IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KEN MCALLISTER, ELEVATUS BRAND PARTNERS LLC, Plaintiffs, v. ROBERT STIDHAM, JOE LEWIS, Defendants, and ELEVATUS BRAND PARTNERS LLC, Nominal Defendant.	C.A. No. 2023-1127-CDW

ORDER GRANTING DEFENDANT JOE LEWIS'S MOTION TO DISMISS

WHEREAS:

A. Plaintiff Ken McAllister is a member of Elevatus Brand Partners LLC, a Delaware limited liability company ("Company"), and brings this action in part derivatively on the Company's behalf.[1] McAllister and defendant Robert Stidham each own a 45% membership interest in the

[1] Pl.'s 2d Am. Verified Compl. ¶¶ 1, 3, Dkt. 164 ("Second Amended Complaint" and cited as "Second Am. Compl.").

Company and served as its two 50/50 managers.[2] Pelican Franchise Consulting, LLC owns the remaining 10% membership interest.[3] McAllister alleges that defendant Joe Lewis controls Pelican,[4] and that Lewis' involvement with the Company was at Stidham's behest.[5]

B. For several months Lewis allegedly served as president of the Company.[6] The Second Amended Complaint alleges Lewis assisted Stidham in diverting Company employees and assets, making unauthorized withdrawals of Company funds, and pursuing business opportunities allegedly belonging to the Company.[7] McAllister asserts three claims against Lewis: aiding and abetting Stidham's alleged breaches of fiduciary duty, civil conspiracy relating to the alleged misappropriation of Company funds, and unjust enrichment relating to business opportunities allegedly belonging to the Company.[8]

C. McAllister made no pre-suit demand. In fact, the Second Amended Complaint alleges demand was futile because "the Members are

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[2] *Id.* ¶ 14.

[3] *Id.*

[4] *Id.* ¶ 34.

[5] *Id.* ¶ 14.

[6] *Id.* ¶ 35.

[7] *Id.* ¶¶ 40, 41, 43–47, 52.

[8] *Id.* ¶¶ 115, 119, 123.

hopelessly deadlocked, Lewis was hired at Stidham's behest, and Lewis was Stidham's co-conspirator."[9]

D. McAllister commenced this action on November 7, 2023.[10] The original complaint asserted claims against Stidham but did not name Lewis as a defendant.[11]

E. On October 14, 2024, the court appointed a liquidating trustee for the Company and ordered that "[t]he Liquidating Trustee shall be the sole Manager of the Company and no other person or entity shall have power or authority to act as Manager of the Company from this date forth without Order of this Court."[12]

F. On July 25, 2025, McAllister filed an Amended Verified Complaint naming Lewis as a defendant for the first time.[13] On September 5, Lewis moved to dismiss,[14] and filed an opening brief in support on December 12.[15]

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[9] *Id.* ¶ 84.

[10] Verified Compl., Dkt. 1.

[11] *See* Opening Br. in Support of Joe Lewis's Mot. to Dismiss Pls.' 2d Am. Verified Compl. 3, Dkt. 165 ("Opening Br.").

[12] Order Appointing Liquid. Tr. ¶ 4, Dkt. 68.

[13] Am. Verified Compl., Dkt. 99.

[14] Mot. to Dismiss, Dkt. 119.

[15] Opening Br. in Support of Joe Lewis's Mot. to Dismiss Pls.' Am. Verified Compl., Dkt. 152.

G. McAllister filed the operative Second Amended Verified Complaint on January 22, 2026.[16] As relevant here, the Second Amended Complaint newly alleges that Lewis was hired at Stidham's behest and was Stidham's co-conspirator.[17]

H. Lewis moved to dismiss the Second Amended Complaint on January 23, and filed his opening brief.[18] On February 2, McAllister filed his answering brief,[19] and on February 6, Lewis filed his reply.[20] On March 26, the court heard argument on the motion.[21]

IT IS ORDERED, this 8th day of September, 2026, that:

1. The court recommends the Motion to Dismiss be GRANTED and counts VIII, IX, and X of the Second Amended Complaint be dismissed with prejudice as to Lewis.

2. McAllister's claims are derivative because the alleged harm was suffered by the Company, and any recovery on those claims would flow to the

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[16] Second Am. Compl.

[17] *Id.* ¶ 84; *see also* Opening Br. 4.

[18] Opening Br.

[19] Pl.'s Ans. Br. in Opp'n to Def. Joe Lewis's Mot. to Dismiss, Dkt. 167 ("Ans. Br.").

[20] Reply Br. in Support of Joe Lewis's Mot. to Dismiss Pls.' 2d Am. Verified Compl., Dkt. 172 ("Reply Br.").

[21] Dkt. 190.

Company.[22] McAllister therefore was required to comply with Court of Chancery Rule 23.1 before pursuing those claims derivatively.[23] The Second Amended Complaint does not allege that McAllister made a pre-suit demand on the Company's board of directors, nor does it plead with particularity facts establishing a basis for demand excusal. The claims therefore should be dismissed under Rule 23.1.

3. In determining whether a claim is derivative, the court considers (1) who suffered the harm and (2) who receives the benefit of recovery. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). A plaintiff's characterization of its claims is afforded "little weight." *Protas v. Cavanagh*, 2012 WL 1580969, at *5 (Del. Ch. May 4, 2012). The *Tooley* framework and Delaware's derivative-demand jurisprudence apply equally in the LLC context, including to an LLC with only two members. *Clifford Paper, Inc. v. WPP Inv'rs, LLC*, 2021 WL 2211694, at *6 (Del. Ch. June 1, 2021).

