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Case Number 563,2014

IN THE

Supreme Court of the State of Delaware

GORDON SCOTT LEVEY,

Plaintiff Below,
Appellant,

v.

BROWNSTONE ASSET MANAGEMENT, LP, BROWNSTONE INVESTMENT PARTNERS, LLC, PINEBANK INVESTMENT PARTNERS, LLC, PINEBANK ASSET MANAGEMENT, LP, DOUGLAS LOWEY, OREN COHEN, and BARRETT NAYLOR,

Defendants Below,
Appellees.

No. 563, 2014

CASE BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE,
C.A. No. 5714-VCL

APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULES AND STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

Appellant/Plaintiff below Gordon Scott Levey ("Levey") filed his Verified Complaint in this action in the Court of Chancery of the State of Delaware on August 12, 2010, claiming, among other things, that he "never relinquished or forfeited his 5% ownership in BAM [Brownstone Asset Management, L.P. ("BAM")] and BIP [Brownstone Investment Partners, LLC ("BIP")]."[1] Dkt. #1 ¶ 24.[2] Appellees/Defendants ("Defendants") below moved to dismiss the Verified Complaint on October 15, 2010. Dkt. #9.

In response to the motion to dismiss, Levey filed an Amended Verified Complaint on November 24, 2010. Dkt. #15. Defendants moved to dismiss the Amended Verified Complaint on December 6, 2010. Dkt. #16. The Court of Chancery granted in part, and denied in part, the motion to dismiss on April 4, 2011. Dkt. #23.

Levey filed a Second Amended Verified Complaint on February 27, 2012. Dkt. #44. Defendants filed an Answer to the Second Amended Verified Complaint on April 9, 2012, Dkt. #52, and an Amended Answer on April 17, 2012, Dkt. #53.

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[1] The Court of Chancery's post-trial Memorandum Opinion, dated August 1, 2014 (the "Opinion" or "Op.") refers to BIP as the "Passive Manager," and BAM as the "Active Manager."

[2] Citations to "Dkt. #__" are to the Court of Chancery docket in the action below, styled *Gordon Scott Levey v. Brownstone Asset Management LP, et al.*, C.A. No. 5714-VCL.

Defendants moved for summary judgment on July 30, 2012. Dkt. #59. The Court of Chancery granted Defendants' motion for summary judgment on October 1, 2012. Dkt. #73. This Court reversed and remanded the Court of Chancery's grant of Defendants' motion for summary judgment in its August 27, 2013 opinion. *See* Dkt. #78. Defendants moved this Court for reargument, which this Court denied on October 1, 2013. *Id*.

On remand, the Court of Chancery held a trial on the merits on February 4-6, 2014. Dkt. ##96-98. Following post-trial briefing and post-trial oral argument, the Court of Chancery issued its Opinion on August 1, 2014, in which it held, among other things, that "[t]he evidence at trial established the plaintiff withdrew from the two entities [BIP and BAM] as of January 26, 2006," and awarded Levey "the value of his capital accounts on the date of his withdrawal," plus pre- and post-judgment interest. Op. at *1.[3]

Levey moved the Court of Chancery for reargument or, in the alternative, for a new trial on August 8, 2014. Dkt. #115. The Court of Chancery denied Levey's motion on August 22, 2014, Dkt. #119, and issued a Final Order and Judgment on September 3, 2014, Dkt. #124.

Levey filed a notice of appeal to this Court on October 2, 2014. Dkt. #125.

[3] Citations to "Op. at __" are to the Memorandum Opinion found at *Levey v. Brownstone Asset Mgmt.*, LP, 2014 WL 3811237 (Del. Ch. Aug. 1, 2014).

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly determined that an implied agreement existed because "*[t]hrough his conduct*, [Levey] manifested an intent to withdraw, and *through their conduct*, the defendants manifested their acceptance of his withdrawal." Op. at *10 (emphasis added). This is the very evidence that Levey contends the Court *should* have considered. Opening Br. at 15 ("A contract implied-in-fact is one inferred *from the conduct of the parties* . . . . The parties' intent and mutual assent . . . *are proved through conduct* rather than words.") (citation omitted) (emphasis added). That conduct—both in isolation and after considering (properly) Levey's feelings and the parties' actions following Levey's abrupt departure—is more than sufficient to support the Court of Chancery's finding "that [Levey] withdrew from [BIP] and [BAM] on January 26, 2006." Op. at *10.

