

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

K&K SCREW PRODUCTS, L.L.C., a)
Delaware limited liability company,)
)
Plaintiff,)
)
v.) Civil Action No. 5633-VCP
)
EMERICK CAPITAL INVESTMENTS,)
INC., a Delaware corporation,)
)
Defendant.)

OPINION

Submitted: April 28, 2011

Decided: August 9, 2011

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PARSONS, Vice Chancellor.

In 1999, a company sold substantially all of its assets to a buyer in exchange for, among other things, \$60 million in cash and an \$11 million unsecured promissory note. The buyer obtained the majority of the cash component of the consideration by taking out loans secured by liens on the assets it had just purchased in the transaction. Pursuant to a subordination agreement, the seller would not receive substantial payments on its promissory note until the senior secured loans were paid off.

Over the next two years, the buyer began to suffer severe financial distress and defaulted on its senior secured loans. The senior lenders agreed, however, not to foreclose on their liens and seize the company's assets if the company obtained additional financing. To this end, in 2001, the buyer entered into a series of transactions that permitted it to obtain an additional cash loan of \$1.5 million and a guaranty of future payments to the tune of \$2.5 million from an affiliate of one of its members. In addition, if and when the buyer paid back the cash loan, it also would be required to pay the affiliate a bonus of \$5 million. The new cash loan would be secured by the company's assets and would be senior to the seller's promissory note.

Immediately after the buyer's board approved the transaction in 2001, the seller and its sole stockholder brought suit to preliminarily enjoin the transaction from closing. This effort failed and the transaction closed. Shortly thereafter, the seller dismissed that litigation without prejudice. Since then, the buyer and the seller, as well as the seller's stockholder, vigorously have disputed, both in and out of court, the propriety of the transaction in 2001 and its effect on the priority of the seller's promissory note.

As such, the buyer brings this action seeking various declarations from this Court that it did not breach any duty, contractual or noncontractual, or commit any type of fraud when it entered into the transaction in 2001. In addition, it seeks declarations that, to the extent it may have breached any duty or committed fraud, any claims by the seller on these grounds are now time-barred. The buyer also has moved for summary judgment on its claims.

The seller responds by arguing that the buyer's requested declarations do not present a controversy ripe for adjudication by this Court and moves to dismiss the Complaint for lack of subject matter jurisdiction. Alternatively, the seller asks the Court to stay this action in favor of a co-pending arbitration proceeding or, at a minimum, to permit it leave to take discovery so it can respond to the buyer's motion for summary judgment.

For the reasons stated in this Opinion, I grant the buyer's motion for summary judgment and deny the seller's motion to dismiss, its request for a stay, and its request for leave to take discovery.

I. BACKGROUND

A. Parties

Plaintiff, K&K Screw Products, LLC ("K&K LLC" or the "Company"), is a Delaware limited liability company with its principal place of business in Glendale Heights, Illinois. It produces high-volume precision made-to-print automatic screw

machine products for use in multiple industries.¹ Defendant, Emerick Capital Investments, Inc. (“ECI”), is a Delaware corporation formerly known as K&K Screw Products, Inc.² ECI’s sole stockholder is Jack Emerick.

B. Facts³

1. The 1999 Transaction

On January 13, 1999, K&K Screw Products, Inc. entered into an Asset Purchase Agreement (“APA”) under which it agreed to sell all of its assets to a group of investors led by Continental Illinois Venture Corporation (“CIVC”).⁴ To acquire the assets, the investors formed K&K LLC,⁵ a limited liability company with eight initial members. K&K LLC is governed by the K&K Screw Products Acquisition, LLC Operating Agreement (the “Operating Agreement”).⁶

¹ Verified Compl. (the “Complaint”) ¶ 7.

² *Id.* ¶ 8.

³ Many of the facts recited here are undisputed and are drawn from the Complaint and the seller’s Answer. Thus, I have provided citations to the record only to the extent pertinent facts appear to be controverted.

⁴ For ease of discussion, I refer to the transactions under and related to the execution of the APA as the “1999 Transaction.”

⁵ K&K LLC was formerly known as K&K Screw Products Acquisition, LLC. In addition, Emerick became a minority member of the Company, owning approximately 20% of its common equity. The remaining interests were acquired by CIVC or CIVC’s coinvestors.

⁶ Aff. of David Dolan (“Dolan Aff.”) Ex. 29, the Operating Agreement.

Upon selling its assets, K&K Screw Products, Inc. changed its name to ECI and received: (1) \$60 million in cash; (2) an \$11 million promissory note (the “Seller’s Note”);⁷ and (3) the buyer’s assumption of certain liabilities of ECI. K&K LLC financed the asset purchase, in part, through a combination of funds invested by its members totaling approximately \$19,471,853.⁸ To make up the balance of the purchase price, K&K LLC obtained loans from Fleet Capital Corporation (“FCC”) and a group of other lenders (collectively, the “Senior Lenders”).⁹ These loans (the “Senior Loans”) were executed under a Loan and Security Agreement dated as of January 13, 1999 (the “Senior Loan Agreement”) and secured by liens on, and security interests in, substantially all of K&K LLC’s post-acquisition assets.¹⁰

On the same day that ECI and K&K LLC entered into the APA, ECI entered into a Subordination Agreement with FCC that outlined the rights and obligations of the various parties with respect to the Seller’s Note.¹¹ Under the Subordination Agreement, ECI agreed that it would not seek or demand payment on any amounts due or owing on the

⁷ Compl. Ex. C, the Seller’s Note.

⁸ CIVC invested \$15,402,483, Emerick invested \$3,894,370, and the other members invested a combined \$175,000. *See* Operating Agreement Sched. 1.

⁹ GMAC Commercial Finance LLC acquired the Senior Loans in 2004. *See* Dolan Aff. Ex. 12. The term “Senior Lenders” in this Opinion includes GMAC.

¹⁰ *Id.* Ex. 1, the Loan and Security Agreement.

¹¹ *Id.* Ex. 22, the Subordination Agreement.

Seller's Note from K&K LLC until K&K LLC paid in full all "Senior Debt," including debt resulting from the Senior Loans.¹²

2. K&K LLC's 2001 financial crisis

In conjunction with an overall slow-down in the manufacturing sector, K&K LLC's financial performance declined dramatically in 2000. In fact, by September 2000, it had violated several of the covenants in the Senior Loan Agreement.¹³ These violations constituted Events of Default under that Agreement, which gave the Senior Lenders the right to seek immediate payment of all amounts owed and to foreclose on their liens secured by the assets K&K LLC purchased from ECI in 1999.¹⁴

According to K&K LLC, the Senior Lenders then began pressuring K&K LLC to raise additional capital and offered to waive the Events of Default if it was able to do so at sufficient levels.¹⁵ Faced with unattractive alternatives such as bankruptcy and attendant liquidation, K&K LLC's managers sought to negotiate with the Senior Lenders regarding a potential solution involving a capital influx.

¹² *Id.* § 2. Under certain limited conditions, K&K LLC was permitted to make quarterly interest payments on the Seller's Note beginning February 1, 2004 and a single principal payment on January 13, 2006. *Id.* § 3. These payments, however, were conditioned upon there being no "Default" or "Event of Default" under the Subordination Agreement. *Id.*

¹³ Dolan Aff. ¶¶ 4-5.

¹⁴ *See id.* ¶ 5.

¹⁵ *Id.* ¶ 6.

On January 31, 2001 K&K LLC's board of managers (the "Board"), which included Emerick, Leonard Friedel, Marcus Wedner, Daniel Wilson, and David Dolan, met in the first of a series of meetings to discuss the Company's strategy for negotiating with the Senior Lenders.¹⁶ From approximately March 2001 until May 2001, the Board engaged in "extensive talks" with the Senior Lenders about a possible loan restructuring and finance arrangements. To forebear action on the Company's Events of Default, the Senior Lenders insisted that any possible arrangement include an infusion of capital into K&K LLC and an immediate payment of some amount of the Senior Loans. Eventually, the Lenders indicated they would accept a \$4 million support package, including a \$1.5 million direct payment on the Senior Loans and a \$2.5 million guaranty of future payments.¹⁷

On May 31, 2001, the Board met to discuss, among other things, the Senior Lenders' proposal. As with two prior Board meetings, Emerick did not attend.¹⁸ According to K&K LLC, the state of the severely depressed credit markets around this time hampered the Company's ability to raise capital using outside sources.¹⁹ As such, the Company reached a preliminary agreement with CIVC Partners Fund LP ("CIVC LP"), an entity affiliated with CIVC, which agreed to provide the \$1.5 million in cash

¹⁶ The Company sent notice to Emerick, but he did not attend. *Id.* ¶ 8.

¹⁷ *See id.* ¶ 12.

¹⁸ Dolan Aff. ¶ 13; Def.'s Ans. to Verified Compl. ("Def.'s Ans.") ¶ 24.

¹⁹ Dolan Aff. ¶ 14.

