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IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re: Dissolution of DOEHLER DRY INGREDIENT SOLUTIONS, LLC, a Delaware limited liability company,	:	No. 350, 2022
	:	
	:	Court below: Court of Chancery of the State of Delaware
	:	
	:	C.A. No. 2022-0354- LWW

CORRECTED OPENING BRIEF OF APPELLANTS RUSSELL DAVIS AND CROSSKEYS ASSOCIATES, LTD.

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NATURE OF PROCEEDINGS

The dissolution provision of the Delaware Limited Liability Company Act, which is at issue in this appeal, will be a dead-letter without clarification and guidance from this Court, for the first time, to prevent the inequitable result presented in this appeal. Namely, the trial court denied the minority member and former manager of a three-member closely-held LLC an opportunity to present his case at trial in a summary proceeding despite numerous explicit allegations in the Petition (defined below), including that the LLC Agreement (which was attached, in full, to the Petition) required him to "commit his full-time efforts exclusively" to providing "supply chain and other day-to-day operations, know-how, trading and supervision on behalf of the Company" – but the managers refuse to pay him anything for those services. (A-0070, ¶11).[1]

The trial court did not address this allegation at all in the Opinion (defined below), but it remains reasonably conceivable that these well-pled allegations can be shown at trial to fulfill the statutory requirements in §18-802 of the LLC Act.

Furthermore, in considering a motion to dismiss under Rule 12(b)(6), the trial court was required to consider what is reasonably conceivable for a claimant to prove

[1] Citations to "A- __" refer to the pages of the Appendix to the Opening Brief of Appellants Russell Davis and Crosskeys Associates, Ltd., which is being filed contemporaneously herewith.

at trial. The trial court, however, failed to consider several reasonably conceivable grounds which were explicitly stated in the Petition and relied on speculation outside the record to consider ways that the Petition could fail. By way of example, the Petition contains several reasons why it no longer remains reasonably practicable to carry on the business of the Company (defined below) in accordance with the Agreement (defined below); however, the trial court focused on only one reasonably conceivable basis, and one comment made in an expedited answering brief, which was not in the Petition. When all bases stated in the Petition are considered in the context of the entire Agreement, the Petition clearly sets forth a reasonably conceivable claim for dissolution. Thus, the Motion to Dismiss should have been denied at the embryonic stage of the case.

The trial court also imposed a new prerequisite not found in the statute, and relied on a comment not in the Petition, to conclude that dissolution was inappropriate because the Petitioner allegedly "manufactured [the] deadlock".

This Court has not directly addressed whether only deadlocks created by those with a pure heart of sufficient sanctity qualify for dissolution. This critical issue requires guidance from this Court because if only saints need apply for judicial dissolution, the legislative intent of the statute cannot be implemented. Even if this Court were to conclude that only righteous deadlocks qualify for dissolution, such a

determination should be made at trial -- and not on a motion to dismiss in a summary proceeding.

The trial court also misinterpreted the nature of the Company and the terms of the Agreement in concluding that the Agreement provided a contractual exit which made dissolution inappropriate. Reading the Petition and the Agreement together reveals that the Agreement does not provide an actual exit mechanism that is either realistic or equitable.

It would be inequitable, and the dissolution provision in § 18-802 of the LLC Act would have little worth, if Appellants were denied the opportunity to present evidence in a summary proceeding to demonstrate the satisfaction of the statutory prerequisites.

SUMMARY OF ARGUMENT

1. The trial court did not apply the correct pleading standard. In deciding a motion to dismiss, the trial court was required to review the Petition, and the Agreement attached to it, as a whole and draw all reasonable inferences in the Petitioner's favor to determine if the Petitioner could be entitled to dissolution under "any reasonably conceivable set of circumstances susceptible of proof." The trial court failed to apply that standard by:

   a. Focusing on only one example of the issues underpinning the need for dissolution to the exclusion of the numerous other examples;

   b. Relying on a comment in the Answering Brief, which does not appear in the Petition, to support a defense the Respondent might make at trial; and

   c. Evaluating the viability of potential defenses to the Petition.

2. The trial court inappropriately added a new requirement to 6 *Del. C.* § 18-802. Specifically, the trial court added language to § 18-802 which would require the Petitioner (and presumably all future petitioners) to demonstrate that the deadlock presented as one of the several reasons to support a request for dissolution is "genuine" -- and that the petitioner have a pure heart before being entitled to judicial dissolution. These additional requirements are not

supported by the text of the statute or any decision of this Court. Instead, the trial court relied on a smattering of Chancery Court cases, which themselves are based largely on dicta.

3. The trial court improperly construed a provision in the Agreement as providing the Petitioner with a contractual exit, thereby precluding dissolution. The so-called exit provision, however, does not guarantee an actual exit from the Company, but rather creates the possibility of an exit subject to the whim and consent of the other members.

4. Furthermore, the trial court's decision fails to consider applicable law and is based on speculation that the parties will agree on a reasonable price for the purchase or sale of the other member's interest in the Company despite ongoing litigation in Federal Court between the parties regarding the current value of Petitioner's membership interest in the Company.

STATEMENT OF FACTS

Three members formed Doehler Dry Ingredient Solutions, LLC ("DDIS" or the "Company") in October 2017, as a Delaware limited liability company. ¶1[2]. Until March 24, 2022, the Company had three managers: Petitioner/Appellant Russell Davis ("Davis" or "Petitioner"); Stuart McCarroll ("McCarroll"); and Garry Beckett ("Beckett"). ¶¶10, 12, 14. The Company had, and continues to have, three members; Davis (through his controlled entity Crosskeys Associates Limited ("CKAL")); Beckett; and Doehler North America, Inc. ("DNA", collectively with CKAL and Beckett, the "Members"). ¶10. Beckett and Davis (through CKAL) each own 25% of the Company's membership interests and DNA owns the remaining 50%. OP 2-3[3]. Respondent-below, Andreas Klein ("Klein") was the head of DNA's parent company and not directly a member or manager of the Company[4]. ¶13.

The Company was formed to engage in the dry food ingredients business in North America. ¶1. Specifically, the Agreement describes the Company's purpose as: "(i) buying, sourcing, manufacturing, producing, distributing, packaging,

[2] Citations to "¶__" refer to the paragraphs of the Petition, a copy of which is in the Appendix at pages A-0066-75.

[3] Citations to "OP___" refer to the pages of the Opinion.

[4] Neither McCarroll nor Klein are parties to this appeal.

marketing and selling air and freeze dried fruits and vegetables in whole pieces, powders and snack blends, including with other foods, spices and materials including dairy, including for business-to-business and direct customer sales. …" (A-0035-36, at § 1(b)).

The Company is governed by the Operating Agreement of Doehler Dry Ingredient Solutions, LLC (the "Agreement"). (A-0032-62). The Agreement provides, among other things, that Davis through CKAL, in his capacity as a member, shall "commit [his] full-time efforts exclusively on behalf of the Company" to "provide supply chain and other day-to-day operations, know how, trading and supervision on behalf of the Company". (A-0055, at §11(a)).

