Del. Ch. 2002). Consideration of the LLC Agreement and April Yule Emails is appropriate in this case, as both are integral to and incorporated into the Complaint.

involvement in the rise and fall of Aeosphere, a tale in which it was, at most, a bit player; nevertheless, a detailed description of Aeosphere's formation, governance, ownership structure, and dissolution is presented to provide context for the Counterclaims addressed later.

### 1. Aeosphere's Formation and Governance Structure

Aeosphere was founded by Matthew and Laudamiel in June 2008 with a commercial focus on the development and marketing of fragrance technologies and systems. Before founding Aeosphere, Matthew had worked in corporate finance and founded SenseLab LLC, "a research and development company dedicated to creating new forms of entertainment by combining neuroscience, artificial intelligence and the creative arts."<sup>3</sup> For his part, Laudamiel was an accomplished perfumer who had been Senior Perfumer of Fine Fragrances and Innovation at International Flavors and Fragrances, Inc., a publicly traded manufacturer of flavor and fragrance products.

In May 2009, Action 1 invested 1.55 million euros in Aeosphere and agreed to provide further financing in the form of contingent loans. In return, Action 1 received 30% of Aeosphere's voting equity in the form of 300 preferred membership units; Matthew and Laudamiel each held 35% of the company's

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<sup>3</sup> Compl. ¶ 13.

voting equity in the form of 350 common membership units (“Common Units”) each.

At the time of Action 1’s investment, the members entered into the LLC Agreement, which governed their rights and obligations as members of Aeosphere.<sup>4</sup> Under the LLC Agreement, Aeosphere was to be managed by a Board of Managers (the “Board”), and each member was given the power to appoint one Manager. At all times relevant to Matthew’s claims, the Board consisted of Matthew, Laudamiel, and Capua. The LLC Agreement also set forth the notice requirements for regular Board meetings and emergency Board meetings, which could be called on less notice (at least 24 hours) than a regular Board meeting. A manager could waive notice under Article 5.2.3 of the LLC Agreement

In addition, the LLC Agreement also set forth the processes for Board approval. Generally, with some exceptions, both Matthew and Laudamiel had to approve actions requiring Board approval.<sup>5</sup> In the event that Matthew and Laudamiel were “deadlocked,” Capua was to cast the “tie-breaking” vote.<sup>6</sup> Some actions, including a winding up of Aeosphere, required “unanimous approval of the

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<sup>4</sup> See *id.*, Ex. H (LLC Agreement) 1.

<sup>5</sup> *Id.* at art. 5.2.6(a).

<sup>6</sup> *Id.*

Board.”<sup>7</sup> A similar process was used for the approval of certain types of contracts by Matthew and Laudamiel in their capacity as co-CEOs. For these contracts, the approval of both Matthew and Laudamiel was required, and if they “disagreed,” approval was to be submitted to the Board where Capua could cast a tiebreaking vote in accordance with the Board-approval procedure noted above.<sup>8</sup> Finally, Article 9.1 of the LLC Agreement set forth a list of events that would trigger the dissolution and winding up of Aeosphere, including “the approval of the Board or the Majority Vote of the Holders of the Common Units.”

## 2. Aeosphere’s Dealings with Fläkt Woods

Upon its formation, Aeosphere started working with Fläkt Woods on the development of a localized air scenting system called the “scent organ.” In July 2008, the two companies began a more formal process of collaboration on a new project with the objective of developing and marketing a new scenting technology to be incorporated into Fläkt Woods’s HVAC systems. An agreement documenting this collaborative relationship was entered into between Aeosphere and Fläkt Woods on July 2, 2008, and was amended twice in 2009 (the “Collaboration Agreement”).

Under the Collaboration Agreement, Aeosphere and Fläkt Woods partnered to develop an air fragrancing component for use in Fläkt Woods’s products.

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<sup>7</sup> *Id.* at art. 5.2.6(b).

<sup>8</sup> *Id.* at art. 5.4.2.

Specifically, Aeosphere was to invest up to \$253,000 (less the dollar equivalent of 25,000 euros) to develop commercial air fragrancing applications of a new electrohydrodynamic technology owned by Battelle Memorial Institute (“Battelle”) (the “Battelle technology”). Fläkt Woods had separately agreed with Battelle to develop and license the Battelle technology in the commercial air fragrancing field (the “Battelle-Fläkt Woods License Agreement”). According to Matthew, it was he who first recognized this potential application of the Battelle technology and brought it to the attention of the Defendants; he also claims to have been instrumental in negotiating the Battelle-Fläkt Woods License Agreement. Aeosphere separately entered into a collaboration agreement with Battelle.

Under the Collaboration Agreement, Aeosphere was to be Fläkt Woods’s exclusive supplier of scented media for use in Fläkt Woods’s HVAC air fragrancing systems for as long as the Battelle technology was employed, and would receive royalties from sales of the devices themselves and a specified percentage of profits from sales of scented media. If Fläkt Woods decided not to use the Battelle technology, Aeosphere would be Fläkt Woods’s exclusive supplier of scented media for 10 years, but would not receive any royalties from sales of the devices. Fläkt Woods accepted responsibility for, and the cost of, sales, marketing, distribution, installation, and maintenance of the systems developed under the Collaboration Agreement.

### 3. SEMCO's Involvement in Aeosphere's and Fläkt Woods's Collaboration

According to the Plaintiff, throughout the discussions and negotiations leading to the Collaboration Agreement, Fläkt Woods's representatives made statements "that Fläkt Woods would utilize the resources of its global 'family of companies,' including but not limited to SEMCO, to market and sell products developed under the joint ventures."<sup>9</sup> Specifically, Neil Yule ("Yule")—the European Sales Director for Fläkt Woods and the individual responsible for negotiating the Collaboration Agreement on behalf of Fläkt Woods—indicated that SEMCO's involvement would be required to facilitate the licensing of the Battelle technology because there were concerns about licensing it to a foreign entity such as Fläkt Woods. Notably, the license agreement between Battelle and Fläkt Woods expressly authorized Fläkt Woods to sublicense the Battelle technology to its affiliated companies.

Representatives of SEMCO were also involved in the collaborations among Aeosphere, Fläkt Woods, and Battelle. For example, John Fischer ("Fischer"), SEMCO's Director of Research and Development, attended a July 2, 2008, meeting between Fläkt Woods and Battelle to discuss the development and

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<sup>9</sup> Compl. ¶ 17.

potential licensing of the Battelle technology for use in Fläkt Woods's systems.<sup>10</sup> Fischer also worked with Yule to evaluate the Battelle technology. Furthermore, in communications with the Plaintiff, Yule identified Doug Haas, SEMCO's Head of Sales, as the individual at SEMCO who would lead the marketing effort in the United States of systems developed under the Collaboration Agreement. Finally, John Morrisette ("Morrisette"), SEMCO's President, was a member of what Yule identified as the "Fläkt Woods Board," from which Yule, allegedly, took direction concerning Fläkt Woods's work with Aeosphere, and, in an August 6, 2009, email sent to Yule, Morrisette noted that Aeosphere's ScentOpera<sup>11</sup> had received "top billing" in a "widely distributed" HVAC industry newsletter.<sup>12</sup>

#### 4. Aeosphere's Dissolution and Laudamiel's and Capua's Alleged Misappropriation of Aeosphere's Assets

According to the Plaintiff, beginning in October 2009, Laudamiel and Capua repeatedly refused to set the 2010 operating budget in violation of the LLC

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<sup>10</sup> In the Complaint, Fischer is described as SEMCO's Director of Research and Development. Apparently, Fischer was a consultant for SEMCO, but was described as its Director of Research and Development by Yule at the Battelle meeting. *See* Reply Br. in Support of Def. SEMCO LLC's & Def. Fläkt Woods Group SA's Mots. to Dismiss ("Reply Br.") 5. Fischer's specific job title and employment status are not crucial to the motion under consideration, as it is clear that he was acting as an agent of SEMCO in all of the activities discussed in this Memorandum Opinion.

<sup>11</sup> As more fully explained in the Plaintiff's briefs, the ScentOpera was a performance "in which scents [were] released at specific times in synchronization with music and visual elements." Pl.'s Answering Br. in Opp'n to Defs. Fläkt Woods Group SA's & SEMCO LLC's Mots. to Dismiss 6. The ScentOpera was created, written, and directed by Matthew, and performances were given at the Guggenheim Museums in New York and Bilbao, Spain. Compl. ¶ 39. The scent organ technology jointly developed by Aeosphere and Fläkt Woods was utilized in the ScentOpera. *Id.*

<sup>12</sup> Compl. ¶ 18 (quoting *id.*, Ex. G (Email from Morrisette to Yule)).

Agreement,<sup>13</sup> fearing that doing so would uncover a working capital shortfall and trigger Action 1's obligation to lend money to Aeosphere.<sup>14</sup> Instead, allegedly, Laudamiel and Capua began setting the stage for Aeosphere's demise and their misbegotten gains by enlisting the support Fläkt Woods. In January 2010, Capua informed Yule of an internal dispute between Laudamiel and Matthew related to the proposed hiring of Laudamiel's spouse, Christoph Hornetz ("Hornetz"). Capua informed Matthew of this discussion, and told him that he had proposed—and Yule "agreed in principle" to—a plan whereby Aeosphere would be split up. Under this plan, Aeosphere's primary assets and contracts would be transferred to an entity controlled by Laudamiel and Capua; Matthew would be permitted to sell fragrances to Fläkt Woods. In conversation, Yule allegedly confirmed to Matthew that he "agreed in principle" with Capua's proposal. Laudamiel and Capua unsuccessfully sought Matthew's assent to this plan.

As tensions among the Managers remained high, Yule made it clear to them that their internal problems were putting the Aeosphere-Fläkt Woods collaboration at risk.<sup>15</sup> In the April Yule Emails, which bear the subject line "The Clock is

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<sup>13</sup> Article 10.8 of the LLC Agreement required the Board to provide the members with an annual budget "within ninety (90) days prior to the beginning of each Fiscal Year."

<sup>14</sup> Under Article 4.4.2(c) of the LLC Agreement, Action 1 was required to loan Aeosphere money sufficient to cover a "Salary Shortfall," which would occur if any two Managers determined that Aeosphere had insufficient funds to pay the salary or guaranteed bonus of either co-CEO.

<sup>15</sup> See Compl., Ex. I (Email from Yule to Capua, Matthew, and Laudamiel (Apr. 22, 2010) ("April 22 Email")).

Ticking,” Yule stated that he would be unable to pursue business opportunities related to the scenting project until “the new set-up for Aeosphere ha[d] been put in place,” and that he “needed some re-assurance that Aeosphere [would] remain a viable business for the foreseeable future.”<sup>16</sup> He further implored the Managers to “sort out [their] internal issues as quickly as possible and allow us to get this exciting venture back on the right path,” lest he be told by his superiors “to wind up our involvement in the scent project.”<sup>17</sup> According to the Plaintiff, this last statement shows that Yule “was taking direction from senior management at Fläkt Woods with respect to the Aeosphere-Fläkt Woods [collaboration].”<sup>18</sup> In the April Yule Emails, Yule also revealed that Fläkt Woods viewed Laudamiel, and not Matthew, as critical to the success of the scent project.<sup>19</sup> The Plaintiff alleges that, in subsequent correspondence,<sup>20</sup> Yule “offered plaintiff an ultimatum of either withdrawing from Aeosphere or permitting Fläkt Woods to proceed with Mr. Capua’s proposal [that Fläkt Woods work with Laudamiel and Capua alone].”<sup>21</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Compl. ¶ 28.

