IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEWART MATTHEW, Plaintiff, v. CHRISTOPHE LAUDAMIEL, ROBERTO CAPUA, ACTION 1 SRL, FLÄKT WOODS GROUP SA and SEMCO LLC, Defendants.	:	**C.A. No. 5957-VCN**
CHRISTOPHE LAUDAMIEL, ROBERTO CAPUA, ACTION 1 SRL, Counterclaim Plaintiffs, v. STEWART MATTHEW, Counterclaim Defendant.	:	

MEMORANDUM OPINION

Date Submitted: March 1, 2012
Date Decided: June 29, 2012

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NOBLE, Vice Chancellor

I. INTRODUCTION

In this action, Plaintiff/Counterclaim Defendant Stewart Matthew ("Matthew") asserts various claims for damages against former business associates, including his former fellow members and Board of Managers members ("Managers") of Aeosphere LLC ("Aeosphere" or the "Company"). Matthew's claims relate to the dissolution of Aeosphere, which he argues was wrongfully undertaken by the other Managers in order to remove him from a cutting-edge and potentially lucrative fragrance business. The former members and Managers of Aeosphere (besides Matthew)—Defendants/Counterclaim Plaintiffs Christophe Laudamiel ("Laudamiel"), Roberto Capua ("Capua") (Laudamiel and Capua, together, the "Manager Defendants"), and Action 1 srl ("Action 1") (Laudamiel, Capua, and Action 1, together, the "Defendants")—bring their Verified Counterclaims (the "Verified Counterclaims" or "Countercls.") against Matthew. The Verified Counterclaims relate to actions Matthew took or did not take in his capacity as a Manager or co-Chief Executive Officer ("co-CEO") of Aeosphere.

This Memorandum Opinion addresses Matthew's motion for partial summary judgment on Count I and Count V of his Second Amended Verified Complaint (the "Complaint" or "Compl.").

II. PARTIES

Matthew was a member, Manager, and co-CEO of Aeosphere. Laudamiel was also a member, Manager, and co-CEO of Aeosphere. Action 1, an Italian business entity, was a member of Aeosphere. Capua was a Manager of Aeosphere and the majority owner of Action 1.

III. BACKGROUND[1]

A. *Aeosphere's Formation and LLC Agreement*

Aeosphere, a Delaware limited liability company (an "LLC"), was founded by Matthew and Laudamiel in June 2008 with a commercial focus on the development and marketing of fragrance technologies and systems. Matthew had previously worked in corporate finance, and Laudamiel was an accomplished perfumer. In May 2009, Action 1 invested 1.55 million euros in Aeosphere and, in return, received 30% of Aeosphere's voting equity in the form of 300 preferred membership units. Matthew and Laudamiel each held 35% of the Company's voting equity in the form of 350 common membership units ("Common Units") each.

At the time of Action 1's investment, the members entered into the Amended and Restated Limited Liability Company Agreement of Aeosphere LLC (the "LLC

[1] Unless otherwise noted, the factual background is taken from allegations in the Complaint that were admitted by the Defendants in their Verified Answer to the Second Amended Complaint. Additional explanation of the events that have brought the parties together in this venue may be found in *Matthew v. Laudamiel*, 2012 WL 605589 (Del. Ch. Feb. 21, 2012) ("*Matthew I*").

Agreement"),[2] which governed their rights and obligations as members of Aeosphere. Under the LLC Agreement, Aeosphere was to be managed by a Board of Managers (the "Board"), and each member was given the power to appoint one Manager.[3] At all times relevant to Matthew's claims, the Board consisted of Matthew, Laudamiel, and Capua.

The two claims for which Matthew seeks partial summary judgment relate to an alleged breach of the LLC Agreement by the Manager Defendants, and one of the affirmative defenses asserted by the Manager Defendants in response relates to Matthew's alleged breaches of the LLC Agreement. The primary LLC Agreement provisions at issue concern the circumstances under which an Emergency Board Meeting may be called, the responsibility of a Manager to attend a properly called Board meeting, and the Board vote required to authorize the dissolution and winding up of Aeosphere.

Section 5.2.3 of the LLC Agreement set forth the requirements for calling a Board meeting. It provided, in part:

> **5.2.3 Board Meetings; Emergency Meetings.** Meetings of the Board may be called by any Board Member and the Board shall meet not[] less often than quarterly. All meetings will be held upon two (2) weeks notice to each Board Member . . . Notwithstanding the foregoing, a Board Member may call an emergency meeting of the Board upon twenty-four (24) hours' notice delivered personally or by telephone, telegraph or facsimile (with

[2] Compl., Ex. H.
[3] *Id.* at § 5.2.1.

> confirmation of delivery) if such Board Member believes in good-faith that such meeting is necessary to preserve a Company right or to avoid a Company liability or adverse consequence to the Company. A notice must specify the purpose of any meeting and contain a detailed agenda. Notice of a meeting need not be given to any Board Member who signs a waiver of notice or a consent to holding the meeting or an approval of the minutes thereof . . . Subject to Section 5.2.6 [t]he presence of a majority by number of all Board Members will constitute a quorum and will be required for the conduct of any meeting of the Board. . . . Board Members may participate in a meeting through the use of conference telephone . . . Once a quorum is present, the Board may only act through Majority Vote; or by such greater percentage as required by this Agreement.

