EFiled: Feb 6 2009 4:26PM EST
Transaction ID 23665456
Case No. 1838-VCN

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| JAMES E. SPELLMAN, JR., M.D. | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | **C.A. No. 1838-VCN** |
| | : | |
| MAYER M. KATZ, M.D. | : | |
| | : | |
| Defendant. | : | |
| | : | |
| *In re:* | : | |
| KSA, L.L.C., a Delaware limited liability company | : | |

**MEMORANDUM OPINION**

Date Submitted: October 29, 2008
Date Decided: February 6, 2009

David R. Hackett, Esquire of Griffin & Hackett, P.A., Georgetown, Delaware, Attorney for Plaintiff.

Robert D. Goldberg, Esquire of Biggs and Battaglia, Wilmington, Delaware, Attorney for Defendant.

NOBLE, Vice Chancellor

## BACKGROUND

Plaintiff James E. Spellman, Jr., M.D. ("Dr. Spellman") and Defendant Dr. Mayer M. Katz, M.D. ("Dr. Katz") are both physicians licensed to practice medicine in the State of Delaware. From September 1999 until February 2002, the two doctors practiced together through Delaware Bay Surgical Services, P.A. ("DBSS") in Lewes, Delaware. DBSS, where Dr. Katz still practices, rents its office space from KSA, L.L.C., a Delaware limited liability company ("KSA"),[1] in which Dr. Spellman and Dr. Katz each holds a 50% ownership interest.[2]

KSA was organized in 1997 and has undertaken a single project during its existence: the construction of Bayview Medical Center, the medical office building where DBSS is located.[3] The project was financed by Wilmington Trust Company, and both physicians remain personally liable on the mortgage as guarantors.

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[1] The Limited Liability Company Agreement of KSA, L.L.C. (the "Agreement") appears as Ex. 1 to App. to Pl.'s Main Br. in Supp. of his Mot. for Summ. J.

[2] Originally, ownership in KSA was divided among three doctors: the two parties and Anthony D. Alfieri, M.D. ("Dr. Alfieri"). Compl. ¶ 5. Dr. Alfieri subsequently withdrew from KSA. *Id.* at ¶ 14. This fact is relevant only as background, and for understanding why the Agreement requires majority vote on certain actions instead of unanimous vote. Obviously, now that KSA has only two members, each holding 50% of the ownership interest, a majority cannot be achieved without unanimity.

[3] The office building has three units: one is occupied by DBSS; one was transferred to a limited liability company in which Dr. Alfieri holds an interest; and one that was sold in 2002. Thus, KSA's primary asset now is the one unit rented to DBSS in the Bayview Medical Center.

It is enough for present purposes to note that the relationship between the two physicians began to deteriorate shortly after it began. As a result, Dr. Spellman left DBSS to practice on his own. Dr. Katz continues to practice medicine with DBSS in the same location.

The two have continued to disagree over how best to disentangle themselves from each other and their joint investments, both as to DBSS and KSA. Dr. Spellman has initiated several suits in Delaware courts against Dr. Katz as a result of their disagreements, including an unsuccessful petition for the dissolution of DBSS in this Court.[4]

Dr. Spellman now seeks a declaration of the dissolution of KSA pursuant to 6 *Del. C.* § 18-802 or, alternatively, an order pursuant to 6 *Del. C.* § 18-803(a) appointing a liquidating trustee to effectuate the winding up of KSA's affairs because KSA is already dissolved by express will of its members, pursuant to Section 5.1 of the Agreement, which provides in relevant part:

> The Company shall be dissolved and its affairs wound-up as soon as possible after the construction of the building [Bayview Medical Center] has been completed, the condominium documents have been finalized and a certificate of occupancy has been issued with respect to each condominium unit . . .

[4] *In re Delaware Bay Surgical Servs.*, C.A. No. 2121-S (Del. Ch. Jan. 28, 2002) (Chandler, C.).