(the “CIVC Loan”) and the guaranty that the Senior Lenders’ sought in their proposal. According to the Company, the loan was to carry a 14% interest rate due to the high risk associated with lending \$1.5 million to a highly distressed business. Furthermore, this loan would be secured by substantially all of K&K LLC’s assets and would be senior to the Seller’s Note and subordinate only to the Senior Loans.²⁰ Also as part of the contemplated transaction, CIVC LP would be entitled to a lump sum payment of \$5 million if and when the \$1.5 million cash loan plus interest was paid in full (the “CIVC Bonus”). Finally, the CIVC Loan called for K&K LLC to amend its Operating Agreement to enable it to issue \$10 million in preferred membership units to its current investors who agreed to certain conditions, including reimbursing CIVC LP for the \$2.5 million guaranty.²¹

3. The Board approves the 2001 Transaction

On August 8, 2001, the Board provided its members with copies of an Overview & Meeting Notification, which detailed the proposed restructuring with CIVC LP.²² On August 10, 2001, it held a meeting to consider the proposed restructuring transaction, with Emerick, Friedel, Dolan, and Wedner participating.²³ Recognizing that the proposed restructuring would further subordinate the Seller’s Note held by ECI, Emerick, as ECI’s

²⁰ Aff. of Jack Emerick (“Emerick Aff.”) ¶ 9.

²¹ See Dolan Aff. ¶ 16; Def.’s Ans. ¶ 27.

²² See Dolan Aff. Ex. 4.

²³ See *id.* Ex. 5.

sole stockholder, requested an opportunity to submit to the Board an alternative financing proposal by August 14, 2001.²⁴ The Board agreed and indicated that it would inquire about the Senior Lenders' receptiveness to an alternative restructuring proposal from Emerick. The Board resolved by majority approval, however, that in the absence of a viable alternative from Emerick by August 14, K&K LLC would take steps to complete the restructuring proposal as outlined in the August 8 Board meeting notice.²⁵

On August 14, Emerick informed Dolan that he would not be in a position to make an alternative financing proposal. The Board then finalized its approval for the CIVC LP proposal and implemented it. The parties disagree, however, as to whether Emerick voted in favor of the proposed transaction.²⁶

On October 11, 2001, CIVC LP issued to K&K LLC a \$1.5 million secured loan subordinate only to the Senior Loans and posted a \$2.5 million guaranty (the "2001 Transaction").²⁷ In exchange, the Senior Lenders agreed to waive the Company's Events of Default and restructure certain terms of the Senior Loans as memorialized in Amendment No. 3, Consent and Waiver to Loan and Security Agreement, dated as of October 11, 2001.²⁸ In conjunction with the CIVC Loan, CIVC LP entered into a

²⁴ *Id.* ¶ 18; Def.'s Ans. ¶ 31.

²⁵ *See* Dolan Aff. Exs. 4-5; Def.'s Ans. ¶ 32.

²⁶ *Compare* Compl. ¶ 33 *with* Def.'s Ans. ¶ 32.

²⁷ With these funds, K&K LLC paid down \$1.5 million of the balance owed on the Senior Loans. Dolan Aff. ¶ 21.

²⁸ *See id.* Ex. 6.

Subordination Agreement with the Senior Lenders, which subordinates that loan to the Senior Loans (the “CIVC Subordination Agreement”).²⁹

K&K LLC asserts that by entering into the 2001 Transaction, it avoided the necessity of filing for bankruptcy and has been able to continue doing business to this day.

4. Subsequent disputes arise between K&K LLC and ECI

Shortly after the Board approved the 2001 Transaction, K&K LLC’s relations with ECI and Emerick broke down. ECI claims that, although the Board sought Emerick’s consent to the 2001 Transaction in September of that year, he refused to give it, in part, because he believed the Transaction would subordinate the Seller’s Note, dilute his equity interest in the Company, and unfairly favor CIVC.³⁰ On December 7, 2001, ECI filed suit against the managers of K&K LLC, except Emerick, in the Chancery Division of the Circuit Court of Cook County, Illinois (the “First Illinois Action”). ECI claimed the 2001 Transaction was a self-interested transaction that unfairly favored the Company’s majority owner and, therefore, constituted a breach of the defendants’ fiduciary duties to the Company. ECI sought injunctive relief to prevent the Transaction

²⁹ *See id.* Exs. 24-28.

³⁰ Def.’s Combined Br. in Opp’n to Pl.’s Mot. for Summ. J. and in Support of Def.’s Mot. to Dismiss, or in the Alternative, to Stay (“DAB”) 6. Similarly, I refer to Plaintiff’s opening brief as “POB,” its response to Defendant’s answering brief as “PRB,” and Defendant’s response to PRB as “DRB.”

from closing.³¹ After the Illinois court denied ECI's request for preliminary injunctive relief—allegedly, because the Transaction already had closed—ECI voluntarily dismissed the suit without prejudice in 2002.

Since the First Illinois Action was dismissed, the parties to this suit, along with Emerick and others, have continued to butt heads on several fronts. On April 28, 2010, for example, Emerick, in his personal capacity, instituted a mediation against K&K LLC's members who were signatories to the Operating Agreement in 2001, alleging that they breached that Agreement by, among other things, causing the Company to enter into the 2001 Transaction. After the mediation attempt failed, the dispute was submitted to arbitration before the American Arbitration Association ("AAA"). The disputants then engaged in discovery regarding whether the members breached the Operating Agreement and whether Emerick suffered consequential damages as a result of that breach. A hearing in the arbitration is scheduled for October 2011. Emerick apparently instituted the mediation because he learned that K&K LLC was preparing to pay off the Senior Loans in the spring of 2010, but that the Company did not have sufficient funds to then repay the CIVC Loan, the CIVC Bonus, and the nearly \$33 million owed on the Seller's

³¹ In support of its application for injunctive relief in the First Illinois Action, ECI argued that the Operating Agreement required the Board to obtain Emerick's consent before it entered into a material financial transaction with a member or an affiliate of a member. *Id.* (citing Operating Agreement §§ 7.2, 7.2.3). It also contended that the defendants needed Emerick's consent to amend the Operating Agreement to permit the creation of the preferred units contemplated in the 2001 Transaction. *Id.*

Note.³² As a result, ECI argues that one of the ways Emerick has been harmed by the 2001 Transaction is that it will cause K&K LLC to be unable to repay the Seller's Note, thereby diminishing the value of his interest in ECI.

In addition, on August 20, 2010, after this suit was filed, ECI and Emerick brought a separate action against CIVC and CIVC LP in Illinois state court, alleging that they tortiously interfered with Emerick's rights under the Operating Agreement when CIVC LP loaned money to the Company in 2001 (the "Second Illinois Action").³³ K&K LLC argues that, like the First Illinois Action and the arbitration, ECI and Emerick's claims in the Second Illinois Action again focus on the propriety of the 2001 Transaction and its effect on the Seller's Note.

5. K&K LLC's attempts to secure a new lender

K&K LLC alleges that the various complaints by ECI over the years have hindered its ability to secure a new senior lender. Although the Senior Loans required repayment in full by January 13, 2004, the Company was unable to do so at that time or since. Hence, the Subordination Agreements and a series of amendments to them remain in force. Moreover, the Company has been in default on its Senior Loans since 2003 and the Senior Lenders have not waived the 2003 or later Events of Default. To prevent the Senior Lenders from foreclosing on their liens on the Company's assets, the Company

³² *Id.* at 7.

³³ At the Argument, counsel for K&K LLC reported that the Second Illinois Action was dismissed with prejudice a few weeks earlier. Tr. of Apr. 28, 2011 Argument ("Tr.") 54.

has been forced to secure forbearance agreements with onerous conditions and incur additional fees and obligations.³⁴ K&K LLC further asserts that, to obtain more favorable terms, it has been working to reach an agreement with a new senior lender to assume the current Senior Loans.³⁵ It contends, however, that these efforts have been hampered by the uncertainty caused by ECI and Emerick's numerous claims against the Company and persons affiliated with it in various forums. Therefore, to remove that cloud of uncertainty, the Company filed this action.

C. Procedural History

Plaintiff filed a single-count Complaint on July 14, 2010, seeking a declaratory judgment that, among other things, ECI “has no legally valid or viable claim based on the [2001 Transaction] and the Seller’s Note”³⁶ ECI answered the Complaint on August 4, 2010. On November 2, Plaintiff moved for summary judgment on its declaratory judgment claim. On December 15, ECI moved to dismiss the Complaint for lack of subject matter jurisdiction. Both motions were fully briefed and I heard argument on them on April 28, 2011. This Opinion constitutes my rulings on these two motions.

D. Parties’ Contentions

In seeking summary judgment on Count I of the Complaint, Plaintiff contends that it satisfies the requirements for declaratory relief under 10 *Del. C.* § 6501. Specifically, it

³⁴ See Dolan Aff. ¶ 37; *Id.* Exs. 8-11, 15, 18-20.

³⁵ *Id.* ¶ 38.

³⁶ Compl. ¶ 54.

argues that it is entitled as a matter of law to a declaration that K&K LLC did not breach any contractual obligation, express or implied, owed to ECI by entering into the 2001 Transaction. Plaintiff also seeks a declaration that, to the extent it owed noncontractual duties to ECI, which it characterizes as a third-party creditor of the Company, K&K LLC and its managers did not breach any such duty and, even if they did, ECI's claims are now barred by the doctrine of laches and the analogous limitations period.

