IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRIAN T. OLSON, Plaintiff, v. O. ANDREAS HALVORSEN, DAVID C. OTT, VIKING GLOBAL INVESTORS LP, VIKING GLOBAL PARTNERS LLC, VIKING GLOBAL PERFORMANCE LLC, and VIKING GLOBAL FOUNDERS LLC, Defendants. ____________________________________ VIKING GLOBAL PERFORMANCE LLC, DANIEL CAHILL and THOMAS PURCELL, Defendant-Counterclaim Plaintiff and Third-Party Plaintiffs, v. BRIAN T. OLSON, Plaintiff-Counterclaim Defendant and Third-Party Defendant-Counterclaimant.	)	C.A. No. 1884-VCL

MEMORANDUM OPINION AND ORDER

Submitted: February 17, 2009
Decided: May 13, 2009

Collins J. Seitz, Jr., Esquire, Bradley R. Aronstam, Esquire, CONNOLLY BOVE LODGE & HUTZ, LLP, Wilmington, Delaware; R. Scott Garley, Esquire, Jeffrey L. Nagel, Esquire, Mark W. Stoutenberg, Esquire, GIBBONS P.C., New York, New York, *Attorneys for Brian T. Olson.*

Martin P. Tully, Esquire, Jon E. Abramczyk, Esquire, MORRIS NICHOLS ARSHT & TUNNELL LLP, Wilmington, Delaware; Bruce Birenboim, Esquire, Susanna Buergel, Esquire, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, New York, New York, *Attorneys for the Defendants and Counterclaim Plaintiffs.*

LAMB, Vice Chancellor.

A founder of a successful hedge fund brings this action against his two co-founders and entities created to run the fund, claiming that they failed to pay him for his equity interest in the enterprise after he was let go. At trial, the co-founders proved that there was an oral agreement reached, before any operations began, that all earnings would be paid out annually, with no deferral of compensation, and that a departing member would receive only his accrued compensation and the balance of his capital account. Following trial, the court concludes that agreement was never superceded by any other agreement relating to deferred compensation or post-termination rights. Thus, the departing founder is not entitled to any further payment.

A. The Parties

The plaintiff in this action is Brian T. Olson, one of the founders of Viking Global, an investment management firm and hedge fund.

The defendants are the two other co-founders of Viking, O. Andreas Halvorsen and David C. Ott, and the various entities through which Viking conducted its business: Viking Global Investors LP, a Delaware limited partnership (“Investors”); Viking Global Partners LLC, a Delaware limited liability company (“Partners”); Viking Global Performance LLC, a Delaware limited liability company (“Performance”); and Viking Global Founders LLC, a Delaware limited liability company (“Founders”).

Performance is also a counterclaim plaintiff in this action. Daniel Cahill, Viking's president, and Thomas Purcell, a top analyst at Viking, are both members of Performance and are third-party plaintiffs, as well. Cahill and Purcell join Performance in asserting claims against Olson.

B. The Facts[1]

Halvorsen, Olson, and Ott worked together at Tiger Management, which was, at the time, one of the world's largest hedge funds. Halvorsen joined Tiger in early 1992. By 1996, Halvorsen had risen to be director of equity investments, the number two person on the investment side of Tiger and second only to the hedge fund's founder, Julian Robertson. Halvorsen was involved in Tiger's hiring of both Ott and Olson. In early 1999, frustrated with Robertson's management, Halvorsen decided to leave Tiger to form his own hedge fund, Viking.[2] Dissatisfied with his compensation, Olson also resigned from Tiger at the end of 1998, but stayed at the fund for a few months to help find his replacement. Halvorsen considered Olson a brilliant analyst and contacted him to discuss the possibility of Olson joining Viking after he finished with his responsibilities at Tiger. Halvorsen also contacted Ott, who was still at Tiger, about joining Viking.

[1] Additional background facts are set forth in this court's opinion at the summary judgment stage of this case. *See Olson v. Halvorsen*, 2008 WL 4661831 (Del. Ch. Oct. 22, 2008).
[2] Halvorsen's last day at Tiger was February 17, 1999. In mid-2000, Tiger returned all its capital to its outside investors and ceased operating in its original form.

1. The February 1999 Meeting: Viking's Core Principles

After a few initial conversations, Halvorsen, Olson, and Ott met at Halvorsen's home in late February 1999 for a more in-depth discussion regarding the new Viking enterprise. At this February meeting, the three founders discussed the governance, investment strategy, compensation, and logistics related to the formation of Viking.

Halvorsen, Olson, and Ott agreed that Viking would be governed by an operating committee made up of the three of them and decisions would require a two of three vote, subject to a Halvorsen veto. The three founders agreed to allow Halvorsen a veto because he had the most experience among them and would contribute about $50 million to the fund, while Olson and Ott would each contribute somewhere between $2 million and $4 million.

The three founders also agreed that the fund would be a long/short equity fund and each would manage a portfolio within their area of expertise. Olson would manage a telecommunications, media, and technology ("TMT") portfolio. Ott would manage a consumer portfolio, and Halvorsen would manage a financial services portfolio. In addition, initially, Halvorsen would be the Chief Investment Officer (the "CIO") and would manage a CIO portfolio not tied to a specific industry, but rather focused on the most attractive investments from the sector-based portfolios.