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[22] Second Am. Compl. ¶¶ 35–48 (alleging "Misappropriation of Company Assets"); ¶¶ 49–57 (alleging usurpation of business opportunities).

[23] Ct. Ch. R. 23.1(a) (requiring derivative plaintiff to state with particularity any effort to obtain desired action from entity and reasons for not obtaining action or not making effort).

4. The alleged harms—misappropriation of Company funds and diversion of Company opportunities—are injuries to the Company.[24] The Complaint itself further pleads that any harm to McAllister is "by extension."[25] McAllister's claims are derivative under *Tooley*.

5. Demand was thus required to be made on the liquidating trustee and was not made or excused. The liquidating trustee has been "the sole Manager of the Company" since October 14, 2024.[26] The Second Amended Complaint's only excusal allegations[27]—50/50 manager deadlock and Lewis's hiring at Stidham's behest—are addressed to a governance structure that ceased to exist roughly nine months before Lewis was first sued, and are contradicted by the court's own order.[28] No demand on the liquidating trustee is alleged, and no particularized futility allegations are directed at the neutral, court-appointed fiduciary.

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[24] Second Am. Compl. ¶¶ 35–48 (alleging "Misappropriation of Company Assets"); ¶¶ 49–57 (alleging usurpation of business opportunities).

[25] *Id.* ¶ 1; *see Prod. Res. Gp., L.L.C. v. NCT Gp., Inc.*, 863 A.2d 772, 776 (Del. Ch. 2004) (explaining that claims are derivative where the entity is injured "in the first instance" and any resulting harm to its stakeholders is indirect).

[26] Order Appointing Liquid. Tr., Dkt. 68 ¶ 4.

[27] Second Am. Compl. ¶¶ 34, 84.

[28] Order Appointing Liquid. Tr., Dkt. 68 ¶ 4.

6. When an amended derivative complaint is filed after a new board has taken office, the new board is relevant to the Rule 23.1 demand inquiry only as to claims that are not already "validly in litigation." *Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006). A claim asserted in the amended complaint remains validly in litigation where "(1) the original complaint was well pleaded as a derivative action; (2) the original complaint satisfied the legal test for demand excusal; and (3) the act or transaction complained of in the amendment is essentially the same as the act or transaction challenged in the original complaint." *Id.* Under *Saito v. McCall*, however, a claim asserted against a new defendant is treated as a separate claim for purposes of the demand inquiry, even where the defendants may be liable for the same harm, because "[t]he identity of the defendant certainly influences a board's decision as to whether to initiate litigation." 2004 WL 3029876, at *9–10 (Del. Ch. Dec. 20, 2004), *overruled on other grounds by Lambrecht v. O'Neal*, 3 A.3d 277 (Del. 2010).[29]

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[29] *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 49 cmt. a (A.L.I. 1982) (claims against others liable for the same harm are separate). Plaintiff characterizes *Saito* as "questionable" because it predates *Braddock*. *See* Ans. Br. 9 n.1. But *Braddock* expressly endorsed *Harris*'s reasoning—the premise on which *Saito* relied—and did not involve, much less address, claims against newly added defendants. *See* Reply Br. 9–12. *Braddock* therefore does not undermine *Saito*'s conclusion that adding a new defendant implicates a distinct demand inquiry. *Cf. OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 718 (Del. Ch. 2014) (treating newly

7. Thus the claims against Lewis do not fall into *Braddock*'s framework. Lewis was not named as a defendant until July 2025, approximately nine months after the liquidating trustee became the Company's sole manager. Thus, the claims against Lewis were not validly in litigation when authority to consider a demand vested exclusively in the liquidating trustee. Because McAllister thereafter asserted new claims against Lewis without first making a demand on the liquidating trustee, *Braddock* does not excuse McAllister's failure to make demand.

8. The court also declines McAllister's "practicality exception" in lieu of demand.[30] The Supreme Court's observation in *Braddock*—that a new board retains "several legal options" to control derivative litigation[31]—describes the consequences of the three-condition rule; it does not create a general exception whenever the new manager has notice. Accepting McAllister's theory—that File & ServeXpress service on the liquidating trustee suffices—would substitute litigation notice for a formal demand and swallow Rule 23.1.[32]

asserted claims as validly in litigation where they arose from existing claims against the same defendants).

[30] Ans. Br. 11.

[31] 906 A.2d at 785–86.

[32] *See* Reply Br. 12–13.

9. Dismissal is with prejudice. McAllister has pleaded against Lewis multiple times and responded to Lewis's first motion to dismiss by amending rather than answering. Under Rule 15(a)(5), dismissal under Rule 23.1 in these circumstances is with prejudice absent a showing of good cause, and none appears.

10. Because McAllister's failure to satisfy Rule 23.1 independently warrants dismissal of the Second Amended Complaint, the court does not reach Lewis' alternative arguments that the Second Amended Complaint fails to state a claim under Rule 12(b)(6).

11. This is a Report under Court of Chancery Rule 144(b)(1). Under Court of Chancery Rule 144(c)(2)(A), exceptions to this Report are stayed pending issuance of a Final Report in this action.

/s/ *Christian Douglas Wright*
Magistrate in Chancery