2. Denied. The flexible Limited Liability Act and Limited Partnership Act define a governing agreement as "*any* agreement" "written, oral or implied," "as to the affairs of [the entity] and the conduct of its business." *Id.* §§ 17-101(12) (emphasis added), 18-101(7) (emphasis added). Neither Act requires that the parties must have intended to create an agreement that "would not apply just to this specific circumstance, but would thereafter govern the rights of all members from then on" in order to constitute an operative agreement. Opening Br. at 22.

STATEMENT OF FACTS

While Levey's Statement of Facts tracks the factual findings of the Court of Chancery at times (predominantly with respect to background matters), it is inconsistent with many key findings of fact in the Opinion. Because Defendants do not dispute the background portion of Levey's Statement of Facts, their Statement of Facts begins on January 26, 2006.[4]

A. "Gordon Resigns"[5]

To put the events of January 26, 2006, into context, it is important to understand Levey's mindset at that time. As the Court of Chancery explained, in the time leading up to January 2006, Levey had become "progressively more miserable *at work* and . . . came to dislike his partners." Op. at *3 (emphasis added).[6] Over time, various issues arose between Levey and Defendants. Many

[4] At the outset of his Statement of Facts, Levey purports to "challenge[] certain inferences and conclusions drawn from those facts." Opening Br. at 4. However, "inferences drawn from" the Court of Chancery's factual findings are entitled to the same deference as the findings themselves. *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008).

[5] This is the heading in the Opinion. Op. at *3. Levey's corresponding headings is "LEVEY RESIGNS *FROM BIG*." Opening Br. at 8 (emphasis added). By adding the italicized words, Levey mischaracterizes the Opinion, which found that "[t]he evidence established that [Levey] withdrew *from [BIP] and [BAM]* on January 26, 2006." Op. at *8 (emphasis added). *See also id.* at 20 ("Having considered the evidence, this decision concludes that [Levey] withdrew *from all of the Brownstone entities, including [BIP] and [BAM]*, on January 26, 2006.") (emphasis added).

[6] Save for a nomenclature difference, Levey's Statement of Facts repeats verbatim the corresponding sentence in the Opinion—except that Levey surreptitiously deleted the words "at work" from the middle of the sentence. That omission is material in light of the Court's subsequent finding, which Levey ignores, that "the bottom line was that [Levey] wanted to leave a business that was making him unhappy." *Id*. at *8 (emphasis added).

stemmed from Levey's admitted desire for more money. Tr. at 358:6-11 (Levey). Levey also was very upset about the formation of BIP and BAM. Indeed, if Levey's wife had not gotten pregnant, he would have left when Defendants Lowey and Cohen decided to form BIP and BAM. *Id.* at 375:5-20 (Levey). As a result of these and other issues, there was, by this time, too much squabbling and fighting for Levey. *Id.* at 358:15-21 (Levey).

As of January 2006, Levey "loathed," *id.* at 229:1-11 (Levey), and "couldn't stand working with" Defendants, *id.* at 358:12-14 (Levey). He "wanted to leave a business that was making him unhappy." Op. at *8. Levey concluded "that [his] life's journey was better off separating [himself] from [Defendants]," Tr. at 362:5-363:14 (Levey), even if it meant leaving Brownstone Investment Group ("BIG")[7]—which had paid him millions of dollars, *id.* at 364:7-23 (Levey).

While leaving BIG was likely to be economically significant, that was not true for BIP and BAM. Those entities were in their infancy. *Id.* at 367:10-22 (Levey). While BAM had made some distributions, B1, it was unclear if the Fund was a viable business and worth the parties' efforts, Tr. 30:4-31:13.