<sup>19</sup> *See id.*, Ex. I (Email from Yule to Matthew (Apr. 28, 2010) (“April 28 Email”)) (noting that while Matthew was “absolutely pivotal in the *formation* of Aeosphere,” it was Laudamiel’s “technical skills [that were] seen as an essential component in the Aeosphere-Fläkt Woods partnership” (emphasis added)).

<sup>20</sup> It is not clear from the Complaint exactly when this communication occurred or whether it occurred telephonically or by email.

<sup>21</sup> Compl. ¶ 29.

Matthew refused to bow out of Aeosphere, and, he alleges, this led Laudamiel and Capua to exclude him from the business by improperly dissolving Aeosphere and misappropriating its assets. On May 3, 2010, Laudamiel and Capua purported to call and deliver to Matthew notice of an emergency meeting of the Board to be held the next day. According to the agenda for this meeting, the Board would consider and vote on, among other things: (1) the dissolution and winding up of Aeosphere; (2) the termination of all of Aeosphere's employees; and (3) the distribution of Aeosphere's remaining intellectual property rights. Following delivery of this notice, Aeosphere's corporate counsel informed Laudamiel and Capua that certain agenda items, including dissolution, did not meet the requirement that emergency meetings could only be called if a Manager "believe[d] in good-faith that such meeting [was] necessary to preserve [an Aeosphere] right or to avoid [an Aeosphere] liability or adverse consequence to [Aeosphere]."<sup>22</sup> Before the meeting, counsel for Matthew notified counsel for Laudamiel and Capua that Matthew would not participate in the meeting and did not consent to the dissolution of Aeosphere. Matthew did not waive notice of the meeting.

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<sup>22</sup> *Id.* at ¶ 21 (quoting LLC Agreement art. 5.2.3).

Laudamiel and Capua were the only Mangers present at the emergency meeting, and they voted to wind up the affairs of Aeosphere and dissolve it as soon as practical. They also voted to terminate Matthew as co-CEO, to terminate Aeosphere's other employees, and to close its labs and offices. Laudamiel was designated to oversee the winding up and liquidation of Aeosphere, and, on May 12, 2010, a certificate of cancellation was filed with the Delaware Secretary of State. The Plaintiff alleges that Laudamiel and Capua took several actions to enrich themselves at his expense prior to and in connection with the liquidation of Aeosphere, including: (a) accelerating capital improvements at Aeosphere properties later transferred to entities controlled by Laudamiel and Capua; (b) taking cash and company funds; and (c) causing Aeosphere to assign material assets, including intellectual property and fragrance formulae, to themselves or entities they controlled.

According to the Plaintiff, among the most valuable assets of Aeosphere that Laudamiel and Capua misappropriated were the "joint ventures" with Fläkt Woods. Since Aeosphere's dissolution, Laudamiel and Capua or entities they control have, allegedly, continued working with Fläkt Woods to: (a) develop the Battelle technology and integrate it or an alternative technology into Fläkt Woods's commercial systems; and (b) market the systems and scented media used in them.

Additionally, SEMCO's Head of Sales has worked with Laudamiel and Capua on the marketing of a scenting system.

*B. The Contentions*

The Plaintiff contends that Laudamiel and Capua breached the LLC Agreement, breached their fiduciary duties, and converted the Plaintiff's Common Units through their actions described above aimed at dissolving Aeosphere and transferring its assets to entities they control; Action 1 is also alleged to have breached the LLC Agreement. The Plaintiff further alleges that Fläkt Woods and SEMCO aided and abetted these breaches of fiduciary duties. Additionally, the Plaintiff argues that Fläkt Woods tortiously interfered with the Plaintiff's rights under the LLC Agreement and his employment agreement (the "Employment Agreement") by conspiring with and inducing Laudamiel, Capua, and Action 1 (together, the "Aeosphere Defendants") to breach these agreements. Finally, the Plaintiff asserts that all of the Defendants were unjustly enriched and committed acts of civil conspiracy.

In support of their respective motions to dismiss, both Fläkt Woods and SEMCO argue that they are not subject to personal jurisdiction in Delaware and, therefore, that the claims asserted against each should be dismissed under Court of Chancery Rule 12(b)(2). Both note that they are non-Delaware entities with minimal contacts with Delaware, either generally or with regard to Matthew's

causes of action. As a result, Fläkt Woods and SEMCO contend, Delaware can exercise neither general nor specific long-arm jurisdiction over them, and, regardless, any assertion of personal jurisdiction would violate the Due Process Clause of the Fourteenth Amendment. Additionally, citing the dearth of allegations linking SEMCO to the alleged wrongful conduct, SEMCO argues that the Plaintiff has failed to state a claim against it upon which relief can be granted, and that this provides a separate ground for dismissal under Court of Chancery Rule 12(b)(6).

In opposition to these motions to dismiss, the Plaintiff asserts that both Fläkt Woods and SEMCO are subject to personal jurisdiction in Delaware under the “conspiracy theory” of jurisdiction. Moreover, the Plaintiff argues that SEMCO is subject to general jurisdiction in Delaware due to its sale and marketing of products in Delaware. Finally, with regard to the claims against SEMCO, the Plaintiff contends that he has alleged facts that—when considered with all reasonable inferences in his favor—meet the liberal pleading standard governing Court of Chancery Rule 12(b)(6) motions to dismiss.

### *C. Analysis*

#### 1. Fläkt Woods’s Jurisdictional Argument

Fläkt Woods moves to dismiss the claims brought against it for lack of personal jurisdiction. In considering a motion to dismiss for lack of personal

jurisdiction under Court of Chancery Rule 12(b)(2), the Court is not limited to the pleadings; rather, it is “permitted to rely upon the pleadings, proxy statements, affidavits, briefs of the parties in order to determine whether the defendants are subject to personal jurisdiction.”<sup>23</sup> “Once a defendant moves to dismiss under Rule 12(b)(2), the burden rests on the plaintiff to demonstrate the two bedrock requirements for personal jurisdiction: (1) a statutory basis for service of process; and (2) the requisite ‘minimum contacts’ with the forum to satisfy constitutional due process.”<sup>24</sup> Here, the Plaintiff contends that the Court may exercise jurisdiction over Fläkt Woods under the conspiracy theory of jurisdiction.<sup>25</sup> The Delaware long-arm statute<sup>26</sup> provides a statutory basis for the “exercise of personal jurisdiction over any nonresident, or a personal representative, who in person or *through an agent*” engages in any one of several categories of actions with a Delaware nexus.<sup>27</sup> Furthermore, a well-established principle of conspiracy posits that, “where a conspiracy exists, the acts of each co-conspirator with respect to the

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<sup>23</sup> *Sample v. Morgan*, 935 A.2d 1045, 1055-56 (Del. Ch. 2007) (quoting *Crescent Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000)).

<sup>24</sup> *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at \*6 (Del. Ch. May 7, 2008) (citations omitted).

<sup>25</sup> “The ‘conspiracy theory’ of jurisdiction is not an independent jurisdictional basis. Rather, it is more aptly described as a shorthand reference to an analytical framework where a defendant’s conduct that either occurred or had a substantial effect in Delaware is attributed to a defendant who would not otherwise be amenable to jurisdiction in Delaware.” *Benihana of Tokyo Inc. v. Benihana, Inc.*, 2005 WL 583828, at \*6 n.16 (Del. Ch. Feb. 4, 2005) (citation and internal quotation marks omitted). In this instance, Matthew is attempting to attribute the conduct of the Aeosphere Defendants to Fläkt Woods.

<sup>26</sup> 10 Del. C. § 3104.

<sup>27</sup> *Id.* at § 3104(c) (emphasis added).

aim of the conspiracy are attributable to the acts of the other co-conspirators under a theory of agency.”<sup>28</sup> Thus, “if the purposeful acts of one co-conspirator are of such nature and quality that the actor would be subject to personal jurisdiction in Delaware, all of the conspirators may be deemed subject to jurisdiction in Delaware.”<sup>29</sup>

In order to establish that personal jurisdiction under the conspiracy theory is consistent with constitutional due process, Matthew must make a factual showing that:

(1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.<sup>30</sup>

This is a strict test with a narrow scope, and, as a result, factual proof of each enumerated element is required.<sup>31</sup> When assessing the first two *Istituto Bancario* factors, the Court focuses on the substance instead of the form of the plaintiff’s

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<sup>28</sup> Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 3.05[b], at 3-82 (2011).

<sup>29</sup> *Id.*

<sup>30</sup> *Istituto Bancario Italiano SpA v. Hunter Eng’g Co., Inc.*, 449 A.2d 210, 225 (Del. 1982) (the “*Istituto Bancario* factors” or “*Istituto Bancario* test”).

<sup>31</sup> *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 330 (Del. Ch. 2003). *See also Newspan, Inc. v. Hearthstone Funding Corp.*, 1994 WL 198721, at \*8 (Del. Ch. May 10, 1994) (explaining that satisfaction of the *Istituto Bancario* test requires “strong evidence of a conspiracy and purposeful involvement in its activities”).

allegations.<sup>32</sup> Therefore, allegations supporting a conspiracy theory of jurisdiction need not be framed as civil conspiracy in the Complaint.<sup>33</sup> Also, although the test “literally speaks in terms of a ‘conspiracy to defraud,’ the principle is not limited to that particular tort.”<sup>34</sup> The first and second *Istituto Bancario* factors may be satisfied by sufficiently pleading a claim for aiding and abetting a breach of fiduciary duty.<sup>35</sup>

While this Court has in the past applied the *Istituto Bancario* test in connection with its analysis under the long-arm statute, the test was, apparently, intended to only apply to the due process analysis.<sup>36</sup> Nonetheless, because it is clear that the Plaintiff cannot meet the *Istituto Bancario* test, the Court will apply only this test, as even a positive showing under the statutory basis analysis would be rendered moot by the Plaintiff’s inability to demonstrate that Fläkt Woods has the minimum contacts necessary to meet constitutional due process standards.<sup>37</sup>

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<sup>32</sup> See *Benihana*, 2005 WL 583828, at \*7.

<sup>33</sup> See *id.* The allegations would, apparently, still need to satisfy the elements of civil conspiracy, even if not pled in this fashion. See *id.*

<sup>34</sup> *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1197 (Del. Ch. 2010).

<sup>35</sup> *Id.* at 1198.

<sup>36</sup> Wolfe & Pittenger, *supra* note 28, § 3.05[b], at 3-85 (citing *Abajian v. Kennedy*, 1992 Del. Ch. LEXIS 6, at \*35 (Del. Ch. Jan. 17, 1992)). See also *Istituto Bancario*, 449 A.2d at 225 (“A conspirator who is absent from the forum state is subject to the jurisdiction of the court, assuming he is properly served under state law, if the plaintiff can make the factual showing . . .”) (emphasis added)).