In response, ECI urges the Court to deny summary judgment for K&K LLC because it has failed to identify an actual case or controversy between the parties to this litigation. Specifically, ECI argues that to the extent any cloud of litigation hangs over K&K LLC based on events arising from the 2001 Transaction, it is not caused by any of the issues on which K&K LLC seeks declaratory relief in this action. Rather, according to ECI, "the real controversy over the 2001 Transaction is whether the Members breached the Operating Agreement by causing the [C]ompany to enter into the 2001 Transaction without Emerick's consent and whether and to what extent that breach[] caused damaged to Emerick."³⁷ ECI contends that these issues are fairly presented in the ongoing arbitration proceeding, as is required under the Operating Agreement. ECI avers that it has not asserted since the First Illinois Action, nor does it have current plans to assert or reassert, claims relating to the substance of any of K&K LLC's requested declarations. Therefore, it contends that K&K LLC's Complaint impermissibly requests that this Court

³⁷ DAB 13.

issue an advisory opinion regarding those issues and should be dismissed for lack of subject matter jurisdiction.

In addition, ECI argues that the Company's motion should be denied because it failed to demonstrate that it is entitled to judgment as a matter of law on the issue of whether the managers breached their fiduciary duties to ECI by entering into the 2001 Transaction. Alternatively, ECI requests leave to take discovery regarding K&K LLC's "alleged need for the declaratory judgments it seeks" or entry of a stay of this action pending resolution of the contemporaneous arbitration between Emerick and certain of K&K LLC's members.

II. ANALYSIS

A. Defendant's motion to dismiss for lack of subject matter jurisdiction

Because the issue of subject matter jurisdiction is a potentially dispositive threshold issue,³⁸ I consider first whether the Complaint pleads a justiciable case or controversy. Having determined that it does, I then turn to whether Plaintiff is entitled to summary judgment.

1. The applicable standard under Rule 12(b)(1)

ECI argues that the Complaint should be dismissed pursuant to Court of Chancery Rule 12(b)(1) because the Court lacks subject matter jurisdiction to grant the declaratory relief K&K LLC seeks. This Court will dismiss an action under Rule 12(b)(1) if the

³⁸ See *Gen. Elec. Co. v. Star Techs., Inc.*, 1996 WL 377028, at *1 (Del. Ch. July 1, 1996).

record, which may include evidence outside of the pleadings, indicates that the Court does not have subject matter jurisdiction over the plaintiff's claim.³⁹ The plaintiff bears the burden of establishing subject matter jurisdiction, and "where the plaintiff's jurisdictional allegations are challenged through the introduction of material extrinsic to the pleadings, he must support those allegations with competent proof."⁴⁰

2. Plaintiff has plead an actual case or controversy ripe for determination by the Court

K&K LLC argues that there is an active and ongoing controversy relating to the 2001 Transaction ripe for adjudication between it and ECI. Specifically, it contends that ECI, and its sole stockholder, Emerick, continue to harbor claims against K&K LLC regarding the propriety of the 2001 Transaction with CIVC LP. It cites the fact that, in 2001, ECI sued K&K LLC in the First Illinois Action to try to enjoin that Transaction from closing. Although that action terminated in 2002, it only was dismissed without prejudice. Plaintiff further asserts that the arbitration Emerick instituted in 2010 against members of the Company similarly pertains to claims related to the propriety of the 2001 Transaction.⁴¹ K&K LLC also alleges that disputes exist over conflicting claims of right with respect to the Seller's Note, the 2001 Transaction, and the parties' resulting rights

³⁹ See *Pitts v. City of Wilm.*, 2009 WL 1204492, at *5 (Del. Ch. Apr. 27, 2009); *Sloan v. Segal*, 2008 WL 81513, at *6 (Del. Ch. Jan. 3, 2008).

⁴⁰ *Pitts*, 2009 WL 1204492, at *5 (internal quotation marks omitted).

⁴¹ POB 14. K&K LLC also points to the Second Illinois Action as further evidence that ECI maintains an adverse legal interest to K&K LLC with respect to claims relating to the 2001 Transaction. *Id.*

and obligations. It contends that these disputes are ripe for adjudication in this Court because there is a real possibility that K&K LLC will pay off the Senior Loans imminently, at which time both the Seller's Note and the CIVC LP Loan will come due, thereby forcing the parties to confront the issue of the propriety of the 2001 Transaction in the context of determining which subordinated creditor gets priority.

ECI, on the other hand, argues that the issues on which K&K LLC seeks declaratory judgment are not ripe for adjudication and that its complaint, therefore, seeks an impermissible advisory opinion from the Court. For support, ECI contends that neither it nor Emerick has ever claimed or threatened to claim that K&K LLC breached the Seller's Note or the Subordination Agreement, or that the 2001 Transaction was the product of fraud or a fraudulent conveyance on the part of the Company. Similarly, ECI asserts that while it accused K&K LLC and its managers in the First Illinois Action of breaching their fiduciary duties to ECI by entering into the 2001 Transaction, it voluntarily dismissed these claims in 2002 and has not reasserted or threatened to reassert them since. Based on these facts, ECI avers that K&K LLC has not "proven that ECI or even Emerick is currently asserting [or has a 'present intention' to assert] any of the claims about which K&K LLC seeks declaratory relief."⁴² As such, ECI contends that to the extent there is any live, ripe controversy between the parties, it is grounded in the

⁴² DAB 11; DRB 3-5 (noting that ECI's motion to dismiss is based on its allegation that "ECI has not asserted, has not threatened to assert and does not intend to assert any of the claims raised in the Complaint.").

claims relating to the Operating Agreement asserted in the arbitration, and does not involve the declarations sought in this action.

a. The case or controversy requirement

Pursuant to Delaware’s Declaratory Judgment Act, 10 *Del. C.* § 6501, Delaware courts have the power “to declare rights, status and other legal relations whether or not further relief is or could be claimed.”⁴³ The purpose of the statute is to provide parties whose legitimate interests are cast into doubt by the assertion or threat of assertion of adverse claims with an opportunity to obtain judicial resolution before their adversaries bring suit against them.⁴⁴ The Act, therefore, is a practical timing device that permits courts to adjudicate controversies earlier than “the stage at which a matter is traditionally justiciable.”⁴⁵

The Act’s timing innovation, however, is subject to the limitation under Delaware law that declaratory relief is only available if an actual case or controversy between the parties exists.⁴⁶ As such, the Supreme Court has explained that the claims put forth by

⁴³ 10 *Del. C.* § 6501.

⁴⁴ See *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1237-38 (Del. Ch. 1987); see also *KLM Royal Dutch Airlines v. Checchi*, 698 A.2d 380, 382 (Del. Ch. 1997) (“[T]he objective of [a declaratory] action is to advance the stage of litigation between the parties in order to address the practical effects of present acts of the parties on their future relations. In this way the declaratory judgment serves to ‘promote preventive justice.’”).

⁴⁵ See *Rollins Int’l, Inc. v. Int’l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973).

⁴⁶ See, e.g., *Stroud v. Milliken Ents., Inc.*, 552 A.2d 476, 479-80 (Del. 1989); *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964); *Certain Underwriters at Lloyd’s London v. Nat’l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at *6-7

the plaintiff still must meet the “prerequisites” of a live controversy. That is, the plaintiff’s claims must:

(1) . . . involv[e] the rights or other legal relations of the party seeking declaratory relief; (2) . . . in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) . . . between parties whose interests are real and adverse; [and] (4) [that involves an] issue . . . ripe for judicial determination.⁴⁷

If one of these elements is not satisfied, the Court risks rendering an advisory opinion, which is impermissible under Delaware law.⁴⁸

It is not clear from ECI’s briefs precisely which of the above elements it believes is not satisfied here. ECI essentially couches its argument for a lack of justiciable controversy in its allegations that it has no present intent to assert any of the claims against K&K LLC identified in the Complaint and that the real controversy between the parties is in the arbitration.⁴⁹ As such, ECI’s position implicates considerations of

(Del. Ch. Dec. 21, 2007) (“For a dispute to be settled by a court of law, the issue must be justiciable, meaning that courts have limited their powers of judicial review to ‘cases and controversies.’”), *aff’d*, 962 A.2d 916 (Del. 2008); *Energy P’rs, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *6 (Del. Ch. Oct. 11, 2006) (“An actual controversy must exist for declaratory judgment jurisdiction.”); *Mulford v. Dep’t of Natural Res. & Env’tl. Control*, 2007 WL 4576616, at *2 (Del. Super. Nov. 5, 2007) (“[F]or a declaratory judgment to be issued, an actual controversy must exist.”).

⁴⁷ See, e.g., *Stroud*, 552 A.2d at 479-80 (citing *Rollins Int’l, Inc.*, 303 A.2d at 662-63); *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *12-13 (Del. Ch. July 14, 2008); *Nat’l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at *6-7; *Schick*, 533 A.2d at 1238.

⁴⁸ See *Stroud*, 552 A.2d at 479-80; *Energy P’rs, Ltd.*, 2006 WL 2947483, at *6.

