IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALAN R. KAHN, Plaintiff, v. BARRY M. PORTNOY, THOMAS M. O'BRIEN, ARTHUR G. KOUMANTZELIS, BARBARA D. GILMORE, PATRICK F. DONELAN and HOPSITALITY PROPERTIES TRUST, Defendants, and TRAVELCENTERS OF AMERICA LLC, Nominal Defendant.	)	Civil Action No. 3515-CC

MEMORANDUM OPINION

Date Submitted: December 3, 2008
Date Decided: December 11, 2008

Joseph A. Rosenthal, of ROSENTHAL MONHAIT & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: James S. Notis of GARDY & NOTIS, LLP, Englewood Cliffs, New Jersey; Harold B. Obstfeld, of HAROLD B. OBSTFELD, P.C., New York, New York, Attorneys for Plaintiff.

Robert S. Saunders, Ronald N. Brown, III, and Joseph O. Larkin, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware, Attorneys for Defendants Barry M. Portnoy, Thomas M. O'Brien, Arthur G. Koumantzelis, Barbara D. Gilmore, Patrick F. Donelan and for Nominal Defendant TravelCenters of America LLC.

CHANDLER, Chancellor

Limited liability companies are primarily creatures of contact, and the parties have broad discretion to design the company as they see fit in an LLC agreement. With this discretion, however, comes the risk—for both the parties and this Court—that the resulting LLC agreement will be incomplete, unclear, or even incoherent.

In this case, plaintiff alleges that the director defendants breached their fiduciary duties to the company by approving a transaction that was allegedly designed to benefit a director at the expense of the company. As the company in this case is an LLC, the fiduciary duties of the directors are defined in the LLC agreement. This agreement, however, explicitly imports and modifies the familiar and well defined fiduciary duties from Delaware corporate law. The result is a company whose directors are governed by a modified version of the fiduciary duties of directors of Delaware corporations. Unfortunately, the agreement in this case fails to clearly articulate the contours of these contractual fiduciary duties. The result is an LLC agreement that provides an ambiguous definition of fiduciary duties and is open to more than one reasonable interpretation.

Since I am faced with a motion to dismiss for failure to state a claim, I am not allowed to choose between reasonable interpretations of ambiguous provisions of a contract. Accordingly, and for the reasons stated below, I must deny the motion to dismiss.

I. BACKGROUND

A. Procedural History

Plaintiff initiated this case by filing a derivative complaint on February 1, 2008, followed by an amended complaint on June 23, 2008. The pending motion to dismiss, filed on July 2, 2008 by the individual director defendants and the nominal defendant, seeks dismissal under Court of Chancery Rules 12(b)(6) and 23.1.

B. The Parties and the Facts

Nominal defendant TravelCenters of America, LLC ("TA" or the "Company") is a publicly traded Delaware LLC with its principal executive offices in Westlake, Ohio. TA is one of the largest operators of truck stops in the United States.[1] Plaintiff Alan R. Kahn is a TA shareholder.

Defendant Hospitality Properties Trust ("HPT") is a publicly traded real estate investment trust ("REIT"). HPT owns real property, some of which it leases to TA. Reit Management & Research LLC ("RMR") is a privately owned company held by defendant Barry M. Portnoy ("Portnoy") and his son, Adam D. Portnoy, with Portnoy as the majority beneficial owner.[2] RMR provides management services to companies that own and operate real estate, including TA and HPT.

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[1] For purposes of the motion to dismiss, the Court accepts as true plaintiff's well pleaded factual allegations. Unless otherwise noted, the facts presented in this Memorandum Opinion are drawn from the amended complaint.

[2] The complaint was voluntarily dismissed with respect to RMR on October 30, 2008.

The individual defendants are the directors of TA. Defendant Portnoy is a director of TA and HPT. Portnoy is also the founder and a director of: HRPT Properties Trust ("HRPT"), a publicly traded REIT that primarily owns office buildings; Senior Housing Properties Trust ("SNH"), a publicly traded REIT that primarily owns assisted living facilities and nursing homes; and Five Star Quality Care Inc. ("FVE"), a publicly traded company that operates senior living facilities leased from SNH. Portnoy was a partner at the law firm of Sullivan & Worcester LLP from 1978 to 1997 and was chairman of that firm from 1994 to 1997. Portnoy's wife[3] is the founder of Immigrant Learning Center, Inc. (the "ILC"), a not-for-profit adult learning center based in Malden, Massachusetts. Plaintiff alleges that the individual director defendants, RMR, and Sullivan & Worcester LLP make regular financial contributions to the ILC.

Defendant Thomas M. O'Brien is a director of TA and its President and Chief Executive Officer. O'Brien is also Senior Vice President of RMR and is President and a director of RMR Advisors, Inc. ("RMR Advisors"), an affiliate of RMR that serves as an investment advisor for seven publicly held closed end mutual funds (the "RMR Funds"). O'Brien is also the President of five of the RMR Funds and is a trustee of each of the RMR Funds.

[3] The complaint refers only to "Portnoy's wife." It is for this reason only that the Court does not refer to her by name. Am. Compl. ¶ 5.

Defendant Arthur G. Koumantzelis is a director of TA and FVE, a trustee for each of the RMR Funds, and the chairman of the board of trustees of the ILC. Koumantzelis was a director of SNH between 1999 and 2003 and was a trustee of HPT from its founding in 1995 until 2007. For 2007, Koumantzelis was paid $94,480 in fees as a director of TA, $74,440 in fees as a director of FVE, and $43,750 in fees as trustee for the RMR Funds.

Defendant Barbara D. Gilmore is a director of TA and FVE. Gilmore worked at Sullivan & Worcester LLP from 1993 to 2000. Since 2001, Gilmore has been a clerk to a judge in the United States Bankruptcy Court for the District of Massachusetts. For 2007, Gilmore was paid $89,480 in fees as a director of TA and $70,940 in fees as a director of FVE.