In a separate section describing the role of the managers, the Agreement provides that Davis shall be entitled to invoice the Company for $100,000 per year…." (A-0045, at §7(f)).

Davis was removed as a Manager in March 2022. (A-0063). The remaining managers refuse to pay Davis to supervise day-to-day operations despite §11(a) of the Agreement. (A-0055, at §11).

The Agreement also contains a provision that, as explained below, provides members with the possibility of an exit, subject to the approval of the other members, in the event of a dispute between them. (A-0054, at §10).

Beginning in early 2022, a series of disputes began to arise among Davis, Beckett, and McCarroll.

On April 21, 2022, Davis filed a Verified Petition for Dissolution of a Limited Liability Company Pursuant to 6 *Del. C.* §18-802 and for Permission to Wind-Up Affairs Pursuant to 6 *Del. C.* §18-803, seeking to dissolve the Company (the "Petition"). (A-0066-75). The Petition provided numerous examples of the disputes between the Members that rendered it no longer reasonably practicable to carry on the business of the Company in conformity with the Agreement (which was attached, in full, to the Petition). (¶¶1, n.1; 2; 17-24).

The examples cited in the Petition include:

1. Beckett, with Klein's knowledge, hacked into Davis's company email and shared non-public information with Klein (who was not a member or manager of the Company) (¶¶20, 21, 22);
2. At least one member believes that other agreements, including various side agreements, control the operations of the Company, and the rights and obligations of the Members (¶¶1, n.1; 17);
3. On March 24, 2022, Beckett and DNA executed a Written Consent of the Majority Members of Doehler Dry Ingredients Solutions, LLC (the "Written Consent") (A-0063-64), which removed Davis as a manager -

- and revoked his right to seek compensation for services he provided to the Company (¶16);

4. However, Davis remains contractually obligated to "commit his full-time services to the LLC and support its 'day-to-day operations", and "provide services to the LLC as the Tax Matters Member" (¶18);

5. Davis may arguably be prohibited from devoting his time to another venture, but he is not being paid for the work the Agreement requires him to do (¶¶ 16, 18, 19);

6. Beckett has formed one or more of his own companies to compete with the Company using Company resources (¶20);

7. Beckett and DNA as Members, and Beckett and the other Managers (not including Davis), violated the Agreement by incurring more than $25,000 of debt without the unanimous consent of all Members (¶23);

8. DNA and/or the Company has violated Section 9 of the Agreement "by failing to follow the timetable and other requirements of the … Agreement in connection with a purported effort to purchase the interests of Davis in the LLC" (¶23);

9. The managers have conspired to allow one manager to breach his fiduciary duties by acting in his own best interest to the detriment of the Company and its members (¶24); and

10. Beckett and DNA as a majority of members, and Beckett and DNA's managers began inequitably freezing Davis out as a manager and a member of the Company (¶2).

The day before the Petition was filed (a matter of hours), DNA filed an action against Davis and CKAL in the U.S. District Court for the District of Delaware for breach of contract and a Motion for Temporary Restraining Order (which was denied). *See Doehler North America, Inc. v. Davis, et al.*, C.A. No. 1:22-cv-00501-RGA (D. Del. 2022) (the "Federal Action").[5] (A-0236-40, at D.I. Nos. 2, 5, and 6).

On May 20, 2022, McCarroll, Klein and DNA (collectively, the "Movants"), filed a motion to dismiss or stay this action in favor of the Federal Action (the "Motion"). (A-0076-78). The Movants filed their Opening Brief in Support of their Motion to Dismiss on May 27, 2022 (the "Opening Brief"). (A-0079-107).

On June 10, 2022, instead of moving to dismiss the Petition, Beckett and the Company filed a response. (A-0108-25).

[5] A motion to reargue the Federal Court's decision as well as a motion to dismiss, including an argument about whether the derivative claims deprive the Federal Court of jurisdiction, is pending. (A-0239, at D.I. 31).

Pursuant to the Stipulated Scheduling Order, Davis filed his Answering Brief in Opposition to the Motion to Dismiss of Doehler North America Inc., Stuart McCarroll, and Andreas Klein (the "Answering Brief") on June 22, 2022. (A-0126-95). DNA, McCarroll, and Klein filed a Reply Brief in Support of their Motion to Dismiss on June 30, 2022. (A-0196-235). The Court heard oral argument on the Motion on July 8, 2022, at 11:00 a.m. The matter was scheduled for an expedited trial on October 3-4, 2022. (A-0010, at D.I. 81).

In light of the impending expedited trial, while the Court was considering the Motion the parties proceeded with substantial expedited discovery, including document production, interrogatories, and numerous depositions -- which stopped less than three weeks before trial when the Opinion was issued.[6]

On September 15, 2022, the Court issued its Memorandum Opinion (the "Opinion"), dismissing the Petition. An implementing Order was filed the next day (the "Order").[7]

[6] This discovery resulted in copious documents and deposition testimony. That evidence was not before the trial court, and is not part of this appeal, however, it does go to the issues in the case and Davis should have the opportunity to present it at trial.

[7] Copies of the Opinion and Order are attached hereto as Exhibits A and B, respectively.

On September 20, 2022, Davis filed his Notice of Appeal in this Court. (D.I. 1). On September 21, 2022, Davis filed his Amended Notice of Appeal. (D.I. 2).

Pursuant to the briefing schedule issued by this Court on September 21, 2022, this is Appellant's Opening Brief. Appellees are required to file their Answering Brief thirty days after service of this Opening Brief, and Appellants are to file their Reply Brief fifteen days after Appellees' brief.

ARGUMENT

I. THE TRIAL COURT FAILED TO APPLY THE PROPER PLEADING STANDARD AND OVERLOOKED THE NUMEROUS BASES FOR DISSOLUTION STATED IN THE PETITION.

A. Question Presented. Whether the trial court failed to apply the correct pleading standard by, among other things, failing to consider all the bases for dissolution stated in the Petition? This issue was preserved below in the Answering Brief at pages 47-52. (A-0183-88).

B. Scope of Review. This question is subject to *de novo* review. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011).

It is black letter law that a "complaint must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief. Such a statement must only give the defendant fair notice of a claim and is to be liberally construed. … [U]nder Delaware's judicial system of notice pleading, a plaintiff need not plead evidence." *VLIW Tech., L.L.C. v. Hewlett-Packard Co*., 840 A.2d 606, 611 (Del. 2003). *See also, In re Coffee Assocs.,* 1993 Del. Ch. LEXIS 263, at *9 n.4 (Del. Ch. Dec. 3, 1993) (confirming that the notice pleading standard applies to dissolution petitions).

