



IN THE SUPREME COURT OF THE
STATE OF DELAWARE

MIRTECH, INC.,
Defendant Below/Appellant,

v.

DECCO U.S POST HARVEST, INC
Plaintiff Below/Appellee.

CASE NO. 627, 2018

Court Below: Court of Chancery
of the State of Delaware

C.A. No. 2018-0100-JTL

APPELLANT'S 2nd AMENDED OPENING BRIEF

Dated: March 6, 2019

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NATURE OF PROCEEDINGS

The is an appeal from the January 14, 2019 Order granting the dissolution of Essentiv, LLC. See Exhibit A.

The subject action commenced with the filing of Decco's Petition for Dissolution on February 12, 2018 seeking the judicial dissolution of Essentiv pursuant to 6 Del. C. § 18-802 on the grounds that said entity was no longer reasonably practicable. MirTech filed its Answer and Counterclaim to Decco's petition. Decco filed a Motion to Strike MirTech's Counterclaim. Witness depositions were taken. Trial commenced on August 27, 2018 and was completed in one full day. On November 28, 2018, the Honorable Judge J. Travis Laster of the Chancery Court entered his Post-Trial Memorandum Opinion granting Decco's Petition for Dissolution pursuant to 6 Del. C. § 18-802. See Exhibit B. MirTech files this appeal from the January 14, 2019 Order granting Decco's Petition for Dissolution of Essentiv, LLC.

SUMMARY OF ARGUMENT

1. The Court erred when it dissolved Essentiv when the LLC Agreement had provided a mechanism for resolving deadlocks that was not utilized. Thus, the court lack subject matter jurisdiction to perform a juridical dissolution.

2. 1-MCP Business could have survived because Dr. Mir had intellectual property to use 1-MCP that would not have compromised the settlement with AgroFresh, as well as other substantial business opportunities available to Essentiv with 1-MCP.

3. Had the Court administered the 3-prong test for judicial dissolution: (1) whether the members' vote is deadlocked at the Board level; (2) whether there exists a mechanism within the operating agreement to resolve this deadlock; and (3) whether there is still a business to operate based on the company's financial condition, it would have concluded that Essentiv could have survived because of the new technologies and other substantial business opportunities available to Essentiv through Dr. Mir.

4. The Court erred in its conclusion that the sole purpose of Essentiv was to develop, manufacture and sell one 1-MCP Product, even though the Limited Liability Agreement under Section 6 provides additional avenues and opportunities for Essentiv.

5. The Court erred in ignoring Decco's malicious intent to dissolve Essentiv. Decco failed to mention in its pleadings and Petition to Dissolve Essentiv, that it executed a distributorship agreement with Hazel Technologies wherein Hazel Technologies would manufacture a 1-MCP product and Decco would be the distributor. Decco sought the dissolution of Essentiv for business and litigation advantage with unclean hands.

STATEMENT OF FACTS

This civil action was initiated in February 2018 when Decco U.S. Post-Harvest, Inc. (hereinafter “Decco”) filed its Petition for Dissolution against MirTech, Inc. (hereinafter “MirTech”), seeking the judicial dissolution of Essentiv, LLC (hereinafter “Essentiv” and/or “the Company”), a joint venture formed by Decco and MirTech (hereinafter “the Parties”) in April 2016, pursuant to 6 Del. C. § 18-802 on the grounds that Essentiv is no longer reasonably practicable as per the LLC Agreement entered into by the Parties. MirTech disagrees.

The purpose of Essentiv was to manufacture multiple 1-MCP and non-1-MCP products, specifically to “conduct and coordinate all activities related to the chemistry and biology R&D, collaboration with universities and government researchers, regulatory support and registration filings, manufacturing, supply, chain activities, strategic marketing and marketing communications related to 1-MCP Products.” See Appellant’s Appendix pp. A-145 and A-146.

As per the LLC Agreement, Decco was responsible for sales-related activities, financial and administrative services, and educating market participants in the benefits of 1-MCP Products. In addition to 1-MCP Products, it was the intent of the Parties that Essentiv would be a vehicle for the development of other non-1-MCP

technologies proposed by MirTech, Decco or its affiliates.” See Appellant’s Appendix pp. A-145 and A-146, and p. A-150.