Defendant Patrick F. Donelan is a director of TA and a trustee of HRPT and the ILC. Donelan retired from his position as a Managing Director at Dresdner Kleinwort Wasserstein in 2001 and from July 2001 through December 2002 was Chairman and Chief Executive Officer of eSecLending (Europe) Ltd. For 2007, Donelan was paid $88,980 in fees as a director of TA and $73,600 in fees as a trustee of HRPT.

1. TA's spin-off from HPT

Portnoy founded RMR and HRPT in 1986. HRPT formed and spun off HPT in 1995 and SNH in 1999. On September 18, 2006, HPT entered an agreement to purchase TravelCenters of America, Inc. ("Old TA") for approximately $1.9 billion, and on October 10, 2006, HPT created TA as a wholly owned subsidiary. HPT retained Old TA's real estate, leased the real estate to TA, transferred Old TA's operating assets to TA, and spun off membership interests in TA to HPT shareholders.

Just prior to the spin-off, TA entered into a series of agreements with HPT and RMR. On January 29, 2007, TA, HPT, and RMR entered into an agreement whereby TA agreed to give all companies managed by RMR the right of first refusal relating to the participation by TA in any acquisition of real estate, including a right of first refusal for any lease or finance agreement for any of its locations. On January 31, 2007, TA entered into a management agreement with RMR whereby TA would pay RMR for management and administrative services. This agreement specified the nature of the relationships between TA, HPT, and RMR and provides that in the case of a conflict of interest "RMR will act on its own behalf and on behalf of HPT . . . and not on [TA's] behalf."[4]

[4] Am. Compl. ¶ 21.

2. The Petro Transaction

On May 30, 2007, HPT agreed to acquire Petro Stopping Holdings, L.P. for $630 million plus $25 million in transactions costs, and TA agreed to acquire Petro Stopping Centers, L.P. ("Petro Centers"), a truck stop operator with operations throughout the United States (collectively the "Petro Transaction"). The transaction was organized so that HPT acquired the real estate of 40 Petro Centers truck stops. HPT then leased those facilities to TA (the "Petro Lease Transaction") pursuant to a May 30, 2007 lease agreement (the "Petro Lease Agreement").

Plaintiff alleges that the terms of the Petro Lease Agreement are more favorable to HPT than to TA and require TA to pay HPT above-market rent. In support of this allegation, plaintiff alleges that a typical REIT capitalization rate of 7.5 percent is appropriate for non-distressed properties and would imply an annual rent of $49 million. Plaintiff alleges that the Petro Lease Agreement obligates TA to pay an annual rent of $62 million, representing a 9.5 percent capitalization rate.

Plaintiff alleges that TA's directors breached their fiduciary duties to TA by approving the Petro Lease Transaction, a transaction plaintiff alleges was designed to benefit HPT, RMR, and Portnoy at the expense of TA. Plaintiff contends that the terms of the Petro Lease Agreement benefit HPT because it is able to collect above-market rents and benefit RMR (and therefore Portnoy)

because RMR collects as a fee a percentage of the gross rent collected by HPT.[5] By contrast, the fees that RMR collects from TA are allegedly not affected by the above market rent because those fees are based on a percentage of TA's "gross fuel gross margin (the difference between wholesale and retail price)"[6] and non-fuel revenues.

II. ANALYSIS

A. Enforcement of the LLC Agreement

The well settled policy of the Delaware Limited Liability Company Act is to give maximum effect to the principle of freedom of contract.[7] LLC agreements are contracts that are enforced according to their terms, and all fiduciary duties, except

[5] Defendants rebut the allegation that RMR will receive increased payments from HPT as a result of the Petro Lease Transaction by pointing to a proxy statement filed by HPT that briefly describes the relationship between HPT and RMR. Ex. 2 to Defs.' Reply Brief. Even assuming the Court can take judicial notice of this document, it does not change my conclusions in this case. *See In re Tyson Foods, Inc.*, C.A. No. 1106-CC, 2007 WL 2351071, at *2-3 (Del. Ch. Aug. 15, 2007). Defendants claim that this document reveals that RMR will not receive from HPT a percentage of gross rents collected from TA because the agreement between HPT and RMR only covers rents collected from a single office building not at issue in this case. Even accepting this allegation as true, the information in the public filing also undermines defendants' claims. Earlier in the same paragraph, the document specifies that RMR receives fees from HPT based on "average real estate investments, as defined, up to the first $250 million and 0.5% thereafter, plus an incentive fee based upon increases in cash available for distribution per common share, as defined." Ex. 2 to Defs.' Reply Brief at 30. Although plaintiff cannot prevent the Court from reviewing the public document, neither can the defendant. Thus, by rebutting plaintiff's claims of a payment to RMR based on gross rents collected, defendant also introduced evidence that RMR receives payments from HPT based on cash available for distribution to HPT common shareholders. Although it is not clear to the Court from the available record, it is likely that an increase in rent collected by HPT would increase cash available for distribution to HPT common shareholders and thus increase payments to RMR.

[6] Am. Compl. ¶ 33.

[7] 6 *Del. C.* § 18-1101(b); *In re Seneca Invs. LLC*, C.A. No. 3624-CC, 2008 WL 4329230, at *1 (Del. Ch. Sept. 23, 2008).

for the implied contractual covenant of good faith and fair dealing, can be waived in an LLC agreement.[8] Accordingly, I will look to the terms of the LLC Agreement to determine the fiduciary duties the directors owe the Company and whether the directors can be personally liable if they breach those duties.