⁴⁹ See DRB 3; Def.’s Ans. ¶ 53.

ripeness in element four and, arguably, considerations concerning whether the parties have interests in this suit that are real and adverse, as required in element three. Beginning with the latter, I discuss each controverted element in turn.

b. The parties have interests that are real and adverse

For purposes of 10 *Del. C.* § 6501, in order to avoid the risk of issuing an advisory opinion, ECI must have a real and adverse interest as to the substance of the declarations K&K LLC seeks. Indeed, “there is no basis for invoking declaratory relief against one who has no role in contesting a claim.”⁵⁰ If a defendant has no interest that would be affected by a declaration, the defendant properly cannot be said to have a real and adverse interest to the Plaintiff.⁵¹

In *Kirkwood Fitness & Racquetball Clubs, Inc. v. Mullaney*, a health club in Delaware shuttered its doors at its Kirkwood Highway location. Thereafter, a number of its members filed claims with the Delaware Division of Consumer Protection (“DCP”) on the ground that the club did not offer alternative facilities within fifteen miles driving distance of the old location as is required by Delaware’s Health Spa Regulation, 6 *Del. C.* § 4201.⁵² The club argued that the statute should be interpreted to mean a fifteen mile radius, not driving distance. The director of the DPC held a quasi judicial hearing to determine whether the claimants were entitled to their refunds and held for the claimants.

⁵⁰ *Wilm. Trust Co. v. Barron*, 470 A.2d 257, 262 (Del. 1983).

⁵¹ *See Kirkwood Fitness & Racquetball Clubs, Inc. v. Mullaney*, 2011 WL 2623949, at *2 (Del. Super. June 29, 2011).

⁵² *Id.* at *1.

The club then brought suit in the Superior Court, seeking a declaration that, among other things, its interpretation of the statute was correct and naming the DPC director and the director of the Fraud Division of Delaware's Department of Justice as defendants. The court dismissed the club's suit, in part, because it found an absence of a controversy between parties whose interests were real and adverse.⁵³ In particular, the court explained that under Delaware law, a judicial officer has no cognizable interest in seeking to have his rulings sustained, so the director, who acted in a quasi judicial role at the hearing, had no interest that would have been affected by the requested declaration.⁵⁴

Unlike the director in *Kirkwood*, ECI has an interest real and adverse to K&K LLC in contesting this action because the declarations K&K LLC seeks would affect ECI. For one thing, K&K LLC's declarations pertain to rights and obligations arising out of certain contracts related to the 2001 Transaction, including some to which ECI is a party, like the Seller's Note and the Subordination Agreement. Therefore, as a party to these contracts, ECI's interests potentially would be affected by declarations of this Court limiting its right to bring suit regarding certain issues arising from such contracts.⁵⁵

⁵³ *See id.* at *2.

⁵⁴ *Id.*

⁵⁵ *See Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 668 A.2d 763, 766 (Del. Super. 1995) ("It is undisputed that the first three criteria [for a declaratory judgment] exist. Mt. Hawley had an insurance contract with JCI. This action, if it proceeds, will determine whether the obligations of that contract will be fulfilled. As such, it involves a right and a legal relation to JCI. As the other party to the D & O insurance contract, JCI has a direct interest in contesting this action. JCI might be liable if Mt. Hawley does not have to pay coverage. Whether or not the obligation

Moreover, the record suggests that ECI's interests with respect to the Transaction and the above-mentioned contracts are adverse to K&K LLC's interests. ECI's Answer in this action, for example, indicates that it believes it has valid claims against K&K LLC arising out of the 2001 Transaction.⁵⁶ Similarly, ECI indicated to K&K LLC as recently as 2008 that it has "numerous claims" against the Company and "reserves all rights" to assert them against it.⁵⁷ In fact, ECI made clear at the Argument that it has not and would not waive its right to "pursue claims [relating to the 2001 Transaction against K&K LLC] at a later point in time if circumstances justify it."⁵⁸ That ECI contends it has no present intention to assert such claims against K&K LLC and that the real controversy is in the arbitration does not change the fact that it has real and adverse interests *vis-à-vis* K&K LLC based on its efforts to reserve all of its potential challenges to the validity of the 2001 Transaction. Thus, to the extent ECI argues that K&K LLC failed to establish the third prong of the declaratory judgment test, I hold that its position lacks merit.

c. This dispute is ripe

Ripeness refers to whether a suit has been brought at the correct time. It is essential for a controversy to be justiciable and, therefore, for the Court to have subject

of a multi-million dollar contract ought or need to be fulfilled between the parties to that contract, that obligation represents interests that are real and adverse.") (internal citations omitted).

⁵⁶ See Def.'s Ans. ¶ 54.

⁵⁷ D.I. 34 Ex. 1 (response from Emerick to K&K LLC's Mark O. Ollinger dated February 8, 2008).

⁵⁸ See Tr. 6.

matter jurisdiction over it.⁵⁹ To determine whether a controversy is ripe, a court must make a practical judgment as to whether the “interest in postponing review until the question arises in a more concrete and final form is outweighed by the immediate and practical impact on the party seeking relief.”⁶⁰ In general, an action is not ripe when it is contingent, meaning that it is dependent on the occurrence of some future event(s) before its factual predicate is complete.⁶¹ Indeed, the Supreme Court has cautioned trial courts not to declare the rights of parties before they are convinced that, among other things, the material facts of the relevant dispute are static and the rights of the parties are “presently defined rather than future or contingent.”⁶² Thus, declaratory relief is appropriate with

⁵⁹ See, e.g., *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006); *Am. Ins. Ass’n v. Del. Dep’t of Ins.*, 2006 WL 3457623, at *2 (Del. Super. Nov. 29, 2006).

⁶⁰ See, e.g., *Energy P’rs, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *7 (Del. Ch. Oct. 11, 2006); *Am. Ins. Ass’n*, 2006 WL 3457623, at *2; *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1233, 1239 (Del. Ch. 1987); see also *Stroud v. Milliken Ents., Inc.*, 552 A.2d 476, 480 (Del. 1989) (citing *Continental Air Lines, Inc. v. C.A.B.*, 522 F.2d 107, 124-25 (D.C. Cir. 1975)).

⁶¹ *Multi-Fineline Electronix, Inc. v. WBL Corp.*, 2007 WL 431050, at *8 (Del. Ch. Feb. 2, 2007); *Energy P’rs, Ltd.*, 2006 WL 2947483, at *7.

⁶² *Stroud*, 552 A.2d at 481; see also *KLM Royal Dutch Airlines v. Cheechi*, 698 A.2d 380, 382 (Del. Ch. 1997) (“Determining whether the parties’ dispute is ready for decision requires consideration of, *inter alia*, the present effects of the challenged conduct versus the future harm to be suffered by the plaintiff if resolution is delayed, the likelihood of a change in the factual circumstances, and the legal issues involved.”). The Court also has explained that another relevant consideration is the degree to which the trial court believes future litigation appears “unavoidable.” *Id.*; *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964) (“There must be in existence a factual situation giving rise to immediate, or about to become immediate, controversy between the parties. The court to

respect to claims based on facts that already have occurred and which do not depend on the occurrence of a future, contingent event.

The premise of ECI's argument against the existence of a ripe controversy is that neither it nor Emerick has asserted or threatened imminently to assert or reassert claims relating to the declarations K&K seeks. ECI misapprehends the ripeness standard, however, because whether or not an adverse party will choose to bring suit against a declaratory plaintiff at some future juncture does not make a controversy between the parties contingent and, thus, disqualified for declaratory relief. Indeed, under Delaware law, the "willingness of the parties to litigate is immaterial" in determining whether a controversy is ripe.⁶³ Thus, the fact that ECI has not asserted or threatened to assert or reassert the various claims it might have against K&K LLC does not render K&K LLC's application for declaratory relief a contingent, speculative venture that would require the Court to issue an advisory opinion.

Furthermore, the record does not support ECI's position that it has no "present intention" to assert or reassert at any point any of the claims arising from the 2001 Transaction that K&K LLC identified in the Complaint. First, ECI filed the Second Illinois Action as recently as 2010. Although it did not name K&K LLC as a defendant in that action, ECI's claims involved the propriety of the 2001 Transaction. Second, as

entertain jurisdiction of the cause must be convinced that the 'actual controversy' in all probability would result in litigation sooner or later.").

⁶³ See, e.g., *Stroud*, 552 A.2d at 480; *Energy P'rs, Ltd.*, 2006 WL 2947483, at *7.

discussed above, ECI's Answer suggests that it believes it has valid claims against K&K LLC arising out of the Transaction.⁶⁴ In fact, ECI made clear at the Argument, like it did in out-of-court correspondence as recently as 2008,⁶⁵ that it has not and would not waive its right to "pursue claims [relating to the 2001 Transaction against K&K LLC] at a later point in time if circumstances justify it."⁶⁶ While ECI claims to have no present intention to pursue such claims, the record reflects that it has not released those claims or stipulated that it would not pursue them.

As to the requirements for a ripe dispute, I find that all material facts giving rise to ECI's potential claims regarding the propriety of the 2001 Transaction have occurred and are static. The Company entered into the Transaction in 2001 and the documents governing and related to that transaction have been in place for almost a decade. Other than the question of whether ECI will sue K&K LLC on its claims, the only contingent fact that arguably remains is whether the Company will repay fully its Senior Loans. The record indicates, however, that K&K LLC is forecasting that this contingency will occur "imminently."⁶⁷ Assuming the Company pays off its Senior Loans, it then must determine which of at least two obligations to pay next: ECI's Seller's Note or the junior secured CIVC LP Loan. The record demonstrates that this question is highly

⁶⁴ See Def.'s Ans. ¶ 54.