Within months of the formation of Essentiv, a non-party AgroFresh, Inc. (hereinafter “AgroFresh”) initiated a civil action against MirTech in the District Court in the District of Delaware (hereinafter “District Court”), challenging the ownership of a patent held by MirTech. After months of litigation, an agreement between MirTech and AgroFresh was entered, the terms of which were incorporated into a Final Consent Agreement (hereinafter “Final Consent Agreement”) filed in the District Court. As per the Final Consent Agreement with AgroFresh, MirTech agreed to cease the production of a 1-MCP Product, TruPick. Decco’s Petition for Dissolution was already filed in response to said agreement. Trial commenced in this matter on August 27, 2018.

ARGUMENT 1

THE COURT ERRED IN GRANTING DECCO'S PETITION FOR DISSOLUTION AND THE ORDERING OF THE JUDICIAL DISSOLUTION OF ESSENTIV PURSUANT TO 6 DEL. C. 18-802.

Question Presented

Did the Trial Court Err in Granting Decco's Petition for Dissolution and Ordering the Judicial Dissolution of Essentiv Pursuant to 6 Del. C. 18-802? See Appellant's Appendix pp. A-45 and A-46, A-52, A-74, A-77 and A-79.

Standard and Scope of Review

A de novo review is required due to the court's misinterpretation of the statute, and its oversight of Decco's failure to satisfy the reasonably practicable standard set forth in 6 Del. C. § 18-802. The court adopted Decco's erroneous belief that ending the production of one 1-MCP product would leave Essentiv unable to carry on business as per the LLC Agreement, and pursuant to 6 Del. C. § 18-802.

Merits of Argument

6 Del. C. § 18-802 states in pertinent part that "[O]n application by or for a member or manager, the Court of Chancery may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement."

Given its extreme nature, judicial dissolution is a limited remedy that this court grants sparingly. The court will not dissolve an LLC merely because the LLC

has not experienced a smooth glide to profitability or because events have not turned out exactly as the LLC's owners originally envisioned; such events are, of course, common in the risk-laden process of birthing new entities in the hope that they will become mature, profitable ventures. *In re Arrow Investment Advisors, LLC*, Del. Ch., C.A. No. 4091-VCS (April 23, 2009), the court found:

A hair-trigger dissolution standard would ignore this market reality and thwart the expectations of reasonable investors that entities will not be judicially terminated simply because of some market turbulence. Dissolution is reserved for situations in which the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock or where the defined purpose of the entity has become impossible to fulfill.

Id. at pp. 8 and 9.

In *Seneca Investments, LLC v. Michael P. Tierney*, Del. Ch., 970 A. 2d. 259 (2008), Petitioner Seneca filed a motion seeking judicial dissolution of a company pursuant to §18-802, claiming that it was functioning as a passive investment vehicle and had conducted limited active business over the past several years. While petitioner claimed a judicial dissolution pursuant to §18-802 was necessary, the Court decided otherwise; denied judicial dissolution of the entity and clarified its limited role in ordering dissolution under § 18-802: “Even assuming that *Seneca* is in violation of some provisions of its operating agreement, such violations are not grounds for this Court to order dissolution of an LLC.” The court further stated it

“will not attempt to police violations of operating agreements by dissolving LLCs.”

Seneca Investments, LLC v. Michael P. Tierney, Del. Ch., 970 A. 2d. 259 (2008).

In this matter, Decco failed to prove that ending the production of one 1-MCP product when the purpose of the Company was to develop and manufacture multiple 1-MCP and non-1-MCP products, left Essentiv unable to carry on business as per the agreement between the parties, and thus, failed to satisfy the reasonably practicable standard set forth in 6 Del. C. § 18-802. The trial court erred in granting Decco a judicial dissolution pursuant to § 18-802.

ARGUMENT 2

THE TRIAL COURT ERRED IN ITS CONCLUSION THAT THE SOLE PURPOSE OF ESSENTIV WAS TO DEVELOP, MANUFACTURE AND SELL ONE 1-MCP PRODUCT.

Question Presented

Did the trial court err in its conclusion that the sole purpose of Essentiv was to develop, manufacture and sell one 1-MCP product? See Appellant's Appendix pp. A-90 thru A-97.