Neither party disputes that those express preconditions to dissolution found in Section 5.1 have been satisfied.[5] The building has been completed; the condominium documents recorded; and the certificates of occupancy issued. Nevertheless, Dr. Katz argues that dissolution and winding up of KSA is not proper because Section 5.1 does not accurately reflect the original intention of the parties. According to him, neither party knew this provision was part of the Agreement. Dr. Katz's position is that the parties never intended to dissolve KSA following completion of Bayview Medical Center, rather, they intended to operate KSA for at least as long as the mortgage's interest obligation and real estate tax benefits remained available to offset profits from DBSS.[6] That KSA was not dissolved or its affairs wound up following the completion of Bayview Medical Center and the issuance of occupancy certificates is, in his view, evidence in support of this position.

In addition to opposing Dr. Spellman's petition, Dr. Katz has asserted a counterclaim, derivatively on behalf of KSA, alleging that Dr. Spellman breached his fiduciary duties to KSA by refusing to participate in the refinancing of the existing mortgage.[7] He seeks damages for the resulting loss.

[5] Compl. ¶ 11; Def.'s Answering Br. in Opp'n. to Pl.'s Mot. for Summ. J. at 9.
[6] Affidavit of Mayer M. Katz, M.D. ("Katz Aff.") ¶ 29.
[7] Am. Countercl. ¶¶ 12-15.

Dr. Spellman has moved for summary judgment on his petition for a decree of dissolution and for the winding up of KSA. He also seeks the dismissal of Dr. Katz's amended counterclaim for failure to properly plead demand futility with the particularity required by Court of Chancery Rule 23.1 or, in the alternative, for failure to state a claim upon which relief can be granted pursuant to Court of Chancery Rule 12(b)(6).[8]

This is the Court's decision on the two motions; each will be addressed in turn.

## DISCUSSION

A. *Plaintiff's Motion for Summary Judgment*

1. Applicable Standard

Summary judgment may be granted where the moving party demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law.[9] The burden is on the moving party to show the absence of any genuine issue of material fact.[10] The Court views the facts in the light most favorable to the nonmoving party.[11] Summary judgment will be denied where the proffered evidence provides "a reasonable indication that a material fact

[8] Dr. Katz has proposed an amendment to his counterclaim. The amendment is opposed by Dr. Spellman. The Court will evaluate the sufficiency of Dr. Katz's counterclaim as if the amendment has been approved.
[9] Ct. Ch. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[10] *Quereguan v. New Castle County*, 2004 WL 2271606, at *2 (Del. Ch. Sept. 28, 2004).
[11] *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

is in dispute."[12] Moreover, "[w]hen the issue before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous."[13] The same is true when the interpretation of an limited liability company agreement is in dispute, as the Delaware limited liability company is a creature of contract.[14] A threshold inquiry on a motion for summary judgment in a dispute over a limited liability company agreement, therefore, becomes whether the agreement contains an ambiguity.[15] "A contract [or limited liability company agreement] provision is ambiguous only when it is fairly susceptible to two or more reasonable interpretations."[16]

2. Dissolution of KSA

The Court's discussion of whether Section 5.1 of the Agreement, which addresses the mandatory dissolution of KSA, is ambiguous can be refreshingly short. The dissolution provision is not ambiguous. Nor does Dr. Katz claim that it is. Instead, Dr. Katz would have the Court ignore the plain language of Section 5.1 in deference to his recollection of the parties' intention that KSA would continue as an entity long after the completion of Bayview Medical Center in order to obtain certain tax benefits.

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[12] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[13] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).
[14] *TravelCenters of Am., LLC v. Brog*, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008).
[15] *Id.*
[16] *Rossi v. Ricks*, 2008 WL 3021033, at *2 (Del. Ch. Aug. 1, 2008) (citing *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008)).

Dr. Katz explains away the existence of the unambiguous dissolution provision of Section 5.1 by claiming its existence was unknown to the parties and thus does not embody their true intentions surrounding dissolution. He asks the Court to overlook this provision.[17] The Court must decline to do so.[18] Construction of the office building was completed in 1999; the condominium documents were finalized and the certificates of occupancy were issued the same year.[19] Neither member, however, undertook any steps to implement the dissolution and winding up of KSA called for by the Agreement. This, Dr. Katz argues, evidences the parties' true intent: that the KSA would continue for an extended and indefinite period of time.