⁶⁵ D.I. 34 Ex. 1 (response from Emerick to K&K LLC's Mark O. Ollinger dated February 8, 2008).

⁶⁶ See Tr. 6.

⁶⁷ See Tr. 53; Def.'s Ans. ¶ 46.

controverted based on ECI's complaints about the 2001 Transaction. Under these circumstances, the Court reasonably can infer that litigation on this issue likely is inevitable.

Finally, I note that the record supports a reasonable inference that K&K LLC is suffering current harm due to the prospect of a future suit by ECI against it based on this very issue. For example, the uncertainty of creditor priority and other issues created by the aspersions ECI has cast on the 2001 Transaction appears to have contributed to K&K LLC's inability to obtain a new senior lender and more favorable loan terms.⁶⁸ Until it can find a new lender or pay off the Senior Loans, K&K LLC will continue to be subject to onerous conditions and additional fees and obligations in order to stave off a foreclosure on the Company's assets securing the Senior Loans.⁶⁹

As a practical matter, therefore, I find no reason to delay review of K&K LLC's claims, especially in light of the immediate and practical impact the uncertainty created by ECI's potential claims has had on K&K LLC's ability to refinance its existing Senior Loans. Thus, K&K LLC has met its burden to demonstrate an actual controversy that is

⁶⁸ See Dolan Aff. ¶ 39 ("Each financial institution with whom [Dolan has] had discussions has reacted negatively to ECI's allegations and claims regarding the ECI's Seller's Note.").

⁶⁹ See *id.* ¶ 37 & Ex. 20 (noting that, for example, the Thirteenth Amendment and Forbearance Agreement dated June 30, 2010 increased the interest rate on the Senior Loans and required the Company to pay an additional \$25,000 per month to secure a forbearance until January 31, 2011).

ripe for adjudication by this Court and, accordingly, I deny ECI's motion to dismiss under Rule 12(b)(1).

B. Defendant's Request to Stay this Action

ECI further asserts that if the Court determines that the Complaint should not be dismissed under Rule 12(b)(1), it should stay this action in favor of the pending arbitration between Emerick and certain of K&K LLC's members. In support of this position, ECI argues that the "real" controversy between the parties is whether the members of K&K LLC, other than Emerick, breached the Operating Agreement by causing the Company to enter into the 2001 Transaction without Emerick's consent. Moreover, it contends that staying this action would avoid the risk of inconsistent rulings about the propriety of the 2001 Transaction and the wasteful adjudication of duplicative issues. According to ECI, a stay also would comport with Delaware's public policy favoring arbitration because, as mentioned above, the "real" controversy currently is being litigated in the arbitration proceeding.

The Court of Chancery possesses the inherent power to manage its docket, including the discretion to stay a case pending the resolution of an arbitration on the basis of "comity, efficiency, or common sense."⁷⁰ Moreover, when determining whether to stay a case whose claims are not subject to arbitration, this Court may take into

⁷⁰ See, e.g., *SRG Global, Inc. v. Robert Family Hldgs., Inc.*, 2010 WL 4880654, at *10 (Del. Ch. Nov. 30, 2010); *Nutzz.com, LLC v. Vertrue Inc.*, 2006 WL 2220971, at *11 (Del. Ch. July 25, 2006); *Salzman v. Canaan Capital P'rs, L.P.*, 1996 WL 422341, at *5 (Del. Ch. July 23, 1996).

consideration the potential that a ruling in the arbitration will preclude further litigation in the case before the Court and vice versa, as well as the burden attendant to litigating two similar actions in different forums.⁷¹ Ultimately, the Court must make a practical judgment as to whether a stay is warranted under the circumstances of each case.

Having considered the nature and extent of the arbitration, I find that staying the action in this Court is unwarranted under the circumstances. First, while both proceedings deal with actions taken concerning the results of the 2001 Transaction, there is little chance that resolution of the claims in the arbitration will obviate the need for or preclude further litigation in this case. To begin with, the two proceedings involve different parties. The arbitration is between Emerick and various other K&K LLC members.⁷² In contrast, the parties to this action are K&K LLC itself and ECI; Emerick is not a party. In addition, the claims in the two proceedings involve different contracts. While the K&K LLC Operating Agreement is at the heart of the arbitration, this action centers on the Seller's Note, the Subordination Agreement, and the CIVC Subordination Agreement. Finally, and most importantly, although the claims in the two proceedings depend to a degree on some of the same operative facts regarding the circumstances and details of the 2001 Transaction, they involve fundamentally different disputes. In the

⁷¹ *SRG Global, Inc.*, 2010 WL 4880654, at *10-11; *Salzman*, 1996 WL 422341, at *4-5.

⁷² *See Dolan Aff. Exs. 32-33.* The members who are parties to the arbitration are CIVC Partners Fund, LLC, Bruce C. Stevens, Leonard G. Friedel, Andrew J. Bahfleth, David F. Dolan, Michael Newell, and Tangram Partners, Inc. *See id.*

arbitration, Emerick accuses the opposing K&K LLC members of, among other things, breaching the Operating Agreement by failing to obtain Emerick's consent to proceed with the 2001 Transaction.⁷³ In this action, on the other hand, K&K LLC seeks various declarations regarding the propriety of the 2001 Transaction as it relates to the rights, duties, and obligations of K&K LLC and ECI under the Seller's Note and Subordination Agreements.

I consider these differences material and conclude that proceeding with both actions simultaneously would not be duplicative or waste judicial resources. The differences noted also serve to mitigate the risk of subjecting the parties to this action to inconsistent rulings regarding the 2001 Transaction.⁷⁴ Indeed, ECI effectively concedes that resolution of one proceeding would not necessarily have any preclusive effect regarding the 2001 Transaction in the other proceeding.⁷⁵

⁷³ *See id.* Ex. 33 at 5.

⁷⁴ For example, a finding by this Court that K&K LLC did not breach any contractual or fiduciary duty to ECI regarding the 2001 Transaction would not necessarily be inconsistent with a potential finding by the arbitration panel that the K&K LLC members in that proceeding violated the Operating Agreement by failing to obtain Emerick's consent before entering into that same Transaction.

⁷⁵ *See, e.g.*, DRB 6 (“The Claims in the arbitration will not be resolved in this proceeding, nor should they be.”); *id.* at 7 (acknowledging that the arbitration “does not address the supposed claims raised in the Complaint”).

Finally, Delaware's public policy favoring arbitration of claims⁷⁶ does not justify staying this case. Here, unlike the Operating Agreement at issue in the arbitration, neither the Seller's Note nor the Subordination Agreement underlying K&K LLC's Complaint contains an arbitration clause. As such, neither party can require the other to submit claims arising out of or related to these contracts to arbitration.⁷⁷

Because ECI cannot require K&K LLC to submit the claims at issue in this proceeding to arbitration and because the arbitration and this action involve different parties, contracts, and disputes, I find there is little practical reason to stay this action in favor of the pending arbitration. Therefore, I deny ECI's request for a stay and turn, instead, to the merits of K&K LLC's motion for summary judgment.

C. Plaintiff's Motion for Summary Judgment

Having found that the Complaint pleads an actual live controversy that is ripe for adjudication by this Court, I now turn to the merits of K&K LLC's motion for summary judgment.

1. The applicable standard for summary judgment

K&K LLC is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

⁷⁶ See *Salzman v. Canaan Capital P'rs, L.P.*, 1996 WL 422341, at *4 (Del. Ch. July 23, 1996).

⁷⁷ See *id.* ("[S]ince arbitration is a consensual proceeding, absent a contract to arbitrate, the Court may not require a party to submit to arbitration.").

judgment as a matter of law.”⁷⁸ When considering a motion for summary judgment, the Court must view the evidence and the inferences drawn from the evidence in the light most favorable to the nonmoving party.⁷⁹ Moreover, summary judgment will be denied when the legal question presented needs to be assessed in the “more highly textured factual setting of a trial.”⁸⁰ The Court, thus, “maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application.”⁸¹

2. Plaintiff’s requested declarations

The Complaint claims that K&K LLC is entitled to a declaratory judgment that ECI has no legally valid or viable claim against it based on the 2001 Transaction.⁸² In its opening brief, K&K LLC provided a more specific list of ten declarations that it seeks in this action (the “Declarations”). They are that:

1. K&K LLC did not breach ECI’s Seller’s Note by entering into the 2001 [Transaction];

⁷⁸ *Twin Bridges Ltd. P’ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

⁷⁹ *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

⁸⁰ *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

⁸¹ *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

⁸² Compl. ¶ 54.