Standard and Scope of Review

A scope of review is required due to the trial court's abuse of discretion by ignoring the LLC Agreement entered into between the parties, which established the purpose of the formation of Essentiv was to manufacture multiple 1-MCP and non-1-MCP products.

Merits of Argument

At the time Essentiv was formed, the parties agreed that its purpose was to manufacture multiple 1-MCP products, which included conducting and coordinating all activities related to the chemistry and biology R&D, collaboration with universities and government researchers, regulatory support and registration filings, manufacturing, supply, chain activities, strategic marketing and marketing communications related to the 1-MCP products. In addition to 1-MCP products, the parties intended for Essentiv to be a vehicle for the development of other non-1-

MCP products and technologies proposed by MirTech, Decco or its affiliates.” (See Appellant’s Appendix pp. A-145 and A-146, and A-150 (Section 3.1 and Section 6.1 of the LLC Agreement.)

Essentiv’s first 1-MCP product to go to market was TruPick. Shortly thereafter, Agrofresh, Inc. (hereinafter “Agrofresh”) initiated a civil action in the District Court of the State of Delaware against MirTech challenging the ownership of a patent held by MirTech and used in the development of the TruPick product. After months of costly, lengthy litigation, MirTech entered into a settlement agreement with Agrofresh relinquishing ownership and ceasing production of the TruPick product. As per the agreement with Agrofresh, MirTech agreed to cease the production of a single 1-MCP Product. However, Decco, while the Delaware and federal litigation was pending, in violation of the Essentiv LLC agreement, entered into a July 2018 distribution agreement with Hazel Technologies for 1-MCP products. Appellant’s Appendix p. A-160 (Section 18.2 and 18.3 of the LLC Agreement).

In its Memorandum Opinion, the trial court finds that from the moment MirTech entered into the settlement agreement with Agrofresh, ceased production and transferred ownership of the TruPick product, Essentiv was no longer reasonably practicable and thus, granted its Petition of Dissolution. The trial court based its decision on the unsupported fact that the parties formed Essentiv for the sole purpose

of developing, manufacturing and selling a single product (“TruPick), and without control it, the company could not continue forward as per the LLC Agreement entered between the parties. That is error. Decco did not rely on Dr. Mir’s representations but instead relied on learned intellectual property counsel at Schwabe and Finnegan’s counsel on the use of 1-MCP intellectual property.

It was never the parties’ intention to manufacture a single product. Decco and MirTech contracted to develop and sell multiple 1-MCP and non-1-MCP products through Essentiv. (Appellant’s Appendix p. A-91, Line 22; p. A-92, Line 1) This fact is evident in the LLC Agreement and various other legal contracts executed by the Parties during the formation of Essentiv. (Appellant’s Appendix, p. A-93, Lines 6-18) The end of production of one product while several others were ripe for development in no way proved Essentiv was not reasonably practicable. While MirTech’s agreement with Agrofresh ceased the production of the TruPick product, it in no way prevented the parties from continuing their work developing other 1-MCP and non-1-MCP products. (Appellant’s Appendix, p. A-94, Lines 15-20; p. A-101, Lines 10-16) In Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC, 2019 Del. LEXIS 23, 2019 WL 237360, the court found:

...“Delaware’s implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract.” *Rather, “the covenant is a limited and extraordinary legal remedy.” As such, the implied*

covenant "does not apply when the contract addresses the conduct at issue," but only "when the contract is truly silent" concerning the matter at hand. Even where the contract is silent, "[a]n interpreting court cannot use an implied covenant to re-write the agreement between the parties, and 'should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.'"

Id. at p. 50. (Emphasis added.)

The trial court erred in concluding that the sole purpose of the formation of Essentiv was to manufacture and sell one product, and in determining that without control of the TruPick product Essentiv was no longer reasonably practicable.

ARGUMENT 3

THE TRIAL COURT FAILED TO FOLLOW THE 3-PRONG TEST FOR JUDICIAL DISSOLUTION.

Question Presented

Did the Trial Court Fail to Follow the 3-Prong Test for Judicial Dissolution?