As the Opinion correctly stated:

> when considering a motion to dismiss a complaint pursuant to Rule 12(b)(6):
>
> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.

OP 15-16 (*citing In re China Agritech, Inc. S'holder Deriv. Litig.,* 2013 Del. Ch. LEXIS 132, at *69 (Del. Ch. May 21, 2013) (*quoting Cent. Mortg.*, 27 A.3d at 536-37)).

This "minimal" test is "one of reasonable conceivability which asks whether there is a possibility of recovery." OP 15-16.

As this Court stated in *Cent. Mortg.,* "[i]ndeed, it may, as a factual matter, ultimately prove impossible for the plaintiff to prove his claims at a later stage of a proceeding, but that is not the test to survive a motion to dismiss." 27 A.3d at 536-37. "A trial court commits reversible error by assessing" the complaint under the more stringent test of "plausibility" which is applicable in the federal system and "falls somewhere beyond mere possibility but short of probability." *Cambium Ltd. v. Trilantic Capital P'rs III L.P.*, 36 A.3d 348 (Del. 2012) (ORDER).

C. Merits of the Argument.

As discussed below, the Court of Chancery did not apply the applicable standards in this case. OP 17-18.

1. The Court Failed To Consider The Numerous Examples Of Why It Was No Longer Reasonably Practicable To Carry On The Business Of The Company In Conformity With The Agreement.

Pursuant to 6 *Del. C.* §18-802, "[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." OP 16 (quoting 6 *Del. C.* §18-802).

There is no authoritative guidance on what the legislature intended by the phrase "reasonably practicable" because this Court has not yet had occasion to provide guidance on the issue, and "the text of §18-802 does not specify what a court must consider in evaluating the 'reasonably practicable standard.'" (OP 17, n. 72 (*citing Fisk Ventures, LLC v. Segal,* 2009 Del. Ch. LEXIS 7, at *13 (Del. Ch. Jan. 13, 2009)).[8]

[8] Nor do the leading treatises provide clear direction in their discussion of the meaning of "reasonably practicable" in § 18-802; instead, they demonstrate that Delaware law on this important and nuanced issue is not well-settled. *See, e.g.,* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice*

The case law in this area includes a smattering of decisions by the Court of Chancery that do not speak with one voice. As the Court of Chancery stated in *In re GR Burgr, LLC*:

> [However,] [o]ur law provides no blueprint for determining whether it is not reasonably practicable for an LLC to continue, but several convincing factual circumstances have 'pervaded the case law: (1) the members' vote is deadlocked at the Board level; (2) the operating agreement gives no means of navigating around the deadlock; and (3) due to the financial condition of the company, there is effectively no business to operate.

2017 Del. Ch. LEXIS 156, at *12-13 (Del. Ch. Aug. 25, 2017). Vice Chancellor Slights later confirmed that "[n]one of these factors is individually dispositive; nor must they all exist for a court to find it no longer reasonably practicable for a business to continue operating." *Seokoh, Inc. v. Lard-PT, Ltd. Liab. Co.*, 2021 Del. Ch. LEXIS 62, at *21-22 (Del. Ch. Mar. 30, 2021).

2. Determining The Existence Of A Deadlock Is A Factually Intensive Inquiry Not Suited For A Motion To Dismiss

As discussed herein, there are several reasons why dissolution is necessary in

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in the Delaware Court of Chancery, 2d. ed. § 10.07 (Matthew Bender & Co. 2021) (the "Wolfe Treatise"); Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Delaware Limited Liability Companies* 2d. ed. § 16.02 (2019), R. Franklin Balotti, & Jesse A. Finkelstein, *Delaware Law of Corporations & Business Organizations*, 3d. ed. §10.13 (2020).

this matter, including, for example, the existence of a deadlock. However, that concept requires a fact-intensive analysis that is not ripe for adjudication on a motion to dismiss in a summary proceeding.

The Agreement does not define "deadlock", therefore, "[i]t is appropriate … to turn to statutory definitions and decisions of this court defining 'deadlock'…" *Mehra v. Teller*, 2021 Del. Ch. LEXIS 16, at *37 (Del. Ch. Jan. 29, 2021). "In the context of judicial dissolution, deadlock refers to the inability to make decisions and take action." *GR Burgr, LLC*, 2017 Del. Ch. LEXIS 156, at *15. *See also, Mehra*, 2021 Del. Ch. LEXIS 16, at *37 (deadlock is "a failure to meet a voting threshold"); 2 David A. Drexler, et al., *Delaware Corporation Law and Practice* § 30.01 (Matthew Bender 2021) (deadlock "is … the inability of the directors or stockholders to function effectively because of dissension among evenly divided interests."); and Wolfe Treatise, at § 9.10 (deadlock is a "circumstance, in which those charged with the management or supervision of the day-to-day corporate affairs are unable to take valid corporate action").

Disputes between equal owners and/or managers regarding the utilization of company assets, the use of operating capital, and whether to dissolve the company, have all been found to create a deadlock sufficient to justify dissolution. *See Fisk Ventures, LLC v. Segal,* 2009 Del. Ch. LEXIS 7, at *13 (Del. Ch. Jan. 13, 2009)

(disagreements between managers regarding "almost every issue facing the company", including, the raising and use of capital and whether to have board meetings, was sufficient to find a deadlock); *In re Silver Leaf, L.L.C.,* 2005 Del. Ch. LEXIS 119, at *41 (Del. Ch. Aug. 18, 2005) (the "two sides [of the company's board] cannot agree on how to run Silver Leaf. … [t]hus, there clearly is an impasse that prevents the effective management of the LLC"); *Seokoh,* 2021 Del. Ch. LEXIS 62, at *10-11 (disputes between owners of an entity regarding, among other things, the utilization of company assets and facilities, use of operating capital, and whether to dissolve the company, were sufficient to find a deadlock); *Symbiont.io, Inc. v. Ipreo Holdings, LLC*, 2021 Del. Ch. LEXIS 174, at *168 (Del. Ch. Aug. 13, 2021) (the company's two equal managers "have not been able to agree on anything"… including "fundamentally over the future of the company"); and *Vila v. BVWebTies LLC*, 2010 Del. Ch. LEXIS 202, at *27 (Del. Ch. Oct. 1, 2010) (dissolving "a business [that was] not being operated in accordance with its governing instrument when one fiduciary acts as sole manager to the exclusion of the other when agreement of all managers is required.")

Notwithstanding the use of the term "vote", courts have found a deadlock to exist even where there has not been a formal vote. *See Meyer Natural Foods LLC v. Duff,* 2015 Del. Ch. LEXIS 162, at *13-14 (Del. Ch. June 4, 2015) (dissolution

sought after the respondents stopped selling cattle to the company, thereby defeating the purpose of the company); *Achaian, Inc. v. Leemon Family LLC*, 25 A.3d 800, (Del. Ch. 2011) (deadlock arose following a dispute regarding the legitimacy and impact of one member's transfer of membership interests to a third party); *In re GR Burgr, LLC*, 2017 Del. Ch. LEXIS 156, at *15 (dissolution sought after the company's only business partner ordered one of the two equal owners and managers to be removed from the company); *Haley v. Talcott,* 864 A.2d 86, 96 (Del. Ch. Dec. 16, 2004) (dissolution sought following disputes regarding the use and/or sale of the Company's property).