<sup>37</sup> Although perhaps analytically distinct, the statutory basis and *Istituto Bancario* tests are clearly closely related in the context of the conspiracy theory of jurisdiction. Indeed, it appears that acts necessary to meet the statutory basis test under the conspiracy theory of jurisdiction would also be required to meet the *Istituto Bancario* test. Thus, a successful or unsuccessful showing under the *Istituto Bancario* test would, generally, seem to imply the same result under

The first and second *Istituto Bancario* factors require a showing that the defendant was a member of a conspiracy to defraud. Matthew asserts claims of civil conspiracy and aiding and abetting a breach of fiduciary duty against Fläkt Woods, either of which, if properly pled, would satisfy the first two *Istituto Bancario* factors. The precise parameters and goals of the alleged conspiracy<sup>38</sup> are somewhat obscure, though. Matthew repeatedly alleges that Fläkt Woods conspired with Laudamiel and Capua to misappropriate Aeosphere’s assets.<sup>39</sup> This is a conclusory allegation; Matthew pleads no facts to support the notion that Fläkt Woods was part of a conspiracy to misappropriate Aeosphere’s assets.<sup>40</sup> More to the point, Matthew alleges that Fläkt Woods conspired with Laudamiel and Capua to pursue Aeosphere’s business plan without him<sup>41</sup> and to “deprive [him] of his

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the statutory basis test. It has been suggested that one distinction between the two tests is that the *Istituto Bancario* test, as a test used to assess the requirements of due process, can consider a wider range of Delaware contacts and is not limited to considering only those forum activities upon which service of process may be based. *See* Wolfe & Pittenger, *supra* note 28, § 3.05[b], at 3-85 to -86. But, given the *Istituto Bancario* test’s focus on a conspiracy with a Delaware nexus—likely the same subject matter underlying any argument in support of finding a statutory basis for the service of process—in practice this is likely to be a distinction which only rarely amounts to a difference. Such a distinction is meaningless in the instant case, as Fläkt Woods’s *only* alleged connections to Delaware result from the acts of its alleged co-conspirators upon which service of process might be based or are otherwise intimately intertwined with such acts (e.g., entering into the Collaboration Agreement with a Delaware corporation). In short, the Plaintiff’s failing of the *Istituto Bancario* test, in this case, makes it highly unlikely that he would meet the statutory basis test if it were separately applied.

<sup>38</sup> The same allegations and conspiracy theory underlie both the aiding and abetting and civil conspiracy claims.

<sup>39</sup> Compl. ¶¶ 53, 67.

<sup>40</sup> The Defendants seemingly have not questioned whether Matthew would have standing to bring a direct claim related to a conspiracy to misappropriate *Aeosphere’s* assets.

<sup>41</sup> Compl. ¶ 53 (alleging a conspiracy to “develop the air scenting systems, and to exploit . . . the business plan reflected in the Collaboration Agreement, all to [Matthew’s] exclusion and

ownership stake [in Aeosphere’s assets].”<sup>42</sup> While his conspiracy allegations are often phrased in terms of harm to Aeosphere—and not Matthew, personally<sup>43</sup>—based upon the totality of the allegations in the Complaint, it is fair to say that Matthew alleges the existence of a conspiracy to force him out of Aeosphere and deprive him of his equity stake in the company.

To plead a claim of civil conspiracy, Matthew must allege facts establishing the following elements: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds between or among such persons relating to the object or a course of action; (4) one or more unlawful acts; and (5) damages as a proximate result thereof.<sup>44</sup> Matthew need not allege “the existence of an explicit agreement; a conspiracy can be inferred from the pled behavior of the alleged conspirators.”<sup>45</sup> At this stage, the Court must draw all reasonable inferences in his favor.<sup>46</sup>

Matthew’s theory that Fläkt Woods had a meeting of the minds with Laudamiel and Capua to remove Matthew from Aeosphere’s business and deny

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detriment); *id.* at ¶ 67 (alleging that the conspiracy involves Laudamiel and Capua’s continued collaboration with Fläkt Woods in violation of Aeosphere’s “valuable rights under the Collaboration Agreement”).

<sup>42</sup> *Id.* at ¶ 67.

<sup>43</sup> *Id.* at ¶ 53 (alleging a conspiracy to misappropriate Aeosphere’s assets and exploit Aeosphere’s business plan); *id.* at ¶ 67 (same and alleging that Matthew had rights to Aeosphere’s “air fragrancing technologies, products, services and systems . . . by virtue of his ownership in Aeosphere” (emphasis added)).

<sup>44</sup> Wolfe & Pittenger, *supra* note 28, § 3.05[b], at 3-83.

<sup>45</sup> *In re Am. Int’l Group, Inc.*, 965 A.2d 763, 806 (Del. Ch. 2009) (citing *Empire Fin. Servs., Inc. v. Bank of N.Y.*, 900 A.2d 92, 97 n.16 (Del.2006)), *aff’d sub nom. Teachers’ Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228, 2011 WL 13545 (Del. Jan. 3, 2011) (TABLE).

<sup>46</sup> *Sample*, 935 A.2d at 1056.

him his stake in the company satisfies these elements, and, based upon the alleged facts, the Court may reasonably infer that such a conspiracy existed. The Court specifically notes two statements allegedly made by Yule that are crucial to its conclusion that a proper factual basis is pled to allow an inference to satisfy the second and third elements of a civil conspiracy. First, Yule allegedly told Capua that he “agreed in principle” with Capua’s plan to remove Matthew from Aeosphere.<sup>47</sup> Second, Yule allegedly offered Matthew “an ultimatum of either withdrawing from Aeosphere or permitting Fläkt Woods to proceed with Mr. Capua’s proposal.”<sup>48</sup> The Court concludes that Matthew has pled sufficient facts to allow it to infer that this conspiracy existed, and that this conspiracy satisfies the first and second *Istituto Bancario* factors.

The filing of the certificate of cancellation satisfies the third *Istituto Bancario* factor. Cancelling Aeosphere was a critical step taken in furtherance of the conspiracy to remove Matthew from Aeosphere, and the filing of a corporate instrument, such as a certificate of cancellation, is considered an act occurring in Delaware.<sup>49</sup>

Matthew, however, does not satisfy the fourth *Istituto Bancario* factor. A defendant does not purposefully avail himself of a forum without knowledge that

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<sup>47</sup> Compl. ¶ 27.

<sup>48</sup> *Id.* at ¶ 29.

<sup>49</sup> See, e.g., *Istituto Bancario*, 449 A.2d at 227 (filing of a certificate of amendment).

an act or effect will occur there.<sup>50</sup> There is nothing in the record from which this Court may infer that Fläkt Woods knew that the conspiracy would have a Delaware nexus until *after* the conspiracy’s goal had been attained and the conspiracy itself was completed. In an email dated May 24, 2010, Yule told Matthew that he had seen a copy of the certificate of cancellation filed in Delaware.<sup>51</sup> This email was sent nearly two weeks after the certificate of cancellation was filed. Furthermore, it is clear from the wording of the email that Yule did not see a copy of the certificate of cancellation until *after* it had been filed with the Delaware Secretary of State.<sup>52</sup> By that time, Matthew’s employment by Aeosphere had been terminated, as had his directorship and economic interest in the company, which were terminated by virtue of the company’s cancellation. In sum, the conspiracy had come to an end by the time Fläkt Woods learned of its Delaware nexus.

Matthew pleads no other facts from which the Court could infer that Fläkt Woods knew that the conspiracy had a Delaware nexus or even that Aeosphere was a Delaware entity. In his Answering Brief, Matthew argues that the May 24 Email and Fläkt Woods’s “continuing relationship” with Laudamiel and Capua establish

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<sup>50</sup> See *id.* at 225 (“Thus, a defendant who has so voluntarily participated in a conspiracy *with knowledge of its acts or effects in the forum state* can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.” (emphasis added)).

<sup>51</sup> Decl. of Stewart Matthew, Ex. 2. (Email from Yule to Matthew (May 24, 2010) (“May 24 Email”)).

<sup>52</sup> See *id.* (wherein Yule stated that he saw “a Certificate of Cancellation of Aeosphere LLC, issued by the State of Delaware”).

that it was aware of the conspiracy’s Delaware nexus.<sup>53</sup> But, both of these acts occurred after the conspiracy was completed; additionally, it is unclear how Fläkt Woods’s “continuing relationship” with Laudamiel and Capua, alone, could establish knowledge of the conspiracy’s Delaware contacts. At oral argument, Matthew’s counsel also asserted that an email sent by Yule to Matthew on May 10, 2010,<sup>54</sup> demonstrated that Fläkt Woods was aware that an act in furtherance of the conspiracy would take place in Delaware.<sup>55</sup> This argument fails because Matthew’s counsel’s characterization of the contents of the May 10 Email was inaccurate. In this email, Yule did not state that he was “provided with the minutes of a Delaware LLC that purport to effect [Aeosphere’s dissolution]”;<sup>56</sup> instead, Yule merely stated that he had heard that Aeosphere had been dissolved—there was no mention of Delaware (or even meeting minutes), whatsoever.<sup>57</sup> Since Matthew does not establish that Fläkt Woods knew of the conspiracy’s Delaware nexus before the completion of the conspiracy, he fails to satisfy the fourth *Istituto Bancario* factor.

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<sup>53</sup> Pl.’s Answering Br. 30-31.

<sup>54</sup> Decl. of Stewart Matthew, Ex. 1. (Email from Yule to Matthew (May 10, 2010) (“May 10 Email”)).

<sup>55</sup> Cross Mots. to Dismiss & Mot. to Strike Hr’g Tr. (“Hr’g Tr.”) at 66.

<sup>56</sup> *Id.*

<sup>57</sup> May 10 Email.

In his brief, the Plaintiff does not sponsor any other arguments that Delaware has personal jurisdiction over Fläkt Woods, and his allegations do not support any other theory of jurisdiction. For instance, there are no allegations that Fläkt Woods itself took any actions in Delaware related to the alleged wrongs, and given the paucity of Fläkt Woods's alleged Delaware-related activities, it is clear that any effort to exercise general jurisdiction over Fläkt Woods would be inappropriate. For the reasons discussed above, the Plaintiff's claims against Fläkt Woods are dismissed for lack of personal jurisdiction.

## 2. SEMCO's Jurisdictional Argument

SEMCO joins in Fläkt Woods's motion to dismiss Matthew's claims for lack of personal jurisdiction. When personal jurisdiction is challenged, the Court's conclusion that it has personal jurisdiction is a condition precedent to judicial action, including dismissal of a complaint for failure to state a claim.<sup>58</sup> Therefore, this Court must address SEMCO's jurisdictional challenge before assessing the merits of its Court of Chancery Rule 12(b)(6) argument.

The Plaintiff first argues that SEMCO is subject to personal jurisdiction under the conspiracy theory of jurisdiction. This argument is unavailing. Based

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<sup>58</sup> *Branson v. Exide Electronics Corp.*, 625 A.2d 267, 269 (Del. 1993).

upon the alleged facts,<sup>59</sup> this Court cannot conclude that SEMCO was involved in a conspiracy to defraud Matthew.

The Plaintiff's argument that SEMCO is subject to general jurisdiction under 10 *Del. C.* § 3104(c)(4) is a closer call. Ultimately, Matthew shows neither a statutory basis for the service of process on SEMCO, nor that exercising personal jurisdiction over SEMCO would comport with constitutional due process.