See Appellant's Appendix p. A-46. See *Lola Cars Int'l Limited v. Krohn Racing, LLC*, C.A. No. 4479-VCN, C.A. No. 4886-VCN, 2009 Del. Ch. LEXIS 193.

Standard and Scope of Review

A scope of review is required due to the trial court's abuse of discretion by ignoring the traditional 3-Prong Test for Judicial Dissolution.

Merits of Argument

The Court failed to follow the traditional guide for discretion. The Court's discretion has been guided by, among other considerations: 1) whether there is deadlock between the members at the board level; 2) whether the operating agreement gives a means of navigating around the deadlock; and 3) whether, due to the company's financial position, there is still a business to operate. Of course, "[t]hese factual circumstances are not individually dispositive; nor must they all exist for a court to find it no longer reasonably practicable for a business to continue operating. "Deadlock" is reached only if both the coequal owners/managers cannot come to a mutual agreement of the company. In this case, one of the owners/managers, MirTech and Dr. Mir continued to discharge their duties as per the LLC

agreement, without knowledge of deadlock, while the other Owner/ manager, Decco and Francois Girin unilaterally made the decision of declaring deadlock and moving to Delaware Chancery Court for company dissolution. In Lola Cars Int'l Limited, the court found:

The Court in Fisk' laid out three factual scenarios this Court should consider when ordering judicial dissolution under Section 18-802's reasonable practicability standard: 1) whether the members' vote is deadlocked at the Board level; 2) whether there exists a mechanism within the operating agreement to resolve this deadlock; and 3) whether there is still a business to operate based on the company's financial condition.

Id. at pp. 16 and 17.

Based on the LLC agreement and commitment letters from Decco for non-1-MCP projects, Dr. Mir continued to work and support Essentiv for new product launches (Appellant's Appendix, p. A-131, Lines 8-14). In lines with the objectives of the company, Dr. Mir was also under the impression that Essentiv will continue to use his Know-how to work on other 1-MCP products. Dr. Mir has extensively worked on 1-MCP for almost 10 years (from 1999 to 2009) prior to his collaboration with AgroFresh for his combination Technology (RipeLock Technology) and is free to practice his 1-MCP knowhow effective February 1, 2019 (Appellant's Appendix p. A-120, Lines 1-24; p. A-121, Lines 1-6).

¹Fisk Ventures, LLC v. Segal (Fisk I), 2009 Del. Ch. LEXIS 7, 2009 WL 73957, at *3 (Del. Ch. Jan. 13, 2009)

Dr. Mir's assumptions were not thwarted by Decco but rather, the management continued to talk to him favorably and send their employee to monitor progress at MirTech (Appellant's Appendix, p. A-130, Lines 14-24; p. A-131, Lines 1-14; p. A-132, Lines 20-24; p. A-133, Lines 1-3).

Further, Dr. Mir has extensively worked on 1-MCP for almost 10 years (from 1999 to 2009) prior to his collaboration with AgroFresh for his combination Technology and is a well published researcher and a global leader on the subject. There is no finding that the operating agreement did not provide an alternative for establishing a deadlock. Further Decco entering into an agreement with a vendor to distribute 1-MCP product belie the continuing existence of 1-MCP business that is not precluded by the Agrofresh litigation. Lola Cars Int'l Ltd. v. Krohn Racing, LLC, Nos. 4479-VCN, 4886-VCN, 2010 Del. Ch. LEXIS 176, at *126 (Ch. Aug. 2, 2010).

ARGUMENT 4

THE TRIAL COURT LACKED JURISDICTION OVER THE PARTIES AND SUBJECT MATTER AS IT FAILED TO HONOR THE MANDATORY PROVISION FOR “RESOLVING DEADLOCKS.”

Question Presented

Did the trial court lack jurisdiction over the parties and subject matter as it failed to honor the mandatory provisions for “resolving deadlocks?” See Appellant’s Appendix pp. A-46, A-52, A-74, A-77 and A-79.

Standard and Scope of Review

A de novo review is required due to the court’s misinterpretation of the statute, and by acting on and entertaining litigation beyond its jurisdiction, and in clear and complete breach of the terms of the agreement between the parties in this matter.