As a function of Tiger's deferred compensation system, each of Halvorsen, Olson, and Ott forfeited large sums of money upon resigning. Wanting to avoid at Viking the perceived unfairness of the Tiger compensation system, they decided, at the February 1999 meeting, that all the profits at Viking would be paid out annually. Each year, after all other employees were paid, Halvorsen would receive 55% and Olson and Ott would each receive 22.5% of the profits.[3] In the event of a sale of Viking, the three founders discussed splitting the equity proceeds 66% to Halvorsen, 20% to Olson, and 14% to Ott. Ott wanted to think about this equity split, and later agreed to the percentages. Shortly thereafter, Ott explained to the other two that these "equity" percentages were useless and ridiculous, because if they paid out all of the profits each year, there would be no equity to split. Halvorsen agreed with Ott's logic. The three founders later changed the equity percentages to 55% to Halvorsen and 22.5% to each of Olson and Ott, to match their profit-sharing percentages. Halvorsen, Olson, and Ott each testified that at the February meeting they all agreed that if any one of them left Viking he would only be entitled to his earned compensation and his capital account (the "cap and comp" agreement). Halvorsen testified that the three founders reached this

[3] Months later, the three founders divided their annual compensation into two separate percentages: a job percentage (also called the work percentage) and a residual percentage (also called equity, management, or non-work percentage). The job percentage represented the three founders' contributions to Viking through their investment-related activities and was essentially a proxy for their replacement cost. The residual percentage represented the three founders' compensation for all of the other services they performed for the firm.

decision based on their shared belief that one should be compensated fully for what one contributes (not a partial amount due to deferred compensation) and that, as a quid pro quo, one should not continue to take a paycheck after one leaves the firm and stops contributing.

As to logistics, the three founders decided that Halvorsen would be primarily responsible for raising capital and hiring employees, Olson would deal with the lawyers regarding formation of the necessary entities, and Ott, who was still employed at Tiger and had less time, would locate office space.

Also in early 1999, although he could not remember exactly when or for what purpose, Olson created a document summarizing the terms by which Viking would be operated. Olson shared this document with Halvorsen and Ott. The terms largely track the discussions the three founders had at the February meeting, and Olson admitted that, at the time he drafted the term sheet, the three founders had agreed that each would only be entitled to his accrued compensation and capital account balance upon leaving Viking.

2. The Viking Entities Are Formed

A few months after the February meeting, the three founders, with the advice of counsel, decided to create three Delaware entities to carry on the Viking business: (1) Performance, a limited liability company, to collect Viking's performance fees of 17.5% to 20% of the annual gains of the hedge fund per year;

(2) Investors, a limited partnership, to pay Viking's expenses, employ Viking's staff, enter into operational contracts on Viking's behalf, and collect a management fee of 1.5% of the hedge fund's assets under management each year; and (3) Partners, a limited liability company, to serve as the general partner of Investors. The certificates of formation for these three entities were executed on April 8, 1999 and filed with the Secretary of State of Delaware the following day.

3. The Long-Form Operating Agreements For The Viking Entities

Olson directed counsel to draft operating agreements for the Viking entities. On April 8, 1999, Viking's counsel sent Olson a first draft of the operating agreement for Partners. Counsel later provided drafts of the operating agreements for Performance and Investors. These drafts reflected the oral agreements reached by the three founders at the February meeting and the core principles listed in Olson's term sheet.[4] Each of these drafts were over 10 pages in length and came to be known during the course of this litigation as the long-form agreements.

4. The Short-Form Operating Agreements For The Viking Entities

In April 1999, the long-form agreements were not yet in final form and the Viking entities needed operating agreements to facilitate the entering of a real

---

[4] Section 3.03 describes an "Executive Committee" (later called the "Operating Committee") with the power to act on a two of three vote, subject to Halvorsen's veto. Section 3.01(e) vests the Executive Committee with the power to require members to retire from Viking. Sections 5.03, 5.05, and 5.06 provide that a departing member is only entitled to accrued compensation and his capital account balance.

estate lease and the opening of bank accounts. Thus, Olson asked Viking's counsel to draft short-form operating agreements for Investors and Partners. After a few changes requested by Olson, all three founders signed short-form agreements for Investors and Partners on May 10, 1999.[5] On September 8, 1999, the three founders also executed a short-form agreement for Performance. The short-form agreements are skeletal (each only three or four pages in length) and do not contain all of the terms agreed upon by the founders at the February meeting. The short-form agreements do, however, appear to be drafted in line with the core principles. Each short-form agreement provides that a member will be entitled to receive his accrued compensation and capital account balance upon departure.

5. The Long-Form Drafting Process Continues

After the short-form agreements were executed, Olson continued to work with the attorneys to refine the long-form agreements for the Viking entities. Between April 1999 and the launch of Viking on October 1, 1999, over a dozen drafts of the long-form agreements were produced. During this period, Olson maintained responsibility for interacting with Viking's outside counsel.[6] By late 2000, the drafting process had come to a halt even though none of the three

[5] Throughout this litigation, Olson insisted on referring to the short-form agreements as the "boilerplate" agreements even though counsel specifically drafted the agreements to be in line with the core principles of Viking and modified the short-form agreements at Olson's request.
[6] Following Viking's launch, Brian Smith (Viking's Chief Financial Officer) and Carl Casler (then Viking's Treasurer) assumed some of the responsibility for working with the lawyers on the long-form drafts.

founders had signed any of the draft long-form agreements for Investors or Partners. As a result of a potential dispute with an employee, the three founding members agreed to supersede the short-form agreement for Performance by signing the Limited Liability Company Agreement of Viking Global Performance LLC dated September 28, 1999.[7] That agreement was amended on January 11, 2002 (the "Performance Long-Form Agreement"). The Performance Long-Form Agreement provided that the Operating Committee could remove members with or without cause. Also, the Performance Long-Form Agreement reflected the three founders' original oral agreement at the February meeting that a member would receive only his accrued compensation and his capital account balance upon departure. In light of the executed Performance Long-Form Agreement, Olson admits that he is not entitled to any interest in Performance beyond his accrued compensation and capital account balance.