It was against this background that on January 26, 2006, Levey abruptly announced his departure. During his meetings with Messrs. Lowey and Naylor that day, "*[t]o emphasize that he was done working at Brownstone,* [Levey] cut up

[7] The Opinion refers to BIG as "the Broker/Dealer."

his corporate charge card and building identification card." Op. at *4 (emphasis added).[8] As a result, of this "dramatic step," *id.* at *8, Levey had no ability to return to the BIP and BAM offices, and he never did, *id.*; Tr. at 395:2-7 (Levey). Instead of being escorted from the premises upon his announcement (as is common), Levey "said goodbye to and shook hands with each of the individual defendants, and everyone wished him well." Op. at *4.

Because Levey had money invested in the Brownstone fund, "[e]ffectuating a complete separation necessarily included withdrawing from all of the entities in which he was a member. Consistent with an effort to sever all ties, [Levey] withdrew his personal funds that were invested in the Hedge Fund." *Id.* at *8.

Levey took other steps after January 26, 2006, that "comported with his departure from Brownstone in all capacities, including his withdrawal from all of the Brownstone entities," *id.* at *9, including that:

- "[Levey] did not ask for information about [BIP] or [BAM], nor did he inquire about distributions," *id.*;
- "[h]e did not follow up with the defendants when he received a 2005 Schedule K-1 for [BIP] marked 'Final,'" *id.*; and,
- "[a] year later, on January 25, 2007, he sent letters to the defendants seeking compensation for his interests in [BIP] and [BAM]," *id.*[9]

[8] While Levey's Statement of Facts repeats verbatim (without quotation marks) the second half of the sentence, it omits the italicized language. Opening Br. at 9.

[9] See Section B, *infra*.

As a result of these actions, "an objective viewer would regard [Levey] as having severed all of his ties with the defendants and the Brownstone financial services boutique" that day. *Id.* at *8.

While Defendants—did not "immediately . . . confirm [Levey]'s withdrawal," *id.* at *9, they also took steps after January 26 reflecting their understanding that they had terminated their relationship with Levey. "Most notably, on June 5, 2006, [Defendants] reported that [Levey] was no longer a partner in [BAM] in a Form ADV filing." *Id.*

Primary Business Name: PINEBANK ASSET MANAGEMENT, LP **CRD Number: 138309**
ADV - Amendment, SCHEDULE C **Rev. 02/2005**
6/5/2006 12:40:36 PM

Form ADV, Schedule C

Amendments to Schedules A and B

1. Use Schedule C only to amend information requested on either Schedule A or Schedule B. Refer to Schedule A and Schedule B for specific instructions for completing this Schedule C. Complete each column.
2. In the Type of Amendment column, indicate "A" (addition) "D" (deletion) or "C" (change in information about the same *person*).
3. Ownership codes are: NA - less than 5%; A - 5% but less than 10%; B - 10% but less than 25%; C - 25% but less than 50%; D - 50% but less than 75%; E - 75% or more; G - Other (general partner, trustee, or elected member)
4. List below all changes to Schedule A (Direct Owners and Executive Officers):

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Type of Amendment	Title or Status	Date Title or Status Acquired MM/YYYY	Ownership Code	*Control Person*	PR	*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.
LEVEY, GORDON, SCOTT	I	D	LIMITED PARTNER/CFO	07/2004	A	Y	N	2067978

B102. In addition, Defendants "stopped making distributions to [Levey] and providing him with information concerning the performance and profitability of the entities." Op. at *9.

Based upon all of this, the Court of Chancery found that "the parties agreed by their conduct that [Levey] could and did withdraw" from BIP and BAM on January 26, 2006. *Id.* at *9. That agreement "did not encompass a requirement that [Levey] and the defendants first agree on the amount he would be paid." *Id.* at *10. Nor was one necessary, since under the Acts, "the ability of a member or partner to withdraw is distinct from the question of what the departing member or partner would receive in compensation." *Id.*.

B. "Gordon Gives Written Notice of His Withdrawal"

In his Statement of Facts, Levey rewrites this heading, suggesting that the Court found that in January 2007, "LEVEY ASK[ED] TO WITHDRAW." Opening Br. at 10. That is not accurate.