Before assessing the parties' jurisdictional arguments, the Court provides the following summary of the facts relevant to determining whether SEMCO is subject to general jurisdiction in Delaware. SEMCO is a Missouri limited liability company with its principal place of business in Columbia, Missouri.<sup>60</sup> SEMCO has no employees, offices, bank accounts, or real estate in Delaware.<sup>61</sup> SEMCO made sales in Delaware in each of the four years before the filing of this suit (2007-2010).<sup>62</sup> These sales ranged in dollar-value from \$32,711.07 to \$286,721.47, and represented from 0.1% to 0.5% of SEMCO's total sales in the United States.<sup>63</sup> The number of sales in Delaware ranged from a low of six in 2010

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<sup>59</sup> See Part III.C.3 (summarizing the facts alleged to tie SEMCO to the wrongful actions alleged in this suit).

<sup>60</sup> Compl. ¶ 12.

<sup>61</sup> Supplemental Opening Br. in Supp. of Def. SEMCO LLC's Mot. to Dismiss for Failure to State a Claim upon which Relief Can Be Granted and to Dismiss for Lack of Personal Jurisdiction ("SEMCO Supplemental Opening Br."), Ex. D ("Jan. Morissette Aff.") ¶¶ 8-11.

<sup>62</sup> SEMCO Supplemental Opening Br., Ex. E ("June Morissette Aff.") ¶ 9.

<sup>63</sup> *Id.*

to a high of eleven in 2009.<sup>64</sup> On its website, SEMCO lists a sales representative located in Delaware.<sup>65</sup> Apparently, this sales representative is independent of SEMCO.<sup>66</sup>

Section 3104(c)(4) provides that personal jurisdiction may be exercised over a nonresident who causes tortious injury inside or outside of Delaware “by an act or omission outside of [Delaware] if the person regularly does or solicits business, engages in any other persistent course of conduct in [Delaware] or derives substantial revenue from services, or things used or consumed in [Delaware].” Based upon the relevant facts, the better inference is that SEMCO does not meet this standard.

Even assuming that Matthew sufficiently pleads that SEMCO caused a tortious injury,<sup>67</sup> he does not offer facts that would support an inference that SEMCO “regularly does or solicits business, engages in any other persistent course of conduct in [Delaware] or derives substantial revenue from . . . [Delaware].”<sup>68</sup> It is clear that SEMCO does not derive “substantial revenue” from sales in

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<sup>64</sup> Decl. of Mark A. Thornhill, Ex. 4 (SEMCO sales report for the years 2007-2010).

<sup>65</sup> Compl., Ex. C (screenshots of SEMCO’s webpage).

<sup>66</sup> *See id.* (separate company, Trane-Seiberlich, listed as the Delaware sales representative); Pl.’s Answering Br. 33 (recognizing that “SEMCO may market and sell its products in Delaware through independent distributors”); Jan. Morissette Aff. ¶ 9 (stating that SEMCO has no employees in Delaware).

<sup>67</sup> In this context, the phrase “tortious injury” is not limited to the strict definition of a “tort,” but includes any act which involves breaching a duty to another and makes the one committing the act liable for damages. *See State ex rel. Brady v. Preferred Florist Network, Inc.*, 791 A.2d 8, 13 (Del. Ch. 2001) (citing *Magid v. Marcal Paper Mills, Inc.*, 517 F. Supp. 1125, 1130 (D. Del. 1981)).

<sup>68</sup> 10 Del. C. § 3104(c)(4).

Delaware,<sup>69</sup> but the more difficult question is whether it engages in a “persistent course of conduct” or “regularly does or solicits business” in Delaware. Matthew relies primarily on two cases—*United States v. Consolidated Rail Corp.*<sup>70</sup> and *Magid v. Marcal Paper Mills, Inc.*<sup>71</sup>—to argue that SEMCO’s sales of its products to consumers in Delaware over a four-year period is, by itself, sufficient to confer personal jurisdiction. In neither of these cases, though, was personal jurisdiction found based upon a pattern of sales alone. In *Consolidated Rail*, the court found that Section 3104(c)(4) was met, not only due to defendant Boston Globe’s (“Globe”) sales in Delaware over the previous four years, but also because Globe’s counsel conceded in oral argument that Globe’s contacts with Delaware “have been regular and persistent.”<sup>72</sup> No such concession was made in this case. In *Magid*, the court found that Section 3104(c)(4) was met, not only due to the defendant’s “regular shipment of goods” to one Delaware wholesaler, but also because of the defendant’s “continuous supervision of certain aspects of the retail sale of its products in Delaware.”<sup>73</sup> No such supervisory activities are alleged in this case.

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<sup>69</sup> See *Bell Helicopter Textron, Inc. v. C & C Helicopter Sales, Inc.*, 295 F. Supp. 2d 400, 405 (D. Del. 2002) (finding that Delaware revenue comprising less than 1% of total revenue was not “substantial revenue”).

<sup>70</sup> 674 F. Supp. 138 (D. Del. 1987).

<sup>71</sup> 517 F. Supp. 1125 (D. Del. 1981).

<sup>72</sup> *Consol. Rail*, 674 F. Supp. at 144.

<sup>73</sup> *Magid*, 517 F. Supp. at 1130.

Instead, the relevant facts of this case more closely track those of *Merck & Co., Inc. v. Barr Laboratories, Inc.*<sup>74</sup> In *Merck*, defendant Barr Laboratories, Inc.’s (“Barr”) Delaware-derived revenue comprised less than 1% of its annual revenue, and it had no Delaware offices, telephone listings, bank accounts, or advertising directed at Delaware.<sup>75</sup> It also was not registered with the Secretary of State to do business in Delaware and did not solicit new customers in Delaware.<sup>76</sup> Barr did maintain two licenses that allowed it to sell drugs in Delaware and to make direct, weekly sales to a company located in Delaware, which resold the drugs as a retailer.<sup>77</sup> Barr also had one account manager for its existing Delaware customers who traveled to Delaware up to three times per year.<sup>78</sup> Based upon these facts, the court in *Merck* concluded that Barr did not regularly do or solicit business in Delaware.<sup>79</sup>

As with the defendant in *Merck*, SEMCO’s Delaware-derived revenue comprises less than 1% of its annual revenue, and it has no Delaware offices, telephone listings, or bank accounts. Matthew has not alleged that SEMCO is licensed with the Secretary of State to do business in Delaware, nor has he alleged that SEMCO holds any licenses issued by the state of Delaware. Unlike Barr,

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<sup>74</sup> 179 F. Supp. 2d 368 (D. Del. 2002).

<sup>75</sup> *Id.* at 371.

<sup>76</sup> *Id.* at 372.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 373.

<sup>79</sup> *Id.*

SEMCO is not alleged to send an employee physically to Delaware to service customers. In fact, beyond the minimal amount of sales SEMCO makes in Delaware, its only alleged contact is a listing on its website for a third-party sales representative based in Delaware. There are no allegations that SEMCO advertises its products in Delaware or does anything else to promote its products in Delaware, besides listing this third-party on its website.<sup>80</sup> This listing, in conjunction with a small amount of Delaware sales and nothing else, does not constitute a “persistent course of conduct” or “regularly do[ing] or solicit[ing] business” in Delaware.

In the alternative, SEMCO contends that even if jurisdiction is proper under the Delaware long-arm statute, the exercise of jurisdiction would be improper under the Due Process Clause. The Court agrees. To satisfy constitutional due process concerns, a defendant must engage in sufficient minimum contacts with a forum state to require it to defend itself in the courts of that state consistent with “traditional notions of fair play and justice.”<sup>81</sup> “[T]o maintain general jurisdiction over a foreign defendant, the facts must establish ‘continuous and systemic general business contacts’ with the forum state.”<sup>82</sup> Furthermore, “a plaintiff must show

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<sup>80</sup> Furthermore, Matthew provides no explanation of the extent of SEMCO’s or its independent sales representative’s sales efforts in Delaware.

<sup>81</sup> *LaNuova D & B, S.p.A v. Bowe Co., Inc.*, 513 A.2d 764, 769 (Del. 1986) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

<sup>82</sup> *Merck*, 179 F. Supp. 2d at 375 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

significantly more than mere minimum contacts to establish general jurisdiction.”<sup>83</sup>

After considering SEMCO’s Delaware contacts and the fact that these limited contacts are unrelated to the causes of action, the Court concludes that they do not satisfy “the high standard for an assertion of general jurisdiction.”<sup>84</sup>

### 3. SEMCO’s Motion to Dismiss for Failure to State a Claim upon which Relief May be Granted

In the alternative, SEMCO moves to dismiss the claims brought against it under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief may be granted.<sup>85</sup> For the reasons explained below, this motion would be granted if this Court had personal jurisdiction over SEMCO.

The pleading standards governing a motion to dismiss are minimal.<sup>86</sup> When considering a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as ‘well-pleaded’ if they provide the defendant notice of the claim, draw all reasonable

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<sup>83</sup> *Id.* (citing *Provident Nat. Bank v. Cal. Fed. Sav. & Loan Ass’n*, 819 F.2d 434, 437 (3d Cir. 1987)).

<sup>84</sup> *Id.* at 374. The Court also notes that, in all three of the cases primarily relied upon by the parties in making their Section 3104(c)(4) arguments—*Merck*, *Consolidated Rail*, and *Magid*—including two in which the requirements of Section 3104(c)(4) were found to be met, it was determined that the requirements of constitutional due process were not met. *Merck*, 179 F. Supp. 2d at 375; *Consol. Rail*, 674 F. Supp. at 145 (regular and continuous business activities in Delaware were insufficient for the assertion of jurisdiction where the activities were minimal (small amount of sales)); *Magid*, 517 F. Supp. at 1131.

<sup>85</sup> Although the Court has determined that it does not have personal jurisdiction over SEMCO, Matthew presented strong arguments supporting a finding of jurisdiction, and this determination was not clear-cut. Therefore, the Court will also assess SEMCO’s Court of Chancery Rule 12(b)(6) argument to inform the parties of how it would rule on this issue in the event it were found to have personal jurisdiction over Matthew.

<sup>86</sup> *Cent. Mortg. Co.*, 27 A.3d at 536.

inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.<sup>87</sup>

Matthew makes the following claims against SEMCO: aiding and abetting breaches of fiduciary duties,<sup>88</sup> unjust enrichment,<sup>89</sup> and civil conspiracy.<sup>90</sup> His theory of these claims is not readily apparent from review of the Complaint. At oral argument, in response to the Court's questioning, counsel for Matthew revealed his theory of the claims against SEMCO, explaining:

But what we have alleged, and what we believe is appropriate, given the totality of the record, is an inference that SEMCO is an integral part of the business that's being pursued by Fläkt Woods, Mr. Laudamiel and Mr. Capua, their entity, just as it was throughout. *So, again, it's an inference that based on their prior participation, their current participation, that they have been involved the whole time.*<sup>91</sup>

In sum, based upon allegations that SEMCO had some involvement with Aeosphere before its dissolution and some involvement with Laudamiel and Capua after the dissolution, Matthew asks this Court to infer that “[it has] been involved

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<sup>87</sup> *Id.*

<sup>88</sup> Compl. ¶ 52. A claim for aiding and abetting a breach of fiduciary duty requires three elements: (1) the existence of a fiduciary relationship; (2) a breach of the fiduciary's duty; and (3) a knowing participation in that breach by the defendant. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995).