6. <u>The Founders Earnout And The Founders Entity</u>

In mid-1999, Olson raised a new compensation concept with Halvorsen and Ott. Olson proposed that upon departure from Viking a founding member (or his

---

[7] Olson testified that he is confident that the original long-form agreement for Performance was not signed until 2001, despite it being dated in 1999. While looking for guidance in how to properly terminate an employee at the end of 2000, the founders realized that the long-form agreement for Performance was unsigned. The founders then signed the long-form agreement for Performance to assure that they did not find themselves in an uncertain position again. It is unclear why the three founders did not sign the other long-form operating agreements at that time.

estate) would be paid an earnout, through a new entity to be called Founders. Halvorsen and Ott considered the idea interesting, but Olson did not detail how the earnout would work at their first meeting, and the three founders left the issue open for discussion.

On July 14, 1999, Olson sent a memorandum to outside counsel stating that Viking would "probably" create another entity called Founders which would "embody some equity-like features relating to [the three founders'] ownership of the management company."[8] Olson testified that, a month or two later, the three founders held a second meeting to discuss the earnout concept. Also, Olson testified that he distributed a term sheet to facilitate discussion about the earnout. Halvorsen and Ott, however, both testified that they had not seen this term sheet before the litigation.[9]

Olson instructed the attorneys to begin work on an operating agreement for Founders in line with the terms he set forth in the term sheet. The document the

---

[8] JX 190.

[9] The purported term sheet appears to be instructions to a lawyer, not the basis for a discussion with partners. For example, the document contains a note in Olson's handwriting that says "To Richard Metsch," one of Vikings' outside lawyers. No copies of this document with Halvorsen's or Ott's handwriting were found in discovery. Moreover, the document does not actually contain the phrase "term sheet" anywhere. The document contains orders such as "include a 'frustration of purpose' paragraph" (JX 36), suggesting that it was prepared as instructions for an attorney. Lastly, the document refers to Halvorsen and Ott in the third (not the second) person and Olson in the first person, again suggesting the document was created to go from Olson to the attorneys and not to Olson's co-founders.

attorneys prepared provided that, upon retirement or death, each founder would receive a declining percentage of his interest in Viking for six years following his departure. Olson and the outside attorneys went through nine drafts of the Founders operating agreement, dating as late as December 2000.

The drafting of the Founders operating agreement took place over about a year and a half, and at no point during that process did Olson discuss with his partners the changes he was making to what he now claims was their "agreement." A number of these changes differed significantly from the term sheet Olson claims he showed Halvorsen and Ott. For example, the term sheet stated that Founders' profit pool percentage in Performance and Investors would remain constant. Later drafts of the Founders agreement departed from this concept, stated that Founders' interest in those entities was residual and variable, and stated that if changes were made in Founders' share of Performance and Investors a retired member's profit pool percentage must be adjusted to maintain, as nearly as practicable, that member's economic interest.[10]

---

[10] This change was significant because at trial the defendants showed that over time Viking's analysts would demand more and more compensation. These demands would decrease the draw of the three founders. If the three founders were required to keep a retiree's draw constant, in the face of increased payouts to the employees, any additional money needed to fund the earnout would have to come from the two founders who were still at Viking doing the work. This possibility was starkly inconsistent with the original understanding that Viking profits were for the people still working at Viking.

Olson also added a requirement to the draft Founders operating agreement that Halvorsen keep over 89% of his capital in the fund or forfeit his veto. This concept was entirely absent from the term sheet. On April 23, 2001, CFO Brian Smith sent Halvorsen the draft Founders agreement and noted that Halvorsen had a question about the clause requiring him to maintain over 89% of his capital in the fund or lose his veto right. Halvorsen testified that he had never agreed to place any contingencies on his veto rights, was shocked to see such a clause in the draft Founders agreement, and had asked Smith about the clause. Both changes discussed above substantially track Olson's handwritten notes to the outside attorneys and were admittedly never discussed with Halvorsen or Ott.

From 1999 until 2001, Halvorsen and Ott received various drafts of the Founders agreement, but never discussed them or the earnout concept in general with Olson after the two brief meetings in the summer of 1999. None of the three founders ever signed a Founders operating agreement and both Halvorsen and Ott convincingly testified at trial that at no time did they agree to or make promises to Olson regarding the Founders earnout.

At Olson's direction, outside counsel filed a certificate of formation for Founders on September 28, 1999. Thereafter, also at Olson's direction, Founders was made a member of Performance. Founders was never made a partner of

Investors, as contemplated in the draft Founders operating agreement, and Olson did not voice concern over this fact while at Viking.[11] From 2000 to 2005, at Olson's direction, Smith ran certain amounts of the three founders' residual income through the Founders entity. These amounts ranged from approximately $3.9 million in 2004 to $84.9 million in 2001 and totaled almost $200 million. At trial, Smith stated that he ran money through Founders for bookkeeping purposes because Olson directed him to do so.[12] Smith described Founders as mere vestige.

7. <u>Olson Threatens To Leave Viking in 2001, Renegotiates Percentages, But Founders Is Not Mentioned</u>

Olson's TMT portfolio performed extremely well in the early days of Viking, and by the end 2001 Olson was dissatisfied with his compensation.[13] Olson demanded that no one at Viking be paid more than he.[14] When Halvorsen refused to agree to Olson's demand, Olson announced that he was leaving Viking.

Cahill, the head trader at Viking who later became Viking's president, convinced Olson and Halvorsen to address their differences and negotiate a mutually acceptable solution, which they did over a period of two or three weeks.