Section 5.1.2 concerned the Managers' obligations to attend Board meetings and vote on proposed actions and it provided:

> **5.1.2** Managers shall use their best efforts to attend all properly called meetings of the Board. If this Agreement or [the Delaware Limited Liability Company Act, 6 *Del. C.* ch. 18] requires a Manager to vote in order to approve or disapprove any action, such Manager shall act with diligence and shall not unreasonably delay approving or disapproving any such action. It is further recognized and agreed between the Company and the Members that damages at law will be an insufficient remedy to the Company and the Members in the event a manager does not act with diligence in respect of any matter in which a Manager is required to vote hereunder. Therefore, in the event a Manager breaches such duty, the Company and the Members will have the right to pursue an action for injunctive relief and specific performance from any court of competent jurisdiction.

Section 5.2.6, which governed the Board vote required to approve certain actions, provided in part:

> **5.2.6 Required Vote.**
>
> (a) Except as otherwise set forth in this Section 5.2.6, the vote of both [Matthew] and [Laudamiel] is required to approve any

> actions which require approval by the Board, provided, that if [Matthew] and [Laudamiel] are deadlocked, [Capua] shall cast the tie-breaking vote; provided further however that if either [Matthew] or [Laudamiel] is no longer on the Board, any two Board Members may approve any action that requires approval by the Board.
>
> (b) For so long as [Matthew] and [Laudamiel] serve on the Board, unanimous approval of the Board is required for the Company to:
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> (i) amend, modify or terminate [Matthew's or Laudamiel's employment agreements]
>
> (ii) undertake the sale, lease, disposal, transfer, hypothecation or other disposal of all, or any material portion, of the assets of the Company or
>
> (iii) wind up of the Company.

Finally, § 9.1 provided that Aeosphere would be "dissolved, its assets [] disposed of, and its affairs wound up upon . . . the approval of the Board or the Majority Vote of the Holders of the Common Units," among other events; and, pursuant to § 9.3, "[u]pon the occurrence of any event specified in Section 9.1, the Company [would] continue solely for the purpose of winding up its affairs in an orderly manner, liquidating its assets, and satisfying the claims of its creditors."

B. *The Emergency Board Meeting and Aeosphere's Dissolution*

By May of 2010, Aeosphere was in poor financial condition,[4] and Matthew and Laudamiel no longer had a productive professional relationship. Attempts to

[4] The parties dispute the precise state of Aeosphere's financial affairs in May 2010. Nevertheless, it is clear from the undisputed facts that, if Aeosphere continued burning cash at the rate it had in

resolve the disputes between Matthew and Laudamiel were unsuccessful. On May 3, 2010, in an email (the "Notice Email"),[5] Capua delivered notice of an emergency Board meeting to be held by conference call on May 4, 2010 (the "Emergency Board Meeting") to Matthew and Laudamiel. In the body of the Notice Email, Capua stated that the Emergency Board Meeting was being held "due to the current and unresolved conflict situation between [Matthew and Laudamiel], and most importantly due to the catastrophic financial situation of our Company[.]"[6] An agenda was attached to the Notice Email (the "Agenda"). The Agenda listed nine items that the Board members were expected to vote on at the Emergency Board Meeting. The first item was stated as the "[d]issolution and wind-up of the Company's businesses and operations . . . [and] filing of [a] certificate of dissolution with the Secretary of State of Delaware."[7] Other items on the Agenda included terminating all of Aeosphere's employees, closing all of its offices, distributing its intellectual property rights, informing its vendors of the "current situation," distributing K-1 forms to its members, and informing its accountants of the decision to dissolve Aeosphere.[8] Matthew does not appear to

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previous months, it would have soon been rendered insolvent, absent an infusion of investment capital.

[5] Aff. of Stewart Matthew, Ex. A.

[6] *Id.*

[7] *Id.*

[8] *Id.*

dispute that the Notice Email was sent at least 24 hours before the Emergency Board Meeting was held.

After Capua sent the Notice Email, Maury Bricks, Esq. ("Bricks"), Aeosphere's counsel,[9] sent an email to Capua, Laudamiel, and Matthew regarding the Emergency Board Meeting.[10] In this email, Bricks stated that certain items listed on the Agenda, including a vote on Aeosphere's dissolution, could not be addressed at an Emergency Board Meeting, the subject matter of which was limited by § 5.2.3 of the LLC Agreement.[11] Furthermore, Bricks stated that dissolution required the unanimous vote of the holders of Common Units or the unanimous vote of the Board.[12] Shortly after Bricks sent his email, Kurt Heyman, Esq. ("Heyman"), an attorney who represented Matthew, sent an email to Gianluigi Esposito, an attorney who Heyman believed represented both Capua and Laudamiel.[13] In his email, Heyman stated that Aeosphere could not be dissolved without Matthew's approval and that Matthew would not participate in the Emergency Board Meeting or support Aeosphere's dissolution.[14]

The Emergency Board Meeting was held on May 4, 2010. Laudamiel and Capua, along with their personal attorneys, attended the Emergency Board

