IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DANIEL GERLANC, Plaintiff,	:	
v	:	Civil Action No. 2017-0211-JTL
JOSEPH BEATRICE and JACOB GOLDSTEIN, Defendants,	:	
and	:	
BARRELL CRAFT SPIRITS, LLC, Nominal Defendant.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, March 23, 2017
10 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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TELEPHONIC ORAL ARGUMENT ON PLAINTIFF'S MOTION TO EXPEDITE PROCEEDINGS and RULINGS OF THE COURT

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CHANCERY COURT REPORTERS
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APPEARANCES: (via telephone)

CHRISTOPHER A. SELZER, ESQ.
McCarter & English, LLP
for Plaintiff

K. TYLER O'CONNELL, ESQ.
REBECCA L. BUTCHER, ESQ.
Landis, Rath & Cobb LLP
for Defendants

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THE COURT: Good morning. This is Travis Laster speaking. Who's appearing for the plaintiff, Mr. Gerlanc?

MR. SELZER: Good morning, Your Honor. Chris Selzer, McCarter, for the plaintiff.

THE COURT: Great. Who's appearing for the defendants?

MR. O'CONNELL: Good morning, Your Honor. You have Tyler O'Connell and Rebecca Butcher from Landis, Rath & Cobb.

THE COURT: All right. Well, I've read your papers, including Mr. O'Connell's papers. So, Mr. Selzer, why don't you go ahead.

MR. SELZER: Good morning, Your Honor. Thank you for hearing us.

Our client was not an employee. He was a consultant that was paid in stock and otherwise, and he acquired a portion of this particular company.

In the last several years there have been some questions about books and records. That was recently resolved, although they are in breach of the recent agreement that we reached that resolved the last books and records issue. And our client had been asking, knowing that things were moving forward with

the company, when the parties were going to prepare a new operating agreement. And that discussion has been back and forth with the parties.

And the long and short of it was that out of the blue, about a week and a half ago, our client received a written operating agreement adopted by written consent that is completely different than the discussions and the understanding that the parties had and had been operating under.

It seems to me at this point, having read the papers as quickly as I could, as Your Honor did, submitted by the defendants, that the affidavits themselves specifically admit that they plan to seek immediate future funding. They say the company, I guess, could be in jeopardy if they don't seek immediate funding, and this new purported operating agreement, Your Honor, does dilute significantly our client's -- it creates very different classes of ownership, all controlled by now a managing member, Beatrice, who can decide who gets what, when and where and why and for how much. There are a number of other provisions in the agreement. They're well outside of what the parties originally understood.

The argument simply, from our client's

perspective, is that although many things, as Your Honor might understand, weren't really discussed or understood and many things were, that does not mean that an operating agreements between the parties did not exist.

It seems to me that the new written operating agreement expressly acknowledges that there was a prior oral operating agreement. And our client was not appraised of any of this stuff. We would have liked to have participated in some of these issues. These issues directly impact his particular rights; and under the statute our client is entitled to, with an amendment of the previously acknowledged oral operating agreement, approve the new written operating agreement.

And we respectfully request that Your Honor tee this up either to allow us to respond to the allegations in the TRO here or grant a status quo order in which the parties won't operate under the operating agreement until a PI hearing moves forward so that we can get to the bottom of what the oral agreement was and whether or not it required approval of all the members before it could be amended as quickly as we can tee it up after having received

that, Your Honor. There was no intent to delay or to prejudice anybody. In fact, I would respectfully submit it was the other way around. Our client didn't receive this for more than a month after they had adopted it, even though he had been asking for it for six months and asking to discuss these particular issues. He's not an angry and disgruntled individual. He just wants to protect his investments, and here we are.

I'm happy to discuss the provisions of the agreements or anything else if Your Honor wishes. I'm not sure you want me to go that far, but I'm willing to discuss that.

THE COURT: Great. Thank you very much.

Mr. O'Connell.

MR. O'CONNELL: Thank you. Good morning. Thank you for considering our papers on such short notice.

As indicated, we were kind of required to prepare them pretty quickly due to the fact we had little notice ourselves. And they were filed as soon as they were done this morning. So over the past few days we've been kind of getting up to speed. And we

learned some interesting things, and I think it would be helpful to give the Court a little more context than our papers tried to do that. But if I can quickly maybe run through a couple things, it may help Your Honor understand where we are.

In a very real way, this is a bet-the-company case. The motions that Mr. Gerlanc has filed really do threaten the company's existence. What we have here is a very small start-up company. It operates at a loss. It's working to implement its business plan, clear some regulatory hurdles in its business, and build its brand. I don't understand any of that to be disputed, and I didn't hear Mr. Selzer say anything to the contrary there. The documents we provided give the Court a little bit of context about the size of the business we're talking about.

There was a note offering, a convertible note offering which, by definition, will dilute people, contrary to the alleged oral agreement with no dilution. Mr. Gerlanc invested in that. Your Honor will see from those documents -- and that's at Exhibit 5, I think page 6 has the definition of the conversion price references a premoney valuation of $1.2 million. Again, small company.