---

[11] Olson did, however, ask Smith to make Founders a partner of Investors in June of 2000. Olson did not request resolutions be drawn to this effect, did not request a vote of the Operating Committee (as required), or follow up on this request.

[12] Smith stated that there was no tax reason to run money through Founders as opposed to one of the other Viking entities.

[13] Olson was paid over $28 million in 2000 and over $42 million in 2001.

[14] Halvorsen was paid over $55 million in 2000 and over $78 million in 2001.

It was unclear from the record whether Olson actually left the Viking offices during the period of dispute. As part of the negotiations, Halvorsen, Olson, and Ott agreed to reallocate their compensation percentages so that Halvorsen's share decreased and Olson's share increased.[15]

Olson admitted that the three founders did not discuss the impact of these changes in percentages on the earnout he claims already existed or on their purported entitlement to the fair value of the Founders entity. It was clear at trial that Halvorsen and Ott thought that by readjusting these percentages only annual compensation would be affected, not retirement benefits. Both Halvorsen and Ott testified that they agreed to increase Olson's compensation because of the value he was adding to the fund, but would have never agreed to increase his retirement

---

[15] For 2002 and 2003, Halvorsen's job percentage would drop dramatically and his residual percentage (also called management or equity percentage) would drop slightly relative to the other founders. Halvorsen's job percentage went from 15.65% in 2001 to 2.99% in 2002 and 2003 and would be renegotiated in 2004. Olson's job percentage went from 6.40% in 2001 to 8.69% in 2002 and 2003 and would be renegotiated in 2004. Halvorsen's residual or equity percentage went from 19.70% in 2001 to 20.69% in 2002 and 2003, and to 19.55% in 2004 and beyond. Olson's residual or equity percentage went from 8.06% in 2001 to 14.99% in 2002 and 2003, and to 16.12% in 2004 and beyond. As between Halvorsen, Olson, and Ott, the residual or equity percentages went from 55%/22.5%/22.5% to 45.48%/32.95%/21.57% (for 2002-2003) to 42.99%/35.44%/21.57% (for 2004 and beyond), respectively.

Olson's job and management percentages would be increased so that Olson and Halvorsen would be paid roughly the same amount in 2002 and 2003. After 2003, they agreed to come back to the table and re-evaluate, with Halvorsen starting the negotiations with a higher residual percentage and the job percentage being open for debate. Ott's compensation stayed basically flat. Ott's job percentage went from 6.40% to 4.81% and his residual percentage went from 8.06% to 9.81%. Ott's total take went from 14.46% to 14.62%, but his residual percentage relative to the other two founders actually went down slightly.

benefits without, at the very least, requiring him to stay at Viking for a substantial period of time. If, as Olson argues, the three were actually readjusting future compensation *and* retirement payouts, Olson could have left the day after the renegotiation and walked away with a massive sum of additional money, without conveying *any* additional benefit to Viking. Halvorsen testified, "I'm just trying to understand how I could possibly, if it was an issue that we had a retirement plan, I would possibly agree to someone who had just walked out the door . . . [to] double his retirement benefits and he can walk out the door that minute."[16] Ott testified to the same effect, stating:

> I would think if anyone had the thought that [the job and residual percentage renegotiations] created a long-term obligation, that we would have had further discussion and, at a minimum, at least say, 'Well, you need to commit to stick around for this period of time . . .' because otherwise [Olson] could have left the next day and all you have done is given [him], per his analysis, tens of millions of dollars.[17]

The three founders did not discuss the effect of the renegotiation on departure payouts nor did they discuss entering into an agreement with Olson obligating him to stay at Viking for any period of time. From this, it is logical to conclude that the three founders believed the "cap and comp" agreement was still in place.

[16] Tr. 1337.
[17] Tr. 656.

8. Founders Resurfaces

Founders was largely off the radar screen from 2001 until 2004. In the summer of 2004, it reappeared. Cahill, who became Viking's president in 2003, testified that as he dug into Viking's various entities and operating agreements he uncovered the draft Founders agreement. Cahill testified at trial that he was alarmed by the earnout concept because he had been "told just the opposite on several occasions, that you only get paid if you work at Viking."[18] Cahill testified that Olson told him personally on multiple occasions that the three founders' "equity" would be retired for no consideration if they left Viking.[19] After reviewing the draft Founders agreement, Cahill met with Halvorsen, Olson, Ott, and Smith to inquire about the earnout concept. Cahill was informed by each of the three founders that no agreement had ever been reached regarding an earnout. At trial, Smith testified that he believed that the three founders never agreed upon

---

[18] Tr. 1233.

[19] Cahill testified that Olson told him the founders were only entitled to "cap and comp" upon departure in 1999 when Viking was attempting to lure Cahill away from Bear Stearns to become their head trader. Cahill was given a 5% "equity" interest in the firm, which, like the founders would affect his annual compensation, but not his retirement payment. Additionally, in 2003 Viking's top analysts were clamoring for additional compensation and asked Cahill to make sure that the founders' "equity" would be available for distribution when the founders left the firm, or scaled back involvement. Cahill testified that he confirmed with Olson that the "cap and comp" agreement was in place and reported back to the analysts. Purcell also testified that on numerous occasions Olson told him that the founders would take only their "cap and comp" when they left Viking.

the proposed earnout and that the draft Founders operating agreement had never been finalized.