[9] Aff. of Stewart Matthew, Ex. D (Minutes of the Emergency Board Meeting) (the "Minutes").
[10] Aff. of Stewart Matthew, Ex. B.
[11] *Id.*
[12] *Id.*
[13] Aff. of Stewart Matthew, Ex. C.
[14] *Id.*

Meeting; Matthew did not attend. The Minutes,[15] which were signed by Laudamiel and Capua, reflect that Laudamiel and Capua discussed Aeosphere's financial condition and the disagreements between Matthew and Laudamiel, and then they voted to dissolve and wind up Aeosphere. Laudamiel and Capua also voted to terminate all of Aeosphere's employees, including Matthew and Laudamiel, close its offices, and notify its creditors of the dissolution.[16] Laudamiel, in his capacity as a Manager, was designated to oversee the winding up and liquidation of Aeosphere.[17] On May 11, 2010, Laudamiel filed a certificate of cancellation with the Delaware Secretary of State.[18]

IV. CONTENTIONS

Matthew moves for partial summary judgment on Count I and Count V of the Complaint. Count I is a claim against the Manager Defendants[19] for breach of the LLC Agreement. Matthew contends that the Manager Defendants breached the LLC Agreement by causing Aeosphere to be dissolved and wound up without his consent, which he asserts was required.[20] Count V is a conversion claim. Matthew

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[15] *See supra* note 9.
[16] *Id.*
[17] *Id.*
[18] Aff. of Stewart Matthew, Ex. E.
[19] Although, in the Complaint, Count I is brought against all of the Defendants, the specific claim that Laudamiel and Capua breached the LLC Agreement by improperly approving Aeosphere's dissolution and winding up is brought only against Laudamiel and Capua. *See* Pl.'s Opening Br. in Supp. of His Mot. for Partial Summ. J. ("Opening Br.") 1-2, 10.
[20] The Complaint lists other alleged breaches of the LLC Agreement for which Matthew has not sought partial summary judgment, including his claim that Laudamiel and Capua breached the

argues that by wrongfully dissolving Aeosphere, the Manager Defendants converted his Common Units. According to Matthew, the undisputed facts of this case establish that the Manager Defendants are liable for a breach of the LLC Agreement and conversion of his Common Units.

The Manager Defendants argue that Matthew is not entitled to partial summary judgment. First, the Manager Defendants contend that their actions did not constitute a breach of the LLC Agreement. Second, according to the Manager Defendants, even if they breached the LLC Agreement, Matthew committed material breaches first,[21] and, therefore, their breach was excused. At the very least, the Manager Defendants argue, they have raised disputed issues of material fact regarding whether Matthew committed material breaches of the LLC Agreement before they took the acts of which he complains. Third, the Manager Defendants argue that, by refusing to attend the Emergency Board Meeting,

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LLC Agreement by calling the Emergency Board Meeting without proper justification. Matthew sought partial summary judgment on Count I only under the theory that Laudamiel and Capua, alone, were not empowered to approve Aeosphere's dissolution. *See* Opening Br. 1-2, 10; Pl.'s Reply Br. in Supp. of His Mot. for Partial Summ. J. ("Reply Br.") 2-3; *id.* at 3-4 (stating that, even if the Court found an issue of material fact related to whether the Emergency Board Meeting was validly called and noticed, "it would not be material to [Matthew's] motion for summary judgment"); Oral Argument Pl.'s Mot. for Summ. J. Tr. ("Tr.") 11-13.

[21] In their brief, the Manager Defendants also argued that Matthew breached the implied covenant of good faith and fair dealing by refusing to approve or disapprove contracts, by otherwise refusing to cooperate in the management of Aeosphere, by diverting Aeosphere's resources to the ScentOpera, and by refusing to attend the Emergency Board Meeting, and that these breaches of the implied covenant excused their alleged breach of the LLC Agreement. This argument fails because the Court previously dismissed the Defendants' implied covenant counterclaim that was based, in part, on these same allegations, concluding that none of these allegations stated an implied covenant counterclaim. *See Matthew I*, 2012 WL 605589, at *17-*20.

Matthew waived his right to vote on the issues addressed at that meeting; thus, their vote to dissolve Aeosphere did not violate the terms of the LLC Agreement. Fourth, the Manager Defendants contend that Matthew is not entitled to partial summary judgment because he has not proven that any damages resulted from the alleged breach of contract or alleged conversion of his Common Units. Fifth, according to the Manager Defendants, under § 7.1 of the LLC Agreement, they cannot be held liable for any losses or damages suffered by Matthew unless he proves that the losses or damages were the result of fraud, gross negligence, intentional misconduct, or a knowing violation of law. Sixth, and finally, the Manager Defendants argue that Matthew may not be granted partial summary judgment on his conversion claim because it is based on a theory that Aeosphere's dissolution violated the LLC Agreement and, hence, violated Delaware law. Therefore, according to the Manager Defendants, because Matthew is not entitled to partial summary judgment on Count I, he cannot prevail on Count V, either.