Your Honor also has the documents showing that the company hopes to do a future capital raise at some point at a $3 million valuation. It's not there yet; but these are documents, again, that were provided to Mr. Selzer's client years ago, showing that, again, additional future diluted financings were always contemplated. And these are -- I think it bears mentioning and repeating that these are the only -- there are no documents in any of the plaintiff's filings that support this alleged oral or implied agreement that contradicts the things we've said in our filing.

Big picture, Your Honor, you have my clients. They're founders. They have every incentive to want to make this succeed. They own almost all of the business, 92.5 percent. They both work for the company and they have since inception. They're regularly defined in the company's documents as the managers. The note document Your Honor has identifies them as the board, not Mr. Gerlanc. Mr. Beatrice is the 72.5 percent interest holder. He's working full-time for the company. He's in meetings right now in Kentucky trying to build this business. He's looking to move his family there. It's his

livelihood. Even Mr. Gerlanc concedes, I believe, that Mr. Beatrice is the manager and has at least day-to-day control over the client. My client -- over the company. I'm sorry. My clients are all in for this company. Again, it's a much bigger deal to them than I think it is to Mr. Gerlanc, to be frank, Your Honor.

Then you have Mr. Gerlanc. He's a minority investor. He left the company under bad circumstances. I think, again, it's undisputed that he resigned and then, according to his own pleading, his problems started in terms of litigation and disputes.

He was granted a small membership interest for his prior work. He never made an actual dollar capital contribution. He has made no contributions of any kind since the end of 2015 when he quit.

His pleading refers to disputes since early 2016. You know, we try to give them a little more context in our papers, Your Honor. We understand he tried to hold the company hostage then to extort just a little bit more comp from the company. He refused to return over control of the website and its

customer relations software. And Mr. Beatrice has sworn that again in an affidavit. This is the second time he's actually sued the company.

There's been talk about the prior books and records action in which he was also represented by the McCarter firm. The fact is that the company gave him almost everything he was asking for before Mr. Gerlanc filed suit. He really just brought suit to get the names of certain investors in the company, which I don't think he would ever get normally if the Court had to rule on that and, also, you know, a detailed general ledger that he says he didn't have.

The company settled the case quickly and gave him those documents to try to avoid the distraction and costs of litigation.

We learned a couple of interesting things through that case, Your Honor --

THE COURT: I'm sorry. Mr. O'Connell.

MR. O'CONNELL: Yes.

THE COURT: I've got to interrupt you on that one. Why don't you think you would ever get names of investors?

MR. O'CONNELL: I -- I think the

purpose he was looking for was to value his shares and understand, you know, the context of the company. You know, there are note offerings. He bought some notes. Other folks bought some notes. You know, I -- I don't have any reason to think that that was public information. I don't know why it would be material to somebody, the names of people who invested.

So I do think that if push came to shove, there would be at least a bona fide dispute there. Well, in any event --

THE COURT: No, no. This isn't in any event, because your guys are taking a series of very aggressive positions and you've just added to the list. So I'm just wondering when 18-305 gives you a statutory right to a current list of the names and the last-known business residence or mailing address of each member or manager, why you think it's preposterous that someone would actually get that.

MR. O'CONNELL: Your Honor, that wasn't, I don't believe, the request that was made. These were people that purchased convertible notes. So I don't think they would be covered under that provision.

But I understand Your Honor's point --

THE COURT: Your whole point has been that they converted the member interest; right?

MR. O'CONNELL: I don't believe that they've converted yet, Your Honor. I think that it's become --

THE COURT: No, I know they haven't converted yet, and that's not what I said. I said your point was "are convertible and that they can convert into member interests."

MR. O'CONNELL: Understood, Your Honor. I -- in any event, I take your point. And the fact of the matter is the company did settle that case relatively quickly after giving him, again, almost everything he had asked for before he filed that lawsuit. And so I don't think there's any dispute that the information we just talked about was actually provided to him.

So --

THE COURT: No. Look, I was focusing on the idea that you didn't think there was any possible way he would have been entitled to the information, which struck me as an overzealous statement.

MR. O'CONNELL: Your Honor -- and I

apologize. I gather -- I understand it's really not material here. That was my take upon it. Again, we are --

THE COURT: No. Look, as long as you're in the business of impugning the guy, why not impugn him as many ways as possible.

MR. O'CONNELL: Your Honor, I'm not attempting to do that. What I'm trying to do is give a little bit --

THE COURT: What -- you haven't actually gotten to anything relevant to this application yet. All you've done is given me three or four reasons why this guy is supposedly a bad guy.