2. K&K LLC did not breach ECI's Subordination Agreement by entering into the 2001 [Transaction];
3. ECI is an unsecured creditor of K&K LLC and, as such, K&K LLC did not owe and did not breach any fiduciary duty to ECI under Delaware law by entering into the 2001 [Transaction];
4. ECI is an unsecured creditor of K&K LLC and, as such, K&K LLC did not owe and did not breach any fiduciary duty to ECI under Illinois law by entering into the 2001 [Transaction];
5. ECI is an unsecured creditor of K&K LLC and, as such, K&K LLC's Managers did not owe and did not breach any fiduciary duty to ECI under Delaware law by entering into the 2001 [Transaction];
6. ECI is an unsecured creditor of K&K LLC and, as such, ECI does not have standing to assert a direct claim for breach of fiduciary duty against K&K LLC's Managers under Delaware law based on the 2001 [Transaction] and [its] alleged effect on ECI's Seller's Note;
7. Any breach of fiduciary duty claim that ECI might assert against K&K LLC and/or its Managers arising out of the 2001 [Transaction] is barred by the statute of limitations and/or the doctrine of laches under Illinois and Delaware law;
8. ECI's Seller's Note and Subordination Agreement are governed by Illinois law, and ECI cannot assert a claim against K&K LLC for breach of the implied covenant of good faith and fair dealing under Illinois law based on the 2001 [Transaction] and [its] alleged effect on ECI's Seller's Note; []
9. Any fraudulent transfer or fraudulent conveyance claim that ECI might assert against K&K LLC based on the 2001 [Transaction] is barred by the applicable statute of limitations and/or the doctrine of laches under Illinois and Delaware law[;] [and,]

10. Any fraud [or] fraudulent inducement claim that ECI might assert against K&K LLC based on ECI's Seller's Note, ECI's Subordination Agreement, or the 2001 [Transaction] is barred by the applicable statute of limitations and/or the doctrine of laches under Illinois and Delaware law.⁸³

For ease of analysis, I have divided these Declarations into four groups as follows: Group 1—Declarations 1 and 2 regarding breaches of contract; Group 2—Declarations 3-7 regarding breaches of fiduciary duties; Group 3—Declaration 8 regarding breach of the implied covenant of good faith and fair dealing; and Group 4—Declarations 9 and 10 regarding various forms of fraud. I address Plaintiffs' motion for summary judgment as to each of these groups seriatim.

3. Application of the standard to the facts of this case

a. Group 1: Declarations 1 and 2 regarding alleged breaches of the Seller's Note and the Subordination Agreement

K&K LLC argues that its relationship with ECI was, at all times, contractual and the scope of that relationship was defined by the Seller's Note and the Subordination Agreement.⁸⁴ It contends that “[n]othing in either [agreement] prevented K&K LLC from incurring further debt—including secured debt senior to ECI's unsecured Seller's Note, like the loan from CIVC LP”—and that the agreements did not “otherwise restrict

⁸³ POB 23-24.

⁸⁴ Pursuant to § 6(b) of the Seller's Note and § 17 of the Subordination Agreement, each contract is governed by the laws of Illinois.

the terms on which K&K LLC might incur any such debt.”⁸⁵ Therefore, according to the Company, the 2001 Transaction did not breach the Seller’s Note or the Subordination Agreement under Illinois law. Having considered the express and unambiguous language of both contracts, I find that K&K LLC is correct that neither contract prevented or restricted the Company from incurring additional, senior secured debt or otherwise impairing the priority of the Seller’s Note.

ECI’s only response on this issue was that, because it has never asserted or threatened to assert claims that K&K LLC breached either the Seller’s Note or the Subordination Agreement, K&K LLC’s requested declarations in Group 1 “raise a hypothetical issue, not an actual controversy.”⁸⁶ In other words, ECI couched its response entirely in terms of its failed justiciability argument. Indeed, ECI did not otherwise respond to the merits of K&K LLC’s contentions on this issue either in its briefs or at the Argument.

Based on the express language of the contracts at issue, K&K LLC has met its burden as the party moving for summary judgment to show that it is entitled to judgment as a matter of law that it did not breach the Seller’s Note or the Subordination Agreement by entering into the 2001 Transaction. “In the face of a properly supported motion for summary judgment, the non-moving party must produce evidence that creates a triable

⁸⁵ *Id.* at 16. K&K LLC further avers that neither agreement addresses what K&K LLC may or may not do with respect to issuing additional debt or equity. *Id.*

⁸⁶ DAB 11.

issue of fact or suffer the entry of judgment against it.”⁸⁷ ECI has not done so here. Furthermore, because “[i]ssues not briefed are deemed waived,”⁸⁸ I find that ECI has failed to carry its burden to rebut K&K LLC’s prima facie showing on the breach of contract issues in Group 1 and has waived its right to attempt to do so.

Therefore, I find that K&K LLC is entitled to the declaratory relief it seeks as to Declarations 1 and 2 and hold that K&K LLC did not breach the Seller’s Note or the Subordination Agreement by entering into the 2001 Transaction.

b. Group 2: Declarations 3-7 regarding alleged breaches of fiduciary duties to ECI by K&K LLC and its managers

K&K LLC also seeks various declarations relating to claims ECI might make regarding alleged breaches of fiduciary duties allegedly owed to ECI by K&K LLC and its managers. Specifically, K&K LLC seeks declarations that it did not owe fiduciary duties to ECI as an unsecured creditor of the Company, under either Delaware or Illinois law, and that, if it did owe such duties, it did not breach them by entering into the 2001 Transaction. K&K LLC also seeks declarations that its managers did not owe fiduciary duties to ECI and that, to the extent they did, ECI does not have standing to assert a direct claim for breach of fiduciary duty against them under Delaware law. Finally, K&K LLC argues that, to the extent ECI was owed fiduciary duties by K&K LLC or its managers and was damaged by a breach of those duties, ECI is barred by the doctrine of laches or

⁸⁷ *In re Nantucket Is. Assocs. Ltd. P’ship Unitholders Litig.*, 810 A.2d 351, 360 (Del. Ch. 2002).

⁸⁸ *Emerald P’rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

the analogous statutes of limitations under Delaware and Illinois law from pursuing those claims.

I begin with K&K LLC's time-bar argument. As a court of equity, this Court generally analyzes questions of time bars under the equitable doctrine of laches. Laches bars a plaintiff from pursuing a claim if she waited an unreasonable length of time before asserting her claim and the delay unfairly prejudiced the defendant.⁸⁹ While statutes of limitations are not automatically controlling in actions in equity, "[a]bsent a tolling of the limitations period, a party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches."⁹⁰

Here, because the declaratory judgments requested by K&K LLC pertain to breaches of fiduciary duty, I consider the relevant limitations period for this type of claim.⁹¹ As I explained in *Petroplast Petrofisa Plasticos S.A. v. Ameron International Corp.*, "where a cause of action at law arises outside of Delaware but litigation is brought

⁸⁹ *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2011 WL 2623991, at *14 (Del. Ch. July 1, 2011); *CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, at *5 (Del. Ch. Jan. 28, 2011). To prevail on a laches defense, a defendant must prove that: (1) the plaintiff had knowledge of his claim; (2) he delayed unreasonably in bringing that claim; and (3) the defendant suffered resulting prejudice. *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009).

⁹⁰ *Whittington*, 991 A.2d at 9; *In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 811-12 (Del. Ch. 2009) ("Even though this is a court of equity, equity follows the law, and this court will apply statutes of limitations by analogy."), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 2011 WL 13545 (Del. Jan 3, 2011).

⁹¹ *See Petroplast*, 2011 WL 2623991, at *15 (noting that because the plaintiff's claim sounded in breach of contract, the Court would consider the relevant limitations period for that type of claim in its laches analysis).

in Delaware, our courts look to Delaware’s ‘borrowing statute’ to determine the applicable limitations period.”⁹² The borrowing statute provides that:

Where a cause of action arises outside of [Delaware], an action cannot be brought in a court of [Delaware] to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of [Delaware], or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.⁹³

The limitations period for breaches of fiduciary duty is three years under Delaware law⁹⁴ and five years under Illinois law.⁹⁵ Therefore, pursuant to Delaware’s borrowing statute, Delaware’s shorter limitations period of three years arguably is the analogous statute of limitations for purposes of laches.

⁹² *Id.*; see also 10 Del. C. § 8121; *VLIW Tech., LLC v. Hewlett-Packard Co.*, 2005 WL 1089027, at *12 (Del. Ch. May 4, 2005). In the context of this declaratory judgment action, ECI has not reasserted its claims from the First Illinois Action or brought new claims asserting breaches of fiduciary duties against K&K LLC or its managers. But, because ECI potentially might argue that its cause of action for such breaches accrued in Illinois, where the Seller’s Note was made and where K&K LLC’s principal place of business is located, Illinois law would be relevant under the borrowing statute. See Seller’s Note § 6(b) (“This Note has been delivered at and shall be deemed to have been made in Chicago, Illinois . . .”). As discussed below, however, whether a potential claim accrued in Illinois or Delaware is immaterial for purposes of this case.

⁹³ 10 Del. C. § 8121.

⁹⁴ 10 Del. C. § 8106; *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), *aff’d*, 752 A.2d 112 (Del. 2000).

⁹⁵ 735 ILL. COMP. STAT. 5/13-205; *Fuller Family Hldgs., LLC v. N. Trust Co.*, 863 N.E.2d 743, 756 (Ill. App. Ct. 2007).

I say “arguably” since ECI really did not address the laches or statute of limitations issues in any detail in its brief. Because Plaintiff’s claim here seeks a declaratory judgment, rather than attempting affirmatively to enforce a cause of action in Delaware that arose in Illinois, a cogent argument could be made that Delaware’s borrowing statute does not apply.⁹⁶ In the circumstances of this case, however, it is immaterial whether Delaware’s three year or Illinois’s five year limitations period applies. In either case, the result is the same: ECI’s claims are untimely. Thus, although I have analyzed the issue below under Delaware law, I would reach the same conclusion under Illinois law.