In response, Matthew contends that the Manager Defendants' actions did breach the LLC Agreement and, regardless, that their argument to the contrary was raised for the first time at oral argument on Matthew's motion for partial summary judgment. Matthew also argues that the Manager Defendants have not supported their contentions that he committed a prior breach of the LLC Agreement with a factual showing and, instead, rely solely upon allegations contained in the Verified

Counterclaims, which he claims are insufficient given the current procedural posture. Even accepting these allegations as true, though, Matthew claims that his alleged breaches would not rise to a level that would excuse the Manager Defendants' breach. Additionally, Matthew argues that the Manager Defendants' waiver argument fails as a matter of law and that he is not required to prove damages in order to prevail on partial summary judgment.

V. ANALYSIS

A. *Legal Standards*

To prevail on a motion for summary judgment, a moving party must demonstrate that there are no genuine issues of material fact in dispute and that he is entitled to judgment as a matter of law.[22] When examining the record, the Court must draw every reasonable inference in the non-moving party's favor.[23] The moving party bears the initial burden of demonstrating the absence of any genuine issue of fact, and any doubt regarding the existence of such an issue will be resolved against the movant.[24] If the moving party introduces facts which, if not denied, entitle him to summary judgment, the burden shifts to the opposing party to dispute the facts.[25]

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[22] Ct. Ch. R. 56(c); *In re Oracle Corp.*, 867 A.2d 904, 926 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005).
[23] *In re Oracle Corp.*, 867 A.2d at 926.
[24] *Scureman v. Judge,* 626 A.2d 5, 10 (Del. Ch. 1992).
[25] *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979).

In order to decide this motion for partial summary judgment, the Court must interpret several provisions of the LLC Agreement. "When the issue before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous."[26] Delaware adheres to the "objective" theory of contracts under which a contract is construed as it would be understood by an objective, reasonable third-party.[27] "Where contract language is 'clear and unambiguous,' the ordinary and usual meaning of the chosen words will generally establish the parties' intent."[28] Ambiguity exists "when the provisions in controversy are reasonably or fairly susceptible [to] different interpretations or may have two or more different meanings."[29] But, "[c]ourts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty."[30] "The true test is . . . what a reasonable person in the position of the parties would have thought [the contract] meant."[31]

B. *Aeosphere's Dissolution and Winding Up*

The Court will first address Matthew's contention that the Manager Defendants breached the LLC Agreement by dissolving and winding up Aeosphere

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[26] *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).
[27] *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005).
[28] *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007), *aff'd*, 985 A.2d 391 (Del. 2009).
[29] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (citation omitted).
[30] *Id.* (citation omitted).
[31] *Id.* (citation omitted).

without proper Board approval. Matthew presents a straightforward argument that Aeosphere was improperly dissolved and wound up. Section 9.1 of the LLC Agreement set forth the events upon which Aeosphere could have been dissolved and wound up. The only such event potentially applicable in this instance was "the approval of the Board."[32] According to Matthew, the dissolution and winding up of Aeosphere could not have been properly authorized by the Board, as the Manager Defendants claim, because § 5.2.6(b)(iii) provided that, so long as both Matthew and Laudamiel served on the Board, "unanimous approval of the Board is required . . . to . . . wind up [] the Company." Matthew contends that "unanimous approval" refers to approval by all three Managers, not merely unanimous approval of a two-Manager quorum. Therefore, under his reading of the LLC Agreement, the vote taken at the Emergency Board Meeting was insufficient to approve the dissolution and winding up of Aeosphere because only Laudamiel and Capua voted.

Matthew also argues that, even if § 5.2.6(b) is found to not apply to a vote to dissolve or wind up Aeosphere, the general provision covering Board votes, § 5.2.6(a), rendered the purported approval improper. Section 5.2.6(a) provided that, generally, the votes of both Matthew and Laudamiel were required to approve

[32] LLC Agreement § 9.1.2. The other method of approving Aeosphere's dissolution and winding up provided for in § 9.1.2, "the Majority Vote of the Holders of the Common Units," is inapplicable because Matthew held 50% of the Common Units, and there are no allegations that he voted, in his capacity as a holder of Common Units, in favor of the dissolution and winding up.

actions requiring Board approval and that Capua may act as a "tie-breaker" when they were "deadlocked." Thus, according to Matthew, his vote was needed to approve Aeosphere's dissolution under § 5.2.6(a).

The Manager Defendants contend that they did have the power to dissolve and wind up Aeosphere. First, they argue that the decision to dissolve Aeosphere did not require unanimous approval of the Board pursuant to § 5.2.6(b) because that provision referred to winding up Aeosphere, not dissolving it. Second, to the extent that § 5.2.6(b) applied to the Board's vote, the Manager Defendants assert that, in this context, "unanimous approval" did not necessarily require the approval of each of the three Managers. Instead, for purposes of § 5.2.6(b), "unanimous approval" referred to the unanimous approval of all the Managers present at a Board meeting at which a quorum of the Managers was present. Pursuant to § 5.2.3, "a majority by number of all Board Members constitute[d] a quorum," and, thus, Laudamiel and Capua constituted a quorum. In support of their argument that in § 5.2.6(b) "unanimous approval" did not require the vote of all three Managers, the Manager Defendants point to § 5.2.1, which stated that additional Managers could be added to the Board provided they were "approved by the unanimous vote of [Matthew, Laudamiel, and Capua]." According to the Manager Defendants, this demonstrates that, when the phrase "unanimous approval" was used without a

specific reference to all three Managers, the action in question did not necessarily require the approval of all three Managers.