<sup>89</sup> Compl. ¶ 63. The elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law. *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).

<sup>90</sup> Compl. ¶ 67. The elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds between or among such persons relating to the object or a course of action; (4) one or more unlawful acts; and (5) damages as a proximate result thereof. *Wolfe & Pittenger*, *supra* note 28, § 3.05[b], at 3-83.

<sup>91</sup> Hr'g Tr. at 60 (emphasis added).

the whole time.”<sup>92</sup> Involved in exactly what and exactly how is not clear. Matthew does not ask for an inference of any particular act that might support the claims asserted; essentially, he asks the Court to imagine what wrongful acts SEMCO might have committed that would support these claims, and then to infer that these acts were indeed committed. Such a theory likely fails as a matter of law, but, nevertheless, the Court will assess the factual allegations involving SEMCO to determine whether or not they can support a *reasonable* inference that SEMCO was involved in actions that could support the claims asserted against it.

There are sparse factual allegations related to SEMCO to support these claims.<sup>93</sup> The following is a summary of the factual allegations tying SEMCO to Aeosphere and Matthew; few, if any, of these allegations connect SEMCO to the alleged wrongs, let alone constitute the well-pleaded facts that, together with their reasonable inferences, are necessary to support any of the claims brought against SEMCO. According to the Plaintiff, representatives of Fläkt Woods stated that SEMCO would assist with the marketing and sales of products developed under the Collaboration Agreement and with licensing the Battelle technology. Fischer, a SEMCO employee, allegedly participated in a meeting between Aeosphere, Fläkt Woods, and Battelle on July 2, 2008, and helped Yule evaluate the Battelle

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<sup>92</sup> *Id.*

<sup>93</sup> Indeed, at oral argument counsel for Matthew admitted as much. In response to the Court’s question asking what involvement SEMCO was alleged to have had in any efforts to separate Matthew from Aeosphere’s business, counsel for Matthew responded: “I’ll admit, Your Honor, that the factual record on that is limited. I do admit that.” *Id.* at 59.

technology. On August 6, 2009, SEMCO's President sent an email to Yule alerting him to an HVAC industry newsletter that highlighted the ScentOpera. Finally, since Aeosphere's dissolution, SEMCO's Head of Sales has allegedly worked with Laudamiel and Capua on the sale and marketing of a scenting system that the Plaintiff alleges should have been undertaken by Aeosphere.

Each of the claims brought against SEMCO requires some connection between SEMCO and the alleged wrong. Aiding and abetting breaches of fiduciary duty requires a knowing participation in the breach by the defendant;<sup>94</sup> unjust enrichment requires a relation between the enrichment and impoverishment;<sup>95</sup> and civil conspiracy requires a meeting of the minds between or among the conspirators relating to the object of the conspiracy or a course of action to be taken.<sup>96</sup> At most, the Plaintiff has alleged that, before Aeosphere's dissolution, SEMCO had a tangential relationship to Aeosphere and the Aeosphere-Fläkt Woods collaboration; there was a disputed dissolution of Aeosphere, and unlawful acts were committed in connection with this dissolution; and, following the dissolution, SEMCO worked with Laudamiel and Capua, who are alleged to have harmed the Plaintiff. Based upon the well-pleaded facts, the Court cannot make a reasonable inference that SEMCO conspired to commit or

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<sup>94</sup> *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d at 72.

<sup>95</sup> *Nemec*, 991 A.2d at 1130.

<sup>96</sup> Wolfe & Pittenger, *supra* note 28, § 3.05[b], at 3-83.

actively participated in any of the alleged wrongful actions, and, as a result, none of the elements noted above requiring a connection between SEMCO and the alleged wrong has been met. For the foregoing reasons, SEMCO's motion to dismiss for failure to state a claim would be granted, if this Court had personal jurisdiction over SEMCO.

#### **IV. MATTHEW'S MOTION TO DISMISS**

##### *A. Background*<sup>97</sup>

###### 1. Aeosphere's Formation and Governance

The Aeosphere Defendants' description of Aeosphere's founding by Matthew and Laudamiel is, in all material respects, consistent with that described in Part III.A. Additionally, they claim that a key component of Aeosphere's business plan was to develop the Battelle technology into a commercially viable project by the end of 2009, and that Matthew brought the ScentOpera to Aeosphere. While considered an interesting project by Laudamiel, neither he nor Matthew expected the ScentOpera to be a significant source of revenue for Aeosphere, and it was not referenced in the written business plan. The Aeosphere

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<sup>97</sup> Unless otherwise noted, the factual background is taken from the Counterclaims, the well-pleaded allegations of which, for present purposes, must be taken as true. *Cent. Mortg. Co.*, 27 A.3d at 535. In certain instances, the Court will rely upon the LLC Agreement. While, as a general rule, the Court is limited to considering only the facts alleged in the Counterclaims when deciding a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court may consider documents both integral to and incorporated into the Counterclaims, and documents not relied upon for the truth of their contents. *Orman*, 794 A.2d at 15-16. Consideration of the LLC Agreement is appropriate in this case, as it is both integral to and incorporated into the Counterclaims.

Defendants also aver that Matthew, who had little background in the fragrance industry, was eager to have Laudamiel associated with the ScentOpera and hoped to use it as a vehicle to establish his own reputation in the fragrance and film industries.

The Aeosphere Defendants' account of Action 1's investment in Aeosphere and Aeosphere's resulting ownership structure is, in all material respects, consistent with that described in Part III.A. They further claim that Action 1 made this investment in reliance upon Matthew's representations to Capua that he was experienced and competent in the areas of corporate finance, business administration, and project management.

The Aeosphere Defendants' descriptions of Aeosphere's management and governance structures are also, in all material respects, consistent with that described in Part III.A, unless otherwise noted. As set forth in more detail in Part IV.C, the Aeosphere Defendants and Matthew interpret differently the portions of the LLC Agreement that required Capua to serve as a tie-breaker when Matthew and Laudamiel—in their capacities as either Managers or co-CEOs—were deadlocked on a decision that required both of their votes. Additionally, the Aeosphere Defendants allege that Laudamiel and Matthew agreed that Matthew would be primarily responsible for overseeing Aeosphere's financial matters and management, while Laudamiel would be Aeosphere's perfumer and have primary

responsibility for creative and technical matters. Furthermore, the Aeosphere Defendants point out that, under Article 7.1 of the LLC Agreement, Matthew, Laudamiel, and Capua each assumed, as a co-CEO and/or Manager, explicit duties of care and good faith.<sup>98</sup> Finally, under Article 5.1.2 of the LLC Agreement, each Manager was obliged to use his “best efforts” to attend all properly called Board meetings.

## 2. Matthew’s Alleged Mismanagement of Aeosphere

The Aeosphere Defendants allege that by the spring of 2010 Aeosphere had expended nearly all of Action 1’s investment, and its business activities had ground to a halt, primarily due to Matthew’s mismanagement, improper expenditures of company funds, and unwillingness to cooperate with Laudamiel and Capua. By this time, Aeosphere’s planned development of the Battelle technology had proven unfeasible, but Matthew failed to pursue other business opportunities, except the ScentOpera. Matthew, allegedly, repeatedly delayed significant contracts and other actions for months, refusing either to accept or to reject them, thereby effectively preventing Aeosphere from conducting business. Citing Aeosphere’s dwindling cash reserves, he refused to approve expenditures for core business activities but, nonetheless, approved an “emergency” expenditure of \$40,000 for

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<sup>98</sup> Article 7.1 of the LLC Agreement provides: “The Board and Company officers will perform their managerial duties in good faith, in a manner they reasonably believe to be in the best interests of the Company and its Members, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”

the ScentOpera. Moreover, Matthew entered into several agreements on behalf of Aeosphere without Laudamiel's knowledge, allegedly in violation of the LLC Agreement.

Matthew's alleged refusal either to accept or to reject contracts and actions put to him by Laudamiel is a basis for many of the Aeosphere Defendants' counterclaims. Perhaps the most contentious of these scenarios involved the hiring of Hornetz, Laudamiel's spouse. Hornetz was qualified as a junior perfumer and had worked with Laudamiel in that capacity in the past. According to the Aeosphere Defendants, when Action 1 became a member of Aeosphere, the members all understood and agreed that Hornetz would be hired as Laudamiel's assistant. The LLC Agreement reflected the possibility that Aeosphere might hire Hornetz and provided in Article 5.2.6(f)(iii) that, if Hornetz was hired by Aeosphere, Laudamiel would be deemed to have a "personal interest in . . . the terms of employment of [Hornetz] or any employment agreement between [Hornetz] and the Company." As a result, a unanimous vote of Matthew and Capua was required to hire Hornetz or set the terms of his employment.<sup>99</sup>

Allegedly, Matthew first approved Aeosphere's hiring of Hornetz, but he later refused to execute an employment agreement between Aeosphere and Hornetz. In July 2009, Matthew sent an unsigned employment agreement to

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<sup>99</sup> See LLC Agreement art. 5.2.6(f).

Hornetz, who promptly signed and returned it. From July 2009 until Aeosphere was dissolved, Matthew failed to execute the agreement or to respond to Hornetz's inquiries about it. Hornetz began working for Aeosphere without an employment agreement, but Matthew largely prevented him from working with Laudamiel, claiming that he could not have access to confidential or sensitive information until an employment agreement was in place. Instead, Matthew allegedly diverted Hornetz's efforts to the ScentOpera. Matthew also refused to pay Hornetz due to the absence of a fully executed employment agreement. As a result, Action 1 paid Hornetz more than 40,000 euros, expecting, but never receiving, repayment from Aeosphere.

The Aeosphere Defendants also float a raft of other complaints about Matthew's performance as a Manager and co-CEO. For instance, allegedly, he prevented Laudamiel from receiving the assistance, supplies, and infrastructure Laudamiel needed to perform his responsibilities as the chief perfumer, while also insisting that Laudamiel assume some of Matthew's own administrative and financial responsibilities. Matthew also, allegedly, charged Aeosphere for personal and other non-business expenses. Furthermore, business partners and Aeosphere employees complained to Laudamiel about the way Matthew conducted himself. Additional alleged improprieties include: (1) Matthew's statements to potential clients and business partners regarding Aeosphere's ownership of intellectual

property; and (2) Matthew's failure to disclose that the outside accountant whom he recommended hiring had been his personal accountant for fifteen years.

### 3. The Dissolution of Aeosphere

In the months preceding the dissolution of Aeosphere in May 2010, Laudamiel and Capua engaged in negotiations with Matthew, first seeking to resolve their internal conflicts, and, when that failed, seeking a mutually acceptable way to end their collaboration and distribute any remaining business opportunities. In April 2010, after several months of negotiations and when the parties were on the verge of finalizing a settlement agreement, Matthew terminated the negotiations and informed Laudamiel and Capua that he wanted Aeosphere to continue, despite the fact that it was on the verge of insolvency and had essentially ceased to function.