B. Rule 12(b)(6)

A complaint must be dismissed under Rule 12(b)(6) if it fails to state a claim upon which relief can be granted. Under the "notice pleading" standard of Court of Chancery Rule 8(a), the complaint need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[9] Thus, the standard under Court of Chancery Rule 12(b)(6) is "less stringent than the standard applied when evaluating whether a pre-suit demand has been excused in a stockholder derivative suit filed pursuant to Chancery Rule 23.1."[10] In evaluating whether the complaint has satisfied this burden I must: (1) accept as true all well pleaded facts; (2) make all reasonable inferences in favor of the plaintiff; and (3) only dismiss the complaint if I can determine with "reasonable certainty" that there is no set of facts that can be reasonably inferred from the well pleaded allegations

[8] 6 *Del. C.* § 18-1101(c); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290 (Del. 1999) ("The [LLC] Act can be characterized as a 'flexible statute' because it generally permits members to engage in private ordering with substantial freedom of contract to govern their relationship, provided they do not contravene any mandatory provisions of the Act.").
[9] Ct. Ch. R. 8(a). *See Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).
[10] *Id.* (quoting *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 39 (Del. 1996)).

in the complaint upon which plaintiff could prevail.[11] Of course, mere conclusory allegations are not well pleaded facts and no inferences will be drawn from them.[12]

Importantly, the Court must not choose between reasonable interpretations of ambiguous contract provisions when considering a motion to dismiss under Rule 12(b)(6).[13] Contractual provisions are ambiguous when they are "reasonably or fairly susceptible of different interpretations."[14] Because any ambiguity must be resolved in favor of the nonmoving party, defendants are not entitled to dismissal under Rule 12(b)(6) unless the interpretation of the contract on which their theory of the case rests is the "*only* reasonable construction as a matter of law."[15]

1. The LLC Agreement and the Pleading Requirements

TA is governed by the terms of the Amended and Restated Limited Liability Company Agreement of TravelCenters (the "LLC Agreement").[16] The LLC Agreement provides that the "authority, powers, functions and duties (including

[11] *See id.* at 1082-83.
[12] *See In re Coca-Cola Enters., Inc. S'holders. Litig.*, C.A. No. 1927-CC, 2007 WL 3122370, at *3 (Del. Ch. Oct. 17, 2007).
[13] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003). *See Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1292 (Del. 2007) ("[O]n a Rule 12(b)(6) motion it was error to select the 'more reasonable' interpretation as legally controlling.").
[14] *VLIW Tech.*, 840 A.2d at 615 (quoting *Vanderbilt Income and Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996)).
[15] *Id.* at 615 ("Because the provisions at issue in the Agreement are susceptible to more than one reasonable interpretation, for purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party.").
[16] The Court takes judicial notice of the LLC Agreement for purposes of the motion to dismiss. *See Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 975 n.45 (Del. Ch. 2004) (taking judicial notice of an LLC agreement presented by defendants because "plaintiffs do not dispute its authenticity or plain terms").

fiduciary duties)" of the board of directors will be identical to those of a board of directors of a business corporation organized under the Delaware General Corporation Law ("DGCL"), unless otherwise specifically provided for in the LLC Agreement. Section 7.5(a)[17] of the LLC Agreement makes several modifications to the duties owed by the directors of a Delaware corporation.

Defendants argue that the second sentence of § 7.5(a) alters the pleading standard by creating a presumption that the board of directors acted in accordance with their duties, notwithstanding that the board's decision may have been interested. According to defendants, the presumption can only be overcome by

[17] Section 7.5(a) provides, in full, as follows:

> Unless otherwise expressly provided in this Agreement or required by the Delaware LLC Act, whenever a potential conflict of interest exists or arises between any Shareholder or an Affiliate thereof, and/or one or more Directors or their respective Affiliates and/or the Company, any resolution or course of action by the Board of Directors in respect of such conflict of interest shall be permitted and deemed approved by all Shareholders, and shall not constitute a breach of this Agreement, of any agreement contemplated herein, or of any duty stated or implied by law or equity, including any fiduciary duty, if the resolution or course of action in respect of such conflict of interest is (i) approved by a Share Plurality (with interested Shareholders not counted for any purpose), or (ii) on terms no less favorable to the Company than those generally being provided to or available from unrelated third parties or (iii) fair and reasonable to the Company, taking into account the totality of the relationships between the parties involved (including other transactions that may be particularly favorable or advantageous to the Company). It shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence.

clear and convincing evidence; therefore, plaintiffs must demonstrate through clear and convincing evidence that they have rebutted this presumption and are entitled to relief. Defendants' interpretation of § 7.5(a), however, is not the only reasonable interpretation of that provision. Since the Court is deciding a motion to dismiss, I must adopt the reasonable interpretation that is most favorable to plaintiff, the nonmoving party.

The clause on which defendants rely—the second of two sentences in § 7.5(a)—must be read in its context. When read in light of its location in the LLC Agreement, the second sentence in § 7.5(a) could reasonably be interpreted to apply only to board decisions that involve a conflict between a shareholder and the board or a shareholder and the Company.

The first sentence of § 7.5(a) specifies that certain courses of action by the board of directors are deemed approved by shareholders if the course of action is "(i) approved by a Share Plurality . . . or (ii) on terms no less favorable to the Company than those generally being provided to or available from unrelated third parties or (iii) fair and reasonable to the Company . . . ."[18] Such approval is deemed to exist notwithstanding certain conflicts of interest.

[18] LLC Agreement § 7.5(a).

The second sentence of § 7.5(a)—the clause on which defendants rely—follows the sentence that deems approval of certain interested transactions. It provides:

> It shall be presumed that, in making its decision and notwithstanding that such decision may be interested, the Board of Directors acted properly and in accordance with its duties (including fiduciary duties), and in any proceeding brought by or on behalf of any Shareholder or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption by clear and convincing evidence.[19]

This sentence directly follows the first sentence in the section and is contained in the same paragraph. While it creates a presumption that certain board decisions are proper notwithstanding certain conflicts of interest, under at least one reasonable interpretation, the sentence does not create a presumption for all decisions of the board. The presumption applies to the board in making "its decision." Read in the context of the preceding sentence, it would be reasonable to interpret "its decision" to refer only to the conflicted board decisions dealt with in the first sentence of § 7.5(a). The first sentence applies to decisions of the board of directors that pose a conflict between "any Shareholder or an Affiliate thereof, and/or one or more Directors or their respective Affiliates and/or the Company." One reasonable way to read this clause is that it only includes conflicts (1) between a shareholder and the board or (2) between a shareholder and the Company, or (3)

[19] *Id.*

both. Under this reading, the clause would not apply to director decisions where there is a conflict between the directors and the Company. Thus, the second sentence of § 7.5(a) would only create a presumption for transactions in which there is a conflict between a shareholder and the board or a shareholder and the Company, but not where there is a conflict between a director and the company.