In response, Matthew contends that the Manager Defendants did not raise this argument until oral argument, and, as a result, the Court should not consider it. He also contends that the reference to "winding up"—without a reference to "dissolution"—in § 5.2.6(b) is, essentially, a scrivener's error or that in some other manner "dissolution" should be read into § 5.2.6(b). As his counsel explained at oral argument: "[I]t's nonsensical to think that the [B]oard could approve a dissolution without unanimous approval but then wait for everyone to agree how to wind it up. Without dissolution there is no winding up. And it only makes sense that those two go hand-in-hand."[33]

Matthew's primary argument that his vote was required to approve the dissolution and winding up of Aeosphere is based upon the contention that a unanimous vote of all three Managers was required pursuant to § 5.2.6(b)(iii) to dissolve and wind up Aeosphere. But, a plain language reading of the unambiguous language of § 5.2.6(b)(iii) reveals that it spoke only to the Board's ability to wind up Aeosphere, not dissolve it. While the dissolution of an LLC and

[33] Tr. 39-40.

the process of winding it up are closely related, they are distinct concepts and the terms are not synonymous.[34]

Matthew seemingly argues that a scrivener's error must be to blame for this LLC Agreement provision, which can be read to require unanimous Board approval to wind up, but not dissolve, Aeosphere. Indeed, such an arrangement, where it is easier, perhaps, to dissolve an LLC than to wind it up, does seem strange. One problem that could arise in such a case is that an LLC properly dissolved by a majority of its managers would need to seek the assistance of the Court to wind up because it lacks unanimous approval of the managers to do so.[35] Regardless of the advisability of such a provision, the plain language of § 5.2.6(b) required unanimous approval to *wind up* Aeosphere, but not to *dissolve* it. Even if

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[34] Basically, an LLC is wound up after it has been dissolved. *See* 6 *Del. C.* §§ 18-801-18-804. There is an argument—and perhaps this was what Matthew's counsel was trying to convey at oral argument—that, in the LLC Agreement, dissolution and winding up were viewed as two steps of one process and, therefore, the same standard for Board approval must have applied to both. Sections 9.1 and 9.3 could be viewed as supporting this argument. One might contend that § 9.1 and § 9.3 provided that, once one of the "Dissolution Events" set forth in § 9.1 occurred, a process of dissolution, asset disposal, and winding up automatically followed, without the possibility of (or need for) any further Board votes. If this argument is accepted as true, it is difficult to envision how the decisions (or decision) to dissolve and wind up Aeosphere could have been subject to different standards of approval. Even considering such an argument, the LLC Agreement would still be, at least, ambiguous regarding whether § 5.2.6(b) applied to a vote to dissolve Aeosphere—the first step in such a process—because it refers specifically and unambiguously to a vote on winding up the Company. If the Court were to conclude, following this line of argument, that the LLC Agreement was ambiguous with regard to the applicability of § 5.2.6(b) to a vote on dissolution, Matthew would not be entitled to partial summary judgment on his breach of the LLC Agreement claim based upon this provision. This is the same conclusion the Court ultimately reaches in the primary text of this Memorandum Opinion after considering whether Matthew has shown that § 5.2.6(b) should be reformed.

[35] Alternatively, this might be the aim of such a provision, since a Court-supervised wind up process might serve to protect the interests of members in the minority who oppose a wind up plan supported by the majority.

Matthew is correct and this was the result of a scrivener's error, the Court would need first to determine that the LLC Agreement needs to be reformed to require unanimous Board approval in order to dissolve Aeosphere before it could award damages to Matthew for breach of this (as-of-yet illusory) provision. "[R]eformation of a written instrument must be based on a showing of either (i) a mutual mistake, or (ii) a unilateral mistake by the plaintiff, combined with knowing silence by the defendant."[36] The uncontested facts before the Court do not satisfy either of these standards.[37] Therefore, Matthew has not shown that his vote was needed to dissolve Aeosphere under § 5.2.6(b).[38]

In the alternative, Matthew argues that even if § 5.2.6(b) does not apply to a vote on whether to dissolve Aeosphere, his vote was still required under § 5.2.6(a). Implicit in this argument is the contention that Matthew's refusal to participate in the Emergency Board Meeting[39] did not create a "deadlock" between Matthew and

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[36] *Amstel Assocs., L.L.C. v. Brinsfield-Cavall Assocs.*, 2002 WL 1009457, at *5 (Del. Ch. May 9, 2002) (citation omitted).

[37] To prove mutual mistake, the plaintiff must show that both parties were mistaken about a material term of the written agreement and show by clear and convincing evidence that the parties' actual, oral agreement was not accurately reflected in their executed written contract. *Id.* The uncontested facts currently on the record do not support such a showing. With regard to a possible unilateral mistake, there are no uncontested facts on the record to support the requisite "knowing silence" by the Manager Defendants.