On May 3, 2010, Capua caused notice of an emergency Board meeting to be delivered to Matthew and Laudamiel. The notice stated that the meeting would be held on May 4, 2010, and was being called "due to the current and unresolved conflict situation between the two co-CEOs of Aeosphere, and most importantly due to the catastrophic financial situation of our Company."<sup>100</sup> A meeting agenda was attached to the notice; it noted that items for discussion included the dissolution and winding up of Aeosphere, termination of its employees, closing of

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<sup>100</sup> Countercls. ¶ 47.

its facilities, the rights to the ScentOpera, and the distribution of remaining intellectual property rights. Matthew acknowledged receipt of this meeting notice, but refused to attend the meeting. The emergency meeting was held at the noticed time on May 4, 2010, and attended by Laudamiel and Capua. They both voted to dissolve Aeosphere, and, on May 12, 2010, Laudamiel and/or Capua caused a Certificate of Cancellation to be filed with the Delaware Secretary of State. Allegedly, during and following the winding up, Laudamiel personally paid significant outstanding accounts payable of Aeosphere for which the company no longer had sufficient funds; Matthew did not contribute.

#### *B. The Contentions*

The Aeosphere Defendants bring a number of counterclaims against Matthew. In Count I, they assert that Matthew breached the LLC Agreement by unilaterally approving actions and entering into contracts on Aeosphere's behalf, refusing to take action on various contracts, and refusing to attend the emergency Board meeting. Count II alleges that Matthew breached his implied obligations of good faith and fair dealing in the LLC Agreement by refusing to accept or reject various contracts and actions for which his approval was required under the LLC Agreement, otherwise refusing to cooperate with the other Managers in the management of Aeosphere, diverting Aeosphere's resources to the ScentOpera for his own benefit, and refusing to attend the emergency Board meeting. In Count III,

the Aeosphere Defendants claim that Matthew breached his fiduciary duties of care, loyalty, and good faith; these alleged breaches of fiduciary duty stem from many of the same alleged actions that form the bases of Counts I and II, as well as from allegedly charging personal expenses to Aeosphere. This alleged improper charging of personal expenses to Aeosphere also forms the basis of the Defendants' counterclaims for breach of the Employment Agreement (Count IV) and unjust enrichment (Count V).

Matthew seeks dismissal of Counts II, IV, and V under Court of Chancery Rule 12(b)(6). In support of his motion to dismiss Count II, Matthew argues that the Aeosphere Defendants fail to establish an independent counterclaim for breach of the implied covenant of good faith and fair dealing because the alleged wrongful acts were either addressed by the LLC Agreement or form the basis of other counterclaims. In response, the Aeosphere Defendants aver that the LLC Agreement did not contemplate a situation where Matthew refuses *expressly* to accept or to reject an agreement. They also argue that they may plead alternative theories for relief, and, as such, the fact that the same allegations form the basis of multiple counterclaims does not provide grounds for dismissal. In seeking to dismiss Counts IV and V, Matthew argues that these counterclaims are derivative, and Laudamiel and Action 1 lack standing to assert them. In response, Laudamiel and Action 1 argue that these counterclaims were property of Aeosphere that

passed proportionately to its members by operation of law upon its dissolution and winding up, and, as such, may now be brought as direct claims.

### *C. Analysis*

#### 1. Court of Chancery Rule 12(b)(6) Standard

Matthew has moved to dismiss Counts II, IV, and V under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief may be granted. As previously noted, the pleading standards governing a motion to dismiss are minimal.<sup>101</sup> When considering a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court,

should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as ‘well-pleaded’ if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.<sup>102</sup>

#### 2. Matthew’s Motion to Dismiss Count II

The Aeosphere Defendants allege that numerous wrongful acts committed by Matthew support the counterclaim brought in Count II. Each of these allegations will be assessed below under the Rule 12(b)(6) standard to determine whether the Aeosphere Defendants have properly pled a counterclaim for breach of the implied covenant of good faith and fair dealing in the LLC Agreement.

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<sup>101</sup> *Cent. Mortg. Co.*, 27 A.3d at 536.

<sup>102</sup> *Id.*

In Delaware, the implied covenant attaches to every contract by operation of law.<sup>103</sup> It requires contracting parties “to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.”<sup>104</sup> Otherwise, “parties to a contract could undermine and frustrate every legal obligation entered into.”<sup>105</sup> The implied covenant acts as a way to import terms into the agreement to analyze unanticipated developments or to fill gaps in the contract’s provisions.<sup>106</sup> To state a claim for breach of the implied covenant, a litigant must allege a specific obligation implied in the contract, a breach of that obligation, and resulting damages.<sup>107</sup>

“Wielding the implied covenant is a ‘cautious enterprise.’”<sup>108</sup> “This quasi-reformation . . . should be a rare and fact-intensive exercise,”<sup>109</sup> and should operate only “in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to provide an explicit answer.”<sup>110</sup> Where the contract does speak directly regarding the issue in dispute, “[e]xisting contract terms control, . . . such

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<sup>103</sup> *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 128 (Del. Ch. 2003).

<sup>104</sup> *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (citation and internal quotation marks omitted).

<sup>105</sup> *Gloucester Holding Corp.*, 832 A.2d at 128 (citation and internal quotation marks omitted).

<sup>106</sup> *Dunlap*, 878 A.2d at 442.

<sup>107</sup> *Fitzgerald v. Cantor*, 1998 WL 842316, at \*1 (Del. Ch. Nov. 10, 1998).

<sup>108</sup> *Loneragan v. EPE Holdings LLC*, 5 A.3d 1008, 1018 (Del. Ch. 2010) (quoting *Nemec*, 991 A.2d at 1125).

<sup>109</sup> *Dunlap*, 878 A.2d at 442.

<sup>110</sup> *Loneragan*, 5 A.3d at 1018 (citation and internal quotation marks omitted).

that implied good faith cannot be used to circumvent the parties' bargain, or to create a free-floating duty unattached to the underlying legal documents.”<sup>111</sup> As a result, generally, a claim for breach of the implied covenant may not be based on conduct authorized by the terms of the agreement.<sup>112</sup> Parties have a right to enter into—and the law enforces—both good and bad contracts.<sup>113</sup>

*a. Matthew’s Refusal to Accept or to Reject Contracts  
that Required his Approval*

Matthew served Aeosphere in two separate and distinct roles—Manager and co-CEO—in which his approval was required in order for the company to take certain actions. Under the LLC Agreement, in their capacity as Managers, both Matthew’s and Laudamiel’s approval was required for Aeosphere to take most actions requiring Board approval; if they were “deadlocked,” Capua would cast the “tie-breaking vote.”<sup>114</sup> Similarly, in their roles as co-CEOs, except for contracts requiring the authorization of and previously authorized by the Board, both co-CEOs needed to “agree” before entering into most contracts; to the extent the co-CEOs “disagree[d],” approval of such contracts would be submitted to the Board and approved (or disapproved) pursuant to Article 5.2.6(a) of the LLC Agreement whereby Capua could cast a tie-breaking vote.<sup>115</sup>

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<sup>111</sup> *Dunlap*, 878 A.2d at 441 (citation and internal quotation marks omitted).

<sup>112</sup> *Id.*

<sup>113</sup> *Loneragan*, 5 A.3d at 1018.

<sup>114</sup> LLC Agreement art. 5.2.6(a).

<sup>115</sup> *Id.* at art. 5.4.2.

The Aeosphere Defendants contend that in order for Aeosphere to employ Capua's tie-breaking power, Matthew and Laudamiel needed to expressly disagree, not simply fail to reach an agreement.<sup>116</sup> The Aeosphere Defendants further argue that the implied covenant in the LLC Agreement required Matthew and Laudamiel "to come to a decision within a reasonable time in good faith."<sup>117</sup> Therefore, by refusing either expressly to agree or to disagree with Laudamiel regarding the approval of various contracts and actions, Matthew, according to the Aeosphere Defendants, breached the implied covenant in the LLC Agreement.

In response, Matthew argues that even if the allegations are true that he refused to make an express decision on contracts and actions that required his approval, the LLC Agreement provided a remedy for such conduct, and, therefore, the implied covenant is not applicable. This argument is based upon Matthew's interpretation of Articles 5.2.6(a) and 5.4.2 of the LLC Agreement. Specifically, he contends that the conduct described, if true, would constitute a "deadlocked" Board under Article 5.2.6(a) or a "disagree[ment]" between the co-CEOs under Article 5.4.2. If this interpretation is correct, the LLC Agreement would have

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<sup>116</sup> See Br. of Defs. Christophe Laudamiel, Roberto Capua, & Action 1 srl in Opp'n to Pl.'s Mot. to Dismiss Counts II, IV, & V of Their Amended Verified Countercls. ("Defs.' Br. in Opp'n") 7-8.

<sup>117</sup> *Id.* at 8.

permitted Capua, in his role as a Manager, to cast a “tie-breaking vote” to break the alleged impasses.<sup>118</sup>

As presented by the Aeosphere Defendants and Matthew, the key issue is whether Matthew’s alleged actions (or inaction) could be deemed to have created a “deadlocked” Board or could properly be considered a “disagreement” with Laudamiel. If so, then the LLC Agreement provided a way to resolve the impasse, and there is no gap for the implied covenant to fill; if not, then Matthew’s actions appear to be the very type of unreasonable conduct that the implied covenant is meant to protect against. The Court concludes that the actions alleged by the Aeosphere Defendants, whether taken by Matthew in his role as a Manager or co-CEO, do not constitute a breach of the implied covenant because such actions were addressed by the LLC Agreement and should be assessed under the standards agreed to in the contract. This conclusion is not based upon the issue focused on by the parties, but upon the Court’s reading of other provisions of the LLC Agreement, namely Articles 5.1.2 and 7.1.

While in their Counterclaims and briefs the Aeosphere Defendants do not distinguish between actions Matthew took in his capacities as Manager and co-CEO, the Court will analyze these actions separately. At least one of the allegations supporting the Aeosphere Defendants’ implied covenant counterclaim

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<sup>118</sup> See LLC Agreement art. 5.2.6(a).

relates to Matthew’s duties as a Manager: his alleged refusal to approve or disapprove the hiring of Hornetz.<sup>119</sup> But, as noted above, the implied covenant only operates where the agreement “does not speak directly enough to provide an explicit answer”;<sup>120</sup> otherwise, “[e]xisting contract terms control.”<sup>121</sup> The LLC Agreement squarely addressed the timeliness of Managers’ decision making, stating: “If this Agreement or [the Delaware Limited Liability Company Act] requires a Manager to vote in order to approve or disapprove any action, such Manager shall act with diligence and shall not unreasonably delay approving or disapproving any such action.”<sup>122</sup> Clearly, that a Manager might delay approving or disapproving an action was not an unanticipated development, and there is no related contractual gap to be filled by implying contract terms through the implied covenant. As such, it would be inappropriate for this Court to supplant or supplement the contractually agreed upon standard for the timeliness of a Manager’s decision making by implying additional terms. If Matthew’s actions

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<sup>119</sup> Under Article 5.2.6(f)(iii) of the LLC Agreement, the unanimous vote of Matthew and Capua was required to approve Hornetz’s terms of employment and any employment agreement between Aeosphere and Hornetz. The Aeosphere Defendants state that “Matthew first approved [hiring Hornetz], but then refused to execute an employment agreement between Aeosphere and Hornetz.” Countercls. ¶ 33. The Aeosphere Defendants never allege that the required Board approval was received to authorize the hiring of Hornetz, and, thus, it appears that Matthew’s dilatory conduct with regard to approving Hornetz’s employment agreement was undertaken in his role as Manager. But, even if proper Board approval was received and Matthew’s actions related to his role as co-CEO, the ultimate result—dismissal of the counterclaim—would be the same under the analysis presented below.