Courts also consider the likelihood the parties can work together going forward. One Court of Chancery decision recognized the fact that expecting parties who have a plainly contentious relationship to continue to work together is a "fantasy". *Symbiont.io, Inc.*, 2021 Del. Ch. LEXIS 174, at *169.

By way of example, Delaware Courts have found that the following factors support the notion that the parties could not work together again:

(i) the existence of ongoing litigation between them;

(ii) suspicion and investigations into a co-equal manager and owner;

(iii) harsh criticisms of another manager's competence and ability to manage the company;

(iv) clear statements of "distrust";

(v) allegations of self-dealing and bad faith; and

(vi) the overall inability to agree on a range of issues, including, strategy, operations, and financial matters.

See, e.g., GR Burgr, 2017 Del. Ch. LEXIS 156 at *17; *Fisk Ventures,* 2009 Del. Ch. LEXIS 7, at *13; *Silver Leaf,* 2005 Del. Ch. LEXIS 119, at *41; and *Haley,* 864 A.2d at 96.[9]

In *GR Burgr,* the company's two co-equal managers were engaged in litigation against each other in Nevada and New York, with each asserting claims for breach of contract and breach of fiduciary duty against the other (2017 Del. Ch. LEXIS 156, at *10, *17 n. 64). When one of the managers filed a petition to dissolve the company pursuant to the terms of the company's operating agreement and §18-802, (*id.* at *2), the respondent filed a counterclaim alleging, among other things, that the petitioner breached his fiduciary duties, breached the terms of a key contract, and misappropriated company resources (*id.* at *9-10).

In granting the petitioner's motion for judgment on the pleadings the Court

[9] In *Mehra,* 2021 Del. Ch. LEXIS 16, at *45 (cited in the Opinion at 18, n. 77), the Court also considered the importance of the status of the relationship between the equal members. In that case, after trial the Court ordered the dissolution of a company based, in part, on the "insurmountable chasm [that] existed between" the managers as evidenced by a fundamental disagreement over who should run the company, and grievous allegations of wrongdoing and incompetence exchanged between the managers.

held that "the relationship between [the managers] is, at best, acrimonious, as evidenced by the [c]ounterclaims here, and the [litigations pending in New York and Nevada]." *Id.* at *17. That, together with the lack of an exit mechanism in the company's operating agreement, made it no longer reasonably practicable for the company to operate in accordance with its LLC agreement. *Id.* at *19-20.

In *Fisk Ventures*, the Court granted a motion for judgment on the pleadings and ordered the dissolution of a company based on the "history of disagreement and discord over a wide range of issues concerning the direction and operation of [the company]" (*id.* at *13), including such foundational issues as whether to hold board meetings and how and whether to raise and use capital (*id.* at *13-14). In its opinion, the Court held that dissolution was appropriate because, "given the [b]oard's history of discord and disagreement I do not believe that these parties will ever be able to harmoniously resolve their differences". *Id.* at *14.

In *Haley,* "a rift" developed between the company's co-equal managers which involved: Haley terminating Talcott and forbidding him from entering the company's property; Talcott's allegations of breach of contract and threats of legal action against Haley; and Haley contesting every operational recommendation Talcott made. *Id.* at *91. The Court granted dissolution because "[w]ith strident disagreement between the parties regarding the appropriate deployment of the asset

of the LLC, and open hostility as evidenced by the related suit in this matter, it is not credible that the LLC could, if necessary, take any important action that required a vote of the members". *Id.* at *96.

Finally, in *Silver Leaf,* the Court found (after trial) that dissolution was appropriate because, among other things, of the acrimonious relationship between the co-equal managers as evidenced by continuing litigation between them in another jurisdiction and cross-allegations of bad faith and breach of contract. 2005 Del. Ch. LEXIS 119, at *41-42.

3. The Court Overlooked Several Reasonably Conceivable Bases For A Deadlock And Lack Of Reasonable Practicability To Continue The Company's Business.

As detailed above, the Petition identifies numerous disputes and issues[10] that make it reasonably conceivable that Davis could establish at trial that it is no longer reasonably practicable to carry on the business of the Company in conformity with the Agreement. (A-0178-79; 81; 82-85; 88-90).[11]

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[10] These examples gave the Respondent (and the Court) fair notice of the reasonably conceivable bases of Davis's claim which is all that is required under Court of Chancery Rule 8.

[11] Appellant is aware of a line of Chancery Court cases which stand for the proposition that unproven allegations of breaches of fiduciary duty and contract, standing alone, do not give rise to the need for judicial dissolution. *See e.g. In re Arrow Inv. Advisors, LLC,* 2009 Del. Ch. LEXIS 66 (Del. Ch. Apr. 23, 2009). These cases are not applicable here because the Petition is based on a variety of issues

As an initial matter, the fact that the Agreement requires Davis to commit his full-time efforts to managing the day-to-day operations -- but he is no longer entitled to be paid for his efforts, self-evidently demonstrates that it remains no longer reasonably practicable to carry on the business of the Company in conformity with the Agreement.

Notwithstanding that self-sufficient example, the allegations in the Petition (either individually or collectively), together with the contentious litigation the parties are currently engaged in against each other in another Court, demonstrate that the animosity between the Members has grown to such a level that it is a "fantasy" (*Symbiont.io*, 2021 Del. Ch. LEXIS 174, at *169) to believe that they could "harmoniously resolve their differences" (*Fisk Ventures,* 2009 Del. Ch. LEXIS 7, at *14) and "take any important action that required a vote of the members" (*Haley,* 864 A.2d at 96).

The Court below did not consider all of the allegations in the Petition, the provisions in the Agreement supporting the Petition, or the fact that, in light of their fractious relationship, the parties, as a practical matter, could never operate the Company going forward in a harmonious and businesslike manner.

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which demonstrate the overall context and circumstances surrounding the parties' dysfunctional relationships.

Instead, the Opinion only cites one allegation from the Petition -- that members of the Company have violated the Agreement by incurring more than $25,000 in debt without unanimous member consent. OP 18. The trial court was correct that is *one* of the bases for dissolution; however, the Petition is more detailed than that and provides additional reasons for dissolution. *See,* ¶¶ 1, n.1; 2; 17-24.

More importantly, contrary to the trial court's statement, the managers' breach of the Agreement is not the "focus[]" of the Petition. OP 17-18. Rather, that allegation was only identified two times, both of which were described as examples and not the sole basis for seeking dissolution. *See* ¶23 (listing that allegation among "[o]ther examples of why it no longer remains reasonably practicable …") and ¶25 (identifying that allegation as an "example" of why "the members are unable to agree on carrying on the LLC's business pursuant to the terms of the Operating Agreement.")