Dr. Katz is implicitly requesting the consideration of parol evidence for the purpose of contradicting the express terms of the parties' agreement.[20] This parol evidence, he argues, creates a dispute concerning a material fact that would preclude summary judgment. However, when a "contract is unambiguous on its

[17] Dr. Katz's suggests that, because the Agreement was not read by its signatories, he should not be bound by its terms. That contention fails. *See, e.g.*, *Pellaton v. The Bank of New York*, 592 A.2d 473, 477 (Del. 1991) ("It will not do for a man to enter into a contract, and when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written.").

[18] Dr. Katz neither pleads nor argues any of the legal doctrines that might warrant reforming the Agreement, such as, *inter alia*, fraud, duress, or "scrivener's error."

[19] Compl. ¶¶ 8-11; Answer ¶¶ 8-11.

[20] Dr. Katz does not argue that Dr. Spellman's failure to move forward with KSA's dissolution at this time constituted a waiver, estoppel, or acquiescence with respect to KSA's continued existence.

face, the operation of the parol evidence rule will preclude the introduction of outside evidence to dispute its terms and summary judgment is particularly appropriate."[21] The Agreement is not ambiguous and the parol evidence rule precludes consideration of Dr. Katz's argument. Ambiguity cannot be created by the mere disagreement of the parties.[22]

Delaware courts adhere to an objective theory of contract interpretation, applying the construction which would be understood by an objective, reasonable, third party.[23] Section 5.1 of the Agreement employs mandatory language commanding the dissolution of KSA upon the happening of specific events. Both parties concede the occurrence of those events.[24] The Court cannot envision any objective third party, certainly no reasonable one, arriving at a conclusion other than Section 5.1 of the Agreement, under the undisputed facts, requires dissolution and subsequent winding up of KSA. As such, the provision is unambiguous, and its enforcement on summary judgment is appropriate.[25] The Court concludes that KSA has been dissolved by express will of the members and that the winding up of

[21] *Cantera v. Marriott Senior Living Services, Inc.*, 1999 WL 118823, at *3 (Del. Ch. Feb. 18, 1999) (quoting CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, § 2730.1, at 63-65 (3d ed. 1998)).
[22] *Id.* at *4.
[23] *Id.*
[24] *See supra* note 5.
[25] *Cantera*, 1999 WL 118823, at *2 ("Summary judgment is the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact.").

its affairs is necessary. Thus, the Court will proceed to consider Dr. Spellman's request for the appointment of a liquidating trustee.[26]

3. Appointment of a Liquidating Trustee

Because no material factual disputes exist, summary judgment is also the proper procedural device for consideration of Dr. Spellman's request for the appointment of a liquidating trustee pursuant to 6 *Del. C.* § 18-803 which provides, in relevant part:

> [T]he Court of Chancery, upon cause shown, may wind up the limited liability company's affairs upon application of any member or manager, the member's or manager's personal representative or assignee, and in connection therewith, may appoint a liquidating trustee.

Dr. Katz argues that the only means of winding up the affairs of KSA is set forth in Section 5.2 of the Agreement which provides that:

> Upon the dissolution of the Company, one or more persons approved by Unanimous Vote shall have full authority, and shall proceed

[26] The same result might be found under 6 *Del. C.* § 18-802 which provides for judicial dissolution "whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement." Courts have looked to the analogous dissolution provision in the limited partnership statute, which contains comparable language, in an effort to apply the Limited Liability Company Act. *In re Silver Leaf LLC*, 2005 WL 2045641, at * 10 (Del. Ch. Aug. 18, 2005); *In re Seneca Investments LLC*, 2008 WL 4329230, at *2 (Del. Ch. Sept. 23, 2008). This Court has ordered dissolution where "deadlock" between two ownership factions prevented achieving the majority vote required by the limited liability company agreement. *E.g.*, *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004). The material facts necessary to establish that it is "not practicable to carry on the business" of KSA, the standard prescribed for judicial dissolution by 6 *Del. C.* § 18-802, may not be undisputed. The business is the rental of a medical arts office, an activity that has been ongoing for about a decade. Disputes about the reasonableness of the rent paid by Dr. Katz's practice (DBSS) are not without their factual twists. However, the conclusion that KSA is dissolved by express will of the members pursuant to Section 5.1 of the Agreement renders such a finding under 6 *Del. C.* § 18-802 unnecessary.