<sup>120</sup> *Loneragan*, 5 A.3d at 1018 (citation and internal quotation marks omitted).

<sup>121</sup> *Dunlap*, 878 A.2d at 441 (citation and internal quotation marks omitted).

<sup>122</sup> LLC Agreement art. 5.1.2.

violated the standard set forth in the LLC Agreement, the appropriate counterclaim is one for breach of contract, and, indeed, the Aeosphere Defendants assert such a counterclaim.<sup>123</sup>

Some of the agreements and actions that Matthew allegedly wrongfully delayed expressly approving or disapproving appear to have implicated his role as co-CEO.<sup>124</sup> There were no provisions in the LLC Agreement that *specifically* governed a co-CEO's diligence in discharging his duties to approve or to disapprove contracts. But, Article 7.1 of the LLC Agreement did create a general standard by which "[t]he Board and Company officers [were to] perform their managerial duties." Article 7.1 states: "The Board and Company officers will perform their managerial duties in good faith, in a manner they reasonably believe to be in the best interests of the Company and its Members, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." The co-CEOs were "officers" of Aeosphere under Articles 5.4 and 5.4.2 of the LLC Agreement. Furthermore, there

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<sup>123</sup> Countercls. ¶ 54 (asserting a counterclaim for breach of the LLC Agreement based in part on Matthew's "refus[al] to take action on various contracts and transactions on behalf of Aeosphere").

<sup>124</sup> For example, the Aeosphere Defendants allege that Matthew "prevented Laudamiel from receiving the assistance, supplies, and infrastructure he needed to perform his responsibilities as Aeosphere's perfumer, by refusing to approve or reject the necessary agreements and/or transactions." *Id.* at ¶ 31. At least some of these agreements would presumably require approval of both co-CEOs under Article 5.4.2 of the LLC Agreement, which requires such approval for "any contract involving research and development, any employment agreement or any contract involving services, work, products, media or technology."

can be little doubt that approval of contracts is a “managerial duty.”<sup>125</sup> Therefore, similar to Article 5.1.2, although more broadly applicable, Article 7.1 sets a contractual standard by which Matthew’s timeliness in approving and disapproving contracts should be judged.<sup>126</sup> As such, the LLC Agreement directly speaks to the issue at hand; there is no contractual gap to be filled; and the “[e]xisting contract terms control.”<sup>127</sup> As discussed above, if Matthew’s actions violated this contractual standard, the appropriate counterclaim is one for breach of contract, a counterclaim the Aeosphere Defendants do, in fact, bring.<sup>128</sup>

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<sup>125</sup> Article 5.4.2 of the LLC Agreement grants the co-CEOs the “general powers and duties of management usually vested in the officers of similar title for a corporation,” and then goes on to explain the way in which each co-CEO, in his individual capacity, is limited in carrying out the specific managerial duty of approving contracts, namely that the approval of his co-CEO is also required.

<sup>126</sup> This contractual standard would also presumably apply to Matthew’s timeliness in approving or disapproving contracts in his role as a Manager. In that case, though, to the extent the Article 7.1 standard conflicted with the Article 5.1.2 standard, the more specific Article 5.1.2 standard—“shall not unreasonably delay”—would govern. *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) (citations omitted) (“Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.”).

<sup>127</sup> *Dunlap*, 878 A.2d at 441 (citation and internal quotation marks omitted).

<sup>128</sup> Countercls. ¶ 54 (asserting a counterclaim for breach of the LLC Agreement based in part on Matthew’s “refus[al] to take action on various contracts and transactions on behalf of Aeosphere”). It should be noted that the standard Laudamiel and Action 1 assert should be used to assess Matthew’s actions under the implied covenant (“to come to a decision within a reasonable time in good faith”) is very similar to the standards articulated in Articles 5.1.2 and 7.1 of the LLC Agreement that would be applied in assessing a breach of contract counterclaim.

*b. Matthew's Refusal to Cooperate in the Management  
of Aeosphere*

The Aeosphere Defendants also allege that Matthew “otherwise unreasonably refus[ed] to cooperate with Laudamiel and/or Capua in the management of Aeosphere as contemplated in the LLC Agreement” and offer this intransigent behavior as another basis for their breach of the implied covenant counterclaim.<sup>129</sup> Even assuming that this not-well-defined category of wrongdoing is truly separate from others alleged by the Aeosphere Defendants, this allegation is so vague that it teeters on the verge of failing to provide Matthew with notice of the counterclaim, as it relates to this particular allegation. In general, this allegation speaks to how Matthew discharged his managerial duties, beyond the more specific allegations made by the Aeosphere Defendants. Review of the Counterclaims reveals, possibly, one particular allegation that would fall most squarely into this category of wrongdoing and not another: Matthew’s alleged unwillingness to pursue business opportunities aside from the ScentOpera.<sup>130</sup>

Any contractual counterclaim based upon allegations that Matthew failed to properly perform his managerial duties, whether it relates to his role as a Manager or a co-CEO, must be pled as a breach of contract counterclaim, not a breach of the

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<sup>129</sup> Countercls. ¶ 59.

<sup>130</sup> See *id.* at ¶ 27. This description of the cited allegation is perhaps charitable, as the Counterclaims actually do not allege, strictly speaking, that Matthew was unwilling to pursue other business opportunities, but merely that he “appeared uninterested” in doing so.

implied covenant counterclaim. As explained above, Article 7.1 of the LLC Agreement sets a contractual standard by which the Managers and officers of Aeosphere were to perform their managerial duties, and, thus, there is no gap to be filled by implying terms through the implied covenant.

*c. Matthew's Improper Use of Company Resources*

A third purported basis for the Aeosphere Defendants' implied covenant counterclaim is the allegation that Matthew "divert[ed] Aeosphere's resources to the ScentOpera for his own benefit and against the best interests of the company."<sup>131</sup> According to the Aeosphere Defendants, the ScentOpera served the personal interests of Matthew because he "intended to use [it] as a vehicle to establish his own reputation in the fragrance and film industries."<sup>132</sup> Thus, the alleged personal benefit was an incidental benefit. The Aeosphere Defendants also admit that the ScentOpera was a valid Aeosphere company project, albeit not one of the most important.<sup>133</sup>

This allegation essentially boils down to a disagreement over how Matthew allocated company resources among various internal projects, perhaps overallocating resources to a project that provided him with incidental personal

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<sup>131</sup> *Id.* at ¶ 59.

<sup>132</sup> *Id.* at ¶ 12.

<sup>133</sup> *See id.* at ¶ 11 (noting that "Matthew brought [the ScentOpera] to Aeosphere" and "[a]lthough Laudamiel viewed the Scent Opera as an interesting project that complemented Aeosphere's other business activities, neither he nor Matthew expected it to be a significant source of revenue").

benefits and less tangible benefits to Aeosphere itself. Such actions might implicate a breach of fiduciary duties, and the Aeosphere Defendants have used this allegation as one basis for such a counterclaim.<sup>134</sup> Here the Aeosphere Defendants assert that these actions also constitute a breach of the implied covenant. These allegations speak to how Matthew carried out his managerial duties—in this case, allocation of company resources—and, to the extent that these allegations support a contractual counterclaim, it would be one for breach of contract, not breach of the implied covenant, as Article 7.1 of the LLC Agreement sets a contractual standard by which the Managers and officers of Aeosphere were to perform their managerial duties. Therefore, there is no gap to be filled by implying terms through the implied covenant.

d. *Matthew's Refusal to Attend the Emergency Board Meeting*

The final allegation the Aeosphere Defendants rely upon as a basis for their implied covenant counterclaim is that Matthew refused to attend or otherwise participate in the emergency Board meeting held on May 4, 2010, during which the other Managers voted to dissolve Aeosphere. As with the other bases of the

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<sup>134</sup> See *id.* at ¶ 63. Matthew argues that in doing so the Aeosphere Defendants have violated “the general principle that Defendants cannot simultaneously seek relief for the same alleged conduct under both contractual and fiduciary duty theories,” and that this, too, provides grounds for dismissal of the implied covenant counterclaim. See Pl.’s Reply Br. in Supp. of His Mot. to Dismiss Counts II, IV, & V of the Am. Verified Countercls. of Defs. Christophe Laudamiel, Roberto Capua, & Action 1 srl (“Pl.’s Reply Br.”) 4. The Court need not address this argument because it grants Matthew’s motion to dismiss the implied covenant counterclaim for the reasons set forth above.

Aeosphere Defendants’ implied covenant counterclaim, this one, too, must be dismissed, since it relates to an issue that was explicitly addressed by the LLC Agreement. Article 5.1.2 of the LLC Agreement provides that “Managers shall use their best efforts to attend all properly called meetings of the Board.” Thus, a claim challenging Matthew’s efforts to attend the emergency Board meeting must be pled as a breach of contract counterclaim applying the contractually agreed-upon best efforts standard, and, in fact, the Aeosphere Defendants assert such a counterclaim.<sup>135</sup> Since this issue was addressed by the LLC Agreement, the existing contract terms control, and there is no justification for implying additional terms through the implied covenant.

For the foregoing reasons, the Aeosphere Defendants’ counterclaim for breach of the implied covenant is dismissed.

### 3. Matthew’s Motion to Dismiss Counts IV and V

In Counts IV and V, Laudamiel and Action 1 assert counterclaims against Matthew for damages resulting from his alleged breach of the Employment Agreement and for unjust enrichment. Both of these counterclaims are based upon allegations that Matthew improperly charged personal expenses to Aeosphere for reimbursement. Matthew moves for dismissal of these counterclaims arguing that Laudamiel and Action 1 do not have standing to bring them in their individual

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<sup>135</sup> See Countercls. ¶ 54.

capacities. Both of these counterclaims belonged to Aeosphere, he contends, and could only have been brought directly by Aeosphere or derivatively on its behalf before the certificate of cancellation was filed; additionally, he argues that neither Laudamiel nor Action 1 qualifies as a third-party beneficiary of the Employment Agreement. Regarding the counterclaim for breach of the Employment Agreement, Matthew notes that the Agreement was between himself and Aeosphere, not Laudamiel or Action 1. Similarly, Matthew avers that the allegations related to the unjust enrichment counterclaim make clear that it seeks relief for harm purportedly done to Aeosphere, not Laudamiel or Action 1 directly.<sup>136</sup>

Laudamiel and Action 1 do not contest that these counterclaims originally belonged to Aeosphere, and they offer no argument that they were third-party beneficiaries of the Employment Agreement. In fact, they admit that these counterclaims “would be derivative claims of the company if it still existed.”<sup>137</sup> In their brief, Laudamiel and Action 1 defend these counterclaims, largely, by contending that Matthew contradicts his argument for their dismissal by asserting claims in his Complaint that are allegedly based upon harm caused to

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<sup>136</sup> See *id.* at ¶ 71 (“Matthew improperly charged expenses to Aeosphere which he misrepresented as relating to Aeosphere’s business”).

<sup>137</sup> Defs.’ Br. in Opp’n 11. Similarly, the Court agrees that, but for the fact that Aeosphere has filed a certificate of cancellation, there would be no question that the counterclaims would belong to Aeosphere and would need to be pursued by it directly or by its members derivatively.