To the extent the Petition focused on a single allegation, and it did not, the core thrust was that the Agreement obligated Davis to work full-time for the Company for free -- which by itself should satisfy the reasonably conceivable standard that it does not remain reasonably practicable to carry on the business of the Company in conformity with the Agreement, and allow the claims to proceed to

trial in a summary proceeding. ¶¶16, 18, 19, 26. *See also* (A-0055, at §11; A-0057, at §14; and A-0063-64).

The fact that the Petition may not have alleged supporting evidence for each of these allegations is not determinative on a motion to dismiss. *See VLIW Tech., L.L.C.,* 840 A.2d at 611 ("under Delaware's judicial system of notice pleading, a plaintiff need not plead evidence").

4. **The Court Focused On The Reasonable Conceivability Of The Defenses – Not The Reasonable Conceivability Of The Claims.**

In deciding a motion to dismiss, the Court is charged with evaluating the claims in the Petition and determining whether, accepting them as true, and drawing all reasonable inferences in favor of the non-moving party, the plaintiff could "recover under any reasonably conceivable set of circumstances susceptible of proof." OP 15-16.

In this case, the Court did not assess whether it was reasonably conceivable that the claims in the Petition, if proven at trial could satisfy §18-802. Instead, the Court focused on the reasonable conceivability that the defenses might prevail at trial, including a defense to a claim for breach of contract which was not pled. OP 17-20.

In the Opinion, the trial court construed one of the examples (incurring more than $25,000 of debt without unanimous member consent) "as an issue of breach of contract not deadlock" and held that "Davis provides no facts from which the court could assess whether that breach is reasonably conceivable." OP 18. That is incorrect. While that allegation shows that the parties failed to agree on specific decisions that require the unanimous consent of members ((A-0042-43, at §6)), it is just one of the many reasons that the Company must be dissolved.

When deciding the Motion, the Court's task was to assume the accuracy of the allegations and determine if the Petition satisfied the minimal "reasonably conceivable" pleading requirement *for dissolution* under 6 *Del. C.* §18-802, *not for a breach of contract that was not pled*.

It is not relevant that "as a factual matter, [it] may ultimately prove impossible for the plaintiff to prove his claims at a later stage of a proceeding" because that "is not the test to survive a motion to dismiss." *See, Cent. Mortg. Co.,* 27 A.3d at 536-37.

Furthermore, as discussed below, the trial court improperly added a requirement that is not found in the statute and not based on decisions of this Court. Even if that requirement was appropriately considered, the trial court was obligated to accept the allegations and not speculate on defenses that may be raised at trial.

5. The Court Based Its Decision On Allegations That Were Not In The Petition.

Rather than decide the Motion on the numerous allegations in the Petition, the documents attached thereto, and the inferences drawn therefore, the trial court relied on a comment in the Answering Brief (that the Court treated as evidence in lieu of a trial) which was *not in the Petition*. OP 18. As noted above, that was not the trial court's charge. The trial court was required to decide the Motion based on the Petition, the attached exhibits, and what was reasonably conceivable to be shown at trial. *Cent. Mortg. Co.,* 27 A.3d at 536-37.

II. THE TRIAL COURT ADDED A REQUIREMENT TO SECTION 18-802, WHICH IS NEITHER IN THE STATUTE NOR SUPPORTED BY DECISIONS OF THIS COURT, THAT WOULD RESTRICT THE AVAILABILITY OF DISSOLUTION TO ONLY THOSE WITH PURE HEARTS.

A. Question Presented. Was the trial court correct in adding a requirement to 6 *Del. C.* §18-802 which is not found in the statute or the controlling case law implementing it? This issue was raised at a high level in Respondent's reply brief at page 30 (A-0232-33), however, it was addressed in detail in the Opinion at page 18.

B. Scope of Review. This question is subject to *de novo* review. *Cent. Mortg. Co.,* 27 A.3d at 535. The standards applicable to a motion to dismiss pursuant to Rule 12(b)(6) are set forth in the Scope of Review section of the first argument. To avoid repetition, they will not be repeated here.

C. Merits of the Argument.

Section 18-802 does not explain what is required to satisfy the "not reasonably practicable" standard, and this Court has not yet had occasion to provide guidance on the issue. While a smattering of post-trial decisions from the Court of Chancery have provided some gloss, they do not speak with one voice, and authoritative interpretation from this Court is needed.

In its discussion of deadlock, the trial court imposed a requirement that is not found in the statute or authoritative case law. Specifically, the trial court required that a deadlock be "genuine" and not "based on a specious premise or one side['s] [attempt] to manufacture it by refusing to consider any issue." OP 18, n. 77, (*citing Mehra*, 2021 Del. Ch. LEXIS 16, at *37, and *Millien v. Popescu*, 2014 Del. Ch. LEXIS 22, at *6-7, n.17 (Del. Ch. Feb. 19, 2014)). Applying that requirement, the Court looked to a legal argument in the Answering Brief – which is *not* in the Petition – that Davis will not consent to any of the nine major decisions identified in the Agreement that require unanimous consent of members. OP 18, and A-0183-85. The trial court seemingly recognized that it was basing this factual finding on an argument and not an allegation in the Petition. *See* OP 18 (the "*argument* fails to identify").

Worse, the court below made this finding of fact at the motion to dismiss stage, with no opportunity to demonstrate at trial what was reasonably conceivable, or not. The trial court held that the "*argument* fails to identify [emphasis added] any *existing* deadlock [emphasis in original] and amounted to a contrived attempted to manufacture a deadlock [which] cannot support a claim for judicial dissolution". OP 18. But this nuanced factual finding about the good faith basis or genuineness of a deadlock, even if that is a correct requirement, should not be made at the motion to

dismiss stage. Given the requirements of *Cent. Mortg.*, the reliance on argument alone, rather than the allegations in the Petition, was inappropriate.

The trial court relied on a smattering of Chancery Court cases (which were decided without guidance from this Court), to impose a prerequisite not found in the statute, that required the Petitioner to demonstrate that the underlying deadlock is "genuine", and that the Petitioner was pure of heart in order to survive a motion to dismiss. OP 18, n.77. This judicially-created requirement is not supported by any Delaware Supreme Court opinions, the text of § 18-802, or the weight of the Chancery Court cases involving judicial dissolution of a limited liability company.[12] *See generally,* Antonin Scalia, *et al., Reading Law: The Interpretation of Legal*

[12] Scholarship on this topic also reasons that there should not be a good faith requirement for deadlocks. *See, e.g.*, Brian C. Durkin, *Note: Manufactured Deadlocks? The Problematic "Bad Faith Defense" to Forced Sales of Delaware Corporations Under Section 226 of the Delaware General Corporation Law*, 59 B.C. L. Rev. 725, 758-60 (2018) (likening dissolution to no-fault divorces). Analogous to a business divorce, a decree of personal divorce can be obtained when a court finds that the parties are "incompatible". "In determining whether spouses are incompatible, Delaware Courts focus on the existence of the "rift or discord" and do not consider what gave rise to it. *Wife S v. Husband S.*, 412 A.2d 886, 887-88 (Del. 1980). By analogy, when considering whether it is no longer reasonably practicable to carry on the business of the Company in conformity with the Agreement, the Court's focus should be on the existence of the deadlock and not the causes of it, or whether the soul of the Petitioner is immaculate.