> without any unnecessary delay, to wind up the Company's business, to sell or otherwise liquidate the assets of the Company, and to pay or make reasonable provision for the payment of all debts, liabilities, and obligations of the Company, and to make distributions to members as provided herein.

Dr. Katz argues that the language of Section 5.2 conditions the winding up process on unanimous agreement.[27] To the contrary, Section 5.2 provides that once dissolution has occurred, the person charged with the winding up responsibilities should be selected by unanimous agreement. The provision was no doubt written under the assumption that agreement would be reached—an unlikely event now given the deadlock that both parties concede. With the parties unable, or unwilling, to agree on the person to conduct KSA's winding up, the only rational and equitable result is for the Court to appoint such a person.

The Court's statutory authority to wind up KSA's affairs and to appoint a liquidating trustee is conditioned upon a showing of cause. Because the Agreement, in light of the events that have occurred, requires the dissolution and winding up of KSA and because the parties are unable or unwilling to implement that process, cause, within the meaning of 6 *Del. C.* § 18-803(a), exists for the appointment of a liquidating trustee to wind up the affairs of KSA.[28]

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[27] The parties could have agreed in that fashion in the Agreement. It likely would have been given effect (*see, e.g.*, *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318 (Del. Ch. Aug. 19, 2008)), but that is not how their agreement reads.

[28] Although the Court relies upon 6 *Del. C.* § 18-803(a) to appoint a liquidating trustee, the same authority may well be found in the Court's traditional equitable powers.

Both parties have looked to *Paciaroni v. Crane*[29] for assistance in defining what constitutes "cause" under Section 18-803(a).[30] In *Crane*, this Court decided the proper disposition of a racehorse after the partners that owned it experienced a similar falling out. The case is instructive for current purposes only for the propositions that a winding up must logically follow dissolution, and that cause for judicial intervention into the winding up process may be shown by the demonstrated inability of the members to agree as to how winding up should proceed. The case does not teach, as Dr. Katz argues, that an enterprise ought to be continued until the purpose of the entity's formation has been accomplished.[31] To the contrary, *Crane* merely stands for the proposition that the value of commonly owned assets should be preserved during the winding up process.[32]

And so, winding up must also occur here. *Crane* confirms that winding up logically follows dissolution in an entity's life cycle. Because KSA is dissolved by

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[29] 408 A.2d 946 (Del. Ch. 1979).

[30] Def.'s Answering Br. in Opp'n. to Pl.'s Mot. for Summ. J. 12; Pl.'s Br. In Supp. of Mot. for Summ. J. 21-22.

[31] Here again Dr. Katz depends on his understanding that KSA was created with the purpose of surviving long after Bayview Medical Center was completed in order to deliver tax benefits to the members, contrary to the express language of the Agreement. *See supra* Part A.2.

[32] The *Crane* Court stated the principle as:

> where, because of the nature of the partnership business, a better price upon final liquidation is likely to be obtained by the temporary continuation of the business, it is permissible, during the winding up process, to have the business continue to the degree necessary to preserve or enhance its value upon liquidation, provided that such continuation is done in good faith with the intent to bring affairs to a conclusion as soon as reasonably possible.

408 A.2d at 956.

the express will of its members, its affairs must now be wound up, and the Court concludes that, on these undisputed facts, the members' inability to implement this process, coupled with their contractual obligation under the Agreement to pursue winding up following dissolution, is sufficient cause for the Court to appoint a liquidating trustee pursuant to 6 *Del. C.* § 18-803 (a).[33]

B. *Motion to Dismiss Amended Counterclaim*

1. The Counterclaim Alleges a Derivative Claim

Dr. Katz asserts a single counterclaim alleging that Dr. Spellman breached his fiduciary duties to KSA by "refus[ing] to participate in the proposed refinancing" of the mortgage held by Wilmington Trust Company and secured by the Bayview Medical Center property.[34] Dr. Katz alleges that Dr. Spellman's refusal was motivated by self-interest.[35] Interest rates at the time were "near historic lows" and Dr. Katz seeks damages in the amount of the savings KSA would have realized had the mortgage been refinanced.[36]