Merits of Argument

In Delaware, LLC agreements and the mediation and/or arbitration clauses contained within, are legally binding, enforceable contracts and when present, govern the question of jurisdiction. The parties detailed in advance exactly how they would attempt to resolve any disputes and deadlocks if they arose in Essentiv. Both parties agreed that either party shall serve notice on the other and upon receipt of notice, the parties shall negotiate with the other in good faith in an effort to reach a resolution. If the parties fail to resolve the deadlock between them within thirty (30)

days, then the parties shall proceed to mediation to resolve their differences. (See Appellant's Appendix pp. A-154 and A-155.)

Francois Girin, President of Decco, expressed in his deposition testimony of July 13, 2018 that following the consent order of June 2017 between MirTech and AgroFresh, he felt "very betrayed" and "lost trust in Dr. Mir." However, Mr. Girin did not communicate these concerns to MirTech. The record is bare of any effort by Mr. Girin, personally or as CEO of Decco, serve MirTech with notice of any disputes or deadlocks, communicate any bona fide disagreements to MirTech, or attempt to resolve any disputes or deadlocks in mediation as per the LLC Agreement. Instead, Mr. Girin waited months, until early 2018, to request that MirTech consent to dissolution of Essentiv.

Despite the dispute resolution clause in the LLC Agreement, at no time did Decco serve MirTech with notice of any disputes or deadlocks, communicate any bona fide disagreements, or attempt to resolve any disputes or deadlocks in mediation as per the LLC Agreement. Instead, it sought the judicial dissolution of Essentiv in violation of the agreement between the parties. (Appellant's Appendix, p. A-52, Lines 9-15)

In *Elf Atochem North America, Inc v. Jaffari and Malek, LLC*, Del. Ch., 727 A.2d. 286 (1999), the parties formed a joint venture limited liability company and entered into a series of agreements as to how the company would be governed and

operated. Included in the LLC agreement was an arbitration clause that covered the resolution of disputes. At some point, a dispute arose between the parties. Elf initiated an action in the Court of Chancery alleging breach of fiduciary duty and requesting equitable relief. The defendants moved to dismiss Elf's action. The court granted the defendants' dismissal and found that the LLC agreement governed the question of jurisdiction.

The higher court affirmed the Court of Chancery's decision to dismiss the action "on the ground that the Agreement validly predetermined the forum in which disputes would be resolved, thus stripping the Court of Chancery of subject matter jurisdiction." *Elf Atochem North America, Inc v. Jaffari and Malek, LLC*, Del. Ch., 727 A.2d. 286 (1999). The court further noted § 18-1101(b) of the Limited Liability Company Act which states, "it is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." 6 Del. C. §18-1101(b).

Sections 11.1 through 11.3 of the LLC Agreement (Appellant's Appendix pp. A-154 and A-155) predetermined the proper method to use to resolve bona fide disputes and deadlocks between the parties. Decco failed to follow the agreed procedure provided in the agreement pertaining to "Resolving Deadlocks." The article clearly provides "The parties agree that any and all disputes, claims or controversies are arising out of the or relating to a Deadlock shall be submitted to

Judicial Arbitration and Mediation Service (“JAMS”), or its successor, for the mediation to be located in Philadelphia, PA.”

The trial court erred in acting on and entertaining litigation beyond its jurisdiction and in clear and complete breach of the terms of the agreement between the parties in this matter.

ARGUMENT 5

THE TRIAL COURT ERRED BY IGNORING DECCO'S MALICIOUS INTENT TO DISSOLVE ESSENTIV.

Question Presented

Did the trial court err by ignoring Decco's malicious intent to dissolve Essentiv? See Appellant's Appendix pp. A-46, A-52, A-74, A-77 and A-79.

Standard and Scope of Review

A scope of review is required due to the trial court's abuse of discretion by ignoring Decco's malicious intent to dissolve Essentiv.