In fact, the Court found that just before the first anniversary of his departure, in letters from his counsel to Defendants' counsel, *see* B113 & B115, "[Levey] gave written notice that he desired to withdraw" from BIP and BAM. Op. at *5. In those letters, Levey did not "ask" Defendants' permission to withdraw; Levey "*demand[ed]* . . . payment of (i) his capital account with [BAM/BIP], and (ii) the cash value of his partnership share in [BAM/BIP]." B113 (emphasis added) & B115 (emphasis added). And Levey's counsel threatened that "[i]f this demand is not honored, Mr. Levey has instructed us to pursue the full range of available legal

remedies, which may include a request for judicial dissolution of [BAM/BIP] in accordance with applicable law." *Id.*

In the face of this threat, Defendants' counsel did what lawyers frequently do in response to demands—he sent responses seeking "additional information in order to assess [Levey's] 'demands.'" Op. at *5.

C. The Arbitration

Roughly one year later, on February 15, 2008, Levey filed a demand for arbitration before FINRA asserting claims against all Defendants except Cohen. Levey's primary claim was for breach of contract, based upon Defendants' purported "refus[al] to compensate" him "*upon his election to withdraw from*" BIG, BIP and BAM:

> **FIRST CLAIM**
> **(Breach of Contract)**
>
> Respondents breached their contracts of partnership with Levey by refusing to compensate him for his partnership share in the Brownstone Entities upon his election to withdraw from the partnerships.

B136 (emphasis added). The demand defines the "Brownstone Entities" as BIG, BIP and BAM. B117. As compensation for these purported breaches, Levey sought "[a]s to BIP and BAM, . . . a cash payment equal to 5% of the value of these two entities." B137.

Thus, as of February 2008, Levey's position was that he:

1. Had the right to withdraw from BIG, BIP and BAM;

2. Had already "elect[ed] to withdraw from" BIG, BIP and BAM; and,

3. Was entitled to a portion of the value of BIG, BIP and BAM.

Levey understood this. He knew that when he authorized the filing of the Demand, he was asserting that:

> [D]efendants, by failing to compensate [him] after [he] *elected to withdraw* from [BIP and BAM], had violated the terms of the agreement that [he] had reached with them.

Tr. 425:22-426:16 (Levey) (emphasis added).

And Levey had no doubt about his right to withdraw.[10] In the Demand, Levey claimed that any challenge to his ability to withdraw (which Defendants never asserted) "would be legally meritless." B138.

In light of the foregoing, the Court of Chancery found that in the arbitration:

> [a]mong other claims, [Levey] contended that he ***had withdrawn*** from [BIG], [BIP], and [BAM] and that the defendants had failed to pay him the value of his equity interests in those entities.

Op. at *6 (emphasis added).

The Levey Statement of Facts subtly, yet substantially, alters this conclusion, replacing "had withdrawn" with "had sought to withdraw." As a result, Levey claims that in the demand:

[10] Indeed, "[o]nly when he brought this litigation did [Levey] advance the position that although he might have tried to withdraw, his attempts were ineffective." Op. at *9.

> [a]mong other claims, [he] contended that he had ***sought to withdraw*** from BIG, BIP and BAM, and that the Appellees had failed to pay him the value of his equity interests in those entities. Op. at *6.

Opening Br. at 11 (emphasis added).

Levey's modification is inconsistent with the plain language of his arbitration demand, the sentence from the Opinion upon which it is based, and other findings in the Opinion. *See* Op. at *9 ("[w]hen he filed his arbitration demand . . ., [Levey] contended that *he had [already] withdrawn*") (emphasis added).

The FINRA panel found that it did not have jurisdiction over BIP and BAM, and dismissed Levey's claims as to those entities. Op. at *6. Levey continued to litigate his claim for the value of his interest in BIG, which he valued at more than seven-million dollars. Tr. at 433:14-18, 434:11-13 (Levey). In May 2009, the panel awarded "an amount that is consistent with the return of his capital account when he left [BIG], plus interest"—a fraction of what Levey sought. Op. at *6.

According to Levey, the decision was "completely" unjust. *Id.* at 435:2-3 (Levey). In his eyes, by convincing the arbitrators to award him only his capital account, Defendants "had basically stolen" "millions of dollars" from him and "gotten away with it." *Id.* at 435:12-20 (Levey).