In an effort to resolve open questions about Founders, Cahill listed Founders on the management committee agendas from July 2004 until November 2004.[20] Olson received the management committee agendas and attended the majority of the management committee meetings, but never asked why Founders was on the agenda and never insisted that the Founders operating agreement had already been agreed to. Despite appearing on the management committee agenda for months, Olson testified that Founders was not discussed at the actual meetings. Smith testified that in December 2004, before departing on paternity leave, he reminded Halvorsen, Olson, and Ott that the issues surrounding Founders had not been addressed. Both Cahill and Smith came away from the discussions in the second half of 2004 believing that there had been no resolution on the draft Founders agreement or the earnout concept.[21]

---

[20] For example, on July 16, 2004, the management committee agenda read "Brian Smith will schedule a meeting to figure out the Founders Agreement." JX 55 at 3. Viking's management committee was a group larger than the Operating Committee that met periodically to look at various aspects of the business. Initially, the management committee consisted of Halvorsen, Olson, Ott, Cahill, and Smith.

[21] Cahill testified at trial that because he had told Viking employees in 2003 that the founders would only be paid "cap and comp" if they left Viking, he would have felt obligated to correct that statement if he ever uncovered information leading him to conclude that the founders had agreed to a scheme allowing them to take their equity with them. Cahill never uncovered such information.

9. Olson's Personal Financial Statements

In 2003 and 2004, Olson was asked to prepare personal financial statements setting forth his net worth. Olson listed the amount of his capital account balance as his interest in the Viking entities in both 2003 and 2004, but did not list the value of the equity (either through a fair value analysis or an earnout concept) that he now claims to have. In his signed 2004 personal financial statement, Olson represented to the U.S. Trust Company of Connecticut that the document was both correct and complete.[22]

10. Olson's Sabbatical

While Olson achieved remarkable returns in 2000 and 2001, the returns on his portfolio decreased substantially over the next few years. Olson communicated his disappointment in both his returns and his role at Viking at a management committee meeting at the end of 2004.[23] On March 6, 2005, Olson sent an email to Halvorsen, Ott, and Cahill announcing that he had decided to step away from managing the TMT portfolio and take a six-month sabbatical. During that time, Olson stated that he would work on some personal goals that he had developed

[22] The 2003 personal financial statement produced in the record does not have a signature page.
[23] Olson's profit or loss as an analyst was roughly $216.7 million in 2000, $316.1 million in 2001, $41.2 million in 2002, $94.0 million in 2003, $38.7 million in 2004, and $-1.2 million in 2005. At trial, Purcell questioned whether all the profit listed should have been attributed to Olson, as opposed to other analysts.

before starting at Viking and that he would think about how he could transition into another role at Viking when he returned. One of the different roles Olson suggested in his email was running a separately managed fund, even though he realized that opening a separate fund would present a number of challenges for Viking. Before he left, Olson told Cahill that he could not be 100% sure that he would return to Viking.

Another reason for Olson's sabbatical appears to have been his dissatisfaction with the proposal, made immediately before his leave, to make Ott co-CIO with Halvorsen. Ott and Halvorsen later did become co-CIOs and the management committee changed the compensation formula for the CIO role while Olson was on sabbatical.[24] Ott, Halvorsen, and Smith testified that the change was not expected to have a material effect on Halvorsen's and Ott's compensation; nevertheless, Olson was not pleased.

During his sabbatical, Olson received periodic updates about the business decisions taking place at Viking, but did not regularly receive agendas or participate in management committee meetings.

[24] The primary driver of Halvorsen's and Ott's compensation was changed from the profits of their individual portfolios to the profits of the firm as a whole.

11. Alternatives For Olson Are Discussed

Viking failed to find a replacement to run Olson's TMT portfolio, shut the portfolio down, and managed those funds in the CIO portfolio. In June 2005, Halvorsen asked Cahill, with the assistance of Viking management, to study what role Olson could play should he return. Cahill analyzed the possibility of starting a second fund, as suggested in Olson's departing email, but came to the conclusion, along with other members of Viking's management, that a separate fund would not be in the best interest of Viking and its investors.[25] During his attempt to find a new role for Olson, Cahill came to believe that, by and large, Viking operated more efficiently without Olson and that a number of employees resented Olson's overbearing management style.

12. Olson Is Terminated

After discussing Cahill's findings, Halvorsen and the other management committee members unanimously determined that there was no longer a place at Viking for Olson. On August 23, 2005, Halvorsen sent Olson an email to schedule a meeting to discuss observations related to Olson's future role at Viking. The three founders agreed to meet on August 29, 2005 at the Viking offices. During that meeting, Halvorsen informed Olson that he would not be permitted to return to

[25] Ott explained at trial that if Viking had two funds it would be forced to make decisions that would advantage one group of investors at the expense of another.

Viking at the end of his six-month sabbatical. Also at this meeting, Olson, for the first time in years, asked about Founders. Halvorsen said they had not given Founders any thought.

On October 17, 2005, the Operating Committee removed Founders as a member of Performance by written resolution. Also by written resolution of the Operating Committee, dated as of December 1, 2005, Olson was retired as a member of Performance, Investors, and Founders, effective 30 days later. Viking paid Olson his compensation for all of 2005 and the full balance of his capital accounts in each Viking entity.

C. Procedural History

On January 12, 2006, Olson filed suit. On February 1, 2008, Olson amended his complaint, making claims for (1) breach of contract, (2) breach of fiduciary duty, (3) civil conspiracy, (4) right to fair value and interest in the Viking entities pursuant to 6 *Del. C.* § 18-604 and 6 *Del. C.* § 17-604, (5) unjust enrichment, (6) accounting, (7) equitable estoppel, and (8) promissory estoppel. In response, on February 28, 2008, Viking amended its answer and added counterclaims by Cahill and Purcell alleging that Olson breached his fiduciary duties and violated the implied covenant of good faith and fair dealing due to his alleged misstatements about, concealment of, and attempt to enforce the purported earnout.