Texts, 93-94 (Thompson/West 2012) (the court's role is not to read additional provisions into statutory texts under the guise of statutory application).

If, however, this Court decides that only pure and righteous deadlocks qualify for dissolution, that determination should only be made after trial because nuanced factual findings of this nature are not appropriately resolved at the motion to dismiss stage. *See, e.g., Balch Hill Partners, L.P. v. Shocking Techs, Inc.*, 2013 Del. Ch. LEXIS 44, at *10 (Del. Ch. Feb. 7, 2013) (in the context of a petition for the appointment of a custodian under 8 *Del. C.* §226, the defense of unclean hands is "best assessed in the context of an evidentiary hearing".)

The cases cited in the Opinion for the non-statutory 'saintly deadlock' requirement find their genesis in a discrete line of cases which begin with the Chancery Court's decision in *Francotyp-Postalia AG & Co v. On Target Tech,* 1998 Del. Ch. LEXIS 234 (Del. Ch. Dec. 24, 1998). *See Millien v. Popescu,* 2014 Del. Ch. LEXIS 22, at *6 (Del. Ch. Feb. 19, 2014) (*citing Francotyp-Postalia AG & Co*); *In re Shawe & Elting, LLC*, 2015 Del. Ch. LEXIS 211 (Del. Ch. Aug. 13, 2005) (*citing Millien*); and *Kleinberg v. Aharon*, 2017 Del. Ch. LEXIS 24 (Del. Ch. Feb. 13, 2017) (*citing Francotyp-Postalia AG & Co*, *Millien,* and *In re Shawe & Elting,*

LLC).[13] None of these cases, however, provide a principled or well-reasoned basis for imposing a purity requirement onto §18-802.

The Foundation Cases do not support dismissal of the Petition. As an initial matter, none of those cases involved a motion to dismiss. Instead, all four cases were post-trial decisions which, as the trial court noted, "are unhelpful … at the pleading stage." OP 17, n. 73.

Moreover, none of the Foundation Cases involved a petition for dissolution under §18-802. Instead, those cases involved petitions based on different statutory language (specifically, 8 *Del. C.* § 226), which, by itself is enough to limit their persuasive applicability to this case. It is true that both § 226, and the case law discussing dissolution under §18-802, refer to "deadlocks," but unlike §18-802, relief under §226 is *only available* when there is a deadlock. *See* 8 *Del. C.* § 226(a). Section 18-802 is not as rigid and does not require a deadlock for an LLC to be dissolved. As the Court of Chancery stated in *In re GB Burgr,* a deadlock is one factor; however, its existence (or nonexistence) is not determinative of whether it is no longer reasonable to carry on the business of the company in conformity with the LLC agreement. 2017 Del. Ch. LEXIS 156, at *12-13. *See also*, § I.C.2., *supra.*

[13] *Francotyp-Postalia*, *Millien, Shawe,* and *Kleinberg* are referred to herein as the "Foundation Cases".

The Opinion states that the Petitioner manufactured the deadlock by refusing to consider issues in the future. OP 17. *Millien* is the only one of the Foundation Cases that involved a statement that the petitioner manufactured a deadlock by refusing to consider issues. That comment, however, was mere dicta because the case was decided, after trial, on the fact that the company was owned 51/49, not 50/50. 2014 Del. Ch. LEXIS 22, at *5-6. Thus, that comment does not provide sound legal authority for the trial court's decision here.

Finally, the Foundation Cases are distinguishable on their facts. In *Francotyp-Postalia AG & Co*, the petitioner sought the imposition of a custodian based on his allegation that the company was insolvent, and the board was deadlocked regarding how to raise the necessary capital to remedy that fact. *Id.* at *11-12. After trial, the Court determined that the petitioner's claim of deadlock was misleading (or specious) because the company was not actually insolvent. *Id.*

In *Millien*, the Chancery Court found that the 49/51 ownership made deadlock impossible, but still speculated in dicta that any hypothetical deadlock would be the result of the petitioner's refusal to consider any issues, which is "not the type of conduct that should support the appointment of a custodian". 2014 Del. Ch. LEXIS 22, at *6.

In *Shawe*, the Court was asked to appoint a custodian over a solvent company. In its analysis, the Court considered whether the directors were deadlocked, meaning they were "so divided respecting the management of the affairs of the corporation that the vote required for curative action by the board as a governing body cannot be obtained." *Id.* at 83-84. The respondent argued that the petitioner "manufactured" the disputes, and therefore the deadlock itself, to facilitate a sale of the company. *Id.* at 90. In its post-trial opinion, the Court rejected that argument, citing several fundamental disagreements regarding the operation and governance of the Company which supported a deadlock (as the court defined it). *Id.*

Notably, the Court's discussion on the respondent's manufactured deadlock argument was cursory and relied solely on the Chancery Court's dicta in *Millien.* In fact, the Court's analysis was limited to the identification of evidence and the statement that it was "not a case where a director has 'sought to create a deadlock by refusing to consider any issue until the deadlock has been resolved.'" *Id.* at 90 (*citing Millien,* at *6-7, n.17).

In *Kleinberg v. Aharon*, the plaintiffs argued that the company was deadlocked when one of the defendants, Refael Aharon, (who founded the company and served as a director and CEO) used his contractual authority to appoint friendly directors thereby creating a 3-3 deadlock at the board level that allowed him to

prevent the board from, among other things, holding meetings and discussing important corporate issues (such as key contracts and changes to personnel). 2017 Del. Ch. LEXIS 24, at *36-37.

At trial Aharon argued that the board had always supported his work and only opposed him in order to "manufacture[] the deadlock in bad faith". *Id.* at *20. The Court rejected this argument, holding that the evidence deduced at trial confirmed that the plaintiffs had "lost confidence in Aharon" some time ago but one of the plaintiffs convinced the other two not to remove him from office. *Id.* at *20. After Aharon began taking unilateral action which impacted the company's key contracts, the plaintiffs lost confidence in him, therefore, "the deadlock [was] the result of legitimate disagreements about the direction of the company and Aharon's role". *Id.* at *34.