Merits of Argument

On November 2, 2018, Francois Girin testified during his deposition that he executed a distributorship agreement with Hazel Technologies on behalf of Decco in July 2018. Under this contract, the parties agreed that Hazel Technologies would manufacture a 1-MCP product ("Hazel CA") and Decco would act as the distributor. It should be noted that Decco neglected to mention this work relationship in any of the pleadings it filed with the court in the Chancery Court matter, which is a violation of the LLC Agreement entered between Decco and Mir. Instead, Decco represented to the Court that without control of the TruPick product, its company, along with Essentiv and MirTech, were unable to continue manufacturing any 1-MCP or non-1-MCP products. Decco sought dissolution of Essentiv for business and litigation advantage with unclean hands. In *In re Orchard Enters., Inc.*, 88 A.3d 1, 2014 Del.

Ch. LEXIS 31; the court found: “*Directors of a Delaware corporation owe two fiduciary duties—care and loyalty.* The duty of loyalty includes a requirement to act in good faith, which is “a subsidiary element, *i.e.*, a condition, of the fundamental duty of loyalty.” Stone,² 911 A.2d at 370. *Id.* at pp. 32 and 33. (Emphasis added.)

² Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006); accord Mills Acq. Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1989)

ARGUMENT 6

THE TRIAL COURT ERRED IN CONCLUDING THAT THE EVIDENCE ESTABLISHED THAT THERE WAS NO VIABLE NON-1-MCP BUSINESS AND IT WAS NOT REASONABLY PRACTICABLE FOR ESSENTIV TO CARRY OUT THIS ASPECT OF ITS BUSINESS.

Question Presented

Did the trial court err in concluding that the evidence established that there is no viable Non-1-MCP business and it is not reasonably practicable for Essentiv to carry out this aspect of its business? Appellant's Appendix pp. A-90 thru A-97, A-100 thru A-105, A-120, A-122 and A-131.

Standard and Scope of Review

A de novo review is required due to the court erred as a matter of law. The mere fact that Decco claimed that they could not work with MirTech is not dispositive. The evidence clearly established that MirTech developed the technology, Decco contracted for manufacture and utilized its marketing expertise. There was minimal overlap in the LLC members' functions thus the stated claim of not reasonably practicable is not supported by the record.

Merits of Argument

The Court was wrong in concluding that the evidence established that there is no viable non-1-MCP business and it is not reasonably practicable for the Company to carry out this aspect of its business. (Appellant's Appendix, p. A-93, Lines 6-18) It is obvious that the Court has contradicted its own observations pertaining to 1-

MCP Business and non-1-MCP business, ownership of patents, misrepresentations or representations of MirTech pertaining to 1-MCP and various breaches of the agreement by Decco before taking refuge of the Court seeking dissolution of Essentiv with ulterior motives. As noted in Oxbow Carbon & Minerals Holdings, Inc., “. . . [a]n interpreting court cannot use an implied covenant to re-write the agreement between the parties, and should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.” *Id.* at p. 50.

The Court wrongly concluded “[a]t trial, Mir admitted his proposed 1-MCP business required measuring 1-MCP”. Nowhere in page 121 of the trial does Mir admit that the business required measuring 1-MCP. To the contrary, Mir continued to emphasize that he had developed 1-MCP measurement methods prior to 2010 and has published on these methods (Appellant’s Appendix p. A-136). Mir clearly had access to intellectual property not tainted by AgroFresh to 1-MCP. (Appellant’s Appendix, p. A-94, Lines 15-20)

ARGUMENT 7

THE TRIAL COURT ERR BY FAILING TO PROVIDE OR CITE ANY CREDIBLE EVIDENCE OR JUSTIFICATION FOR GRANTING DECCO'S MOTION TO STRIKE MIRTECH'S COUNTERCLAIMS.

Question Presented

Did the trial court err by failing to provide or cite any credible evidence or justification for granting Decco's Motion to Strike MirTech's Counterclaims? See Appellant's Appendix pp. A-39 and A-40, A-57, A-98 thru A-100.

Standard and Scope of Review

A scope of review is required due to the trial court's abuse of discretion by erroneously failing to provide or cite any evidence or justification for granting Decco's Motion to Strike MirTech's Counterclaims.