Under this reasonable interpretation, § 7.5(a) would not apply to the decision of the board to approve the challenged Petro Lease Transaction because the conflicts of interest were not between a shareholder and a director or a shareholder and the company. The Petro Lease Transaction involved a board decision in the face of a conflict between a single director (Portnoy) and the Company. Plaintiff alleges that Portnoy stood on both sides of the Petro Lease Transaction and stood to benefit personally from the transaction. The other directors allegedly acted in the best interest of Portnoy at the expense of the Company. As I have shown, under one reasonable interpretation, § 7.5(a) would not apply to the decision to approve the Petro Lease Transaction. Because the application of § 7.5(a) is ambiguous, I must adopt the reasonable interpretation that favors the nonmoving party. Under that interpretation, § 7.5(a) would not apply to the board decision that is challenged in this case.

Even assuming, *arguendo*, that § 7.5(a) applies to the decision of the board to approve the Petro Lease Transaction, the "clear and convincing" language in

§ 7.5(a) does not necessarily alter the pleading standard. The Court does not apply a standard of proof at the motion to dismiss stage of the proceedings; rather, I must only determine whether plaintiff would be entitled to relief under any reasonable interpretation of the facts alleged.[20] While it is true that the complaint must be dismissed if plaintiff would not succeed even if all his well pleaded allegations were proven true, plaintiff need not meet a heightened evidentiary standard at the pleading stage.

2. Fiduciary Duties Under the LLC Agreement

The LLC Agreement specifies that the Company will be managed by a board of directors that, subject to exceptions elsewhere in the LLC Agreement, has the same powers and duties (including fiduciary duties) as a board of directors of a corporation organized under the DGCL.[21] The directors of a Delaware corporation owe the corporation dual duties of due care and loyalty. Implicated in this case is the duty of loyalty which requires that directors act in the best interest of the company and prohibits them from using their positions as directors to further their own self-interest.[22] The business judgment rule is a presumption that the Court

[20] *See Interactive Corp. v. Vivendi Universal, S.A.*, C.A. No. 20260, 2004 WL 1572932, at *15 n.76 (Del. Ch. June 30, 2004) (revised July 6, 2004).
[21] LLC Agreement § 7.1(a).
[22] *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939). Defendants point to cases in the partnership context that suggest that a partner cannot complain about a conflict of interest if the conflict was disclosed and agreed to by the partners in forming the partnership. *See Litman v. Prudential-Bache Props. Inc.*, C.A. No. 12137, 1993 WL 5922, at *5 n.4 (Del. Ch. Jan. 4, 1993); *Boxer v.*

will not second guess decisions made by directors unless "the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process . . . ."[23]

After expressly importing corporate fiduciary duty concepts, the LLC Agreement modifies the duties owed by the TA directors. Specifically, § 7.5(a) of the LLC Agreement modifies the duties of the directors with respect to certain transactions; however, as explained above, under at least one reasonable interpretation, § 7.5(a) does not modify the directors' fiduciary duties because the challenged Petro Lease Transaction involves conflicts of interest between TA directors and the Company. Under this interpretation, the duties of the director defendants are defined by the duties owed by the directors of a Delaware

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Husky Oil Co., C.A. No. 6261, 1983 WL 17937, at *7 (Del. Ch. June 28, 1983). Defendants argue that these cases preclude plaintiff from complaining about the alleged conflicts of interest because the relationship between TA, HPT, and RMR were apparent when plaintiff acquired his interest in TA. This argument is unavailing.

Assuming, *arguendo*, that these partnership cases should be extended to the case of a publicly held LLC, the LLC Agreement expressly defines the fiduciary duties of the directors and thus negates any other implied approval of conflicted board decisions. Section 7.5(a) specifies certain conflicted board decisions that are deemed approved by shareholders or to which a presumption that the board complied with its duties applies. Section 10.2 exculpates TA directors from personal liability for certain conduct, notwithstanding that it may otherwise be a breach of duty. Thus, when plaintiff acquired his interest in TA he was entitled to rely on the explicit provisions of the LLC Agreement. These provisions impose on the TA directors the fiduciary duties of directors of a Delaware corporation, as modified by other provisions of the LLC Agreement. Thus, the express provisions of the LLC Agreement define the fiduciary duties owed by TA directors, and other disclosures do not impliedly override the express provisions of TA's primary governing document.

[23] *In re Lear Corp. S'holder. Litig.*, C.A. No. 2728-VCS, 2008 WL 4053221, at *9 n.42 (Del. Ch. Sept. 2, 2008) (quoting *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000)).

corporation. Whether the defendants can be personally liable for violating their duties, however, is governed by the exculpatory provisions in § 10.2 of the LLC Agreement.

3. The Exculpatory Provisions

The LLC Agreement contains two provisions that exculpate TA directors from personal liability for monetary damages. Both of these provisions contain exceptions for certain conduct that is not exculpated, and the two provisions define these exceptions differently.

Section 10.2(a) eliminates personal director liability for money damages for a breach of fiduciary duty except:

> (i) for any breach of such director's duty of loyalty to the Company or the Shareholders as modified by this Agreement, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or (iii) for any transaction from which such director derived an improper personal benefit.

Section 10.2(b), which apples "[n]otwithstanding anything to the contrary" in the LLC Agreement, eliminates liability for monetary damages for any "Indemnitee," which is defined[24] to include directors, unless there has been a final judgment that the person "acted in bad faith or engaged in fraud, willful misconduct or, in the case of a criminal matter, acted with knowledge that the Indemnitee's conduct was unlawful."

[24] LLC Agreement § 1.1.