[38] The Court agrees with Matthew that the Manager Defendants did not timely raise the argument that § 5.2.6(b) did not apply to a vote to dissolve Aeosphere. Nonetheless, Matthew simply did not meet his burden of showing that the undisputed facts on the record, which include the language of § 5.2.6(b), entitle him to judgment as a matter of law regarding this claim.

[39] For purposes of this motion, the Court will assume that the Emergency Board Meeting was properly called because Matthew does not seek partial summary judgment on his claim that it was improperly called. Of course, if Matthew were to show that the Emergency Board Meeting

Laudamiel that Capua broke with a tie-breaking vote.[40] This issue cannot be resolved on summary judgment with the record currently before the Court. The question of whether Matthew's refusal to participate in making business decisions, in his roles as a Manager and a co-CEO, triggered Capua's tie-breaking power is an issue that is central to some of the Verified Counterclaims, and it would be more properly decided with the aid of a more robust factual record.[41] In sum, Matthew is not entitled to partial summary judgment on the claim that the Manager Defendants breached the LLC Agreement by dissolving Aeosphere without proper authority because he has not shown that a Board vote on Aeosphere's dissolution was governed by § 5.2.6(b) or, if the vote was governed by § 5.2.6(a), that his actions did not create a deadlock that could be resolved by Capua's vote.

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did not meet the requirements of § 5.2.3, it would call into question the validity of Aeosphere's dissolution.

[40] One might also wonder whether Heyman's email could be viewed as creating a "deadlock."

[41] In the context of the Verified Counterclaims, Matthew has argued that—assuming the Defendants' allegations are true and he obstinately refused to approve or disapprove certain actions—the Defendants could have called a Board meeting and used Capua's tie-breaking power. *See* Pl.'s Opening Br. in Supp. of his Mot. to Dismiss Counts II, IV, and V of the Am. Verified Countercls. of Defs. Christophe Laudamiel, Roberto Capua, and Action 1 srl 10-11. Unsurprisingly, the Defendants have argued that they had no such power. *See* Br. of Defs. Christophe Laudamiel, Roberto Capua, and Action 1 srl in Opp'n to Pl.'s Mot. to Dismiss Counts II, IV, and V of their Am. Verified Countercls. 7-8. Assuming that the same arguments are applicable to Matthew's refusal to attend the Emergency Board Meeting, in the context of Matthew's motion for partial summary judgment, the parties would hope the Court comes to the conclusion opposite from that which they argued for in the context of the Verified Counterclaims. Of course, these arguments may be inapplicable to Matthew's refusal to attend the Emergency Board Meeting, but, without a more detailed factual record, it is too early for the Court to make this determination. Although the Manager Defendants did not raise this issue in opposition to Matthew's motion for partial summary judgment, the Court should not ignore it. It is implicated by the facts and arguments presented by Matthew, and its resolution could have collateral effects on other aspects of this litigation.

While Matthew has not met the summary judgment standard with regard to his claim that the Manager Defendants' approval of Aeosphere's dissolution breached the LLC Agreement, § 5.2.6(b)(iii) did require "unanimous approval of the Board" to wind up Aeosphere. As described above, the parties disagree about what, exactly, "unanimous approval of the Board" means and whether the actions approved at the Emergency Board Meeting were "unanimously" approved. The Court concludes that § 5.2.6(b)(iii) is unambiguous and that Matthew's interpretation—that "unanimous approval of the Board" requires the approval of all three Board members—is the only reasonable interpretation.

Generally, under § 5.2.6(a), actions requiring Board approval needed only to be approved by Matthew and Laudamiel; if they were "deadlocked," Capua could cast a tie-breaking vote. The other subsections of § 5.2.6 set forth different combinations of Manager votes that served as Board approval for certain, specified actions. For example, "unanimous approval of the Board" was required to wind up Aeosphere;[42] the vote of any two of the three Managers was required to approve certain actions;[43] other actions required the vote of Capua and any one of the other two Managers;[44] and actions in which a Manager had a personal interest needed to

[42] LLC Agreement § 5.2.6(b)(iii).
[43] *Id.* at § 5.2.6(c).
[44] *Id.* at § 5.2.6(d).

be approved by a "unanimous vote of the other two Board Members."[45] These different approval schemes made certain actions easier to approve, made others more difficult to approve, and ensured that certain Managers either approved or did not vote on specific actions.

The actions for which § 5.2.6(b) required "unanimous approval of the Board" are actions that would have fundamentally changed Aeosphere: the amendment or termination of Matthew's or Laudamiel's employment agreements, the sale or lease of all of Aeosphere's assets, or the winding up of Aeosphere. A reasonable person in the position of the parties would not interpret the LLC Agreement as providing that these actions could have been more easily approved than the typical action requiring Board approval, but the Manager Defendants' interpretation has this effect. Under the Manager Defendants' interpretation of § 5.2.6(b), if all three of the Managers were present at a Board meeting, all three would need to approve the decision to wind up Aeosphere. But, according to the Manager Defendants, if only two Managers were present at a meeting—a quorum—those two Managers could approve the decision to wind up Aeosphere, even if either Matthew or Laudamiel did not vote. Therefore, in the second scenario, the Manager Defendants' interpretation of § 5.2.6(b) actually results in "unanimous approval of the Board" being an easier standard to meet than the