MR. O'CONNELL: Your Honor, what I -- that's not my intention. What I'm trying to do is give Your Honor the objective facts that show the interest, on the one hand, that my clients have to make this company grow and succeed, it is their livelihood, and give Your Honor some context to help understand why we're here with a 7.5 percent member bringing serial litigation against this tiny company that really is --

THE COURT: By "serial litigation" you mean a books and records action and now an action

challenging the adoption of a LLC agreement where they didn't get his consent. That's what you mean by "serial"; true?

MR. O'CONNELL: Your Honor, these are the cases, yes.

THE COURT: By "serial," what you mean is two.

MR. O'CONNELL: Yes, Your Honor.

THE COURT: And by "litigation," what you mean is an effort to get books and records and now the current case.

MR. O'CONNELL: Your Honor, that's right. These are the cases that have been filed.

THE COURT: Right. I just wanted -- you seem to be speaking a different language than I speak. So I'm trying to translate it in real time, and I now understand what you mean by "serial litigation."

MR. O'CONNELL: Understood, Your Honor.

And I do think the prior case is just interesting for a couple reasons. One, Your Honor, the verified complaint in this case says that part of this alleged oral LLC agreement was that the members

"would freely exchange information" among themselves. I just raise that because that is not a claim or contention that was raised in the prior books and records case, where, if there had been such an agreement, according to Mr. Gerlanc, it would have been breached and, you know, according to the rules and the way litigation works, he would have been expected to assert that claim in that verified pleading. So I raise that just to let Your Honor know that that's something.

The second point that I think is germane and helps the Court understand a little bit of context is that we learned that the McCarter firm represents Mr. Gerlanc without charging fees. That was something that was disclosed to us. There is some sort of relationship there, either with his parents or with him itself, that causes them to want to do this without charging attorneys' fees. They have indicated to us --

THE COURT: Yeah. Like, I'm going to come back and say okay, is this just the list of disparaging points that you want to throw out there? How -- how is that -- how does that equate to anything that I would take into account on this application?

Or is this just -- again, you just like throwing out a bunch of mud?

MR. O'CONNELL: Your Honor, I don't -- I didn't regard that as being mud. But what I'm trying to do is help Your Honor understand the economics of this and why --

THE COURT: I'm trying to understand how it relates. So, again, what is your theory? --the fact that he has some atypical relationship with his law firm casts doubt on the bona fides of his claim? So what -- how does that follow?

MR. O'CONNELL: Your Honor, that was not my point. My point is simply this: It's very easy for Mr. Gerlanc to make this very expensive for everybody else, completely out of proportion with the reasonable implied value of his membership interest. And that gives him leverage without incurring the same costs. And that's one point I do want Your Honor to appreciate.

We are here at a scheduling conference, but, again, we view this as basically a bet-the-company case in a very important stage of that case.

THE COURT: How soon are these guys

(Inaudible) money?

MR. O'CONNELL: Your Honor, I don't know exactly. It's not -- there is no agreement with anybody. There are no, you know, focused talks with anyone in particular. My understanding is that they feel they definitely need to raise additional capital by the end of this year and ideally would do it, you know, six months out, you know, by six months out. You know, again, this is something that was always understood that was going to happen. Not a single piece of paper suggests that Mr. Gerlanc would ever have a veto right over any such transaction.

THE COURT: All right. Well, let's --

MR. O'CONNELL: Your Honor --

THE COURT: -- let's not call this a bet-the-company case when there's nothing imminent. Like, if these guys were running out of money right now and they were in extremis, then you could legitimately call this a bet-the-company case. What this is is a dispute about whether people had the right to adopt an LLC agreement nonunanimously.

MR. O'CONNELL: Your Honor, I --

THE COURT: Again, you are speaking a language of alarm and extremism and exaggeration, and

I am trying to translate it into what actually seemed to be the facts.

MR. O'CONNELL: Your Honor, I -- I'm not attempting to -- I don't believe I'm exaggerating. If the motion --

THE COURT: No, I know you don't believe that because that's a subjective thing.

MR. O'CONNELL: I -- right. I'm not exaggerating. If the motion to expedite were to be granted, the attendant costs on my client, which, again, I believe would be disproportionate -- and my understanding is the dynamic is very easy for him to try to do that based on his relationship, but the costs on my client would cripple the business. It would exacerbate the need for financing that it would be unable to raise in light of the litigation.

THE COURT: Yeah. So what alternatives would your fellows have, then?

MR. O'CONNELL: What -- the alternative we would suggest, Your Honor, is really what we're seeking in our papers, is that the motion --

THE COURT: No. No. If -- that's not -- and to be fair to you, that was an ambiguous

question on my part. But you are painting this as if, in a world where I were to expedite, your folks would have zero choice but to engage in litigation. And my point is simply that's never an exclusive choice.

MR. O'CONNELL: Oh, I -- I think I take your point, Your Honor. And I -- if I'm catching your meaning correctly, you're saying we could talk to Mr. Gerlanc and try to reach a resolution. Is that right?

THE COURT: Yes.