It is unclear to the Court why the LLC Agreement includes two different, and arguably conflicting, provisions exculpating directors from personal liability for money damages. After much deliberation, I have been unable to explain these provisions as anything other than poor drafting or a strategy of "if one exculpatory provision is good, then two must be better." Fortunately, it is not the role of the Court to reconcile the provisions of a poorly drafted LLC Agreement. I must only apply those provisions in the context of the motion to dismiss, a context which requires the Court to interpret ambiguous provisions in favor of the nonmoving party.

Under § 10.2(a), directors may not be held personally liable for violations of the duty of loyalty *as modified* by the LLC Agreement. Thus, I must refer back to my discussion of how, under at least one reasonable interpretation, § 7.5(a) does not modify the duty of loyalty in this case. Additionally, while § 10.2(b) provides a narrower range of action for which directors can be held personally liable than does § 10.2(a), neither provision exculpates directors from personal liability where the director acted in bad faith.[25] Although it may be arguable that bad faith should also be interpreted "as modified" by the LLC Agreement, this argument is not convincing at the motion to dismiss stage for at least two reasons. First, as I have already explained, under one reasonable interpretation § 7.5(a) does not apply to

[25] Section 10.2(a) does not exculpate director "acts or omissions not in good faith" and § 10.2(b) does not exculpate directors who "acted in bad faith."

the challenged transaction. Second, § 10.2(b), which applies "[n]otwithstanding anything to the contrary" in the LLC Agreement, does not purport to alter the standard of good faith.

As explained above, in evaluating a complaint under Rule 12(b)(6), I must accept as true all well pleaded facts in the complaint and make all reasonable conclusions in plaintiff's favor.[26] I can only dismiss the complaint if I can determine with "reasonable certainty" that there is no set of facts that can be reasonably inferred from the complaint under which plaintiff would prevail.[27] Under this favorable standard, I am unable to conclude that there is no set of facts that can be reasonably inferred from the allegations in the complaint under which plaintiff could show that the director defendants acted in bad faith.

It is well settled that good faith does not constitute an independent fiduciary duty; it is encompassed within the fiduciary duty of loyalty.[28] The duty of loyalty, however, is not limited to cases in which there is a conflict of interest between a fiduciary and the company.[29] A director does not act in good faith, even if there is not a direct conflict of interest as to that director, unless the director "acts in the

[26] *See Malpiede*, 780 A.2d at 1082-83.
[27] *See id.*
[28] *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).
[29] *Id.* at 368-70 ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. There may be other examples of bad faith yet to be proven or alleged, but these three are the most salient.") (quoting *In re Walt Disney*, 906 A.2d at 67).

good faith belief that her actions are in the corporation's best interest."[30] Thus, a director does not act in good faith if the director acts with a subjective belief that her actions are not in the best interest of the corporation, such as when she is acting for the benefit of a related person at the expense of the company. This is "classic, quintessential bad faith."[31] In contrast, director action that constitutes mere gross negligence—a violation of the duty of care—cannot constitute bad faith.[32]

There is a third area of potential bad faith conduct that falls between traditional duty of loyalty violations and director action that is merely grossly negligent.[33] This category of bad faith includes conduct that can be defined as "a conscious disregard for one's responsibilities" or "intentionally fail[ing] to act in the face of a known duty to act."[34] Although the distinction between actions not in good faith and actions that are merely grossly negligent may be difficult to discern

[30] *Id.* at 370 (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)).
[31] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 65 (Del. 2006).
[32] *Id.*; *McPadden v. Sidhu*, C.A. No. 3310-CC, 2008 WL 4017052, at *9 (Del. Ch. Aug. 29, 2008).
[33] *In re Walt Disney*, 906 A.2d at 66 ("[T]he universe of fiduciary misconduct is not limited to either disloyalty in the classic sense (*i.e.*, preferring the adverse self-interest of the fiduciary or of a related person to the interest of the corporation) or gross negligence. Cases have arisen where corporate directors have no conflicting self-interest in a decision, yet engage in misconduct that is more culpable than simple inattention or failure to be informed of all facts material to the decision. To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence, should be proscribed. A vehicle is needed to address such violations doctrinally, and that doctrinal vehicle is the duty to act in good faith.").
[34] *Id.* at 66-67.

in some cases, it is nonetheless an important feature of Delaware law.[35] I need not, however, proceed further into the important issues lurking in this area of our good faith jurisprudence. There are sufficient allegations in the complaint to establish the threshold showing under Rule 12(b)(6) for the "classic, quintessential bad faith" described in the preceding paragraph.

Based on the necessarily limited record and the requisite assumptions made in plaintiff's favor at this stage, I conclude that plaintiff has made sufficient factual allegations to rebut, at least in the preliminary context of a motion to dismiss under Rule 12(b)(6), the presumption that the directors acted in good faith. To be clear, I am not concluding that the directors acted in bad faith. I am required, at this stage in the proceedings, to merely evaluate the sufficiency of the allegations in the complaint. Making all the required presumptions in plaintiff's favor, I conclude that plaintiff has met the notice pleading burden under Rule 12(b)(6).

The complaint sets forth sufficient factual allegations to show, at this preliminary stage, that Portnoy's loyalties to the company were divided with respect to the Petro Lease Transaction. As I have explained, the duty of good faith requires that Portnoy act with a good faith belief that his actions are in the best

[35] *Id.* at 65 ("The conduct that is the subject of due care may overlap with the conduct that comes within the rubric of good faith in a psychological sense, but from a legal standpoint those duties are and must remain quite distinct. Both our legislative history and our common law jurisprudence distinguish sharply between the duties to exercise due care and to act in good faith, and highly significant consequences flow from that distinction.") (Citation omitted).

interest of TA. Portnoy, as a director of HPT and TA, is therefore bound to act in the best interest of both companies. Thus, when Portnoy acted on behalf of TA in approving the transaction, his loyalties as an HPT director raise at least a reasonable doubt as to whether he was acting in the best interest of TA.[36] Additionally, Portnoy's interest in RMR means that Portnoy stands to benefit personally from the transaction if TA is bound to pay above market rents to HPT. As explained above, plaintiff has alleged that payments to HPT filter through to RMR (and Portnoy) through agreements between RMR and HPT. Intentionally acting to benefit oneself at the expense of the Company is a quintessential example of failing to act in good faith, which requires a director to act with the good faith belief that his actions are in the best interest of the company. Plaintiff's well pleaded factual allegations, which support the allegation that Portnoy used the Petro Lease Transaction to benefit himself at the expense of the Company, are sufficient allegations of bad faith to survive a motion to dismiss.