Subsequently, the parties filed cross-motions for summary judgment and, on October 22, 2008, this court granted summary judgment in favor of the defendants on Olson's contract claim.[26] The parties submitted pretrial briefs and the court held a six-day trial in November and December of 2008. Thereafter, the parties filed post-trial briefs and engaged in post-trial argument on February 17, 2009.

II.

At trial and in his papers, Olson focused on his alleged entitlement to fair value for his ownership interest in Founders, Investors, and Partners. The defendants proved (and Olson admitted) that the three founders orally agreed that a departing member or partner would only be entitled to his accrued compensation and his capital account balance. Olson did not prove the existence of any superceding agreement that conflicted with that understanding. Accordingly, Olson is not entitled to fair value for his ownership interest in any of the Viking entities.

A. The Fair Value Statutes

The Delaware Revised Uniform Limited Partnership Act ("DRULPA") states that a withdrawing partner is entitled to the fair value of his partnership interest "if not otherwise provided in a partnership agreement."[27] Section 18-604

---

[26] *Olson*, 2008 WL 4661831.
[27] 6 *Del. C.* § 17-604.

of the Delaware Limited Liability Company Act, tracks this language and states that a resigning member is entitled to the fair value of his membership interest "if not otherwise provided in a limited liability company agreement."

B. Operating Agreements Govern In Conflict With Fair Value Statutes

As set forth in the language of both statutes and in a number of Delaware cases, Delaware law generally defers to the demonstrated agreement of the parties in the limited partnership and limited liability company context.[28] Both DRULPA and the Limited Liability Company Act expressly provide that it is the policy of the act "to give the maximum effect to the principle of freedom of contract and to the enforceability of [limited liability company/partnership] agreements."[29] Accordingly, if a valid and enforceable agreement of the parties conflicts with the fair value statute, the agreement of the parties will govern.

C. The "Cap and Comp" Agreement For All Viking Entities

All the founders, including Olson, testified that they reached an oral agreement on the core principles of Viking. These core principles, Olson admitted, included that a departing member would take only his accrued compensation and

---

[28] *See, e.g.*, *TravelCenters of Am., LLC v. Brog*, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008); *In re Grupo Dos Chiles, LLC*, 2006 WL 668443, at *2 (Del. Ch. Mar. 10, 2006); *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B. V.*, 2008 WL 4057745 at *14 (Del. Ch. Sept. 2, 2008); *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318, at *4 n.20 (Del. Ch. Aug. 19, 2008).
[29] 6 *Del. C.* § 17-1101(c); 6 *Del. C.* § 18-1101(b).

capital account balance when he left Viking–an agreement that conflicts with the fair value statutes.[30] The oral agreement as to Viking's core principles was reached before any of the Viking entities were formed and was intended to apply to Viking as a whole. Thus, the original agreement governing the operation of each Viking entity, including Founders, was the oral agreement regarding the company's core principles.[31] This oral agreement was refined by subsequent signed written agreements for Investors, Partners, and Performance–all of which were in line with the "cap and comp" agreement.

D. <u>No Departure From The "Cap And Comp" Agreement</u>

The evidence does not suggest that Halvorsen and Ott agreed to depart from the "cap and comp" agreement when they formed Founders, but rather confirms that the "cap and comp" agreement held strong through the formation of Founders and continued past Olson's termination.

1. <u>Olson's Arguments Are Unavailing</u>

Olson argues that the draft Founders operating agreement is the *only* operating agreement ever created for Founders and focuses on the fact that the oral

---

[30] Olson testified: "we agreed that a departing member would receive, probably most simply stated, their capital back, their invested capital plus their accrued compensation." Tr. 27; *see also* Tr. 261-62, 615, 700, 1265-66.

[31] These oral agreements are examples of enforceable oral limited liability company and limited partnership agreements under Delaware law that the court alluded to in its summary judgment opinion in this case. The "cap and comp" agreement is enforceable because it is *possible* that it could be completed in the span of one year. *Olson*, 2008 WL 4661831, at *3.

agreement was made before Founders was formed. The oral agreement, however, was made before *any* of the Viking entities were formed, and the oral agreement was clearly meant to apply to Viking as a whole, as evidenced by the reflection of those core principles in each of the signed operating agreements for the Viking entities. Olson also argues that the formation of Founders and the running of nearly $200 million in compensation through Founders shows that Halvorsen, Olson, and Ott intended to turn from their original "cap and comp" agreement and create an arrangement where each of the founders would be entitled to an equity payment when he left. This change is not supported by the facts.

Olson admitted that he only had two brief conversations in the summer of 1999 with Halvorsen and Ott regarding Founders and could recall almost no details from those meetings. Olson worked with the outside attorneys on drafts of the Founders operating agreement, but never discussed the draft agreement with his partners and never received their sign off on major changes (such as adding contingencies to Halvorsen's veto). Olson had the outside lawyers form Founders and ordered Smith to run money through Founders. The defendants' witnesses convincingly testified that they viewed Founders as an entity created simply for bookkeeping purposes to run the three founders' residual compensation (also called equity compensation) through.