MR. O'CONNELL: Yes. So, Your Honor, I can tell you this: We've repeatedly talked to Mr. Gerlanc. And, you know, these communications have gone on since the filing of this case and we're getting stonewalled. You know, I mean, my clients honestly think that Mr. Gerlanc's goal here is just to harm the company and depress its value to such a point that perhaps he, with the help of some other people, can come in and attempt to take it over. And I -- I'm not trying to speak out of school. I know Your Honor wants to focus on the merits, but that really is the context here that I hope Your Honor appreciates.

THE COURT: All right. Well, you've talked a long time now and you haven't actually said

anything about the merits of the application.

MR. O'CONNELL: Okay. Your Honor, let me turn to the merits. I mean, you've obviously got the standard, colorable claim and a threat of imminent irreparable harm.

Colorable claim. We describe the claim as facially dubious. I don't think that's an overly aggressive characterization of this claim, Your Honor. It's an extraordinary alleged right to give a 7.5 percent member an oral veto right over financing transactions that clearly were contemplated in the future. But --

THE COURT: Why don't we actually frame it as what they claim rather than how you just recharacterized it? What the claim actually is is that this company was operating under an oral LLC agreement where no one took the time at the outset of this small start-up company, which is not an uncommon thing not to take the time to do, to agree upon provisions for amending the agreement and, therefore, default principles of law apply. The claim is that default principles of law, when you amend a contract, required that all parties to the contract sign off. And the claim is that because that common law

principle was not always immediately recognized by LLC lawyers in other jurisdictions, that the Delaware General Assembly confirmed it by adopting a provision of the LLC statute, 18-302(f), that specifically says it.

So what I think the extraordinary claim here is that despite these things, what your fellows are saying is that they could amend a contract without the consent of one of the parties. So what they are essentially saying -- and you, because you are -- you're a contract party with these fellows. You're their lawyer. So the position these folks are taking is that the two of them can unilaterally amend your fee agreement. That is how it translates from this context into your context.

So think about that. What their claim is is that you guys can -- you can work for them and with them for four years and that they can go -- then go and write up a big fee agreement among themselves that says you actually get, you know, 20 percent instead of your full hourly rate. Legally, that is the framework of the defense you are advancing. And that is what you are saying is an extraordinary -- you are saying that the claim that someone has contract

rights is an extraordinary claim.

MR. O'CONNELL: Your Honor, I -- I don't think that's our position. Our position is that the claim that someone has the few identified alleged contract rights referred to -- and it's really one paragraph of the complaint, paragraph 16 -- really boils down to the information point I already addressed and this veto right. And that's what it is. It says no changes in the capital structure without the consent of all members. No additional financing -- I'm paraphrasing -- without all members. It's kind of redundant because it says the same thing twice. But that is the alleged content of the alleged agreement. Otherwise, I understand them to say, you know, the default act controls.

So they're saying that --

THE COURT: Okay. See, that -- but you see, what you are doing is, you are identifying the specific and claiming that it's the exclusive. And then you -- but what you just recognized by saying "the default act controls," that's the general, okay? What they are saying is that "We got together to do this LLC and nobody ever sat down and spelled out everything. We just all knew that we were the guys.

We were going to be it and that we were going to agree on stuff, stuff, you know. And sure, stuff includes bringing people into the venture. Stuff includes financings like that. But basically nobody talked about this, and we agreed on the default statute."

Now, under the default statute, what would you have to do to create a preferred class of units if your LLC agreement didn't initially provide for them?

MR. O'CONNELL: Your Honor, I think if there was the kind of agreement you're mentioning, that you need to go back to the members.

THE COURT: And do what?

MR. O'CONNELL: And get consent, is my understanding.

THE COURT: To do what? Yeah, to do what?

MR. O'CONNELL: To --

THE COURT: What would you be doing? What would be the legal act you would be doing?

MR. O'CONNELL: If you had -- if you had an original agreement that did not provide for that, you would be amending that agreement.

THE COURT: Yeah, you would be

amending that agreement, exactly. And what would you be doing if you were then going to introduce -- like, let's say we have an oral agreement that parallels the statute. What would you be doing if you went out and changed a lot of the governance provisions? What would that require?

MR. O'CONNELL: Your Honor, I take your point. And I think it's the same answer.

THE COURT: No. What would it require, Mr. O'Connell?

MR. O'CONNELL: It would require an amendment, just as before.

THE COURT: Yeah, it would require an amendment to the agreement. And what is -- when you're -- what is the default rule under the common law in terms of people amending a contract if the contract doesn't provide for anything? So could your clients just unilaterally amend your fee agreement without your consent?

MR. O'CONNELL: No, Your Honor.

THE COURT: No. They'd need your consent, right, because you have to have party consent to amend a contract; right?

MR. O'CONNELL: Yes, Your Honor.

THE COURT: All right. So step back now and go back to the beginning where you were telling me that you weren't exaggerating by saying that that was an extraordinary claim.