In Delaware, the statute of limitations begins to run when the cause of action first accrues.⁹⁷ According to ECI’s claims in the First and Second Illinois Actions, and as suggested in its briefs in this action, the actions that gave rise to ECI’s potential claims for breach of fiduciary duties involved K&K LLC’s conduct in entering into the 2001 Transaction and incurring the additional junior secured loan from CIVC LP. Thus, ECI would be time-barred from pursuing claims relating to breaches of fiduciary duty against either K&K LLC or its managers as of the end of 2004, or three years after the Company

⁹⁶ *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 16-18 (Del. 2005) (noting that in certain situations, Delaware courts do not apply the borrowing statute, even though its literal requirements may be satisfied, where such application would “subvert” its overriding purpose, which is to prevent a plaintiff from shopping for a favorable limitations period under Delaware law as compared to the law of the state where the cause of action arose).

⁹⁷ *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007).

entered into the 2001 Transaction.⁹⁸ Absent some basis to toll the running of that limitations period, the analogous statute of limitations barred these actions long ago.⁹⁹

ECI has offered no basis for tolling the limitations period nor any other argument as to why it should not be time-barred from bringing a fiduciary duty claim against K&K LLC or its managers.¹⁰⁰ As with its response to K&K LLC's Declarations dealing with breach of contract, ECI did not address the merits of the Company's time-bar argument, choosing instead to rely almost exclusively on its argument that there is no justiciable case or controversy here.¹⁰¹ As discussed above, that argument is without merit. Hence,

⁹⁸ As noted *supra*, even if I applied Illinois's five-year limitations period, ECI's cause of action still would be barred, absent some basis to toll it.

⁹⁹ *See id.* Indeed, these claims also are barred under Illinois's longer five-year limitations period.

¹⁰⁰ As the proponent of a fiduciary duty claim against K&K LLC, ECI would have the burden to show a basis for tolling the statute. *See Merck & Co. v. SmithKline Beecham Pharm. Co.*, 1999 WL 669354, at *42 (Del. Ch. Aug. 5, 1999), *aff'd*, 766 A.2d 442 (Del. 2000). "Under Delaware law, tolling applies only in very limited circumstances—where the injuries were inherently unknowable . . . or where there has been fraudulent concealment Even when tolled, the statute of limitations is suspended only until a plaintiff discovers his rights or, by exercising reasonable diligence, should have discovered such rights." *Id.* (internal citations omitted).

¹⁰¹ *See* DAB 11. ECI responded to the merits of K&K LLC's claim only to the limited extent it argues that there is a genuine issue of material fact as to whether K&K LLC owed fiduciary duties to ECI and whether it breached them by entering into the 2001 Transaction. *See id.* at 15-16. ECI assumes that "as one of K&K LLC's creditors, [it] would be permitted [to] bring a *derivative* claim for breach of fiduciary duties." *See id.* Thus, it asserts that "whether or not ECI can pursue a 'direct' claim for a breach of fiduciary duty is not dispositive of whether Members actually breached a duty to ECI or even whether ECI has standing to bring a claim." ECI's arguments are unconvincing for several reasons. First, K&K LLC does not seek a declaration regarding the propriety of any action taken or not taken

ECI has not adduced any evidence that would create a triable issue of fact as to the time-bar issue or provide an appropriate basis for tolling the analogous limitations period.

Therefore, pursuant to K&K LLC's Declaration 7, I hold that any breach of fiduciary duty claim that ECI might assert against K&K LLC or its managers arising out of the 2001 Transaction is barred under the doctrine of laches and the analogous limitations periods under Delaware and Illinois law.¹⁰²

c. Group 3: Declaration 8 regarding claims involving alleged breaches of the implied covenant of good faith and fair dealing

K&K LLC also seeks a declaration that ECI cannot assert a claim for breach of the implied covenant of good faith and fair dealing with regard to the Company's having entered the 2001 Transaction and its alleged effect on the Seller's Note and Subordination Agreement. As discussed *supra*, both of those contracts are governed by

by its *members*. Thus, I express no opinion as to whether K&K LLC's other members breached any duty they might have owed to ECI or Emerick, an issue which evidently is at the center of the contemporaneous arbitration. Second, the issue of whether ECI has creditor standing to pursue derivative claims against K&K LLC's managers on behalf of K&K LLC, a proposition K&K LLC denies, is separate and distinct from whether K&K LLC's managers owed ECI any duties. In fact, recent Delaware case law indicates the answer is no. *See generally CML V, LLC v. Bax*, 2010 WL 4517795, at *245-46 (Del. Ch. Nov. 3, 2010). Rather, derivative claims are asserted on behalf of the corporation based on claims of the corporation, not those of the derivative plaintiff. Third, and most importantly, none of ECI's arguments addresses whether, if K&K LLC or its managers actually did breach fiduciary duties, any claims by ECI regarding such conduct still would be time-barred.

¹⁰² Because I find that these claims are time-barred, I need not reach the issues of whether K&K LLC or its managers owed fiduciary duties to ECI or, if they did, whether they breached them. Therefore, I do not reach the issues regarding the merits of potential claims addressed in K&K LLC's Declarations 3-6.

Illinois law.¹⁰³ Consequently, K&K LLC asserts that it is entitled to declaratory relief on this issue because Illinois does not recognize an independent cause of action for an alleged breach of the implied covenant of good faith and fair dealing under a contract.

Under Illinois law, while an implied covenant of good faith and fair dealing inheres in every contract unless the parties expressly disavow it, the implied covenant is not an independent source of duties for the parties to a contract.¹⁰⁴ Indeed, the Illinois Supreme Court held in *Voyles v. Sandia Mortgage Corp.*¹⁰⁵ that there is no independent cause of action for a breach of the implied covenant except in the narrow context of cases involving an insurance company's obligation to settle with a third-party who sued the company's policy-holder.¹⁰⁶

Instead, the implied covenant is used as a tool of construction.¹⁰⁷ In particular, “[w]here a contract specifically vests one of the parties with broad discretion in performing a term of the contract, the [implied covenant] requires that the discretion be exercised reasonably and with proper motive, not arbitrarily, capriciously, or in a manner

¹⁰³ See *supra* note 84.

¹⁰⁴ See *Fox v. Heimann*, 872 N.E.2d 126, 134 (Ill. App. Ct. 2007); see also *Brenner v. Greenberg*, 2009 WL 1759596, at *5 (N.D. Ill. June 18, 2009).

¹⁰⁵ 751 N.E.2d 1126 (Ill. 2001).

¹⁰⁶ *Id.* at 1130-32; *7-Eleven, Inc. v. Dar*, 757 N.E.2d 515, 523 (Ill. App. Ct. 2001); see also *Trading Techs., Inc. v. REFCO Gp. Ltd.*, 2006 WL 794766, at *3 (N.D. Ill. Mar. 23, 2006) (“The Illinois Supreme Court recently reiterated that the covenant of good faith and fair dealing is a guide to construction, not an independent cause of action.”).

¹⁰⁷ See, e.g., *Fox*, 872 N.E.2d at 134; *Brenner*, 2009 WL 1759596, at *6.

inconsistent with the reasonable expectations of the parties.”¹⁰⁸ Because the implied covenant does not support an independent cause of action, a violation of it is remediable only through a breach of contract action.¹⁰⁹ Thus, in order to state a claim for breach of the implied covenant under Illinois law, a plaintiff must plead the existence of a contract that vests one party with discretion in the performance of its obligations and a breach of that contract.¹¹⁰

As discussed *supra*, K&K LLC is entitled to a declaration that it did not breach the Seller’s Note or the Subordination Agreement. Because ECI has not offered any argument as to how K&K LLC was vested with broad discretion in performing any of its part of the bargain under either of those two agreements, let alone that it exercised such discretion unreasonably, Illinois law would bar ECI from asserting an independent claim for breach of the implied covenant.

¹⁰⁸ See *id.* (internal quotation marks omitted); *Mid-W. Energy Consultants, Inc. v. Covenant Home, Inc.*, 815 N.E.2d 911, 916 (Ill. App. Ct. 2004) (“Illinois courts have recognized that a party who does not properly exercise contractual discretion breaches the implied covenant of good faith and fair dealing that is in every contract.”).

¹⁰⁹ See *Citadel Gp. Ltd. v. Wash. Reg’l Med. Ctr.*, 2011 WL 1811396, at *4 (N.D. Ill. May 12, 2011).

¹¹⁰ See *Mid-W. Energy Consultants, Inc.*, 815 N.E.2d at 916 (“In order to plead a breach of the covenant of good faith and fair dealing, a plaintiff must plead existence of contractual discretion. . . . Nevertheless, the good-faith duty to exercise contractual discretion reasonably does not apply where no contractual discretion exists.”) (internal citation omitted).