Making the same presumptions in plaintiff's favor, I am unable to conclude with reasonable certainty that the other directors acted in good faith when they approved the Petro Lease Transaction. Plaintiff alleges that the members of the TA board were beholden to Portnoy and approved the Petro Lease Transaction to

[36] Defendants argue that the second sentence of § 7.5(a) requires the Court to ignore director conflicts of interest, however, I have concluded that there is ambiguity regarding whether § 7.5(a) applies to the Petro Lease Transaction.

benefit Portnoy at the expense of TA. Plaintiff supports this allegation with specific factual allegations regarding the board members' relationships to Portnoy and Portnoy-related entities. For example, O'Brien is a director of TA, its President and Chief Executive Officer, a Senior Vice President of RMR, and President and a director of RMR Advisors. Accordingly, O'Brien owes a duty of loyalty to TA and RMR, entities that, according to the complaint, have diverging interests with respect to the Petro Lease Transaction. Additionally, the allegations in the complaint are sufficient to support, at least at the motion to dismiss stage, the claim that O'Brien was beholden to Portnoy and acted to benefit him at the expense of TA. O'Brien has extensive relationships with many Portnoy-related entities and receives compensation for his services. In addition to his positions with TA and RMR, O'Brien is also President of five of the seven RMR Funds and a trustee of each of the RMR funds. These factual allegations support plaintiff's claim that O'Brien was beholden to Portnoy and that he acted to benefit RMR and Portnoy at the expense of TA.

Plaintiff's allegations with respect to the other three directors are sufficient for similar reasons. Koumantzelis, Gilmore, and Donelan all serve as directors of other Portnoy related entities and are compensated for their service. Koumantzelis, for example, is a director of TA and FVE, a trustee for each of the RMR Funds, and was a trustee of HPT from its founding in 1995 until 2007. For 2007, he

received $94,480 in fees as a director of TA, $74,440 in fees as a director of FVE, and $43,750 in fees as trustee for the RMR Funds. As detailed above, Portnoy has extensive relationships with each of these entities. Portnoy is the founder and a director of FVE. Portnoy is also a portfolio manager at each of the RMR funds, and his son, Adam D. Portnoy, is the President of each of the RMR funds. Koumantzelis is also the Chairman of the Board of Trustees of the ILC, a not-for-profit organization founded by Portnoy's wife. Koumantzelis, like the other director defendants, makes regular financial contributions to the ILC.

The complaint alleges similar facts with respect to Gilmore and Donelan. Gilmore is a director of TA and FVE. For 2007, she was paid $89,480 in fees as a director of TA and $70,940 in fees as a director of FVE, compensation the complaint alleges is material to Gilmore because it exceeds the compensation from her position as a clerk in the United States Bankruptcy Court. Gilmore also worked at Sullivan & Worcester LLP from 1993 to 2000, during part of which time Portnoy was a partner and chairman of the firm. Donelan is a director of TA and a trustee of HRPT and the ILC. In 2007, Donelan was paid $88,980 in fees as a director of TA and $73,600 in fees as a trustee of HRPT.

These allegations support plaintiff's contention that the directors were beholden to Portnoy and acted to benefit RMR and Portnoy at the expense of the Company. Additionally, there is not a single director on TA's board that is free of

the influence of being otherwise involved in the web of Portnoy-related entities that could question whether the board was acting to benefit the Company and not Portnoy individually. The allegation that the directors intentionally acted to benefit RMR and a director at the expense of the Company, as supported by the well pleaded factual allegations in the complaint, is sufficient to survive the motion to dismiss. In light of the favorable inferences I must draw in plaintiff's favor, I am unable to conclude with reasonable certainty that there is no set of facts that can be inferred from these allegations upon which plaintiff could show that the directors acted in bad faith. Accordingly, plaintiff has met the notice pleading burden of Rule 12(b)(6).

C. Demand Futility

In order to maintain a derivative suit on behalf of an LLC, a member must either (1) make a demand on the managers of the company to bring the suit or (2) show that "an effort to cause those managers or members to bring the action is not likely to succeed."[37] Thus, if demand is not made on the board of directors or managers of the LLC,[38] the complaint must allege with particularity the reasons

[37] 6 *Del. C.* § 18-1001; Ct. Ch. R. 23.1; *see VGS, Inc. v. Castiel*, C.A. No. 17995, 2003 WL 723285, at *11 (Del. Ch. Feb. 28, 2003).

[38] Although 6 *Del. C.* § 18-1001 refers to "managers" of an LLC, under the LLC Agreement TA is managed by a board of directors. Accordingly, I refer to TA's managing body as the board of directors.

why seeking such demand would have been futile.[39] Since plaintiff does not claim that demand was made on the board of directors, the analysis turns on whether plaintiff properly alleged demand futility.

In evaluating demand futility, the Court looks to case law governing derivative suits brought on behalf of a corporation.[40] Under the familiar *Aronson* test, in order to establish demand futility, the allegations in the complaint must allege particularized facts that establish a reasonable doubt that "(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[41] The prongs of the *Aronson* test are in the disjunctive; therefore, if plaintiff creates a reasonable doubt as to either prong of the test, demand is excused.[42] In evaluating the allegations in the complaint, I must draw reasonable inferences that logically flow from particularized factual allegations in plaintiff's favor.[43] Mere conclusory allegations do not constitute well pleaded facts.[44]

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[39] Ct. Ch. R. 23.1; *VGS, Inc.*, 2003 WL 723285, at *11.
[40] *Id.* at *11 ("[C]ase law governing corporate derivative suits is equally applicable to suits on behalf of an LLC.").
[41] *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984); *Brehm v. Eisner*, 746 A.2d 244, 253-55 (Del. 2000); *VGS, Inc.*, 2003 WL 723285, at *11.
[42] *Brehm*, 746 A.2d at 256.
[43] *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004).
[44] *Martha Stewart*, 845 A.2d at 1048; *White v. Panic*, 783 A.2d 543, 549 (Del. 2001).