MR. O'CONNELL: Sure. Your Honor, I -- my point I just this: That -- it comes down to a few things. One is, the only specific obligation that people allegedly agreed upon really boils down to this right to veto financings. And I think that is a fair characterization of the papers, that any member could veto financings. That --

THE COURT: And why are they saying that any member could veto the financings?

MR. O'CONNELL: Paragraph 16 of your -- of the complaint, Your Honor. I mean, this is the only explanation of the alleged agreement that we have.

THE COURT: No. I didn't say where. I said why. I said what is their rationale for asserting that any member could veto the financings?

MR. O'CONNELL: As I understand it, they claim there was an agreement, oral or implied, I guess, based on a course of conduct -- I don't know -- that that would be the case. There's no detail in the

complaint. The oral part of it is not explained in the complaint. There's not a single shred of paper that's been provided by the --

THE COURT: All right. Let me stop you. Let me stop you. So, again, if we are operating under the default principles of the LLC Act and we have agreed that we each have a certain number, certain percentage of units, what would one have to do to create new units to raise financing?

MR. O'CONNELL: I guess the question is whether -- I understand the managing member -- I mean the majority in interest of the company would have a lot of rights in that regard, Your Honor, and --

THE COURT: You think they would.

MR. O'CONNELL: Yeah.

THE COURT: You think that if the LLC agreement, you know, orally said Laster and O'Connell are the sole members of this LLC, O'Connell holds 70 and Laster holds 30, you think that you would have a lot of rights to issue new units without us first doing something.

MR. O'CONNELL: Your Honor, I -- I think -- I'm sorry. I may have misunderstood your

question. If there was, in fact, a limited liability company agreement, in fact, reached among the members at the time contemplated in the statute, what Your Honor is saying is completely true. I take your point and --

THE COURT: Okay. What if O'Connell and Laster said "Hey, look, you know, it costs a lot of money to write up an LLC agreement, and, you know, we know each other. You know, we're both members of the Delaware Bar. We're just going to go with the default provisions of the LLC Act and, you know, have an oral agreement to that"? What is your view as to the majority member's ability to issue more units under that circumstance?

MR. O'CONNELL: Well, I -- I don't believe that -- if there was not, in fact, an LLC agreement -- and, you know, we talked a little bit about the technical point of amending an LLC agreement. If all there was was agreement with respect to who owns what equity, the majority member has a lot of rights under the LLC Act, including, I mean --

THE COURT: Why don't you identify them for me.

MR. O'CONNELL: Well, Your Honor, for one, he could do a merger. You know, that's even in the amendment provision itself that references it's not intended to affect the way you can amend things by the law. That's one that just jumps straight out to me. But --

THE COURT: Did your guys do that?

MR. O'CONNELL: No, Your Honor. There has not been that action taken.

THE COURT: So if what we're talking about here -- again, to get back to the original question -- is just -- the original question was whether O'Connell in my hypothetical or O'Connell's clients in the real situation could simply pump out new units without having to do something first -- and since, you know, you're doing a lot of work to try to avoid saying this, I'll just ask you: Do you think that the majority member could pump out new units without an amendment to the LLC agreement?

MR. O'CONNELL: Your Honor, I'm not aware of a prohibition on raising -- whether it's a board of managers, a majority member, I'm not aware of a prohibition of raising new capital, you know, assuming the only agreement you had, again, was that I

owned 5 percent, you owned 95 percent, whatever it was --

THE COURT: So you think in a member-managed LLC -- because that's the statutory default -- where all of the units have been allocated, that the dominant member can just create new units and issue them without an amendment to the agreement.

MR. O'CONNELL: Your Honor, if I accept your premise that the agreement, in fact, was that they were a defined set of units and they had all been allocated and that was in the LLC agreement, I get your point and I agree with you.

I think what our point here on the merits, Your Honor, is really this: that the types of narrow alleged implied promises that supposedly compromise the oral or implied LLC agreement did not -- well, one, they didn't happen. And we can litigate over the merits of that, and I know Your Honor wants to put aside that question. Your Honor is saying assuming --

THE COURT: Why do you think it's narrow? Why do you think it's narrow to sit down and say if this even said this at all -- what usually happens in these situations is people just say "All

right, we've got an LLC. Let's get rolling." But if we're living in a hypothetical world, which is alleged in the complaint, where they functionally agree to follow the default provisions of the Act, why do you keep saying that's narrow?

MR. O'CONNELL: Well, Your Honor, I guess -- one -- you're right. It depends how it happened. I wasn't even sure that they were saying there was an actual affirmative agreement to follow the default provisions. I guess just by not saying otherwise maybe you have this implied agreement idea because it's the background. So I --

THE COURT: Yeah, because otherwise you wouldn't have an operating agreement; right?

MR. O'CONNELL: Yeah. And, I mean, my understanding is the company, a Delaware LLC is not required to have one. You know --

THE COURT: No, it's not required to have a written one.

MR. O'CONNELL: I take your point. I mean, these are interesting issues, Your Honor. I --

THE COURT: No. Your interpretation of them is interesting. That is what is interesting. What is interesting is your interpretation.