[45] *Id.* at § 5.2.6(f).

general standard for Board approval set forth in § 5.2.6(a) because it would allow Laudamiel and Capua, alone, to approve an action without meeting § 5.2.6(a)'s requirement of a "deadlock" between Matthew and Laudamiel before Capua could cast a tie-breaking vote. While this distinction may seem minor and merely procedural,[46] the fact that the Manager Defendants' interpretation of § 5.2.6(b) would, even if only in a technical sense, render it easier to meet than § 5.2.6(a) points to the unreasonableness of this interpretation. The only reasonable interpretation of § 5.2.6(b) is that it required the approval of all three Managers to approve the enumerated actions.[47] As a result, unless the Manager Defendants prevail on one of their affirmative defenses or Matthew is unable to prove that he suffered any damages, the Manager Defendants will be liable for a breach of § 5.2.6(b)(iii) of the LLC Agreement.

C. *Matthew's Alleged Prior Material Breaches of the LLC Agreement*

The Manager Defendants argue that, even if their approval of the decision to wind up Aeosphere constituted a breach of the LLC Agreement, the breach was

[46] By requiring a deadlock between Matthew and Laudamiel before Capua can cast a tie-breaking vote, § 5.2.6(a) ensures that both Matthew and Laudamiel have the opportunity to vote on and, presumably, explain their views on a matter. This process could sway (at least in theory) Capua one way or the other; therefore, the deadlock requirement should not be readily discounted. This view that the deadlock requirement was important is buttressed by the fact that the parties bothered to include it in § 5.2.5(a). Had it been seen as merely a procedural matter lacking in substance and import, the general requirement for Board approval could have been the approval of any two of the three Managers, which was the standard for Board approval of certain actions under § 5.2.6(c).

[47] Alternatively, the Court concludes that the Manager Defendants' argument concerning the meaning of the unanimity requirement in § 5.2.6(b) was not timely raised.

excused by Matthew's prior, material breaches of the LLC Agreement. The Manager Defendants allege that Matthew committed numerous breaches of the LLC Agreement before the Emergency Board Meeting. For example, the Manager Defendants allege that Matthew, in his roles as a Manager and a co-CEO, in breach of the LLC Agreement, refused either to approve or to disapprove certain contracts that required his approval. Examples of these contracts include Christoph Hornetz's employment contract and contracts for the "assistance, supplies, and infrastructure" supposedly needed by Laudamiel to carry out his duties as a perfumer.[48] Additionally, the Manager Defendants have alleged that Matthew breached the LLC Agreement by improperly approving various contracts that also required Laudamiel's approval, including contracts to hire a headhunter and a personal assistant and contracts related to the ScentOpera.[49] The Manager Defendants contend that even if they have not proven their affirmative defense of a prior material breach, they have, at the very least, raised a disputed issue of material fact that requires trial.

In response, Matthew argues that, on a motion for summary judgment, the Manager Defendants may not simply rely upon the allegations of the Verified Counterclaims as support for these alleged breaches. Furthermore, according to

[48] Countercls. ¶¶ 31-34.
[49] *Id.* at ¶ 30.

Matthew, even assuming the truth of these allegations, the Manager Defendants' defense would still fail because the breaches alleged are not material.

As previously recognized by this Court:

> Substantial failure to live up to the material terms of a valid contract nullifies that contract. A party may terminate or rescind a contract because of substantial nonperformance or breach by the other party. Not all breaches will authorize the other party to abandon or refuse further performance. To justify termination, it is necessary that the failure of performance on the part of the other go to the substance of the contract. Modern courts, and the Restatement (Second) of Contracts, recognize that something more than mere default is ordinarily necessary to excuse the other party's performance in the typical situation, subscribing to the general rule that where the performance of one party is due before that of the other party, such as when the former party's performance requires a period of time, an uncured failure of performance by the former can suspend or discharge the latter's duty of performance only if the failure is *material or substantial*.[50]

In sum, "although a material breach excuses performance of a contract, a nonmaterial—or *de minimis*—breach will not allow the non-breaching party to avoid its obligations under the contract."[51]

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[50] *DeMarie v. Neff*, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005) (emphasis in original) (internal quotations and citations omitted). Citing the portion of *DeMarie* quoted above, Matthew also argues that his alleged breaches must be immaterial because Laudamiel's and Capua's "obligation to observe the LLC Agreement's restrictions on dissolution [were] not dependent upon [Matthew's] prior performance under the contract, a pre-requisite for any valid repudiation." Reply Br. 6 (citing *DeMarie*, 2005 WL 89403, at *4). The Court rejects this argument because *DeMarie* did not limit the ability of one party to void a contract due to another party's material breach to only the specific situation described by Matthew. *See DeMarie*, 2005 WL 89403, at *4.

[51] *DeMarie*, 2005 WL 89403, at *4.