Turning to the first prong of the *Aronson* test, it is helpful to start by briefly reviewing what is meant by disinterested and independent. A director is interested in a transaction when the director receives a personal benefit (or detriment) from a transaction that is not shared by the other shareholders of the corporation and the benefit is of subjective material significance to the director.[45] A director can also be interested in a transaction where the director stands on both sides of the transaction. Thus, the first prong of the *Aronson* test requires inquiry into whether the director was interested in the underlying transaction.[46] While a director has an interest, in some sense, in any decision that involves approving a derivative suit that names the director as a defendant, normally the threat of personal liability against a director is not enough, standing alone, to challenge the interestedness of a director.[47] A director may be interested in the decision, however, if the challenged transaction is so egregious on its face that it gives rise to a "substantial likelihood" of personal liability for the director.[48]

Independence, on the other hand, does not necessarily involve an inquiry into whether the director will derive a benefit (or detriment) from the particular transaction or whether the director stood on both sides of the transaction. Rather,

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[45] *See Martha Stewart*, 845 A.2d at 1049; *Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002); *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *In re NVF Co. Litig.*, C.A. No. 9050, 1989 WL 146237, at *4 (Del. Ch. Nov. 22, 1989).
[46] *See Martha Stewart*, 845 A.2d at 1049.
[47] *Aronson*, 473 A.2d at 815.
[48] *Id.*

inquiry into a director's independence focuses on whether the director's decision was impartial and based on the merits of the subject to be decided.[49] In other words, the independence inquiry focuses on whether the director's loyalties were in any way divided such that the director will be unable to exercise business judgment in deciding whether the corporation should pursue a claim.[50] A director, for example, is not independent if the director is "beholden" to another such that the director's decision would not be based on the merits of the subject before her.[51] Thus, plaintiff can show lack of independence by creating "a reasonable doubt that a director is not so 'beholden' to an interested director . . . that his or her 'discretion would be sterilized.'"[52]

Defendants argue that the first prong of the *Aronson* test is unavailable to plaintiff because § 7.5(a) of the LLC Agreement modifies the requirement for demand futility by creating a presumption that the decision of whether to pursue a lawsuit is disinterested, notwithstanding that the board may be interested. This argument is unconvincing for at least two reasons.

First, as I explained above, while defendants' interpretation of § 7.5(a) may be reasonable, it is certainly not the only reasonable interpretation. When read in its proper context, it is reasonable to conclude that the second sentence of § 7.5(a)

[49] *Rales*, 634 A.2d at 936.
[50] *In re NVF*, 1989 WL 146237, at *4.
[51] *Rales*, 634 A.2d at 936.
[52] *Martha Stewart*, 845 A.2d at 1050 (quoting *Rales*, 634 A.2d at 936).

applies only to conflicts between a shareholder and the board or a shareholder and the Company, and not to conflicts between a director and the Company. Under this interpretation, § 7.5(a) would not alter the *Aronson* analysis. I will not choose between reasonable interpretations of ambiguous provisions of the contract at the motion to dismiss stage of the proceedings.

Neither of the conflicts that allegedly plagued the board in this case involve a conflict between a shareholder and a director or a shareholder and the company. The *Aronson* test deals with two general categories of conflicts of interest: (1) those that arise in the underlying transaction that is being challenged; and (2) those that arise as a result of the directors being faced with the decision of whether to cause the company to sue themselves or a fellow director. Plaintiff alleges that Portnoy and O'Brien stood on both sides of the Petro Lease Transaction and that Koumantzelis, Gilmore, and Donelan were so beholden to Portnoy that their discretion in making their own determination based on the facts of the transaction was sterilized. Both these alleged conflicts are between the directors and the Company. Additionally, the directors are faced with the decision of whether to pursue a derivative action against themselves for approving a transaction, and any resulting conflict is between the directors and the Company. The *Aronson* analysis in this case does not involve any transaction where there is a conflict of interest between a shareholder and a director or a shareholder and the Company.

Accordingly, the presumption created by the second sentence of § 7.5(a) does not alter the application of *Aronson*.

Second, even assuming, *arguendo*, that § 7.5(a) applies to the board's decision whether to initiate the suit in this case, I am not convinced that the demand futility requirement or the *Aronson* requirements are altered by the LLC Agreement. Unless plaintiff has made a demand on the board to bring the suit, plaintiff must show that an effort to cause the directors to bring the suit would not have been likely to succeed.[53] The *Aronson* test guides the Court in making this determination and requires evaluating the directors' interestedness and independence. Defendants argue that the second sentence of § 7.5(a) negates the first prong of the *Aronson* test. Recall, however, that the sentence at issue only purports to create a presumption that the board acted properly—a presumption that can be overcome by clear and convincing evidence. As I explained above, plaintiff is not required to meet any standard of proof in the pleadings; the complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[54] Thus, I am not convinced that § 7.5(a) would change the *Aronson* test, even if it applies to the challenged transaction.

Although the LLC Agreement certainly *could* have altered the demand futility and *Aronson* requirements, at this point in the case the application of the

[53] 6 *Del. C.* § 18-1001; Ct. Ch. R. 23.1.
[54] Ct. Ch. R. 8(a).

LLC agreement is far too unclear for me to conclude that § 7.5(a) negates the first prong of the *Aronson* test. Section 7.5(a) creates a rebuttable presumption that certain director action was proper and in accordance with the director's duty, notwithstanding that it was interested; it does not address suits by shareholders or whether demand must be made on the board of directors. Although it could have, § 7.5(a) does not purport to eliminate or modify the ability of shareholders to bring a suit on behalf of the company or modify the prerequisites for bringing such a suit. Additionally, although the first prong of the *Aronson* test requires an inquiry into director independence *and* disinterestedness, § 7.5(a) addresses interestedness but not independence. Although defendants may ultimately be able to make such a showing in this case, at this point in the proceedings I am unable to reasonably conclude that § 7.5(a) negates the first prong of the *Aronson* test.