Mehra, is the only case cited in the Opinion which involved a petition for dissolution pursuant to §18-802. 2021 Del. Ch. LEXIS 16, at *37. However, like the Foundation Cases, Mehra was a post-trial decision and is therefore "unhelpful … at the pleading stage". OP 17, n. 73. Even if *Mehra* were helpful, it is factually distinguishable.

The issue in *Mehra* was the validity of the dissolution of a company by one of its two-equal managers, Jonathan Teller, pursuant to the terms of the company's

operating agreement. Teller began the dissolution process after becoming concerned about the management of the company, which was handled by the plaintiff and the other co-equal manager, Sanjiv Mehra. After an investigation, Teller decided to utilize the dissolution provision of the company's operating agreement to sever ties with Mehra.

To achieve that goal, Teller engaged legal counsel to draft a board resolution removing Mehra from his roles with the company (which he knew Mehra would not agree to) and the documents needed to dissolve the company in accordance with the operating agreement. *Id.* at *28-30. Teller then called a board meeting and presented the resolution to Mehra, who rejected the resolution and proposed a counter-resolution to remove Teller. *Id.* at *31-33. The two exchanged scathing allegations about their abilities and Teller declared the board deadlocked and dissolved the company in accordance with the company's operating agreement. *Id.* at *33.

Mehra filed a lawsuit seeking to invalidate the dissolution alleging, among other things, that Teller sought a financial windfall and had "manufactured the deadlock based on an inauthentic dispute designed to deliver control over distributions to Teller". *Id.* at *34-35.

The Court restated the definition of deadlock used in the Court of Chancery decisions cited above but added the requirement that "a deadlock must also be

genuine for it to have legal effect." *Id*. at *37-38. In its post-trial decision, the Court cited *Shawe,* stating:

> … a deadlock must be a product of genuine, good faith divisions. A genuine deadlock does not exist where it is 'based upon a specious premise' or 'one side sought to manufacture it by refusing to consider any issue.' Delaware courts have denied petitions for judicial intervention where the respondent has shown that 'the [constituent] seeking intervention has done so in bad faith by manufacturing a deadlock.' The bad faith defense . . . seeks to demonstrate that a director or stockholder has manufactured a 'phony' deadlock or has sought to give the appearance of a deadlock by refusing to agree to any business decisions . . . .

Id. at *37-38. The Court went even further by changing the very inquiry applicable to resolving a motion to dismiss by stating: "the focus of the court's factfinding on the deadlock issue is to determine whether there is a genuine irreconcilable disagreement between the parties." *Id.* at *45.

Armed with this new requirement, which, as discussed above, is not based on a sound foundation, the Court held that Teller's process was "contrived" and could "cast doubt on the earnestness of the parties' disagreement". *Id.* Still, Teller's disputes with Mehra were "not pretextual" and demonstrated an "irreconcilable disagreement as to who should run the company." *Id.* at *45.

There are no such facts in the instant action. The Petition specifically describes numerous bases supporting a determination that it was "no longer reasonably practicable to carry on the business of the LLC in conformity with the

LLC agreement", none of which suggest an "inauthentic dispute designed to deliver control" to Davis. ¶¶1, n.1; 2; 17-24. The Agreement, which was attached to the Petition, provides additional support for why it remains reasonably conceivable that the statutory standard for dissolution could be satisfied at trial.

In fact, the only basis for the Court's *sua sponte* factual determination that Davis manufactured a deadlock is a cursory comment in the Answering Brief, which is no substitute for evidence in lieu of a trial. Rather, a trial court must assume the allegations in the Petition are true and determine if it is reasonably conceivable that the Petitioner could be entitled to dissolution after trial.

As demonstrated, neither the Foundation Cases nor *Mehra* provide any sound, principled authority for adding a "genuine" or good faith purity requirement for a deadlock that the Court applied below. Even if it were appropriate to impose a purity of heart requirement for deadlock, such a nuanced factual issue would not be appropriately resolved on a motion to dismiss. *See Seokoh*, 2021 Del. Ch. LEXIS 62, at *20-21 (motions to dismiss are decided on the contents of the complaint, documents attached thereto, and reasonable inferences drawn therefrom); and *Balch Hill Partners, L.P.*, 2013 Del. Ch. LEXIS 44, at *10 (defenses such as "unclean hands" are "best assessed in the context of an evidentiary hearing").

III. THE TRIAL COURT, IN DICTA, MISINTERPRETED A PROVISION IN THE AGREEMENT, OVERLOOKED THE REALTY OF THE SURROUNDING CIRCUMSTANCES, AND ENGAGED IN UNREALISTIC SPECULATION WHEN IT STATED THAT THE AGREEMENT PROVIDED AN EXIT MECHANISM.

A. **Question Presented.** Did the trial court properly determine that the Agreement Provided an Exit Mechanism? This issue was preserved in the Answering Brief at pages 52-54. (A-0188-90).

B. **Scope of Review.** This question is subject to *de novo* review. *Cent. Mortg. Co.,* 27 A.3d at 535. The standards applicable to a motion to dismiss pursuant to Rule 12(b)(6) are set forth in the Scope of Review section of the first argument. To avoid repetition, they will not be repeated here.

C. **Merits of the Argument.**

Next, the trial court found that "[h]ad Davis adequately alleged voting deadlock, dissolution would still be unavailable because the deadlock could be remedied through a legal mechanism set within the four corners of the operating

agreement."[14] OP 18. Not so. This discussion is not an explicit basis for the Court's opinion and is dicta, however, it is also factually incorrect.[15]

Section 10(b) of the Agreement purports to provide a mechanism to resolve irreconcilable differences "in the event that the Members become deadlocked with respect to any decision that materially and adversely affects the Corporation's business as a result of their dispute.…" (A-0054, at §10(b)). That mechanism allows one member (the "Electing Member") to deliver written notice to the other member (the "Responding Member") of a dispute and demand that the Responding Member "either purchase all of the Electing Member's Units for a purchase price determined by the Electing Member" or sell to the Electing Member all of [the Responding Member's] Units" for the price set out in the Electing Member's notice. (A-0053-55, at §10). Contrary to the trial court's finding, this provision does not, as a matter of law, provide an actual or definite exit mechanism to preclude dissolution.

The plain language of Section 10(b) does not guarantee an exit from the

[14] While the Court focused on Section 10(b), it also referred to Section 12. OP 19. That provision, however, applies only *after* the occurrence of an "event of dissolution described in Article 1, or in the event that a deadlock cannot be duly resolved under the provisions of Section 10(b)…." Therefore, unless one of those two triggers occurs, Section 12 is not applicable.

[15] *See* Opinion at pages 17 and 20 confirming the bases for the trial court's decision are the lack of a genuine deadlock and the failure to allege impossibility of purpose.

Company. Instead, it creates the mere possibility of an exit that is subject to the whim and approval of the other members. That is, instead of buying the Electing Member's interest, the Responding or Non-Electing Member may prevent the Electing Member from exiting the Company by requiring the Electing Member to buy the Responding Member's interest in the LLC. (A-0053-55, at §10).