MR. O'CONNELL: Well, Your Honor, maybe I should turn to the second aspect of this really what I think is where the rubber meets the road on a scheduling conference such as this and, you know, given the TRO that's been filed.

Your Honor, we don't think that there's really --

THE COURT: So here's the thing. So, all right. And I guess, look, I've been a little harsh on you because the word "narrow" does appear in paragraph 15. I don't get why this is narrow, but they say, "Since its inception, the parties have operated BCS pursuant to a narrow, but long understood, oral and implied agreement that defaulted to the governing statute." That is their core allegation. Their core allegation is that everybody agreed, either affirmatively or by default, because nobody talked about it, that the default provisions of the LLC statute functioned as the agreement. And so everything else that they allege in here -- so, for example, you focus on paragraph 16 -- it flows from that.

So you get 305 rights. You were talking about the prior books and records action. You

get 18-305 rights because they're part of the default under the statute. You have to do an amendment to do something major like shift people's ownership percentages or pump out new units, which has the same effect, because that's the default under the statute. And you need unanimous consent to do that because that's the default under the statute.

That's the context in which we're playing here. And so what your guys have come in is, they haven't said "Yeah, we had some type of agreement." What they said is "Oh, if I understood the full implications of the unlawyered, undrafted LLC agreement that we functioned under, I never would have agreed to it." Well, that's great to have regrets. I think a lot of us have regrets. One of the challenges of being a mature person is to accept your prior decisions and minimize your regrets. But having regrets now doesn't let you pretend that it didn't happen.

What you have tried to do this entire time is, A, even though you've denied it, throw a bunch of irrelevant aspersions and then, B, contest the idea that the general proposition is that everybody was working under the default provisions of

the Act. And neither -- you know, casting dirt on a guy, like, A, isn't helpful and, B, really only undermines your own credibility on the merits because it suggests that you really don't have anything to say meaningful on the merits. And now that we've gotten to the merits, well, that turned out to be true. You know, you really didn't have anything to say on the merits of their actual argument, which is that "We were operating under the default provisions of the LLC Act."

So, you know, you did a good job. You're a good lawyer. You tried to, you know, dance and say "Oh, well, this is really just these two agreements in paragraph 16 and why would anybody ever agree to these narrow things," et cetera. You're missing the point.

The point is they agreed to the default provisions of the Act, either consciously or by not doing this, but just sort of going forward with the LLC, which, again, like, start-up ventures, I think it's highly likely. And that was -- that may well have been a sensible risk-adjusted decision at the time not to spend money for a fully worked agreement that would contemplate all these things,

because everybody's in start-up mode and everybody's getting along and everybody's trying to work together.

But when the risk actually comes home, you don't get to go back and pretend that you did something different. And none of the things that you and your clients have pointed to as suggesting that they did something different actually support the inference that they did something different.

So you've identified this idea that they raised capital through the convertible notes. But you've also pointed out that that was unanimous. In other words, the plaintiff Gerlanc himself invested along with his friend. He was on board. So what does that actually suggest? It is actually consistent with the idea that everybody wanted these -- everybody expected that they'd be on the same page and would agree and that they didn't have to lawyer up and work these things out, because if everyone agrees, which we, with some difficulty, established, you can either amend the LLC agreement or waive its provisions and go forward and do what you want.

So the fact that you guys raised capital with Gerlanc's consent does not provide any support for the idea that you could raise capital

without his consent. It is action consistent with his theory and not inconsistent with his theory. It is action inconsistent with your theory because you actually got his consent.

MR. O'CONNELL: Your Honor, may I ask a question? I guess -- and part of this is an explanation. I think Your Honor has articulated a theory that did not come across clearly in the plaintiff's papers. And I do think it's an interesting theory.

THE COURT: Really? You don't think -- you don't think that the fair -- that paragraph 15, "Since its inception, the parties have operated BCS pursuant to a narrow, but long understood, oral and implied agreement that defaulted to the governing statute," you think that is insufficiently clear so that I just made all this up.

MR. O'CONNELL: Your Honor, I didn't mean to suggest that. The way I read their complaint -- and I can see why Your Honor reads it the way you do. But the way I had read it was that there were -- there was -- there's a reference to an oral agreement, there's a reference to an implied agreement about specific terms. And then they say "coupled with

the protection of Delaware's limited liability company statute."

So I didn't know -- I didn't read their complaint as suggesting that the agreement, in fact, was just this is "We're going to default to the LLC Act." And I guess the other term would be "we are the members," "there are no unissued units," et cetera. That would be the other, I guess, implied term that they would be arguing.

THE COURT: But these are all the baseline things. So you, Ms. Butcher, and I form an LLC. We are the members. And unless we write an agreement that says we are the members that hold X number of units, the authorized number of units for the LLC is in excess of the number of units we have; therefore, there is the potential to issue more units, other than that, again, if you deal with the default principles, the ownership of the LLC is coterminous with its members.