2. Evidence That Viking Did Not Depart From The "Cap And Comp" Agreement

While there is virtually no evidence, outside of Olson's own testimony, that the founders intended to depart from the "cap and comp" agreement, there is substantial evidence that Viking continued to act in conformity with the "cap and comp" agreement before and after the formation of Founders. First, Olson himself made presentations in 2001 and 2002 regarding compensation at Viking and stated that members of Viking took only their "cap and comp" when they left. These presentations had accompanying PowerPoint slides that stated the same. Second, Olson communicated to Cahill, in both 1999 and 2003, that the three founders would take only their "cap and comp" when they left. Cahill passed this information along to important employees at Viking. Third, when Olson quit (or threatened to do so) in 2001, he never raised the issue of entitlement to any kind of fair value or earnout via Founders. Fourth, when Halvorsen, Olson, and Ott renegotiated compensation at the end of 2001, they did not discuss the impact of changing their residual percentages (also called non-work or equity percentages) on a member's rights after leaving Viking. It is not believable that these three extremely sophisticated business people, with a keen interest in the economics of a business, would have failed to discuss any of this if they believed the "cap and comp" agreement had been superceded, particularly in light of Olson's threat to leave Viking. It is also unbelievable that Halvorsen and Ott would have given Olson the right to (by his analysis) tens of millions of additional dollars upon departure, without an agreement that he stay at Viking for some period of time.

Fifth, Halvorsen and Ott both testified that if they left Viking they would expect to take only their "cap and comp." If Olson's arguments were true, Halvorsen would be entitled to even *more* than Olson upon departure and Ott would be entitled to a very handsome amount as well. By testifying the "cap and comp" agreement remained in place, Halvorsen and Ott gave up the ability to collect an earnout or fair value for their equity interest upon departure. This willingness to part with rights that Olson argues are worth well over $100 million strongly suggests that Halvorsen and Ott never believed they would be entitled to payment beyond "cap and comp" when they leave Viking.

Sixth, Founders, as it is structured, does not fulfill the purpose for which Olson claims it was meant or make business sense, further suggesting that the founders had not agreed to supercede their "cap and comp" agreement. Founders, if it entitled the three founders to hundreds of millions of dollars upon departure, provided a great incentive to be the first person out the door–not something a company would want to promote. Also, the structure does not work for Halvorsen. If he left, the investors would be entitled to leave, and there would likely be no money to fund an earnout or make a fair value payment to him. In addition, it seems likely that the bottom-line focused employees of Viking would leave if they saw a sizeable amount of "their" money going to someone who was no longer a part of the fund, thus substantially decreasing the possibility that the other two would ever get the benefit of an earnout or fair value.

Seventh, Founders, even if it were intended to capture the equity of Viking (which the court finds it was not), is not structured in a way to capture much, if any, value. This further supports the conclusion that the "cap and comp" agreement was never supplanted. Founders was only a member of Performance and had only a variable residual interest in Performance. Each year, the employees pushed for more and more compensation, and over the years at issue in this case, the flow to Founders deceased substantially. A buyer looking to purchase Founders would have no assurance that *any* amount would flow to Founders, and, without any employment agreements, would have no assurance that Viking would even remain as a hedge fund for any period of time. Ultimately, the issue of whether Founders has value is irrelevant, and the court takes not position on that issue.

The evidence overwhelmingly shows that Halvorsen, Olson, and Ott agreed that they would each take only their accrued compensation and capital account balance when they left Viking and that they never agreed to an alternative operating agreement for Founders.[32] Moreover, Investors and Partners were both governed by signed short-form agreements that stated that a partner or member was entitled only to his accrued compensation and capital upon departure.[33] Thus, Olson was only entitled to his accrued compensation and the balance of his capital account.[34]

---

[32] Even if the core principles of Viking did not act as the operating agreement of Founders (and, as a matter of fact, the court finds that they did), there is little convincing evidence on this record as to what the operating agreement of Founders was. If, hypothetically, there was no agreement on the issue of what a member takes, Olson would be correct that the fair value statutes would govern. However, even in this hypothetical situation, Olson would not be entitled to the payout he seeks. All Founders held was a terminable, variable interest in Performance. Performance was not obligated to send even one dollar to Founders and Founders' interest in Performance could be (and ultimately was) terminated buy a 2 of 3 vote of the Performance Operating Committee.

[33] Olson argues that these short-form agreements do not apply to termination because they only refer to "withdrawal, retirement or death." Olson admits that these short-form agreements were not meant to capture every term of the parties' original oral agreement. The short-form agreements do not directly address termination, and could be read to mean that the "cap and comp" agreement applies to all departures or only to voluntary departures. In this situation it is appropriate for the court to consider extrinsic evidence to resolve the ambiguity. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (A contract is ambiguous "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings"). It is clear from the evidence, including the testimony and the Performance Long-Form Agreement (which did address termination and which the unsigned Investors and Partners agreements for the most part follow), that the "cap and comp" agreement was meant to apply to any type of departure, including termination.

[34] The parties agreed that Olson was paid his entire, sizeable capital account. Olson argues that the compensation he was paid for 2005 was millions less than it should have been due to a change to the co-CIOs' compensation. While such a change in compensation for Halvorsen and Ott looks suspect on the surface, the formulae for calculating compensation at Viking were constantly changing and the change appears to be reasonably linked to the increase in responsibility for the co-CIOs, including managing a portfolio that had expanded to fill the space left by the loss of Olson's TMT portfolio. Also, because in the new system Halvorsen and Ott shared the CIO duties (instead of Halvorsen performing them alone), their compensation actually

III.

As an alternative to his fair value claim, Olson argues that he is entitled to damages in a similar amount through promissory estoppel, equitable estoppel, civil conspiracy, unjust enrichment, and breach of fiduciary duties. At trial, Olson failed to prove even one of the required elements of his estoppel claims, and thus the court will enter judgment in favor of the defendants as to those claims. Olson's civil conspiracy, unjust enrichment, and breach of fiduciary duty claims also fail, due to his inability to show deprivation of value to which he was entitled.