Aeosphere.<sup>138</sup> The Court is now addressing the counterclaims of the Aeosphere Defendants. Whether Matthew’s claims are vulnerable to the same line of attack is not at issue; thus, there is no need for the Court to consider a question that has not been squarely put before it.

What is left of Laudamiel’s and Action 1’s defense of Counts IV and V is a brief argument almost devoid of citations to authority.<sup>139</sup> They assert that, since the counterclaims were property of Aeosphere and under Articles 9.4 and 6.1 of the LLC Agreement and 6 *Del. C.* § 18-804 any assets of Aeosphere remaining after liquidation were to be *distributed* to the members pro rata (with certain preferences for Action 1), the *undistributed* counterclaims devolved by operation of law proportionately to Laudamiel, Action 1, and Matthew, each of whom could then bring the counterclaims directly in their individual capacities. Laudamiel and Action 1 argue that this must be so because, otherwise, there would be no way for them to pursue Aeosphere’s claims, and Matthew would be “absolved” of liability for the harm he allegedly inflicted upon Aeosphere.

While there appears to be no Delaware statutory or case law that directly addresses this argument, the Court concludes that the dissolution and cancellation of a limited liability company (an “LLC”) does not transform derivative claims into direct claims held proportionately by the LLC’s members, as asserted by

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<sup>138</sup> See *id.* at 11-13.

<sup>139</sup> See *id.* at 12.

Laudamiel and Action 1; instead, after the filing of the certificate of cancellation, such claims must be brought in the name of the LLC by a trustee or receiver appointed under 6 *Del. C.* § 18-805, or directly by the LLC or derivatively by its members after reviving the LLC by obtaining revocation of its certificate of cancellation.<sup>140</sup>

The dissolution process for an LLC is outlined in 6 *Del. C.* §§ 18-801—18-806. After an act of dissolution occurs, an LLC is to be wound up and its assets distributed as provided by 6 *Del. C.* § 18-804. The persons winding up an LLC’s affairs may prosecute and defend suits on the LLC’s behalf until the filing of the certificate of cancellation.<sup>141</sup> After the certificate of cancellation has been filed, suits generally may not be brought by or against an LLC.<sup>142</sup> But, under 6 *Del. C.* § 18-805, “at any time” after the filing of a certificate of cancellation, the Court of

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<sup>140</sup> The Court notes that the LLC Agreement did not provide for how Aeosphere’s claims should be pursued after the filing of its certificate of cancellation. Therefore, the Court’s ruling does not speak to the validity of a provision in a limited liability company agreement that purports to establish an alternative process for pursuing the claims of a cancelled entity. This Memorandum Opinion merely recites the background rule governing the disposition of such claims in the absence of some other contractually agreed-upon process that might possibly be capable of displacing the background rule. Limited liability companies “are creatures not of the state, but of contract.” *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at \*8 (Del. Ch. May 7, 2008), *aff’d*, 984 A.2d 124 (Del. 2009). As such, the parties to an limited liability company agreement “have wide contractual freedom to structure the company as they see fit.” *In re Seneca Invs. LLC*, 970 A.2d 259, 261 (Del. Ch. 2008). Thus, it might be possible to include a provision in an limited liability company agreement that prescribes an alternate method for pursuing the claims of a cancelled LLC.

<sup>141</sup> 6 *Del. C.* § 18-803(b).

<sup>142</sup> *Metro Commc’n Corp. BVI v. Advanced Mobilecomm Techs., Inc.*, 854 A.2d 121, 138 (Del. Ch. 2004).

Chancery may, on application, appoint one or more managers or other persons to act as trustees or receivers “to take charge of the [LLC’s] property, and to collect the debts and property due and belonging to the [LLC], with the power to prosecute and defend, in the name of the LLC, suits as may be necessary or proper for the purposes aforesaid.” The trustee or receiver may also be given the broad power “to do all other acts which might be done by the [LLC], if in being, that may be necessary for the final settlement of unfinished business of the [LLC].”<sup>143</sup>

This provision is almost identical to 8 *Del. C.* § 279, which allows the Court of Chancery to appoint a receiver or trustee, with the same powers described in § 18-805, to conclude the unfinished business of a dissolved corporation. Since the wording and context of these two statutory provisions are essentially identical, authorities interpreting § 279 are persuasive when interpreting § 18-805.<sup>144</sup> This Court has found that the primary purpose of § 279 is “to safeguard the collection and administration of still existing property interests of a dissolved corporation,” and that “[i]t functions primarily for the benefit of shareholders and creditors where assets remain undisposed of after dissolution.”<sup>145</sup> Along with 8 *Del. C.*

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<sup>143</sup> 6 *Del. C.* § 18-805.

<sup>144</sup> Due to the paucity of reported decisions in the LLC context, this Court often looks to corporate law authorities when interpreting similar statutory provisions. *See, e.g., Re: Travelcenters of Am., LLC v. Brog*, 2008 WL 868107, at \*2 n.2 (Del. Ch. Mar. 26, 2008).

<sup>145</sup> *In re Citadel Indus., Inc.*, 423 A.2d 500, 506 (Del. Ch. 1980).

§ 278,<sup>146</sup> § 279 ensures “that a dissolved corporation maintains the authority and viability to sue and be sued ‘incident to the winding up of its affairs.’”<sup>147</sup>

As described above, § 18-805 provides members an avenue to pursue an LLC’s claims in the name of the LLC after the filing of a certificate of cancellation;<sup>148</sup> thus, one who harmed an LLC would not be “absolved” of any related liability by the filing of a certificate of cancellation, even if the cancelled LLC’s members could not pursue its claims directly. The process set forth in § 18-805 also addresses concerns regarding a multiplicity of suits. This statutory analysis indicates that the undistributed claims of a cancelled LLC may not, on the authority of the statute alone, be asserted directly by some of the LLC’s former members.<sup>149</sup> Such claims may be brought in the name of the LLC using the

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<sup>146</sup> Under § 278, the legal existence of a dissolved corporation is automatically extended as a “body corporate” for three years immediately following the corporation’s dissolution, during which time the corporation can sue and be sued and otherwise wind up its business. While there is no statutorily-defined period of time during which an LLC’s existence continues after dissolution, the period of time between the dissolution of an LLC and the filing of the certificate of cancellation is somewhat analogous. During this time, an LLC may be wound up and suits brought on its behalf and against it. *See* 6 *Del. C.* § 18-804 (providing that “[u]pon dissolution of [an LLC] and until the filing of a certificate of cancellation” the LLC may be wound up and suits prosecuted and defended in its name); *Metro Commc’n*, 854 A.2d at 138 (stating that suits may be brought by or against an LLC until the certificate of cancellation is filed).

<sup>147</sup> *In re Tex. E. Overseas, Inc.*, 2009 WL 4270799, at \*3 (Del. Ch. Nov. 30, 2009) (citing *Citadel*, 423 A.2d at 504), *aff’d*, 998 A.2d 852 (Del. 2010).

<sup>148</sup> This is not the only way in which former members may pursue an LLC’s claims after a certificate of cancellation has been filed. For example, if the Court finds that an LLC’s affairs were not wound up in compliance with the Delaware Limited Liability Company Act, it may nullify the certificate of cancellation, which effectively revives the LLC and allows claims to be brought by and against it. *See Metro Commc’n*, 854 A.2d at 138.

<sup>149</sup> This is consistent with general principles of corporate law expressed in the case law of other states. Generally, “[t]he dissolution of a corporation prior to the commencement of an action against erring directors does not create an individual right of action in shareholders where the

process set forth in § 18-805, or as direct claims of the LLC or derivative claims of its members after or in conjunction with<sup>150</sup> a successful action seeking the nullification of the LLC's certificate of cancellation.

One case applying Delaware law with an argument similar to that of *Laudamiel* and Action 1 supports this determination, although it did not definitively rule on the issue. That case, *Deerfield Specialty Papers, Inc. v. Black Clawson Co., Inc.*,<sup>151</sup> involved a counterclaim by Black Clawson Company, Inc. ("Black Clawson") for breach of contract against Deerfield Specialty Papers, Inc. ("Deerfield Specialty").<sup>152</sup> The contract at issue was entered into between Deerfield Specialty and Black Clawson Enterprises, Inc. ("Enterprises"). Black Clawson was the sole shareholder of Enterprises and claimed that it "automatically became the owner of all of [Enterprises's] assets, including [Enterprises's] causes

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action is representative or derivative in character and cognizable only in equity at suit of the corporation," since "[t]he reasons for prohibiting individual actions by shareholders on derivative causes of action, namely, the avoidance of multiplicity of actions and the protection of creditors, are equally applicable when the corporation has dissolved." 12B WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5909 (Perm. Ed. 2011). This logic can be extended to derivative suits involving LLC's and derivative suits based upon claims beyond those levied against former directors.

<sup>150</sup> In *Metro*, the Court found that a litigant need not bring a separate action seeking nullification of a certificate of cancellation before filing a derivative suit on the LLC's behalf. *Metro Commc'n*, 854 A.2d at 140.

<sup>151</sup> 751 F. Supp. 1578 (S.D.N.Y. 1990). A related argument was offered by the plaintiffs in *Abelow v. Symonds*, 156 A.2d 416, 418-19 (Del. Ch. 1959). In that case, the Court's decision to allow the plaintiffs to amend their complaint was based upon its determination that the plaintiffs should not be "summarily denied the right to couch their complaint in terms which seek a remedy for alleged personal injury to a class of stockholders as opposed to the theoretical injury to a now dissolved corporate entity," rather than a finding that the dissolution of a corporation transformed derivative claims of a corporation into direct claims of its shareholders.

<sup>152</sup> *Deerfield Specialty Papers*, 751 F. Supp. at 1579.

of action” upon Enterprises’s dissolution.<sup>153</sup> Deerfield Specialty contended that, since Black Clawson was not a party to the contract, it did not have standing to bring a direct suit.<sup>154</sup> The Magistrate, who first heard the matter, initially recommended that summary judgment should be granted for Deerfield Specialty on the counterclaim and found that the causes of action “were not assets which passed to Black Clawson, by operation of law, merely by virtue of the dissolution.”<sup>155</sup> The District Court ruled that the counterclaim survived a motion to dismiss based upon the possibility that genuine issues of material facts existed as to a purported related oral contract between Deerfield Specialty and Black Clawson and the alleged assignment to Black Clawson of Enterprises’s causes of action.<sup>156</sup> Even so, the District Court cast doubt on Black Clawson’s ability to pursue a direct claim, stating that “[t]here appears to be scant authority to support the proposition that a shareholder of a dissolved corporation can bring a contract action in its own name, and not derivatively, either during or after the winding-up period,” and that, “[i]n reviewing Delaware law, [the District Court] found that actions by or against a corporation after dissolution should be brought in the name of the corporation.”<sup>157</sup>

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<sup>153</sup> *Id.* at 1580.

<sup>154</sup> *See id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1582.

<sup>157</sup> *Id.*

For the foregoing reasons, Counts IV and V are dismissed because Laudamiel and Action 1 lack standing to assert these counterclaims directly.

## **V. CONCLUSION**

For the foregoing reasons, the claims against Fläkt Woods and SEMCO are dismissed in their entirety, and Counts II, IV, and V of the Counterclaims are dismissed.

An implementing order will be entered.