Both parties agree—correctly—that this allegation states a derivative, and not a direct, claim.[37] The distinction between a direct and derivative claim

[33] Dr. Katz has requested that he have a "right of first refusal" in the event that KSA's assets are liquidated. Katz Aff. ¶ 30. There is no basis for the Court to burden the liquidation process in that manner.
[34] Am. Countercl. ¶ 2.
[35] *Id.* at ¶¶ 3-5.
[36] *Id.* at ¶ 2.
[37] Def.'s Answering Br. in Opp'n to Pl.'s Mot. to Dismiss Countercl. at 6; Pl.'s Br. In Supp. of Mot. to Dismiss Def.'s Countercl. at 6, 9-10.

generally may be found by asking (1) who suffered the alleged harm (the company or the members, individually); and (2) who would receive the benefit of any recovery or other remedy (the company or the members, individually).[38] Here, Dr. Katz alleges harm in the form of mortgage interest payments, made by KSA, in an amount higher than was necessary as a result of Dr. Spellman's refusal to participate in the refinancing. Were this Court to award damages on this claim, that award would flow to KSA, and not directly to the members in their individual capacity. The counterclaim states a derivative claim.

2. Pleading Requirements for a Derivative Claim

On a motion to dismiss, the Court assumes the truthfulness of all well-pleaded allegations of fact in the complaint, as well as all reasonable inferences drawn therefrom.[39] Generally, a motion to dismiss will be denied unless it appears with reasonable certainty that a claimant could not prevail on any set of facts reasonably inferred from the pleading.[40]

However, the pleading burden imposed on the sponsor of derivative claims is more onerous; it requires pleading "with particularity"[41] to survive; one cannot rest after serving mere notice of the claim asserted.[42]

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[38] *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).
[39] *Gantler v. Stephens*, 2009 WL 188828, at *5 (Del. Jan 27, 2009).
[40] *Kohls v. Kentech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000).
[41] 6 *Del. C.* § 18-1003 ("complaint shall set forth with particularity" reasons for not making demand); Ct. Ch. R. 23.1; *Rales*, 634 A.2d at 932.
[42] *See McPadden v. Sidhu*, 2008 WL 4017052, at *6 (Del. Ch. Aug. 29, 2008).

3. Failure to Plead Demand Futility

A member's right to bring a derivative claim on behalf of a Delaware limited liability company is governed by 6 *Del. C.* § 18-1001, which provides that:

> A member or an assignee of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

Dr. Katz admits he has not made demand on KSA's managers or members to bring this action and must therefore demonstrate that such demand would have been futile.[43] Demand will be excused if Dr. Katz has adequately alleged that Dr. Spellman[44] would not be able to consider the merits of his demand impartially without being influenced by improper considerations.[45]

> [A] court must determine whether or not *the particularized factual allegations* of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. If the derivative plaintiff satisfies this burden, then demand will be excused as futile.[46]

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[43] "Case law governing corporate derivative suits is equally applicable to suits on behalf of a Delaware limited liability company." *VGS, Inc. v. Castiel*, 2003 WL 723285, at * 11 (Del. Ch. Feb. 28, 2003). 6 *Del. C.* § 18-1001; *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993) (discussing standard for demand excusal).

[44] When there are but two directors or members with authority to authorize an action, a derivative plaintiff can show demand futility if she can allege adequately that one of them lacks independence or is interested. *See e4e, Inc. v. Sircar*, 2003 WL 22455847, at *2 n.10 (Del. Ch. Oct. 9, 2003).

[45] *Rales*, 634 A.2d at 932 (Del. Ch. 2003).

[46] *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003) (emphasis added) (citing *Rales*, 634 A.2d at 934); *Rattner v. Bidzos*, 2003 WL 22284323, at *8 (Del. Ch. Sept, 30, 2003).