A. Estoppel Claims

In order to establish a claim for promissory estoppel, a plaintiff must show that "(i) a promise was made; (ii) it was the reasonable expectation of the promissor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise."[35] Olson does not point to a promise by either Halvorsen or Ott. Olson only managed to show that there were two short meetings in the summer of

---

decreased in 2005. Moreover, Olson lost money for Viking in 2005 and yet was still paid approximately $9 million. Thus, the court finds that Olson was paid the full amount owed for his accrued compensation.

[35] *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000); *see also Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003).

1999 about the concept of forming Founders. At those meetings, Halvorsen and Ott stated that Olson's concept was interesting, but never promised Olson an earnout or a payout representing equity in Viking upon his departure. Quite the contrary, as discussed above, Halvorsen's and Ott's statements and actions throughout their time at Viking suggested that a departing member would only be entitled to his "cap and comp." Accordingly, Olson could not have reasonably relied on an equity payment upon leaving Viking. Moreover, it is difficult to see any detriment. Olson received approximately $150 million in compensation during his time at Viking. In addition, Olson offered no evidence of opportunities he passed up during his time at Viking that he would have taken but for the alleged equity payment he thought he would receive.

Olson's equitable estoppel claim also fails. To prevail on a claim of equitable estoppel, a plaintiff must show "(1) conduct by the party to be estopped that amounts to a false representation, concealment of material facts, or that is calculated to convey an impression different from, and inconsistent with that which the party subsequently attempts to assert, (2) knowledge, actual or constructive, of the real facts and the other party's lack of knowledge and the means of discovering the truth, (3) the intention or expectation that the conduct shall be acted upon by, or influence, the other party and good faith reliance by the other, and (4) action or forbearance by the other party amounting to a change of status to his detriment."[36] Halvorsen and Ott did not act to deceive Olson, but rather acted consistently with the "cap and comp" scheme throughout their time at Viking. When Olson threatened to leave in late 2001, Halvorsen and Ott did not bring up Founders in an effort to get him to stay–the focus was on year-to-year compensation and departure payments were never mentioned. Also, Olson did not show that he relied to his detriment on any action by Halvorsen or Ott.

Olson's estoppel claims fail for the additional reason that the alleged promises on which he bases his claims are inconsistent with the terms of the operating agreements of each Viking entity. Under Delaware law, "a party cannot assert a promissory estoppel claim based on promises that contradict the terms of a valid, enforceable contract."[37]

Even if Olson proved his estoppel claims (which he did not), he would only be entitled to reliance, not expectation, damages. While Delaware courts have recognized some instances when expectation damages may be appropriate in the promissory estoppel context, this is clearly the exception rather than the rule.[38]

---

[36] *Cornerstone Brands, Inc. v. O'Steen*, 2006 WL 2788414, at *3 n.12 (Del. Ch. Sept. 20, 2006); *see also Gillenardo v. Connor Broad. Del. Co.*, 2002 WL 991110, at *10 (Del. Super. Apr. 30, 2002).
[37] *Weiss v. Northwest Broad. Inc.*, 140 F. Supp. 2d 336, 345 (D. Del. 2001).
[38] *RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2001 WL 984689, at *14-15 (Del. Ch. Aug. 22, 2001).

The "quintessential remedy for promissory estoppel is an award of damages measured by the reliance costs reasonably incurred by the plaintiff," and an award of expectation damages for a promissory estoppel claim has generally been accompanied by a showing of the defendant's bad faith.[39]

B. Olson's Other Claims

Olson's claims of breaches of fiduciary duty, unjust enrichment, and civil conspiracy are based on the assumption that Halvorsen and Ott worked in concert to deprive him of his alleged equity rights in Viking. As discussed above, Olson agreed to give up any claim to equity in Viking in his agreement to take only "cap and comp" upon his departure. In return, Olson benefitted from full payout of his compensation every year and the ability to walk away from Viking with his entire capital account (unlike his experience at Tiger). Thus, the assumption underlying those claims, that Olson was entitled to equity in Viking, was never proven.

Moreover, what a partner or member is entitled to upon departure is addressed by the operating agreements of the various Viking entities. DRULPA states that a partner will not be liable to another partner for a breach of fiduciary duty stemming from good faith reliance on the partnership agreement.[40] The

[39] *Ramone v. Lang*, 2006 WL 905347, at *16 (Del. Ch. Apr. 3, 2006), *see also RGC Int'l*, 2001 WL 984689, at *14-15.
[40] 6 *Del. C.* § 17-1101(e). This case is distinguishable from *Juran v. Bron*, 2000 WL 1521478, at *19-20 (Del. Ch. Oct. 6, 2000), because the court finds no evidence of bad faith here. Halvorsen

Delaware Limited Liability Company Act contains a parallel provision.[41] Here, as discussed above, the operating agreements for the Viking entities uniformly provided that a departing member would receive only his accrued compensation and capital account balance upon departure. Olson received his compensation for all of 2005 and his full capital account balance. He is entitled to no more.

C. Counterclaims And Third-Party Claims

The counterclaims are not discussed in this opinion because they are based on the existence of Olson's entitlement to an earnout or the fair value of Founders and the court finds that Olson has no such entitlement.

IV.

For the foregoing reasons, judgment is entered in favor of the defendants and against the plaintiff. The counterclaims and third-party claims are dismissed. IT IS SO ORDERED.

---

and Ott merely acted in concert with the core principles of Viking and the signed operating agreements at issue. Halvorsen and Ott admit that they, like Olson, would not be entitled to any equity payout upon retirement, further evidencing that there has not been any unjust deprivation of value to support Olson's claims.

[41] 6 *Del. C.* § 18-1101(a).