So, again, like, this is -- what I think -- and, again, like, I think you're a good lawyer. And so having had to sort of listen to me, you're now accusing me of making all this stuff up on behalf of the plaintiffs rather than them having

argued it.

But I don't see how you read paragraph 15 as anything other than the general statement. It comes first. Paragraph 16 then elaborates on that and essentially describes a couple of the default principles that are part of that broad -- I keep calling it broad because I don't understand how it's narrow. But I guess it's narrow in the sense that it's one sentence, effectively, "We're going with the LLC Act." Part of going with the LLC Act is that absent unanimous agreement of the members, no one could be diluted, and the parties would be entitled to profits in proportion to their ownership percentages. I'm not as good as I used to be on the statutory sections, but I think that's 18-503.

Now, you know, I get it that what you could say is going beyond the statute -- and here I'll give you -- I'll tip my hat to you on this. The idea that Beatrice would play a key membership role in all day-to-day operations -- well, actually that is probably a default provision because it's manager managed. So by default under the statute, you get manager management. So that is, again, sort of a

specific articulation of the default.

Same way "BCS would operate under its regulatory licenses as authorized and approved by the three members." So I can imagine where you, being the defense side, would read that as a specific agreement that they had to sit down and make. When I was reading this, that struck me as just lawful business purpose. So a core principle of Delaware entity law is that you can't do things unlawfully. And so the fact that you would actually have to comply with regulatory requirements, again, it strikes me that that's just part of the overall general agreement.

Now I hear you that "members would freely exchange information," maybe that's a little more aggressive than 18-305, although maybe, since it's member managed, it's not. And then "fundamentals of the ownership structure of the business would not change [after] unanimous agreement of the members," that is precisely the LLC Act.

So this -- as I'm reading through the complaint and understanding their theory, this is all consistent. And, like, it's great to try to create a straw man and then it's fun to accuse the judge of making different arguments on behalf of the

plaintiffs.

MR. O'CONNELL: Your Honor, that --

THE COURT: I don't think either is the case here.

MR. O'CONNELL: Your Honor, I -- I hope Your Honor believes this. With all respect, I didn't mean to suggest that you were attempting to advocate on the plaintiff's side. I -- I take Your Honor's point. I read the pleading differently than Your Honor read it. I think we end up at a place on the merits -- and I think this is where we always were, really -- that this is going to be a fact-intensive dispute about what the agreement, in fact, was from day one.

I'll reiterate that Mr. Gerlanc was not there on day one. He didn't get a membership interest until, I think, the LLC was over a year old, is my understanding. But, in any event, you know, I -- folks could have had a different understanding. I think that's my clients' point, is that they understood that they could always issue more units, and that was the agreement, in fact, among the original members. And if there is -- to the extent something like that should be considered a "limited

liability agreement," oral or implied, their position would be that was the agreement.

And I'm sorry if I didn't articulate that as well as I could have first time around. I think we're back maybe where we ultimately thought we were. These are fact-intensive issues. I just -- I do think that the specific -- again, these are alleged specific promises that were made and some of this oral, I guess.

Our guys' point is they never said that to this guy, and that's all I was trying to convey. I do believe that that is a very credible statement.

THE COURT: Well, look, this is a situation where your clients, and really everybody here, ought to think responsibly about the situations they've created, because the default, both in terms of the -- what has been pled and the reality of proof, is that you've got to prove that you departed from the default provisions of the Act. And usually that's pretty easy because people have a writing.

So your guys are going to have to think about whether they can really credibly claim that they had this original understanding and whether

they can persuasively prove it to show that they, in fact, departed from the Act. And this gets back to what is a fair point you made, although it's a bilateral point and not a unilateral point, which is that what you have here when you have an LLC agreement -- an LLC that was not properly documented, is, you have a messy situation.

So I think we've probably spent enough time on this.

I think this claim is colorable. I think it's sufficiently colorable that, particularly given the minimal showing that Mr. O'Connell's side has made and the fact that they've really only pointed to acts consistent with the plaintiff's assertion, I would actually grant summary judgment on this. Based on the current record, if somebody asked me for a mandatory injunction, this seems to me summary judgment-able such that a mandatory injunction could be entered.

I do not think you can do this, namely, when you have an LLC agreement, that you just can roll over one of the parties to the agreement. Just like I don't think you can roll over one of the parties to any contract. You actually have to get

their consent. This is true not only as a matter of common law. It is true as a matter of the Delaware statute. It is irreparable harm for somebody to have their contract rights, and potentially all of their rights, run over in this fashion.