In light of this determination, I must apply the *Aronson* test to determine if a demand on the board would have been futile. To justify a finding of demand futility under the first prong of *Aronson*, plaintiff must create a reasonable doubt as to the disinterestedness or independence of at least three of the five TA directors.[55] Taking plaintiff's well pleaded facts as true, I conclude that the complaint creates a

[55] *Aronson*, 473 A.2d at 814-15.

reasonable doubt as to the disinterestedness or independence of a majority of the TA board.[56]

1. Portnoy and O'Brien

Portnoy and O'Brien are both interested under the first prong of *Aronson*. Portnoy is a director of TA and HPT. Portnoy was clearly interested in the Petro lease transaction between TA and HPT because as a director he owes fiduciary duties to both companies. Additionally, Portnoy owns RMR which receives fees from HPT that are allegedly increased by above market rent payments from TA.

O'Brien is (1) a director of TA and its President and Chief Executive Officer; (2) Senior Vice President of RMR; (3) President and a Director of RMR Advisors; (4) President of five of the seven RMR Funds; and (5) a trustee of each of the RMR funds. Because of the payments RMR receives from HPT, O'Brien's position as Senior Vice President of RMR creates a reasonable doubt as to whether O'Brien stood on both sides of the challenged transaction. As a director of TA and an officer of RMR, O'Brien owes fiduciary duties to both TA and RMR. Because the interests of these two companies were in conflict for purposes of the Petro Lease Transaction, O'Brien stood on both sides of the transaction and was therefore interested in the transaction. Additionally, the extensive relationships

[56] Because plaintiff has met the pleading burden under the first prong of *Aronson*, I need not decide whether plaintiff would have succeeded under the second prong.

between O'Brien and several Portnoy-related entities are sufficient to create a reasonable doubt whether O'Brien is so beholden to Portnoy that he would be unable to exercise independent business judgment regarding this derivative action.

2. Koumantzelis, Gilmore, and Donelan

The well pleaded facts in plaintiff's complaint are also sufficient to create a reasonable doubt that Koumantzelis, Gilmore, and Donelan are independent for purposes of deciding whether to cause the Company to pursue a derivative claim against the directors for approving the Petro Lease Transaction. Ordinarily, reasonable director compensation, without more, is not enough to establish that a director was not independent. In this case, however, the facts alleged in the complaint suggest that Koumantzelis, Gilmore, and Donelan had relationships with numerous other Portnoy-related entities and received compensation for serving as directors or officers for such entities.[57]

As detailed above, Koumantzelis has close ties to many Portnoy-related entities. For example, Koumantzelis is a director of TA and FVE, a trustee for each of the RMR Funds, and was a director of HPT from its founding in 1995 until 2007. For 2007, he received $94,480 in fees as a director of TA, $74,440 in fees as a director of FVE, and $43,750 in fees as trustee for the RMR Funds. Portnoy has extensive relationships with each of these entities. Koumantzelis is also the

[57] *See In re NVF*, 1989 WL 146237, at *4-5.

Chairman of the board of Trustees of the ILC and, like the other director defendants, makes regular financial contributions to the ILC. I am convinced that these relationships, taken together, are sufficient to raise a reasonable doubt that Koumantzelis would be capable of exercising independent business judgment.

I also conclude that plaintiff has raised a reasonable doubt as to the independence of Gilmore and Donelan, both of whom are compensated for their TA board service and for service on the board of other Portnoy-related entities.[58] For 2007, Gilmore was paid $89,480 in fees as a director of TA and $70,940 in fees as a director of FVE. This compensation is allegedly material to Gilmore because it exceeds the compensation she receives as a clerk in the United States Bankruptcy Court. Gilmore also worked at Sullivan & Worcester LLP while Portnoy was a partner and chairman of the firm. Donelan is a director of TA and a trustee of HRPT. For 2007, he was paid $88,980 in fees as a director of TA and $73,600 in fees as a trustee of HRPT. Donelan is also a trustee of the ILC, an organization to which he and the other TA directors make regular financial contributions.

Under *Aronson*, receiving reasonable compensation for serving as a director for one other company related to an interested director, without more, will usually

[58] As I have already found that a reasonable doubt exists as to the disinterestedness or independence of three of the five directors, demand would be excused even if plaintiff failed to raise a reasonable doubt as to the independence of Gilmore and Donelan.

not be enough to create a reasonable doubt as to director independence. In this case, however, all of the TA directors are involved in the web of Portnoy-related entities; there is not a single director on the TA board who could serve as an independent voice, free of the potential influence of serving in a paid position of another Portnoy-related entity. Adding to this concern is the fact that the allegations in this case arise from the relationships of the TA board and other Portnoy-related entities, specifically HPT and RMR. When the relationships of all the TA board members to other Portnoy-related entities are considered together with the allegations of a conflicted transaction with other Portnoy-related entities, it becomes clear that there is a reasonable doubt that the TA board would be able to exercise disinterested and independent business judgment in deciding whether to pursue the derivative action. Because I have found that at least a majority of the TA directors were interested or not independent, demand on the company is excused as futile.

III. CONCLUSION

Ultimately, this is a case involving contract interpretation. The contract at issue, the LLC Agreement, attempts to define the directors' fiduciary duties by importing and modifying corporate law fiduciary duty principles. The LLC Agreement, however, leaves ambiguity regarding these duties. As a result, I am unable, in the context of a motion to dismiss, to resolve this ambiguity by choosing

among reasonable interpretations of the contract. After careful consideration of the allegations in the complaint, I conclude that plaintiff has alleged sufficient facts to survive the motion to dismiss. For the foregoing reasons, defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.