Dr. Katz argues demand futility has been sufficiently demonstrated because Dr. Spellman, by virtue of his 50% interest in KSA, may effectively "veto any proposed action" and KSA management is therefore interested in any decision regarding this suit because Dr. Spellman "will himself become a defendant in any action" and it "would be futile to request that Dr. Spellman grant permission to sue himself" for the alleged conduct.[47]

A director is considered interested for the purpose of demand futility "if he will be materially affected, either to his benefit or his detriment, by a decision of the board," in a manner not shared by the company or its members.[48] However, the "mere threat" of personal liability will not render a director interested for the purposes of the *Rales* test. One does not satisfy Delaware's demand futility standards with the oft-employed phrase that one cannot be expected to sue himself. To the contrary, Dr. Katz must show a "substantial likelihood" of Dr. Spellman's personal liability before demand will be excused of lack of impartiality.[49] Thus the Court applies heightened pleading requirements to the very factual allegations surrounding the claim itself to determine whether a "substantial likelihood" of liability has been shown.

[47] Am. Countercl. ¶¶ 10-11.
[48] *Rales*, 634 A.2d at 933.
[49] *Id.* at 936; *see also Rattner*, 2003 WL 22284323, at *9.

Dr. Katz, in his amended counterclaim, fails to articulate *any* particularized facts supporting his claim and thus has not satisfied his pleading obligations. Therefore, the Court's analysis is again quite short. By pleading only the naked assertion of a breach of fiduciary duty the amended counterclaim shows no more than a "mere threat" of personal liability. Dr. Katz justifies his failure to make demand with the following allegations:

> KSA is incapable of acting because, as stated above, its members are deadlocked. A demand upon its members would therefore be futile. Further, Dr. Spellman will himself become a defendant in any action or other litigation instituted to address the aforesaid misconduct [not pursuing the opportunity to remortgage the real estate]. It will be futile to request that Dr. Spellman grant permission to sue himself and therefore, demand is excused for that reason as well.[50]

Deadlock—an evenly divided control group—will not by itself satisfy the demand excusal standard. Thus, review of the substantive allegation regarding the refinancing becomes necessary. In February 2005, Dr. Katz proposed to refinance the KSA real property because of "historic low interest rates." Dr. Spellman is alleged to have refused to participate because he wanted Dr. Katz to buy out his interest in KSA. "Significant savings in interest payments" could have been achieved through the refinancing. These allegations are not particularized. For example, the balance on the mortgage, the interest rate differential, a reasonable estimate of the potential savings, whether the interest to be saved would be

[50] Am. Countercl. ¶ 11.

material to KSA, and whether any potential liability would be material to Dr. Spellman are lacking. An allegation that "significant" savings could be achieved is merely conclusory, and conclusory allegations are wholly insufficient.[51] If heightened pleading requirements are to mean anything, then this amended counterclaim must fail. It is a "rare case" in which a director or member's actions are sufficiently egregious that a "substantial likelihood" of personal liability exists.[52] This Court has no authority to guess those facts that might support a derivative claim. The burden is on the complaining party to put forth supporting factual allegations. A complaint devoid of factual specificity will fail to provide the necessary basis for excusing demand; Dr. Katz's counterclaim is clearly insufficient to satisfy the heightened requirements applicable to demand excusal. His pleading provides no factual basis from which one could find or infer the requisite "substantial likelihood" of personal liability. Accordingly, Dr. Katz's amended counterclaim will be dismissed with prejudice in accordance with Court of Chancery Rule 15(aaa).

## CONCLUSION

For the forgoing reasons Plaintiff's motion for summary judgment declaring the dissolution of KSA and requiring the winding up of KSA's affairs and for the

[51] *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (finding conclusory allegations insufficient); *Guttman*, 823 A.2d at 499 ("cursory contentions" are not sufficient).
[52] *Seminaris v. Landa*, 662 A.2d 1350, 1354 (Del. Ch. 1995).

appointment of a liquidating trustee is granted. Plaintiff's motion to dismiss the derivative counterclaim is also granted, with prejudice.

Counsel are requested to confer and to submit an implementing form of order.[53]

[53] Counsel are also requested to confer and, if possible, to recommend a liquidating trustee for the Court's consideration.