The agreement that was adopted here is not some minor thing, as it was suggested in the defendants' papers. This is an entire reworking of the governance relationship in a very well-lawyered and powerful way. I am sure it is what Messrs. Beatrice and Goldstein wished they had done at the outset. I am sure that now they desire with all of their hearts that they had done this at the outset. I am sure that they may even be able to convince themselves that this is really what they envisioned at the outset. But in a non-self-delusional world where you have a third party fact finder who is not a party to your dispute and doesn't have an axe to grind on either side, what I see is a start-up entity where it's unlikely that anyone was doing any type of serious lawyering or thinking at all, and where for four years -- again, it's alleged but it would seem logical -- everybody just operated based on the default rules. And then all of a sudden at the

four-year mark, two of the three people spring this. So is this worth a fact-intensive fight? I would really suggest not. And maybe Mr. Beatrice and Mr. Goldstein ought to think about what happens and what their paths are because they didn't do this up-front planning. And Mr. Gerlanc, for his part, ought to think about what he can really get out of a small start-up entity and whether there's really any value for him in fighting this litigation when his former business partners, at least based on how they're communicating with him and treating him, they actually don't seem to like him at the moment. That's an inference I'm drawing, and they're not going to like him any better at the end of this fight. Everybody is going to like each other much less. In fact, I would suggest that the polarity is likely to flip, if it hasn't already flipped, to affirmative disliking and disliking much more. So none of this ends up being good for anybody in this setting.

What this does is it gives you a concrete lens through which to focus on resolving these people's relationship. And if that means that you guys do negotiate an agreement that has some protections for minority holders like Gerlanc and his

friends who invested, great. Do it. That's the path out of this. If this means that Beatrice and Goldstein buy out Gerlanc and his friends so that they can then do whatever they want, great. That's another path out of this.

What is unlikely to be the path out of this is to claim, unless you have really good contemporaneous documents to back yourself up, that really when you started this entity, you effectively had in your mind the equivalent of 39 pages of LLC agreement legalese.

So here's what I'm going to do. As I say, I would grant this TRO today. But what I want you-all to do is go work out a status quo order. The status quo order ought to say something like "Pending the resolution of this dispute, the parties will operate Barrell Craft Spirits, LLC in conformity with the provisions of the LLC Act," because that's really what the basic agreement here seems to have been, absent actual proof otherwise. Then what you guys ought to do is you ought to sit down and put your constructive deal-making hats on and get Goldstein -- Goldstein of the two, at least in the correspondence, seems to be the aggressive communicator -- have him

chill out. Have everybody think about what is the path forward for this entity, and have everybody recognize that Gerlanc is not just some random guy. I don't know what his mental state is. Maybe he's some form of disgruntled. Maybe he's gruntled. But he's a member and he brought in other investors. And people need to be realistic and plot something forward that actually works this out.

The unilateral action which, again, I think this is pretty much a laydown, in terms of default provisions of the LLC Act, is something you don't do.

And the merger thing, like, all right. You guys want to be heavy-handed. I haven't reread that merger provision. It definitely works when you've got a board of managers and members. Look, maybe that's great because this converts this thing into a real money damages claim. I don't know. So maybe when you're negotiating, Gerlanc gets to have the high hand in terms of his ability to potentially win the current case, and Beatrice and Goldstein get to have the threat of potentially doing a merger to convert this into a money damages litigation. And maybe what people ought to do is say, "Wow, there's

mutual risk here, and what we really want to do is make good bourbon. So let's figure out some protective provisions for the minority that lets us go forward and make good bourbon." And that, I think, would actually be a good outcome and a better use of people's time than litigating.

But for purposes of today, the motion to expedite is granted.

I, in theory, would have no problem granting a TRO. I, in theory, would have no problem granting a preliminary injunction because of the strength of the claim. But why don't you-all go and work out a status quo order, and then the lawyers need to have a heart to heart with their clients. And the lawyers need to earn their money by not just channeling what the clients' emotional state might be at a given instant, but actually forcing them to reflect on the reality of the situation in which they find themselves.

Today is the 23rd. It's a Thursday. Why don't you get back to me on Monday with a status quo order and a schedule for the case going forward. If it is helpful, I would be happy to have you-all come in and talk about this. I offer that as

something that may be helpful, if it is helpful. I'm not insisting on it. But let me also say that nobody ought to do anything aggressive until we get the status quo order in place. So if somebody were to suddenly pump out a lot of units or something like that, I would view that as contumacious.

Go and have a deep and meaningful conversation with your respective clients about the consequences of not doing up-front planning. Once you have explained to them the realities of their current situation, game out potential strategies and explain to them that you have a decision-maker who at least is suggesting that the rational strategy here is for you-all to actually negotiate a written LLC agreement that you can all live with going forward and that will contain some protections for the minority, but which will actually resolve this situation and let people go and make good bourbon. Because even recognizing the downsides of alcohol, making good bourbon likely will do more productive good for society than this litigation.

Thank you very much for listening to me. I'll look forward to hearing from you-all on Monday.

MR. SELZER: Thank you for your time, Your Honor.

MR. O'CONNELL: Thank you, Your Honor.

(The proceedings concluded at 11:01 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 48 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 41 through 48, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 23rd day of March 2017.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public