D. Levey Files Suit

To make matters worse, in May 2009, "[t]he same month that the arbitration panel issued its decision, Barron's ranked the Hedge Fund as the 82nd best performing fund." Op. at *6. When Levey saw this, he knew he had made a mistake: the Fund he had walked away from was now "significantly larger," with $370 million in assets under management. B150-1; Tr. 437:11-15 (Levey).[11] And Levey knew that as a result, the share he held before his "election to withdraw" was now worth substantially more. *Id.* at 438:6-11 (Levey).

Shortly after, Levey filed suit. He asserted six causes of action, all premised upon the notion that he remained a member of BIP and BAM (and therefore was entitled to share in the tremendous success of which he recently had learned). In response to Defendants' motion to dismiss his original complaint, Levey elected to file an amended complaint. His amended complaint continued to assert the same six claims, including for violation of the New York Payment of Wages Law. Am. Compl. Count VI.

Thus, notwithstanding his prior "election to withdraw" from BIP and BAM (as discussed in his 2008 arbitration demand), Levey *now* claimed that he "never

[11] The substantial growth in the Fund resulted from its improved performance after Levey's departure. Most significantly, in 2008, the Fund outperformed its peers by more than 30 percent, which attracted additional investments. Tr. 58:2-15. Levey played no role in the Fund's post-departure performance. *Id.* at 58:16-18.

relinquished or forfeited his . . . ownership in BAM and BIP." *Id.* ¶ 24. And as a result, Levey claimed that he remained "a 5% partner/member of BAM and BIP" and was entitled to a proportionate share of their success. *See id.* ¶ 31; *see also id.* ¶¶ 26, 38, 41, 44, 50, 52, 57, 58, 60 (same). Levey's Complaint makes no reference to his prior "election to withdraw."

E. Lowey and Naylor Depart

By 2010, four years after Levey's departure, "Lowey and Cohen decided to go their separate ways." Op. at *6. By then, BIP and BAM were operating pursuant to written agreements. B2; B45.

In connection with this separation, Lowey and Naylor sought to withdraw from BIP and BAM. Like Levey, they were permitted to do so, although unlike Levey they received three-year tail interests in connection with their departure. Op. at *6.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY FOUND THAT, AS A MATTER OF FACT, LEVEY WITHDREW FROM BIP AND BAM PURSUANT TO AN ENFORCEABLE IMPLIED AGREEMENT.

A. Question Presented

Are the Court of Chancery's factual determinations that "[Levey] withdrew from the [BIP] and [BAM] on January 26, 2006," and "the parties agreed by their conduct that [Levey] could and did withdraw" clearly erroneous? Op. at *8, *10.

B. Scope of Review

While Levey argues that the Court of Chancery's conclusion that an implied agreement existed "is a question of law" "reviewed de novo," Opening Br. at 13-14, he fundamentally challenges the factual sufficiency of the Court of Chancery's findings. Indeed, Levey claims that the issue presented is whether the "facts and statements . . . show . . . a contract implied-in-fact." *Id.* at 13.[12]

The Court of Chancery's findings of fact "are subject to the deferential 'clearly erroneous' standard of appellate review." *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004). To the extent the appeal presents any issues of law, those determinations are subject to *de novo* review. *Id.*

[12] Levey claims that "[w]here essential facts are not in dispute," whether an implied agreement exists "is a question of law." Opening Br. at 13. But in light of Levey's deviations from the Opinion, as well as his "challenges [to] certain inferences and conclusions drawn" by the Court of Chancery, many essential facts are in dispute.

C. Merits of Argument

Levey argues that the Court of Chancery erred (1) "by relying on [his] subjective attitude toward the other equity owners in determining whether there was an implied contract," and (2) "in finding an implied contract as the facts found did not establish acceptance of the proferred [sic] terms or any meeting of the minds, particularly as to the creation of a partnership agreement and LLC operating agreements." Opening Br. at 14-15. These claims are meritless.