Indeed, like its handling of K&K LLC's other requested Declarations, ECI did not respond to the merits of K&K LLC's challenge to its implied covenant claim, choosing instead to frame its argument in terms of a lack of justiciable controversy. As a result, because its brief did not even attempt to rebut K&K LLC's showing that Illinois law would not provide a basis for an independent cause of action for a breach of the implied covenant, ECI has waived its ability to do so.¹¹¹ Therefore, I find that K&K LLC is entitled to summary judgment regarding Declaration 8 and hold that, under Illinois law, ECI may not assert against K&K LLC an independent cause of action for breach of the implied covenant of good faith and fair dealing as to either the Seller's Note or the Subordination Agreement based on the Company's participation in the 2001 Transaction.

d. Group 4: Declarations 9-10 regarding claims involving alleged fraud or fraudulent conveyance

K&K LLC also seeks declarations that ECI is time-barred from asserting any claim sounding in fraud, fraudulent inducement, fraudulent transfer, or fraudulent conveyance based on the Company's having entered into the 2001 Transaction. The limitations period for fraud actions is three years in Delaware¹¹² and five years in Illinois.¹¹³ In addition, as both Delaware and Illinois have adopted the Uniform Fraudulent Transfer Act ("UFTA"), the limitations period for claims sounding in

¹¹¹ See *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

¹¹² See 10 Del. C. § 8106; *In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 811-12 (Del. Ch. 2009).

¹¹³ 735 ILL. COMP. STAT. 5/13-205; *Fitton v. Barrington Realty Co.*, 653 N.E.2d 1276, 1278 (Ill. App. Ct. 1995).

fraudulent transfer or conveyance would run for no later than four years after accrual.¹¹⁴ Therefore, under the Delaware borrowing statute, discussed *supra*, I apply Delaware's shorter three-year limitations period for actions relating to fraud and a four-year period for actions relating to fraudulent conveyance.

Under Delaware law, a cause of action generally accrues at the time of the alleged harmful act.¹¹⁵ To the extent ECI might argue that K&K LLC fraudulently induced it to enter into the Seller's Note or the Subordination Agreement, those causes of action would have accrued in 1999 when ECI entered into those agreements, and, in no event later than 2001, when K&K LLC entered into the 2001 Transaction and ECI brought the First Illinois Action to enjoin it. To the extent ECI might argue that K&K LLC committed a fraudulent "transfer" under the UFTA, the relevant "transfer" took place when K&K LLC granted CIVC LP a lien on the Company's assets as part of the 2001 Transaction.¹¹⁶ Thus, ECI would have had to sue K&K LLC for actions in fraud by the end of 2004, or three years after the 2001 Transaction closed, and for actions for fraudulent transfers by the end of 2005, or four years after K&K LLC granted a lien in the form of the CIVC LP Loan to CIVC LP. Also as discussed *supra*, absent a basis to toll those limitations

¹¹⁴ See 6 Del. C. § 1309; 740 ILL. COMP. STAT. 160/10.

¹¹⁵ See *In re Am. Int'l Gp.*, 965 A.2d at 811-12.

¹¹⁶ See 6 Del. C. § 1301(12) ("transfer" includes the "creation of a lien"); accord 740 ILL. COMP. STAT. § 160/2(1).

periods, laches and the analogous statutes of limitations barred such causes of action long ago.¹¹⁷

As with the Declarations involving potential claims for breach of contract and fiduciary duties, ECI did not address the merits of the Company's time-bar arguments and chose instead to argue that there was no actual controversy regarding issues of fraud or fraudulent conveyance ripe for adjudication. ECI failed to present any evidence that would justify tolling the applicable limitations periods here or any other basis on which to deny summary judgment on these issues.

Therefore, K&K LLC is entitled to summary judgment in its favor as to Declarations 9 and 10. That is, I hold that any fraudulent transfer or conveyance claim that ECI might assert against K&K LLC based on the 2001 Transaction is barred by the doctrine of laches and the analogous limitations periods under Delaware and Illinois law. Similarly, I reach the same conclusion for any fraud or fraudulent inducement claims that ECI might assert against K&K LLC based on the 2001 Transaction.

4. Defendant's request for leave to take discovery

ECI, acknowledging that neither party has taken discovery in this case, requests that if the Court finds that an actual controversy exists, it be allowed under Rule 56(f)¹¹⁸

¹¹⁷ See *Fike v. Ruger*, 754 A.2d 254, 260-61 (Del. Ch. 1999). I note that my conclusion that ECI's claims relating to fraud are time-barred would not change if I applied Illinois's five-year limitations period.

¹¹⁸ Rule 56(f) states: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment

to take discovery to respond to the Company's motion.¹¹⁹ It argues that it cannot present by affidavit evidence sufficient to oppose K&K LLC's motion for summary judgment because "much of the information relevant to plaintiff's claim is exclusively within plaintiff's control."¹²⁰ ECI asserts, for example, that before it adequately could rebut the Company's arguments, it needs discovery pertaining to "Plaintiff's alleged need for the declaratory judgment it seeks," including information pertaining to

(a) the Existing Events of Default under the Senior Loan Agreement, forbearance agreements and amendments that have allegedly been required to prevent the Senior Lenders from exercising their default rights as described in the [Dolan Affidavit]; (b) attempts by Plaintiff to reach agreements with new Senior Lenders to assume the current Senior Loans and renegotiate their terms as noted in the Dolan Affidavit; and (c) discussions that Plaintiff has had with financial institutions regarding any unresolved disputes with ECI and . . . Emerick that have allegedly affected Plaintiff's ability to secure additional financing.¹²¹

According to ECI, K&K LLC's Dolan Affidavit does not demonstrate a lack of a genuine issue of material fact regarding its motion and, in any case, ECI has the right to conduct discovery on this issue before responding to K&K LLC's motion.

or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Ct. Ch. R. 56(f).

¹¹⁹ DAB 3 n.1; Aff. of Amy G. Doehring ("Doehring Aff.") ¶¶ 4-5.

¹²⁰ Doehring Aff. ¶ 4.

¹²¹ *Id.* ¶ 5.

Preliminarily, I doubt that the discovery ECI purportedly needs to respond to K&K LLC's motion is material. "A fact is material if it 'might affect the outcome of the suit under the governing law.'"¹²² As discussed *supra*, K&K LLC has demonstrated that the evidence of record entitles it to summary judgment on its motion for declaratory relief. Reasons *why* it sought this relief, for example, are not likely to be relevant to a determination as to whether K&K LLC should succeed on its motion as a matter of law.

In any event, even if the discovery ECI seeks is material, I find that it has not carried its burden under Rule 56(f) to show that it could not present facts essential to oppose the Company's motion for summary judgment. This action has been pending since July 14, 2010 and K&K LLC's motion was filed on November 2, 2010. Nevertheless, ECI has not even attempted to take any discovery in this litigation.¹²³ Equally important, this Court never stayed discovery in this action nor did either party ever ask it to do so. In addition, all of the events giving rise to the potential causes of action that ECI might assert against K&K LLC as identified in the Company's requested Declarations occurred in 1999 and 2001. It is reasonable to infer that ECI could have obtained at least some of the information it now claims to need from its sole stockholder, Emerick, who was personally involved, or through the various law suits it or Emerick has instituted since the 2001 Transaction.

¹²² *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

¹²³ *See Doehring Aff.* ¶ 4.

Moreover, much of the material ECI seeks appears to have been available to it through nonlitigation means. Emerick, for example, is a member of K&K LLC and, pursuant to its Operating Agreement, could have had access to certain of the Company's books and records, which presumably would have included at least some of the information ECI now seeks under Rule 56(f).¹²⁴ Furthermore, K&K LLC's requested Declarations pertain largely to issues of law based on the explicit language of several contracts that it included as attachments to its opening brief.¹²⁵

Finally, much of the information and evidence that ECI would need to develop and present to the Court in order to rebut K&K LLC's argument that ECI's alleged breach of fiduciary duty or fraud claims are time-barred should be within ECI's own control. If ECI believed, for example, that there was a justifiable basis for tolling the applicable statutes of limitations after the 2001 Transaction, the facts underlying that basis would have been within ECI's possession, custody, or control.

Possibly, ECI took a calculated gamble that it could prevail in this action on its argument that there was no justiciable case or controversy between the parties when it elected not to respond substantively on the merits to Plaintiff's motion. It lost that gamble and must live with the consequences. Thus, as discussed *supra*, I find that K&K

¹²⁴ See Def.'s Ans. ¶¶ 1, 11; Operating Agreement § 12.2 ("Each Member shall have the right to review all Company records, agreements, . . . and financial projections of the Company which may be prepared from time to time . . ."). Emerick also was a manager of K&K LLC. Def.'s Ans. ¶¶ 20, 22. In that capacity, he probably had even greater access to the information ECI now seeks.

¹²⁵ See generally Dolan Aff. & exhibits.

LLC is entitled to the declaratory relief sought in its Complaint to the extent outlined in this Opinion. This Opinion, however, does not address the claims at issue in the on-going arbitration, and I express no opinion as to the validity of those claims. My rulings here pertain only to the declarations I have granted in favor of K&K LLC.

III. CONCLUSION

For the reasons stated in this Opinion, I deny ECI's motion to dismiss the Complaint under Rule 12(b)(1), its request to stay this action in favor of the pending Arbitration, and its request to take discovery under Rule 56(f). I grant Plaintiff's motion for summary judgment as to its requested declaratory relief to the extent stated herein. I am entering concurrently with this Opinion an Order and Final Judgment reflecting these rulings.