Merits of Argument

In its Memorandum Opinion, the Court failed to provide any reasonable argument or justification for granting Petitioner's motion to strike the counterclaims of the Respondent. The Court neglected to look beyond that simple petition for dissolution of Essentiv ("the Company"). Respondent at length had explained the continuing breeches by the Company particularly, nonpayment of consulting fees in the sum of \$300,000.00 per annum. (Appellant's Appendix, p. A-55, Lines 3-9 and Lines 12-17; p. A-91, Line 22)

Petitioner filing Inter Partes review on August 9, 2018 to invalidate the patent, which breaches section 3, more specifically Sections 3.1 and 3.4, of the LLC agreement (Appellant's Appendix pp. A-145 and 146). In addition, Plaintiff's filing of Inter Partes Review for invalidation of Licensed Technology further proves that Plaintiff is working in a systematic manner to destroy the intellectual property of the Essentiv.

The Court further ignored MirTech's serious arguments and reasons including that Decco's further misconduct of unilaterally deciding to register 1-MCP as TruPick with USEPA in the name of Decco and Mahaan in Turkey in the name of UPL, thus depriving Essentiv of its ownership rights for carrying out registration in the target markets. Decco unilaterally applied for registrations in various countries either in the name of Decco or UPL but never in the name of Essentiv, a clear breach of Essentiv LLC agreement. Decco unilaterally manufactured TruPick and Mahaan while utilizing MirTech's pre-2010 1-MCP expertise and know-how, a clear breach of Essentiv LLC agreement. Decco unilaterally decided not to comply with indemnification responsibility to Dr. Mir forcing Dr. Mir and MirTech to settle with AgroFresh on AgroFresh's terms, a clear breach of Essentiv LLC agreement. Appellant's Appendix p. A-164 (See Sections 21.3 and 21.4 of LLC Agreement)

ARGUMENT 8

THE COURT ERRED IN CONCLUDING THE 50-50 RULE APPLIED WHEN THE LLC AGREEMENT PROVIDED ALTERNATIVE MEANS OF RESOLVING THE DEADLOCK.

Question Presented

Did the Court err in concluding that the 50-50 rule applied when the LLC Agreement provided alternative means of resolving the deadlock? Appellant's Appendix pp. A-82 and A-83. See *Huatuco v. Satellite Healthcare*, 2013 Del. Ch. LEXIS 298 *; 2013 WL 6460898.

Standard and Scope of Review

A de novo review is required due to the court's misinterpretation of the statute by concluding that the 50-50 rule applied when the LLC Agreement provided alternative means of resolving the deadlock.

Merits of Argument

The Delaware Court of Chancery has, on occasions, analogized the judicial dissolution of a limited liability company (LLC) with two 50 percent owners under Del. Code Ann. Tit. 6, § 18-802 to the 50-50 deadlock scenario addressed by Del. Code Ann. tit. 8, § 273, noting that the reason that the § 273 analysis is useful in the LLC context is obvious: when an LLC agreement requires that there be agreement between two managers for business decisions to be made, those two managers are deadlocked over serious issues, and the LLC agreement provides no alternative basis

for resolving the deadlock, it is not "reasonably practicable" to continue to carry on the LLC business in conformity with its limited liability company agreement. GR Burgr, LLC v. Seibel (In re GR Burgr, LLC), No. 12825-VCS, 2017 Del. Ch. LEXIS 156, at *1 (Ch. Aug. 25, 2017)

In Huatuco v. Satellite Healthcare, 2013 Del. Ch. LEXIS 298 *; 2013 WL 6460898, the court found:

“. . .the explicit policy of the LLC Act is to "give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." Permitting judicial dissolution where the parties have agreed to forgo that remedy in the LLC Agreement would frustrate that purpose, and change in a fundamental way the relationship for which these parties bargained. This is especially true where several provisions in the LLC Agreement act to prevent one party from unilaterally changing the terms of the other members' investments. Engrafting judicial dissolution rights onto an LLC agreement. . . where default rights to dissolution under the Act have been rejected, would not preserve the bargain these parties made. Generally, our courts uphold rights bargained for by contract, and only where "a public policy interest even stronger than freedom of contract" must be vindicated will such rights go unenforced.

Id. at pp. 18 and 19.

The LLC agreement provided an alternative mechanism of arbitration to resolving deadlocks precluding the need for judicial intervention. Appellant's Appendix p. 154. (See Sections 11.1 through 11.3 of the LLC Agreement).