1. Levey Waived Any Challenge to the Evidence Considered by the Court of Chancery and the Burden of Proof.

Under Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review." Supr. Ct. R. 8. *See also Knott v. LVNV Funding, LLC*, 95 A.3d 13, 20 (Del. 2014) (finding party "waived an[] argument . . . by failing to present that argument to the" trial court). And under Supreme Court Rule 14(b)(vi)(A)(3), arguments not raised "in the body of the opening brief" are "deemed waived and will not be considered by the Court." Supr. Ct. R. 14(b)(vi)(A)(3). *See Lum v. State*, 101 A.3d 970, 972 (Del. 2014) (finding party waived argument raised "as a mere aside in a footnote" "in his opening brief").

Levey never argued below that the Court of Chancery was limited in the evidence it could consider in determining whether an implied agreement existed. That argument appears for the first time on appeal.

In addition, Levey charges that the Court of Chancery "did not determine the quantum of evidence necessary to provie [sic] an implied-in-fact contract," and that a "clear and convincing" standard should apply. Opening Br. at 15 & n.2. The Court of Chancery never made that determination because Levey never asked it to do so. Levey's Opening Brief is the first time he has raised this issue. Moreover, Levey raises this issue in a footnote, and not the body of his brief.

As a result, Levey waived both of these arguments.

2. The Court of Chancery Properly Weighed the Appropriate Evidence in Determining That an Implied Agreement Existed.

Levey's first purported error reflects a misapprehension of the Opinion. Levey claims that the Court of Chancery erred because the "determin[ation] whether there was an implied contract . . . must be based solely on observed conduct and statements." *Id.* at 14-15. The Court did just that.

According to Levey, "[a] contract implied-in-fact is one inferred from the *conduct* of the parties, though not expressed in words. The parties' intent and mutual assent to an implied-in-fact contract *are proved through conduct* rather than words." *Id.* at 15 (citation omitted) (emphasis added).

This is precisely what the Court of Chancery considered in determining that an implied agreement existed. Like Levey, the Court defined "[a]n implied agreement '[a]s one inferred from the conduct of the parties, though not expressed in words.'" Op. at *10 (citation omitted). And like Levey, the Court recognized

that "[a] party's subjective intent or belief, does not determine whether an implied contract exists." *Id.* (citation omitted).

After articulating the correct standard, the Court of Chancery relied upon appropriate evidence in finding that an implied agreement existed. Specifically, the Court found that "*[t]hrough his conduct*, [Levey] manifested an intent to withdraw, and *through their conduct*, the defendants manifested their acceptance of his withdrawal." *Id.* (emphasis added). Or, stated differently, "the evidence . . . established . . . that the parties agreed *by their conduct* that [Levey] could and did withdraw." *Id.* at *9 (emphasis added).

That conduct, as found by the Court of Chancery, includes the following:

- Levey "turned in his keys and took the dramatic step of cutting up his corporate charge card and building identification card," *id.* at *8;
- "The other principals of the firm and its employees gathered together and said goodbye" to Levey, *id.*;
- Levey "walked out the door, never to return," *id.*;
- Levey "withdrew his personal funds that were invested in the Hedge Fund," *id.*;
- "After he left on January 26, 2006, [Levey] did not ask for information about [BIP] or [BAM]," *id.* at *9;
- Soon after Levey's departure, "the defendants did take steps reflecting [Levey's] withdrawal. Most notably, on June 5, 2006, they reported that [Levey] was no longer a partner in [BAM] in a Form ADV filing," *id.*;

- After his departure, Defendants "also stopped making distributions to [Levey] and providing him with information concerning the performance and profitability of the entities," *id.*;

- "After he left . . ., [Levey] did not . . . inquire about distributions," *id.*;

- After leaving, Levey "did not follow up with the defendants when he received a 2005 Schedule K–1 for [BIP] marked 'Final,'" *id.*;

- "[O]n January 25, 2007, [Levey] sent letters to the defendants seeking compensation for his interests in [BIP] and [BAM]," *id.*;

- "When he filed his arbitration demand on February 15, 2008, [Levey] contended that he had withdrawn from [BIG], [BIP], and [BAM] and sought compensation for the value of his equity interests in those entities," *id.*; and

- It was "[o]nly when he brought this litigation"—more than four years after his departure—that Levey "advance[d] the position that although he might have tried to withdraw [on January 26, 2006], his attempts were ineffective." *Id.*

In light of this, the Court of Chancery's conclusions that Levey, through his conduct, "manifested an intent to withdraw" and that "through their conduct, the defendants manifested their acceptance of his withdrawal" are not clearly erroneous. Op. at *10. Indeed, they are correct. *Id*.