Therefore, the two key questions are (1) whether the factual allegations of the Verified Counterclaims may be used to raise an issue of material fact sufficient to carry the Manager Defendants' burden under the summary judgment standard and (2) whether Matthew's alleged breaches, if proven, would be considered material breaches sufficient to excuse the Manager Defendants' performance under the LLC Agreement. The Court concludes that the factual allegations contained in the Verified Counterclaims may be used to raise an issue of material fact and that they have raised issues of material fact related to Matthew's alleged breaches and the materiality of those alleged breaches.

Matthew first argues that the Court need not even consider the Manager Defendants' contention that their prior breach affirmative defense raises an issue of material fact because it is based solely upon the factual allegations set forth in the Verified Counterclaims. "A verified pleading can be used as an affidavit if the facts stated therein are true to the party's own knowledge."[52] Concerning the acts and deeds of others, verified pleadings must contain an affirmation by the filing party that the information is believed by the party to be true.[53] In this case, the Manager Defendants argue that Matthew's prior breaches excuse their later breach. The factual allegations underlying this argument were set forth in the Manager

[52] *Taylor v. Jones*, 2002 WL 31926612, at *2 n.6 (Del. Ch. Dec. 17, 2002) (citing *Bruce E.M. v. Dorthea A.M.*, 455 A.2d 866, 869 (Del. 1983)).
[53] *Id.*

Defendants' Verified Counterclaims.[54] The portions of the Verified Counterclaims relevant to this argument concern the acts of Matthew. Therefore, the verification portion of the Verified Counterclaims, which recites that the allegations of the Verified Counterclaims are "true and correct to the best of [Laudamiel's and Capua's] knowledge, information and belief,"[55] is sufficient to allow the Verified Counterclaims to be used as an affidavit. In his reply to the Verified Counterclaims, Matthew generally denies these factual allegations.[56] As a result, the facts relevant to the Manager Defendants' prior breach affirmative defense are in dispute.

Alternatively, Matthew contends that, even if the Court were to accept the truth of the Manager Defendants' allegations regarding his alleged breaches of the LLC Agreement, such breaches were not material and, therefore, could not excuse the Manager Defendants' later breach. The Manager Defendants argue, essentially, that Matthew engaged in a pattern of conduct that made the governance structure set forth in the LLC Agreement unworkable. At the core of this pattern of conduct were the actions that the Manager Defendants allege constitute breaches of the LLC Agreement. In this sense, the Manager Defendants seem to argue that the

[54] *See* Countercls. ¶¶ 30-34.
[55] *Id.*
[56] Plaintiff's Reply to Amended Counterclaims of Defendants Christophe Laudamiel, Roberto Capua and Action 1 srl ¶¶ 30-34.

total impact of Matthew's multiple alleged breaches is greater than the sum of the parts.

Within the context of a disclosure claim, it is commonly stated that the determination of materiality is a mixed question of law and fact.[57] This is so because the determination of materiality involves the application of a legal standard to a particular set of facts.[58] The same may be said about assessing the materiality of a breach of contract. The Supreme Court, citing the United States Supreme Court, has stated that the "issue of materiality . . . is . . . predominately a question of fact, which is not generally suited for disposition by summary judgment."[59] Furthermore, it has been recognized that "factual disputes concerning the occurrence or materiality of [an] alleged breach itself may prevent summary judgment from being entered."[60]

The Court cannot, on the record before it, determine as a matter of law whether the alleged breaches were material. The nature of the alleged breaches requires the Court to consider a broader factual context than what is currently reflected in the undisputed facts in order to determine whether the alleged breaches were material. In other words, the alleged breaches, on their faces, are neither so

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[57] *E.g., O'Malley v. Boris*, 742 A.2d 845, 850 (Del. 1999).
[58] *See Branson v. Exide Elecs. Corp.*, 645 A.2d 568 (Del. 1994) (TABLE).
[59] *Id.* (citing *TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 450 (1976)). *See also Pfeffer v. Redstone*, 965 A.2d 676, 685 (Del. 2009) (stating that the issue of materiality is predominately a question of fact).
[60] 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2730.1 (3d ed. 2012).

severe, nor so insignificant, that the Court can assess their materiality without the aid of a fuller understanding of the functioning of Aeosphere's Board, the impact of the alleged breaches on Aeosphere's operations, and, perhaps, the number and severity of other breaches affecting the Board's ability to manage Aeosphere.[61] Since the Manager Defendants have raised contested issues of fact that are, potentially, material, Matthew has not carried his burden and is not entitled to partial summary judgment on Count I.

D. *The Conversion Claim*

Matthew is not entitled to partial summary judgment on Count V. Matthew's argument in support of his conversion claim is based on the premise that Aeosphere's dissolution and winding up violated Delaware law because these actions were approved in a manner that violated the LLC Agreement. Therefore, since Matthew has not prevailed on partial summary judgment on his claim that Laudamiel and Capua are liable for a breach of the LLC Agreement related to their approval of Aeosphere's dissolution and winding up, he cannot prevail on his conversion claim, either.

[61] This, of course, is not a complete list of all of the facts that might be relevant to the Court's assessment of materiality.

VI. CONCLUSION

For the foregoing reasons, Matthew's motion for partial summary judgment as to Count I and Count V is denied.[62]

IT IS SO ORDERED.

[62] It is not anticipated that the issues resolved in this Memorandum Opinion will be relitigated.