Stated differently, while Section 10(b) appears to give the Electing Member a way out of the Company, it actually gives the Responding Member the contractual right to force the Electing Member to remain in the Company. As a result, Section 10(b) is not an exit mechanism and does not preclude judicial dissolution. *See Fisk Ventures, LLC*, 2009 Del. Ch. LEXIS 7, at *20 ("if that deadlock cannot be remedied through a legal mechanism set forth within the four corners of the operating agreement, dissolution becomes the only remedy available as a matter of law."); and *Haley*, 864 A.2d at 88, 96-98 (an exit provision must "provide[] a fair opportunity for the dissenting member who disfavors the inertial status quo to exist and receive the fair market value of her interest"… "If an exit mechanism offered in the LLC agreement was not a reasonable alternative to a continued deadlock, the party is not required to seek relief from the deadlock under its provision").

The trial court rejected this argument by unrealistically and without support speculating in favor of the Respondent that "this concern would only arise if Davis

proposed an unreasonably high price." OP 19, n. 80. The Court guessed that the Responding Member would agree to the Electing Member's undefined price, while ignoring the fact that the parties are currently litigating the value of the CKAL's membership interest in the Federal Action.[16] (A-0236-40). It remains unreasonable under the circumstances to assume the parties will agree on a price for a member's interest.

As the Court of Chancery recently confirmed, the existence of an LLC agreement does not preclude the Court from applying equitable principles when necessary. *XRI Inv. Hldgs. LLC v. Holifield*, 2022 Del. Ch. LEXIS 229, at *166 (Del. Ch. Sep. 13, 2022) (the LLC Act "operates against a backdrop of common law, including principles of equity."). It has long been said that "equity will not suffer a wrong without a remedy." *In re WeWork Litig.*, 2020 Del. Ch. LEXIS 365, at *21 (Del. Ch. Dec. 14, 2020).

Even if Section 10(b) provided Davis with a contractual definite right to exit the Company, the legal effect of the trial court's holding is inequitable. Given the veto power that section gives the Respondent, the palpable animosity between the

[16] Notably, the provision of the Agreement at issue in the Federal Action includes a formula for determining the value – a formula that does not exist in Section 10(b). The parties still cannot agree on value. Thus, it is unlikely that they could agree on a "reasonable price" as the trial court stated, with a provision that has no price formula.

parties, and the fact that the parties are currently litigating over the current price of CKAL's membership interests, the trial court's decision essentially forces Davis to work full-time but receive no compensation.

This is akin to involuntary servitude, which was outlawed years ago, and violates the equitable principles this Court must recognize. To undo this inequity, this Court should reverse the trial court's decision and allow Davis to present evidence at trial demonstrating the need to dissolve the Company and the satisfaction of the requirements of §18-802.

IV. THE TRIAL COURT APPLIED THE WRONG STANDARD IN DETERMINING THE SCOPE OF THE COMPANY'S OPERATIONS.

A. Question Presented. Did the trial court properly determine that the Petition did not "demonstrate that the defined purpose of the entity [had] become impossible to fulfill? This issue was preserved in the Answering Brief at pages 43-47. (A-0179-83).

B. Scope of Review. This question is subject to *de novo* review. *Cent. Mortg. Co.,* 27 A.3d at 535. The standards applicable to a motion to dismiss pursuant to Rule 12(b)(6) are set forth in the Scope of Review section of the first argument. To avoid repetition, they will not be repeated here.

C. Merits of the Argument.

The trial court held that the "allegations do not demonstrate that the 'defined purpose of the entity has become impossible to fulfill." OP 20. This conclusion, however, is based on the application of the incorrect pleading standard and overlooked key facts.

First, the law does not require Davis to show impossibility. As the Chancery Court stated in *Silver Leaf,* the test is "whether it is reasonably practicable to carry on the business of the [Company], and not whether it is impossible." 2005 Del. Ch. LEXIS 119, at *40. *See also, GR Burgr, LLC,* 2017 Del. Ch. LEXIS 156, at *12-13

("[t]he reasonable probability standard does not require a petition to show that the purpose of the limited liability company has been completely frustrated"). When the appropriate standard is applied to the allegations in the Petition, and the documents attached thereto, it is reasonably conceivable that Davis could be entitled to judicial dissolution. Therefore, dismissal was inappropriate.

The trial court's decision on this issue also overlooks several relevant facts. Specifically, the Petition lists several reasons why it is "no longer reasonably practicable to carry on the business of the [Company] in conformity with the [Agreement]. *See,* ¶¶ 1, n.1; 2; 17-24.

By not considering those facts and prematurely making nuanced factual findings on a nascent record, the Court could not fairly reach a principled conclusion that it is not reasonably conceivable that Davis could demonstrate at trial that it no longer remains reasonably practicable to carry on the business of the Company in accordance with the Agreement.

CONCLUSION

Petitioners/Appellants Russell Davis and Crosskeys Associates, Ltd., respectfully request that this Court reverse the trial court's dismissal of the Petition and allow the matter to proceed to trial in a summary proceeding. As discussed, this relief is appropriate for several reasons, including:

- The trial court was myopically focused on only one of the numerous reasons for dissolution that are alleged in the Petition, and made nuanced factual findings based on an *argument* that was made in a brief, not found in the Petition, or the documents attached to it, and failed to consider the other claims that support the conclusion that it remains reasonably conceivable that Davis could demonstrate at trial that he can satisfy the requirements of §18-802.
- Delaware law required the trial court to review the Petition to determine if, based on the facts alleged, and drawing all reasonable inferences in Davis's favor, it was reasonably conceivable that Davis could prove he is entitled to dissolution after trial. The trial court, however, reversed that test and focused on how Davis could potentially lose at trial and what defenses might succeed at trial.

- The trial court imposed an additional requirement that Davis (and by extension all petitioners seeking judicial dissolution under §18-802) must demonstrate that the deadlock he alleges as one of the bases for dissolution is genuine and that the petitioner has a pure heart. This requirement is not supported by the text of the statute or a decision of this Court. Rather, the trial court relied on a smattering of Chancery Court cases which themselves are based on dicta and do not provide a sound foundation for the trial court's conclusion on this point.
- The trial court interpreted a provision of the Agreement as providing a contractual exit mechanism that precluded dissolution. That interpretation, however, is based on speculation and ignores the parties' pending litigation in Federal Court over the value of a membership interest in the Company.

- The trial court disregarded the reality that the terms of the Agreement will force Davis to remain in the Company and devote his full-time efforts to the Company's operations without compensation.

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CERTIFICATE OF SERVICE

I hereby certify on this 21st of November, 2022, that a copy of the ***Corrected Opening Brief of Appellants Russell Davis and Crosskeys Associates, LTD.*** was served on the following counsel via *File & ServeXpress*.

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