3. Levey's Attacks on the Court of Chancery's Finding that an Implied Agreement Existed Are Meritless.

Levey offers several attacks on the Court of Chancery's finding that an implied agreement existed. None of those attacks has any merit.

First, *w*ithout any authority, Levey claims that the Court of Chancery could only consider the "evidence as of January 26, 2006." Opening Br. at 20.

Levey's desire to avoid his post-January 26 actions is understandable. As the Court of Chancery found, "[Levey's] subsequent actions comported with his departure from Brownstone in all capacities, including his withdrawal from all of the Brownstone entities." Op. at *9. Among other things, after his departure, Levey (1) withdrew his funds from the Hedge Fund, (2) did not ask for information about BIP or BAM, (3) did not inquire about distributions, and (4) did not follow-up after he received a "Final" BIP K-1 in 2005. *Id*. Consistent with these actions, in his February 2008 FINRA arbitration demand, Levey claimed that in January 2006, he "elect[ed] to withdraw from" BIG, BIP and BAM. B136.

While the evidence as of January 26, 2006, was sufficient to support the factual findings at issue, the law does not require the Court to blind itself to this confirmatory evidence. A court may consider "circumstantial evidence of [an] alleged implied contract," *Melbye v. Accelerated Payment Technologies, Inc.*, 2012 WL 5944644, at *3 (S.D. Cal. Nov. 27, 2012), including "the subsequent acts of the parties in conformity therewith . . . to establish an implied agreement," *Wilson & Co. v. U.S.*, 82 Ct. Cl. 261, 289 (Ct. Cl. 1936). *See also Estate of Thompson v. Comm'r of Internal Revenue*, 382 F.3d 367, 376 (3d Cir. 2004) ("An implied agreement may be inferred from the circumstances surrounding both the transfer *and subsequent use* of the property.") (emphasis added); *Estate of Rapelje v. Comm'r of Internal Revenue*, 73 T.C. 82, 86 (1979) ("In determining whether there

was an implied understanding between the parties, all facts and circumstances surrounding . . . *subsequent [events] must be considered*.") (emphasis added).

Second, Levey claims that the Court's finding that he withdrew "relie[s] in large measure, on [his] . . . 'antipathy', toward other equity owners," and that this "is not a proper consideration." Opening Br. at 19. Levey is doubly mistaken.

The Opinion does not "rel[y] in large measure" upon Levey's undisputed "antipathy." Instead, the Opinion finds—based upon "the parties[']. . . conduct"—that "[Levey] withdrew from [BIP] and [BAM] on January 26, 2006." Op. at *8. The Opinion then notes Levey's assertion that "he intended to resign as an employee and to withdraw from [BIG], but not to withdraw from [BIP] and [BAM]." *Id.* In that same paragraph, the Court utilized Levey's "then-unexpressed" "antipathy towards the business and his partners" to test this claim, and finds it "not credible." *Id.*

The law does not require the Court to ignore Levey's undisputed "antipathy towards the business and his partners." *Id.*; *see* Opening Br. at 22. Witness credibility is no less significant in implied agreement cases than it is in any other case. *See, e.g.*, *In re Kamien*, 2012 WL 603808, at *5 (B.A.P. 9th Feb. 9, 2012) (appellant court gives "considerable deference to" trial court's finding that witness testimony concerning implied contract "not credible"). The Court was entitled—and indeed required—to test the credibility of Levey and his claims as part of its

findings of fact, and measuring those claims against his undisputed "antipathy" was an appropriate means for doing so.[13]

Third, Levey suggests that the Opinion causes a "forfeiture." Opening Br. at 21. Levey is incorrect. Permitting Levey to withdraw, as the Court found he wanted and intended to do, is not "constru[ing] a contract as resulting in a forfeiture." Opening Br. at 17.[14]

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[13] Levey's claims, at page 21 of his brief, that the Court's opinion "ignores" certain facts, and that his actions are "inconsistent" with certain findings, is simply an attempt to reargue the facts. But Levey's disappointment with "th[e] factual murk" he helped create, Op. at *9, the Court's weighing of the evidence, and its rejection of his claims as "not credible," *id.* at *8, do not establish any—much less reversible—error.

[14] To the extent Levey regrets not putting in more evidence of value, it is his own fault. Although not asserted as a point of error, Levey suggests in passing in a footnote that he did not provide such evidence because the Court "previously barred such evidence." Opening Br. at 24 & n.3. That argument is therefore "deemed waived and will not be considered by the Court" under Supreme Court Rule 14(b)(vi)(A)(3). In any event, it is also meritless. In the ruling at issue, the Court first directed service of an "interrogatory, asking for whether there have been any . . . distributions, dates and amounts" to determine if there were any monies at issue. A-63. The Court never ruled that was the only permissible discovery, and Levey served numerous interrogatories, *see, e.g.*, B154, and conducted four lengthy depositions on a variety of topics far beyond "whether there have been any . . . distributions, dates and amounts," *see* Dkt. #93 (reflecting, among other things, that despite already having a 2006 deposition transcript that was at least 254 pages long, the transcript of Levey's deposition of Lowey in this case was at least 167 pages long). Had Levey truly felt constrained, he would not have pursued this discovery.

Levey never sought this information in discovery because—from the outset—his claims have all assumed that he remained a member of BIP and BAM. As a result, he had no reason to conduct discovery concerning their value, and he never indicated any desire to do so. Levey could have asserted a claim for the value of his interest upon withdrawal and sought discovery concerning the value of BIP and BAM upon withdrawal. Opening Br. at 24 & n.3. He simply chose not to do so. And in any event, Levey tried unsuccessfully at trial to offer valuation evidence, Tr. at 84-86, 564-66, confirming that he never understood the Court to have "barred such evidence," Opening Br. at 24 & n.3.

4. The Court of Chancery's Findings of Fact Are Sufficient to Establish Implied Agreements Under 6 *Del C.* §§ 17-603 & 18-603.

Levey argues that "even if this Court were to find that the objective evidence of conduct demonstrated a contract by implication," such an agreement is not sufficient because "nothing in the trial court's findings show[s] that the parties intended to create an operating agreement which would govern the conduct of the members of the entities going forward." Opening Br. at 22, 23. Levey cites no authority for the supposed requirement, which he claims exists, that "[a] partnership or operating agreement would not apply just to this specific circumstance, but would thereafter govern the rights of all members from then on." *Id*. at 22.

Levey's suggested requirement is foreclosed by the Delaware Limited Partnership Act and the Delaware Limited Liability Company Act. Both statutes permit withdrawal "at the time or upon the happening of events specified in a [limited partnership agreement/limited liability company agreement] and in accordance with the [limited partnership agreement/limited liability company agreement]." 6 *Del. C.* §§ 17-603, 18-603. And both statutes broadly define a governing agreement as "*any* agreement" "written, oral or implied," "as to the affairs of [the entity] and the conduct of its business." *Id.* §§ 17-101(12) (emphasis added), 18-101(7) (emphasis added).

By their plain terms, neither Act requires that the agreement must "thereafter govern the rights of all members from then on." Reading such a requirement into the statutes would be inconsistent with their expansive terms, which broadly define governing agreements as "any agreement," without limitation (including based upon their duration or prospective application).

Levey's suggested interpretation is also inconsistent with the policies behind the Limited Partnership Act and the Limited Liability Company Act of providing parties with "maximum flexibility." *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 293 (Del. 1999) ("The [LLC] Act is a statute designed to permit members maximum flexibility."); *id.* at 291 & n.27 ("Clearly, both the LP Act and the LLC Act are uniform in their commitment to 'maximum flexibility.'") *see also* Martin I. Lubaroff & Paul M. Altman, *Delaware Limited Liability Companies* § 20.4 ("[T]he Act gives members virtually unfettered discretion to define contractually their business understanding."). That flexibility requires that parties be able to enter into agreements even if they do not intend for them to apply in all circumstances going forward.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Chancery.

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